



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO 49 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

STANLEY NGAIRA MUSINDI.....ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The Accused person herein, STANLEY NGAIRA MUSINDI was charged jointly with JOHN CHIVILI CHOMBI with murder contrary to section 203 as read with section 204 of the Penal Code, the particulars thereof being that on diverse dates between 24th day of November 2012 and 26th day of November 2012 at Shipala Village, Lunyu Sub-location in Kakamega East District within Kakamega County, they jointly murdered JOSIAH ATSANGO MUSINDI. The accused person, together with his co-accused who died during the pendency of this case pleaded not guilty to the allegations. The case thereafter proceeded to full hearing.

Prosecution case

2. The prosecution called 7 witnesses in support of its case against the accused. The following persons testified:-

Hezina Shisali – PW1; Benjamin Achesa – PW2; Christine Kwatsima – PW3; Lena Ikana Musindi Abungana – PW4; Jentrix Ikara also known as Airen Ikana Atsango – PW5; Nelson Musindi – PW6 and Dr. Dixon Mchana Mwaludindi – PW7.

3. PW1(Hezina) testified that on 26.11.2012 (time not indicated) she was at her home with Christine, PW3, when they decided to go and get some sweet potatoes from the shamba. On the way to the potato farm, the two witnesses noticed someone ahead of them. The person seemed to be sleeping. For a moment, Hezina and Christine thought that the person was one of the village drunkards. They made a report to one Muchere (not called as a witness). Hezina did not know whose body it was nor who had killed the person.

4. PW2 (Benjamin) testified that at the material time, he was the village elder of Shipala Village. On 26.11.2012 at about 5.00pm, while he was at his home, the deceased's wife, Lena PW4, went to his home and informed him that her husband's body had been found lying near a potato farm. On receipt of that information, Benjamin telephoned the Assistant Chief who went to the scene and directed Benjamin to inform the police at Mukhonje Police Post. At the scene, Benjamin observed the body, and noticed some injuries on the neck. There was foam at the mouth. Benjamin stated that he knew the deceased.

5. Christine, PW3 testified that she was going to her potato farm at around 5.00pm on 26.11.2012 when she saw a body lying on the ground. She rushed and reported the incident to Lena, PW4. Lena contacted the village elder who soon thereafter arrived at the scene. After Christine established that the body lying on the ground was that of Atsango, she went back to her home. In cross examination, Christine stated that the scene was very close to the deceased's home.

6. PW4, Lena, testified that after she received news of the deceased's death, she sent for Benjamin who went to the scene and confirmed that the deceased was dead. Later, the police also arrived at the scene and asked her to confirm to them what had happened. Lena could however not say how the deceased had died or who killed him.

7. Jentrix, also known as Airen, PW5 told the court that on 24.11.2012, she was at home waiting for the arrival of her father, the deceased who had told her he was going to see her. Instead, the accused herein who is Airen's grandfather arrived at her home, accompanied by his co-accused. When Airen enquired from the accused person where her father was, the accused told her that he had sent them to see her since

he (deceased) was too busy to travel.

8. After some discussions, the accused asked Airen's father in law, Enock Musembi for dowry. The accused also asked Airen and her husband to tell them how many animals they would give, but after consultations, Airen's father in law told accused person and his co-accused they could not discuss dowry on that day and that he would arrange to call them on another day when Airen's father was also present. The accused person and his co-accused became angry and decided that they were going away. They then left on their motorbike after being given KShs.500/- by Airen's father in law.

9. On the morning of 26.11.2012 at about 9.00am, Airen received shocking information from her sister in law Violet Khamenye that her (Airen's) father had died. Later when Airen spoke to her grandmother Lena, about the report Lena confirmed that indeed the body of the deceased had been found in a potato plantation. Defence counsel did not put any questions to Airen.

10. Nelson, PW6, testified that he received news of the death of the deceased on 27.11.2012 at about 11:00am. Nelson is a brother to the deceased and a son to the accused person. Nelson also testified that when the police got to the scene and later searched the accused person's house, the accused person was not present.

11. Dr. Mchana testified on behalf of Dr. Rotich who did the autopsy on the body of the deceased. According to Dr. Mchana, he guided and watched Dr Rotich as the latter carried out the autopsy. The body was identified by two relatives, David Musindi and Florence.

12. According to the postmortem examination, the deceased was about 35 years old and of good physique and nutrition. The skin was already peeling off and the fingertips, lips, tongue and spaces below the eyes were deep blue in colour. The neck veins were filled with blood.

13. Internally, there was a fracture of the small bone in the front of the neck. There was another fracture of the neck involving the 1st and 2nd neck bones. The spinal cord was injured at the level of the 1st and 2nd neck bones.

14. From the injuries outlined above, Dr. Rotich concluded that the cause of death was asphyxia due to manual strangulation. The burial permit duly filled and signed by Dr. Rotich was produced in evidence as Pexhibit 1.

15. It is to be noted that the prosecution closed its case after the evidence of Dr. Mchana. The investigating officer was said to have been unavailable.

Defence case

16. In a ruling delivered on 26.4.2019, the accused person was found to have a case to answer and placed on his defence. He elected to give sworn evidence in which he denied murdering the deceased. He stated that on 24.11.2012, his mother sent him to Malimili, to the home of Airen. He stated he was with his co-accused John Chivili Chombi. It was the accused person's testimony that the two of them arrived back home between 8.30pm and 9.00pm.

17. On the next morning which was 25.11.2012, he took his motor bike to the mechanic for repairs before returning home between 1.30pm and 2.00pm. On the 26.11.2012 he went to Shitalio to plant sweet potatoes between 8.00am and 4.00pm. He then went to the home of his uncle, one George Musindi where he stayed briefly before returning to his home. It was after he got home on that material evening that his uncle George telephoned him and informed him of the presence of a child's body in the potato shamba.

18. On the morning of 27.11.2012, the accused person said he went to the scene where the body of the deceased was. When he got to the scene, some police officers were already there and they started interrogating him. The police sought to know from him whether he had any grudge with the deceased. Thereafter, the deceased's body was taken to the Kakamega Provincial General Hospital. The accused said he was arrested on 28.11.2012 while visiting the mortuary. He added that it was the deceased's mother who raised the complaint against him. The accused person did not call any witnesses.

Issues for Determination

19. Sections **203 and 206 of the Penal Code** require that for the prosecution to succeed in proving the charge of murder against an accused person, it must show by cogent evidence, be it direct or circumstantial:-

- a) That the deceased died
- b) The cause of the deceased's death
- c) That it is the accused person and no one else who caused the death through his unlawful acts or omissions,
- d) That the accused person did so with malice aforethought.

20. It is section **206 of the Penal Code** which defines malice aforethought. Before reaching any conclusions, I have taken note of those provisions and the authorities cited to me by counsel for the accused person.

Whether the deceased died and the cause of that death

21. The evidence on record shows very clearly that the deceased died. Dr. Mchana gave medical evidence to prove that fact and his evidence was corroborated by the testimonies of Lena, Airen and Nelson. Even Benjamin testified to the fact that the deceased died.

22. As regards the cause of death, Dr. Mchana testified that the deceased died from Asphyxia due to manual strangulation. The postmortem report, Pexhibit 1 confirms the same.

Whether the accused died as a result of the accused person's unlawful act or omission

23. The evidence tending to connect the accused person with the death of the deceased is very scanty, if not completely missing. There is no eye witness account of what may have happened prior to the deceased's death. There is no suggestion that the deceased and the accused person were together just prior to the death of the deceased. There is also no evidence as to the exact or approximate time when the deceased lost his life. The fact that the accused person and his co-accused visited Airen does not in any way connect the accused person with the death of the deceased, and more so, in the absence of the evidence of the investigating officer.

24. It is also not clear to this court how and why the accused person was arrested. Benjamin the village elder says nothing regarding any circumstances leading to the death of the deceased. He does not even suggest that the accused person was suspected of killing the deceased. The testimony of Lena offered no help to the prosecution case. It is my considered view that if the prosecution had availed the investigating officer to testify, he would have filled the glaring gaps in the prosecution case. The prosecution's failure to call the investigating officer was a costly omission on the part of the prosecution. As was held in *Ng'ang'a versus Republic [1981] KLR 483*,

“The Prosecution may elect not to call a material witness, but they do so at the risk of their own cases.....”

25. And in *Buwaneka versus Uganda [1967]EA 768*, the Court of Appeal for Eastern Africa held *inter alia*, “...it is the duty of the prosecutors to call as witnesses the police officers who investigated the case and charged the accused.” In the instant case, the court is left guessing as to who arrested the accused person and why he was charged. The above being the position, I find and hold that the prosecution has failed to prove to the required standard that the deceased herein died as a result of the unlawful act or omission on the part of the accused person.

Whether the prosecution has proved malice aforethought

26. Having completely failed to establish a nexus between the accused person and the death of the deceased, the prosecution has also failed to establish malice aforethought as defined under section 206 of the Penal Code against the accused person.

Conclusion

27. The conclusion of this matter is that the prosecution has failed to prove all the ingredients of the offence of murder as prescribed by section 203 of the Penal Code. Accordingly I find the accused person herein STANLEY NGAIRA MUSINDI NOT GUILTY of murdering JOSIAH ATSANGO MUSINDI as alleged by the prosecution. I therefore acquit him of the offence under section 322(1) of the Criminal Procedure Code.

28. Unless the accused is being held for any other lawful reason, he shall be released from prison custody forthwith.

29. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 9th day of October, 2019.

WILLIAM M. MUSYOKA

JUDGE