



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 60 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

BEN NZIOKA KASOA.....ACCUSED

JUDGEMENT

1. The accused faces the charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that the accused and Peter Kyalo Kasusu on 2nd October, 2009 at Mbukoni village, Kalawa Location in Makueni District within Eastern Province, jointly murdered Domitila Mumbua Mule.

2. The prosecution brought a total of twelve (12) witnesses. Peter Mutuku Kioko (PW1) gave an account of how he received the information on the death of the deceased. That he was informed by one Mwanzia Kioko that the deceased had been killed at Thwake. He was arrested together with the accused herein, Kyalo Kasusu and Peter Kinyili in relation to the killing but he was later released. He denied having bought himself out.

3. Jemima Kalendi (PW2) and Beth Kaluki (PW3) were on the material day headed to the river when they found the deceased's donkey alone. They tried to drive it home but it refused. They then went with it to the river, fetched their water and started for their homes. On their way home, they met Albanus Mulinge who inquired why they had the donkey and whether they had seen the deceased. They informed him of how they got the donkey. He then informed them that the deceased left for the river and had not returned home. They then organized for a search. It is then that blood stains were found near river Thwake. The police were informed and the deceased's body was found buried at the river bank.

4. Sometime in September, 2009, Mary Ndunge Sila (PW4) received threat from a person who was cycling indicating that the deceased, her husband and her will see. Two (2) to three (3) days later, Peter threatened her telling her that "they will see." PW4 stated that the deceased's posts that had been stolen had been recovered at Peter's tea kiosk.

5. Police Constable James Maina (PW5) was manning the station with Tobias Malele when members of the public brought Peter Kyalo on allegation that he was found attempting to break into a house. Corporal Mwangi later informed PW5 that Peter Kyalo had been charged with murder.

6. Police Constable Joseph Mutie (PW6) attached to photographic section CID headquarters visited the scene with DCIO Makueni and Mr. Makori and other officers. He was shown a dug well at Thwake river where a female body had been buried and photographed the scene. He produced the said photographs. Photo 1 was of the general view of the scene, photographs 3-6 was of full and close vision of the deceased with a scarf tightly tied on the neck and photograph 7 of a closer view of several wounds. The same were produced as P. Exhibit 2 (a)-(g) and the report thereto as P. Exhibit 3.

7. Corporal Sylvester Mwanza (PW.7) was instructed to assist Corporal Mwangi in the investigations. He recorded statements and suspects including Peter Kyalo were arrested. The accused herein was said to have led PW.7 and his colleagues to where the weapons of murder were recovered. That at the river, the accused removed a piece of wood which had blood stains and an iron bar. Corporal Mwangi prepared the exhibit memorandum and sent it to Government Chemist. On cross examination PW.7 stated that he was a Police Constable. That the accused went to the police when he heard that the police were looking for him and confessed the killing. That the confession was voluntary. That he took the accused to Chief Inspector Ng'eno, the OCS when accused agreed to make a confession. That one of the accused's relative was present at the time of confession and that it was 11 days after the murder. He stated that the finger prints were not detected on the murder weapon.

8. Corporal Naftali Mwuiria Mwangi (PW8) confirmed that the deceased's body was found buried at the bank of Thwake river. He was given names of suspects of the killing. That the suspects had earlier stolen the deceased's fencing posts. That the accused surrendered himself to the police when he heard he was being looked for. The accused showed the police the place where the murder weapons were. He produced a club and a rod as P. Exhibit 4 and 5 to that effect. On cross examination, he stated that he recorded statements and that the weapons had blood stains.

9. Christine Matindi (PW9) who is an analyst at Government Chemist confirmed having worked with Mr. Paul Kangethe Waweru who had since retired and had prepared a report and examined the weapons. She stated that she was conversant with his signature. That blood stains on the club matched that of the deceased. She produced the memorandum as P. Exhibit 6 (a) and the report thereto as P. Exhibit 6 (b).
10. Richard Mulee Mulinge (PW10) received information on the deceased's death and attended the postmortem.
11. Dr. Katherine Kilonzo (PW11) who conducted an autopsy on the deceased stated that the body had sand particles with eight wounds on the head with sharp edges and were 4 cm deep. The same were on the back of the head and two at the side of the head. There was a deep cut on the right parietal and on the forehead, a cut along the nose, multiple abrasions over the face, depression on the neck where a knot was tied. In the depression there was bleeding with no bruises over the depression. There were abrasions on the chest and shoulder. There were fractures and puncture wounds on upper limbs and wrist and elbow and abrasion on the knee. Internally, the deceased had a depressed skull fracture over the right parietal region and intracerebral and intraventricular haemorrhage.
12. Police Constable Charles Makweba Mulinge (PW 12) stated that Albanus Mulinge reported the deceased's death. That the deceased had left home to go for water and never returned. PW 12 recorded his statement and proceeded to the scene where he dug and found the deceased's body. He stated that the accused confessed to the killing.
13. The accused was put on his defence where he gave unsworn evidence. He denied knowing the deceased and stated as follows. That he was arrested by Kalawa Police Officers. That he had gone to give some money to an officer by the name Corporal Maina. Upon arrest he was taken to Makueni Police Station from where he was taken to River Thwake. That he was not told the reasons for being taken there. He only remained in the police vehicle and the officers went to the river and brought some weapons. He stated that he did not know where the weapons were recovered from. He stated that he had been framed for the alleged murder after he failed to give them money for them to allow him to continue with his illicit brew business. On cross examination, he denied knowing the deceased and PW4. That he had not disagreed with the police save for the day he gave lesser money. He denied having been involved in a case of stealing the deceased's fencing posts. He however stated that he knew Peter Kyalo and another person were involved in the theft. He denied that he presented himself to the police.
14. Submissions for the accused were tendered on the ingredients of murder as follows. That the prosecution failed to prove beyond reasonable doubt that the death was as a result of human act and not by any other intervening circumstance. That all prosecution witnesses testified that the deceased was found murdered and buried in a shallow grave in Thwake river and is said to have died as a result of internal haemorrhage. That the deep wounds on the body of the deceased were inflicted using an iron bar and a piece of wood but there was no proof that the same were inflicted by the accused. That although P. Exhibit 4 and 5 were produced, the prosecution did not produce any report to show that the fingerprints on the exhibits were those of the accused. That the 'leso' alleged to have been on the deceased's neck was not produced in evidence which brings doubt as to what caused the death. That in the said circumstances, there is no evidence by the prosecution that it is the accused who inflicted the injuries to the deceased using the piece of wood and iron bar or the 'leso'.
15. It was submitted that the alleged confession was never produced in evidence to prove when and before whom it was made. That the confession is said to have been made before a police officer of a rank of Chief Inspector. That a police officer of the said rank is not qualified to hear a confession. section 25 (1) and (2) of the Evidence Act was cited in support of the argument thereof and submitted that the alleged confession is inadmissible in the circumstances. Further reliance on the issue of confession was placed in **Kanini Muli v. Republic [2014] eKLR**.
16. Citing section 206 of the Penal Code on malice aforethought, it was submitted that there is nothing from the prosecution case which links the accused to the deceased's death thereby an inference of malice aforethought cannot be established. It was further submitted that the prosecution case did not establish a prima facie case against the accused. In that regard, the case of **Ramnalal Trambaklal Bhatt v. Republic [1957] EA** was cited. Additionally, it was submitted that the prosecution evidence was full of inconsistencies and contradictions since it was thoroughly challenged by the defence in cross examination. That the cardinal principle of Criminal Law is that any contradictions, inadequacies and or inconsistencies should be resolved in the accused's favour and the case of **Pius Arap Maina v. Republic [2013] eKLR** was cited in that regard.
17. The prosecutor on the other hand submitted that PW3 who testified that she saw the body of the deceased which had injuries on the forehead and that she was still bleeding proved the death of the deceased and the cause of death. That her evidence was corroborated by the evidence of PW10 who identified the body and PW11 who conducted the autopsy and attributed the cause of death to the injuries. On the question of who caused the death, it was submitted that PW7 testified that it is the accused who led the police to where the murder weapons were discovered and that the weapons had blood confirmed by PW9 to be that of the deceased. That by leading the police to the where the weapons were, it can only be deduced that the accused participated in the murder and hiding of the weapons.
18. It was submitted that the question at hand is whether that amounts to a confession under section 25A of the Evidence Act. It was submitted that the same was not a confession since no formal confession was produced in court. It was further submitted that once the prosecution proves one or a combination of the circumstances provided under section 206 of the Penal Code, malice aforethought will be deemed to have been established. The court was invited to examine the evidence of PW.11. That looking at the nature and location of the injuries inflicted on the deceased, it can be concluded that the assailant had an intention of inflicting grievous injuries on the deceased which led to death. That the injuries demonstrate malice aforethought as do the location of the injuries. That the injuries could only have been intended to cause death of or do grievous harm to the deceased.
19. In a murder case, the burden lies with the prosecution to prove that death has occurred, that the death was caused by an unlawful act or omission by the accused person and that the accused person had malice aforethought in committing the unlawful act or omission. In the case at hand, death was confirmed by the prosecution witnesses to have occurred. What is left for determination is whether or not the said death was occasioned by the accused person and whether or not he had malice aforethought to cause the death. It is clear from the evidence on record that none of the witnesses witnessed the killing of the deceased. What is on record is the evidence of PW7 who stated that the accused led him to the place where the murder weapons were hidden and made a confession of the killing. As to the issue of confession, I find and hold that there was no confession since no properly recorded confession was produced in court.

20. I also acknowledge the fact that the accused person's finger prints were not found to be on the murder weapons, however, PW7's evidence corroborated by PW8 that the accused led the police to the murder weapons infers that he was involved in the murder. 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 –

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.”

21. In view of the above definition and the link of the accused to the murder weapons, I find that the prosecution proved the case against the accused beyond reasonable doubt. In the circumstances, I find the accused guilty of the charge of murder contrary to Section 203 as read with Section 204 of the Penal code and I convict him accordingly.

Orders accordingly.

Dated and delivered at Machakos this 17th day of May, 2018.

D. K. KEMEI

JUDGE.

In the presence of:

Mutinda for Muia - for the accused

Machogu - for the state

Kituva - Court Assistant