



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 7 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JAMES WAWERU NDIKAA.....1ST ACCUSED

JENIFFER WAMBUI.....2ND ACCUSED

J U D G M E N T

A. Introduction

1. The accused persons were jointly charged with murder contrary to **Section 203** as read with **Section 204 of the Penal Code** for which they both pleaded not guilty.
2. One of the accused, Cecilia Wangithi Ndikaa passed on during the trial and thus the case against her was withdrawn under Section 87(a) of the Criminal Procedure Code.
3. In order to prove the contrary on the presumption of innocence of the accused, the state summoned eight witnesses whose evidence is summarised herein.

B. Prosecution's Case

4. PW1 testified that on 17/07/2007 at around 10.00 am at Kithiriti village in Kirinyaga county, she was working in a shamba when she heard a lady scream from the house of a neighbour. The lady was saying that she had seen three men holding a young man saying they would lynch him. It was in the shamba of one Maringa. PW1 left the shamba and went towards Maringa's shamba where she saw a man burning and identified him as her brother, the deceased. PW1 talked to the deceased who had a cut on the leg and said that Waweru the 1st accused had inflicted the injury.
5. PW2 testified that he received a report that a thief had been arrested at his home area and upon arrival at the scene at around 12.00 noon, he was able to identify the deceased who had been cut and burnt on suspicion of being a thief. PW2 did not see the accused persons at the scene of crime at the time he arrived.
6. PW3 told the court that he identified the deceased as a thief who was stealing from her house and whom she knew as an employee of the 1st accused. PW3 further testified that the deceased was chased by a mob who eventually caught up with him. She further testified that she did not witness the beating and the burning of the deceased. Neither did she see the accused persons at the place where the deceased had been caught.
7. PW4 testified that he heard people screaming "*thief, thief*" and chasing someone whom he later realised was the deceased who had been employed by his son. He did not see any of the accused persons at the scene of the crime and did not witness the deceased being lynched.
8. PW5 is the psychologist who examined the accused and deemed them mentally fit to stand trial. PW6 who was working alongside PW1 said he similarly heard screams from a mob chasing a young man who was on fire whom she later realised was Peter, a brother to PW1. PW5 said he identified 1st and 2nd accused as the persons who had tied a rope on the deceased's neck and were attempting to set him on fire.
9. PW7 was the officer in charge of crime at Sagana and visited the scene where the deceased had been beaten by a mob after which he rushed him to hospital. He testified that an inquest was carried out in a court in Kirinyaga County with recommendations that certain suspects

be charged. He further testified that he led the investigations in the inquest but was not involved in this murder investigations.

10. PW8 conducted the autopsy of the body of the deceased and concluded that the deceased died of the 65% burns. In cross-examination, PW8 reiterated that despite the deceased having a big cut wound that led to bleeding, it was the 65% burns that caused his death.

C. Defence Case

11. The 1st accused denied killing the deceased and testified that on the material date at around 10.00am he was working on his leased land and that he worked there until 2.00pm. He further testified that he later learnt that his brother's house had been broken into and two years later, he was arrested and charged with killing the deceased.

12. The 2nd accused denied killing the deceased and further testified that on the material date, she was at home and at around 10.00am when she heard noise coming from her brother in law's home but did not go there. She further testified that she later learnt that her brother's home had been broken into. It was two years later that she was arrested and charged with killing the deceased.

D. 1st Accused's Submissions

13. It is submitted on behalf of the 1st accused that the deceased's murder was not investigated as there's no evidence that connects the 1st accused to this offence. Further, it is submitted that the only evidence that connects the 1st accused to the offence is the testimony of the PW1 which is full of contradictions and thus unreliable. It is submitted that the prosecution has not discharged its burden of proof.

E. Analysis of Law

14. The issues for determination in this matter revolve around the provisions of Sections 203 and 206 of the Penal Code.

15. Section 203 which defines the offence of murder requires proof of the following if the offence of murder is to be established: -

- *malice aforethought on the part of the accused*
- *death of the deceased*
- *the cause of the death*
- *an unlawful act or omission on the part of the accused resulting in the death of the deceased*

16. Section 206 of the Penal Code on the other hand defines malice aforethought in the following terms: -

“206.Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances

a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) an intent to commit a felony;

d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

17. The prosecution must satisfy the court on the identification of the accused. The courts have held, and rightly so, that in a case where the evidence for the prosecution rests on the identification of the assailant by whatever number of witnesses be it by way of identification of a stranger” or the recognition of a close relative or friend, the court must be careful to properly direct its mind to the condition prevailing at the time of the identification. The court must also consider the length of time for which the witness had the accused under his/her eye. The purpose of this careful consideration is to eliminate the possibility of error, which is bound to happen even in cases where the person under observation is a close friend or relative. See **Joseph Ngumbao Nzaro v Republic [1991]2KAR 212**

18. It is also important to note that in a case where a question touching on the identity of an accused arises the court ought to consider whether a description of the accused was given with the first report to any person in authority such as a police officer or even a member of the local administration. Where description of the accused is given, the evidence of both the given and the recipient of the description must testify so as to seal any gaps in the identification evidence.

19. Another issue that is apparent from the evidence on record revolves around the allegation that the deceased mentioned the people who had assaulted and lynched him before he died. In other words, the prosecution sought to rely on the evidence of a dying declaration. The

principles governing dying declarations are now well established. In **Republic v Pattni [2005] IKLR 310**, the court held, inter alia, that “a dying declaration, in order to be accepted as evidence, must have been made by the deceased at the time the attack leading to his death was carried outand the statements needed to be words by the deceased to the effect that the accused or someone else was killing him.” In this case, the court will be careful to establish whether indeed the words allegedly spoken by the deceased before he died amounted to a dying declaration.

20. The death of the deceased has been established by the evidence of PW8 who conducted the autopsy of the body of the deceased and concluded that the deceased died of the 65% burns.

21. Having sufficiently proved the fact as well as the cause of the death of the deceased the prosecution is under a duty to prove that the accused persons before the court are criminally culpable for the act leading to the death of the deceased. Thus, the prosecution must adduce evidence to prove that the accused persons were guilty of a wrongful act or omission, the direct consequence of which was the death of the deceased. The fact that such an incident or attack did in fact occur on 17/07/2007 cannot be in any doubt.

22. The issue of whether there has been a positive identification of each of the accused persons, as having been present at the scene on that fateful day and as having participated in the attack on the deceased and his team must be established.

23. The incident is said to have occurred between 10.00am to 12.00pm. Given the time it was broad daylight and visibility was good. The attack took around two hours. Only PW1 witnessed the attack on the deceased. PW1 told court that she was working on a shamba when she heard a lady scream from the house of a neighbour on account of three men wanting to lynch a young man. PW1 identified the victim as her brother and noticed that he had a cut on the leg. Upon inquiry, the deceased revealed that the 1st accused had cut him. In cross-examination, PW1 testified that the deceased told her that the 1st accused had given petrol to him to drink. PW1 further testified that she saw the 2nd accused striking a match and setting the deceased a blaze. This witness was able to clearly point out and identify each of the persons whom she named before the court. **PW1** has not changed or altered her evidence with respect to those whom she identified in any manner whatsoever.

24. During cross-examination, PW1 described the scene and the parts played by each of the accused persons in a clear and concise manner. She said she did not know the accused prior to the attack but was also able to physically identify each one in the dock. PW6 further identified 1st and 2nd as the ones who *tyed the deceased with a rope around the neck and hands and dragged him to the roadside where they placed collected twigs and placed on him and tried to light the fire however the police arrived*. Police later left only to come later and find the deceased lynched.

25. PW1 testified that the deceased made a dying declaration in which he named the 1st accused as the one who had cut his leg with a panga and made him drink petrol. Under **section 33(a)** of the **Evidence Act**, a statement made by a deceased person relating to his cause of death is admissible in evidence:

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

26. In **Philip Nzaka Watu vs Republic [2016] eKLR**, the Court of Appeal stated the following on admission and reliance on a dying declaration:

“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

27. In this case, the deceased was found on a footpath with serious injuries. PW1 testified that the deceased named the 1st accused as the one who had cut his leg with a panga and made him drink petrol and that he had gone to the home of the 2nd accused seeking monies owed to him. The deceased died at the scene within less than two hours after the assault and the lynching. This was after he had told PW1 what had happened to him that led to the attack.

28. It is my considered view that the dying declaration having been communicated to PW1 that the 1st accused was identified by PW1 and the deceased as the person who assaulted the him, I am of the considered view that the dying declaration was sufficiently corroborated and is safe to rely on having passed the test of the case of **R vs Pattini (supra)**. I therefore find that it is admissible in evidence.

29. Each of the accused persons testified in their defence and denied having participated in any way whatsoever in the attack against the deceased. The burden of proof in criminal cases at all times lies upon the prosecution to prove the participation of an accused in any offence beyond a reasonable doubt. At no time is the accused ever required to prove his/her innocence.

30. The 1st accused’s defence was an alibi that he was not at the scene of crime at the material time and only learnt of the breaking in of his brother’s house the following day.

31. The 2nd accused said she was at her home around 10.00am on the material day when she heard noise from the home of her brother in law. She did not go there but was later told that the home of Peter Njogu had been broken into.
32. Both accused state that they were arrested and charged two years after the alleged offence. This delay was explained by PW8 who said that at first, an inquest was held and that it was later ordered that some suspects be investigated for the offence of murder.
33. The defences of the accused persons in view of the evidence of PW1 and the dying declaration were not plausible. Both of them were placed at the scene of crime by the key witness. It was said that they are the ones who tied the deceased with a rope on the neck and dragged him to the road where he was assaulted and burnt to death.
34. Having established that accused persons attacked the deceased, the question is whether they can they be held criminally culpable for the death of the deceased from the evidence on record including the dying declaration that *the 1st accused was the one who cut his leg and made him drink petrol.*
35. The accused sought to punish the deceased for his actions of attempting to steal from the home of PW2 and PW3. In my view, the acts of attack on the deceased by the accused persons were unwarranted. There exist proper legal channels by which such grievances could be addressed. Even if the accused persons believed that the deceased had attempted to steal, they had no right to take the law into their hands in the manner that they did.
36. In my considered view, the accused persons acted unlawfully in their act of assaulting and lynching the deceased. I therefore find that the prosecution have established that the two accused persons did the unlawful act that caused the death of the deceased.
37. The *mens rea* for murder is described as “*malice aforethought*’. **Section 206 of the Penal code** defines ‘*malice aforethought*’ as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

38. From the above definition specifically Section 206(b) and Section 206(c), malice aforethought comprises not only intentional acts, but also comprises reckless acts likely to cause death and/or grievous bodily harm with indifference of the consequences of such acts. In the case of **Republic v Rahman & others [2008] (UKHL) 45** while describing the *mens rea* required for a party in a crime of common intention Lord Neuberger of Abbotsbury gave the following illustration:

“If B realizes (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A with the requisite intent, kills in the course of the venture.....”

39. Likewise, in the case of **Njoroge v Republic [1983] KLR 197** the Kenya Court of Appeal held that:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common object of the assembly.”

40. The act of the accused persons of gravely assaulting and lynching the deceased was intended to grievous harm or death to him. In my view, the prosecution has demonstrated that the accused persons in addition to having a common intention, acted unlawfully to cause the death of the deceased.
41. It is my considered view that the prosecution have proved malice aforethought on the part of the two accused persons.
42. It is my finding that the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code has been proved beyond any reasonable doubt against the two accused persons.
43. I find them guilty of the said offence and convict him accordingly.
44. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. momanyi for 1st Accused and holding brief for Ms. R. Njeru for 2nd Accused

The two Accused persons present