



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 76 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH RIOBA SEGENO alias NYAITOTI.....ACCUSED

JUDGMENT

1. **JOSEPH RIOBA SEGENO**, the accused person herein, faces the charge of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars the offence are that on 2nd May 2014 at Mashangwa village in Mashangwa Location in Transmara West Sub County within Narok County in the Republic of Kenya murdered CHARLES CHACHA MWITA.

2. The accused pleaded not guilty to the charge and a trial thereafter ensued in which the prosecution presented 5 witnesses whose evidence was as follows:

3. PW1, John Mwitwa Chacha testified that he was on 2nd May 2014 at about 5 a.m., on his way to school when he heard noises emanating from a nearby maize farm and on taking a closer look, he saw three people standing and one person lying down and that 2 people were beating the person lying down while a third person stood aside holding a panga. He stated that he recognized one person, Nyaitoti Rioba Segero, the accused herein, as he had known him for a long time. He continued on his way to school and did not go close to where the 4 people were but later learnt that a person had been killed at the scene where he had seen the 4 people.

4. On cross examination, he stated that he was alone on the road at the time he witnessed the assault that took place 30 meters from where he was and that it was already dawn and therefore it was not very dark and he could see a little even though he did not have a torch or a lamp. He named the people he saw at the scene as Samuel Rioba Segeno, Musa Rioba Segeno and the accused herein. He added that the deceased was his maternal uncle.

5. PW2 Consolata Nyamorobe Nyakongo testified that on the material day at about 6 a.m., she was on her way to the farm when she met the accused in the company of Musa Rioba and Samuel Rioba running along the road while armed with a panga and swords and that their clothes were blood stained. She stated that she met them face to face as they were running towards her direction and that even though she was shocked to see them, she still proceeded to the farm. She added that after a short while she heard wails and screams emanating from a nearby maize farm and on going to the scene, she found the deceased lying dead with very serious cut wounds all over the body.

6. On cross examination she stated that the 3 people she met on the road that morning were well known to her. She explained that the deceased's body was decapitated and that there was a lot of blood at the scene. She however did not witness anyone assaulting the deceased. She denied the claim that she was related to PW1.

7. PW3 Allan Masambe Wambura testified that he received information regarding the death of the deceased from his brother Felix Mwitwa (PW4) on the same morning of 2nd May 2014. He stated that he rushed to the scene, but while still on the way he met one Gesonko Mwitwa and his wife Boke Gesonko as they were running away from the scene of murder. He testified that he also met the accused on the road and that he (the accused) had a white shirt that had blood stains and that the accused also ran away on seeing him.

8. PW4 Felix Wambura Kimani testified that he was at about 5 a.m. on 2nd May 2014, sleeping in his house when his in-law one Eunice Gati called him to complain that her husband, the deceased herein, had been called by one Gesonko Mwitwa the previous night and that he (deceased) did not come back home. He then decided to go to the home of Gesonko in order to find out what could have transpired but that before entering Gesonko's home, he met one Mokami, Gesonko's sister in law, who informed him that she also heard strange noises from Gesonko's home at about 3a.m. He then got word that the deceased was in the nearby maize farm and that on reaching the said farm, he found the deceased still alive and struggling to get up but that he could not get up. He further stated that on getting closer to the deceased, he (deceased) talked to him and informed him that it was "Nyaitoti" who had hurt him after which the deceased collapsed and died. He then accompanied the police to the home. The police were called to the scene and he accompanied them to the home of the said Gesonko where they found a red shuka and cap that was alleged to be the property of the deceased. Inside Gesonko's house, the police found a pool of blood, a blood stained table and door frame and recovered a blood stained axe, jacket, cap, shoes and a school bag.

9. He further testified that even though the accused was reported to have gone into hiding in Tanzania, he was later arrested while sleeping in his mother's house. He added that in 2006, Gesonko migrated to Mombasa with his entire family and that even though Gesonko's wife was arrested following the death of the deceased, she was released after spending 2 days in custody while Gesonko was not arrested in connection with the death of the deceased.

10. PW5 Corporal David Langat, who was at the material time attached to Transmara CID office, received information regarding a murder and proceeded to the crime scene where he found the body of the deceased lying in the maize plantation. According to PW5 the murder was believed to have taken place at the nearby home of one Gesonko which was 50 meters away from the scene where the body lay and that upon visiting the said home, he found a pool of blood in the house and spots of blood on the door frame and table which, according to him, was an indication that there was a struggle or scuffle in the said house.

11. He collected a blood stained jacket and shoes from the said house which items he alleged belonged to the accused. The said items were produced during the trial as Pexhibit 1 (a) and 1 (b) respectively. He however stated that he did not submit the jacket and shoe to the government analyst for examination in order to establish if the stains on stains on them were human blood or if it was the deceased's blood.

12. PW5 opined that the deceased and Gesonko must have had differences because Gesonko was the one who called him to get him drunk before he was killed.

13. On 11th July 2017, counsel for the state counsel and the defence agreed to admit the post mortem report as an exhibit (Pexhibit 3) in this case without calling the author of the said report after which the prosecution closed its case. The said report indicated that the cause of death was extensive hemorrhage and brain laceration due to multiple cut wounds.

14. When placed on his defence, the accused gave a sworn statement in which he vehemently denied any involvement in the death of the deceased. He testified that he only learnt about the death of the deceased on the material day while he was at his farm and stated that he was implicated in the murder because it was alleged that the real killers of the deceased, one Gesonko, had passed through his homewhile on the run because they used to herd cattle together.

15. He denied the allegation met PW1 or PW2 on 2nd May 2014 and stated that he did not know them. He attributed his arrest to the claim that the suspected killer, Gesonko, hid in his home before escaping from the area. He denied owning of the jacket and shoes that were produced in court as exhibits. He also denied having gone into hiding in Tanzania as alleged by PW4.

16. On re-examination, the accused stated that he was framed up in the case and was emphatic that he was being punished for someone else's sins.

Submissions

17. Mr. Otieno, Counsel for the state opted not to file any submissions while Mr. Okemwa for the accused filed written submissions on 25th January 2018 in which he argued that the prosecution did not discharge its burden of proof to the required standards. He argued the prosecution's star witness PW1 did explain how he was able to identify the assailants at 5 a.m. considering that it was still dark and that he did not have any form of light from lamp or a torch which could have enabled him to see the attackers clearly.

18. He also argued that PW2 was not a truthful witness going by her claims that she met the accused and 2 other people running away from the scene of the murder with weapons and blood stains on their clothes yet she did not raise any alarm but instead proceeded with her normal business as if nothing had happened.

19. It was the defence's case that the investigations were conducted a very shoddy manner despite the seriousness of the offence before the court which offence attracts capital punishment upon conviction. Counsel for the accused observed that had the police conducted proper investigations, they could have apprehended the correct suspect instead of relying on guess work. In this regard, the accused relied on the decision in the case of **Republic vs James Omondi alias Castro and 3 others Nairobi HCCRC No. 57 of 2008** in which the court observed that serious crime should be accorded proper and professional investigations.

20. Counsel for the accused also submitted that the prosecution did not establish any motive for the murder as none of the witnesses stated that the accused had the intention to kill the deceased.

Analysis and determination

21. After considering the evidence tendered by both the prosecution and the accused together with the written submissions filed by counsel for the accused, I am of the view that the main issue for determination is whether the prosecution established its case against the accused beyond reasonable doubt.

22. I note that it was not in dispute that the deceased was murdered in cold blood and in a very cruel and gruesome manner. PW2, described the macabre murder scene as follows:

“I found that the deceased lay dead. I saw the body had very serious cut wounds all over and the brain had poured out... the deceased was cut like meat that was about to be cooked.”

23. PW5 produced the post mortem report as Pexhibit 3 which report established the cause of death to be extensive brain laceration and hemorrhage due to multiple cut wounds. The big question in this case is who murdered the deceased.

24. Section 203 of the Penal Code defines murder as:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

25. Malice aforethought, on the other hand, is defined under section 206 of the Penal Code thus:

“206. Malice aforethought shall be deemed to be established by evidence proving any one 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.”

26. In the present case, I find that the prosecution’s case fell short of the standard of proof required in criminal cases for the following reasons:

27. PW1 who was the prosecution’s star witness and who alleged that he witnessed the deceased being assaulted in the maize plantation did not explain, to the satisfaction of this court, how he was able to positively identify the assailants at 5 a.m. when it is ordinarily still dark and when positive identification can be difficult. PW1 did not state how dark or bright it was and what enabled him to see the assailants considering that he did not have any source of light from a torch or a lamp.

28. PW1 stated as follows on this issue of identification:

“It was not very dark. It was already dawn. I could see a little. I saw 4 people about 30 meters away from where I was... I did not have a torch or a lamp.”

29. It is trite law that identification particularly at night has to be treated with extreme caution and to base any conviction on it, it must be watertight. See **Mohamed Mafhabi & 2 Others Vs. Republic CA No. 15 of 1983 (NBI)**. My finding is that the testimony of PW1 left a lot to be desired as he did not explain how tall the maize plants in the plantation were and how he was able to peer through the plantation so as to clearly see and identify the 3 people who were allegedly assaulting the deceased. This court takes judicial notice that maize plants can grow taller than an adult man and assuming that the maize had, as at the date in question fully matured, it would not be possible to see or identify people who are 30 meters deep into the farm even assuming the incident took place in broad daylight.

30. It is also my finding that the testimony of PW1 was tainted with a tinge of exaggeration thereby leading any reasonable observer to the conclusion that he was not a truthful witness. Of great concern to this court is the fact PW1 did not inform anyone about what he had witnessed on the fateful morning and that it took him over 1 month to record his statement with the police. The conduct of PW1 and the fact that it took him that long to record his statement with the police can make any reasonable observer to conclude that he could have been an imposter in the case who was probably coached to give unfavorable evidence against the accused.

31. PW2 did not witness the murder but claimed that she saw the accused and two other people running along the road while armed with crude weapons and that they wore blood stained clothes. I find the evidence of PW2 to be incredible because she did not raise any alarm upon seeing the accused and his companions in such an unusual state but instead continued with her business of the day.

32. PW3 also claimed that he saw the accused and his companions running along the road at about 6.30 a.m. and that they were armed and had blood stained clothes. In terms of timelines, PW2 stated that she met the accused and his 2 companions at 6 a.m. while PW3 claimed that as at 6.30 a.m. he also met the accused running away. The evidence of both PW2 and PW3 on the claim that they met the accused running away creates the impression that the accused was on the material day running a marathon in which all and sundry could see him sprint with blood stained clothes and a weapon. I find it hard to believe that a person who had just committed a murder could be so brazen as to run around while still armed with the same murder weapon for everyone in the village to have a good look at him.

33. PW4, on the other hand, introduced an aspect of a dying declaration in the case when he testified that he found the deceased still alive at the scene and that the deceased was struggling to get up whereupon he went to hold him with a view to assisting get up at which point the deceased told him “Ni Nyaitoti” meaning that it is Nyaitoti who had attacked him. I find this piece of evidence to be totally inconsistent and contradictory to the evidence of PW2 on the condition of the deceased while at the scene of murder. According to PW2 the deceased was dismembered into several body parts and his brain had spilled out. In the post mortem report (P exhibit 3), the external appearance of the body was presented as follows:

“Multiple fractures (compound) with brain herniation (occipital region).

Multiple fractures on both forearms, deep cut wound over the left Scapular, Fractured Humerac head.

Three compound fractures of the left leg. Three compound fractures of the right leg.”

34. Having regard to the nature of the injuries inflicted on the deceased and considering that his brain matter had spilled over, I find that it is most unlikely if not impossible, that the deceased could have been in a position to struggle to get up, leave alone talk to PW4 as he had claimed. Furthermore, even in the unlikely event that miracles do happen and the deceased was still alive at the time PW4 arrived at the scene, I find that the alleged statement made by the deceased; “Ni Nyaitoti,” does not meet the threshold of a dying declaration because it was not shown that the accused was the only person known as Nyaitoti in the entire area where the crime was committed. Moreover, it is most unlikely that the deceased could have picked on Nyaitoti as his only assailant yet PW1 testified that the saw at least 3 people assaulting the deceased.

35. I further find that it is the evidence of PW5 that drove the final nail into the coffin of the prosecution’s case when he testified that he visited the house of one Gesonko where, he established, was the place where the actual murder took place as there was a pool of blood in the said house which also had blood stains on clothes, table, door frame and the wall. PW4 testified that the deceased was at Gesonko’s home on the night before the murder. The body of the deceased was found barely 50 meters from the said Gesonko’s house. The big question that arises from the evidence of PW5 is why Gesonko was not charged with murder case despite the overwhelming evidence pointing towards his direct involvement in the death of the deceased. This unanswered question leaves no doubt in my mind that the police conducted shoddy, lopsided and lack-luster investigations and further lends credence to the accused’s testimony that he was falsely implicated in the murder in which the real culprit was Gesonko.

36. I observed the demeanor of the accused when he testified before me and I noted that he was candid and was very consistent. His sworn evidence was not impeached even upon stinging cross examination from Mr. Otieno counsel for the state.

37. The prosecution did not explain why the blood stained clothing items that it alleged belonged to the accused and that were produced as exhibits in court were not subjected to DNA analysis in order to establish if firstly; if they belonged to the accused and secondly; if the blood stains alleged to be on them was blood belonging to the deceased.

38. Having regard to the numerous gaps and unanswered questions that I have noted in prosecution case, I find that the case was not proved to the required standards or at all and this court cannot hesitate but acquit the accused herein under section 215 of the Criminal Procedure Code.

39. This court will not conclude this judgment without expressing its displeasure at the shoddy manner in which the police investigated this case. It is quite regrettable and disheartening that the accused herein has been languishing in custody while awaiting the hearing of a case that ends up to have been investigated in the most deplorable and lopsided manner imaginable. The investigators did not exhibit any hint of professionalism in their work and ended up implicating an innocent man in a crime he did not commit while leaving the real culprit walking free and unperturbed. The importance of proper and thorough investigations in a serious case, such as the one before the court cannot be gainsaid because poor investigations can lead to a state of lawlessness or anarchy when perpetrators of crimes take advantage of police incompetence and/or lethargy to continue committing crimes unabated while taking comfort in the knowledge that they will not be brought to book.

40. In conclusion, I reiterate the accused person is hereby acquitted and shall be set at liberty forthwith unless he is otherwise lawfully held.

Delivered, dated and signed in at Kisii on 7th of March 2018.

W.A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Mr. Omwega for the Accused
- Omwoyo court clerk