



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NO. 14 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RICHARD TANDASI ANYULA.....ACCUSED**

**J U D G M E N T**

**The Charge**

1. On 02.05.2012, the accused herein, Richard Tandasi Anyula appeared before this court (differently constituted) on a charge of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 10<sup>th</sup> day of March 2012 at Shidodo Location in Kakamega East District within Western Province, with others not before court murdered Benson Musava. The accused denied committing the offence, hence these proceedings.

**Prosecution's Case**

2. The deceased in this case, together with the accused and other alleged attackers hail from Shidodo sub-location. On 09.03.2012, at about 9.00pm or thereabouts Membo Mwangani, PW4 was in his house when the deceased went to him and informed him that there was a plot to assault him (deceased) together with Collins Chitavoi who testified as PW3. The alleged assault had been planned for that night. According to PW4 (Membo) the night was moonlit. Membo advised the deceased to make a report of the threat to the village elder but the deceased declined to do so for fear of meeting with his attackers on the road.

3. Before long, a group comprising Stephen, Richard (the accused) and Wycliffe arrived at Membo's house and asked him whether he (Membo) knew what the deceased had done and when Membo responded that he did not know, the group descended on the deceased, hitting him with sticks. When Membo pleaded with the group to report the matter to the authorities, the group took the deceased away as they also assaulted him. Membo rushed to the home of the accused and informed his parents of what was happening and thereafter, Membo followed the group and found them at the road junction near the deceased's home. Despite pleas to the group to take the deceased to the police, the group ignored those pleas completely and continued to assault the deceased who by this time was lying down on the ground at the road junction. The attackers also chased away anybody else who tried to approach the scene. According to Membo, the deceased was so thoroughly beaten that he could not talk. Eventually the deceased was taken to his home. The wife was asked to give him porridge. The deceased died the next day at around 10.00am. The village elder was accordingly informed.

4. On the same night of 09.03.2012, Alex Kitai, also known as Chitai, was in his house at about 9.30pm when he heard the deceased screaming. He rushed to the road junction where the screams were coming from and found the deceased lying on the ground and surrounded by Stephen, Wycliffe, Richard and another person by the name Isabwa. Alex Kitai who testified as PW5 (Alex) stated that the people he saw at the scene were armed with rungas and on seeing him they chased him away.

5. At about 11.00pm on 09.03.2012, Kevin Ikutu PW6 (Kevin) was woken up from sleep by Stephen and asked to go and see what had happened to the deceased. When Kevin went to the scene, he found the deceased lying on the ground at the road junction, completely helpless and in an unconscious state. Kevin stated that when he got to the scene, he found the accused, one Stephen (not the one who called Kevin) Wick aka Wycliffe and Isabwa who told him (Kevin) that the deceased had stolen a polythene paper for covering bricks. The four wanted the deceased to get up and sign that he was going to return the polythene paper, but because he was so hurt, the deceased was not able to sign any document.

6. On being told that deceased could not sign any document, Stephen, Wycliffe, Bernard and the other Stephen started beating the deceased again before asking Kevin to take the deceased home. Kevin took the deceased home and tried to give him porridge, but deceased could not take it. Kevin stated that the accused was among the people who assaulted the deceased.. He also confirmed that the accused was together with the other people who assaulted the deceased.

7. Jackline Muhoni, PW2 was wife to the deceased. She was in her house at around 9.00pm on 09.03.2012 when her husband, the deceased was taken away by the accused and other people. She testified that the group asked her to close the door after they had led the deceased away. PW2 (Jackline) never identified the people who took away her husband because they never entered the house.

8. On 10.03.2012, at about 9.30am, Wilson Tom, (Wilson) who is Assistant Chief of Shidodo sub-location was informed about the death of the deceased at the hands of his (deceased's) own brothers. Wilson visited the scene and after observing the body of the deceased, he contacted the OCS, Kakamega Police Station who later went to the scene and took away the body to Kakamega County General hospital Mortuary.

9. The doctor who performed the post mortem examination was Dr. Milka Olando but at the time of the hearing was represented in court by Dr. Dixon Mchana. Dr. Mchana testified as PW8. He presented the following findings. The body of the deceased had been identified by two family members before the post mortem examination was conducted some three days after death. The body had multiple non-extensive cuts on left half of the chest, both upper limbs and entire back. There were also bruises with huge blood clots underneath.

10. Internally, there was a clot overlying the 8<sup>th</sup> and 9<sup>th</sup> ribs. There was also an injury on the left kidney. In the opinion of Dr. Olando, the cause of death was shock following physical trauma. The burial permit No. 164854 was duly stamped, dated and signed and produced in court as PExhibit 1.

11. The investigating officer testified as PW7. He was number 83213 PC Abdudek Sharif Molud. After receiving a report of the incident at the police station's crime office, he accompanied Ip Otieno to the scene and took the body to the mortuary, PW7 recorded witness statements from which he established that on 09.03.2012, the accused herein, in the company of others took the deceased out of his house at about 9.30pm and assaulted him up to about midnight on the allegation that the deceased had stolen a canvas for covering bricks. PW7 also stated that after the incident, the accused ran away to Kambiri from where he was arrested by AP officers from Kambiri AP Camp on 12.03.2012. PW7 who also witnessed the post mortem examination did not recover any murder weapon.

### **The Defence Case**

12. The accused who gave sworn evidence denied committing the offence although he conceded that at about 9.30 pm on the material day, he heard shouts of people saying Thief, Thief. He responded to those shouts by going out of his house and running to the house of Membo Shanyisa, a neighbour. Together with one Jairus they followed and eventually caught up with the crowd. He saw the deceased sitting on the ground together with another. The two had been beaten up on allegations of having stolen a canvas from Stephen Makatia. The accused testified further that he saw one Stephen Ashihundu assault the deceased on the legs. After the deceased agreed to return the canvas, they were let to go and the accused also left. On the following day at about 10.00am, the deceased died.

### **Submissions**

13. At the close of the hearing Miss Andia, counsel for the accused submitted the prosecution had failed to prove their case against the accused beyond reasonable doubt. Counsel also submitted that there was no evidence to show that the accused had the intention of committing the offence and further that if anyone assaulted the deceased then that person was Stephen Ashihundu who is still at large. It was further submitted that the evidence by Collins, Membo and Kitai clearly suggested it was other persons who assaulted the deceased. Counsel urged the court to dismiss the case against the accused. On its part, the prosecution relied on the evidence on record.

### **Issues for Determination**

14. The issues for determination in this case are set out under Sections 203 and 206 of the Penal Code. The prosecution must prove that he accused caused the death of the deceased by an unlawful act or omission and with malice aforethought. So, there must be death, an unlawful act or omission and malice aforethought or the mens rea or intention to commit the offence.

15. Section 206 of the Penal code defines what malice aforethought is and if the prosecution proves one of the circumstances set out thereunder, the offence of murder will have been proved, all other parameters being equal.

### **Analysis and Determination**

16. In determining the issues outlined above, the court has to determine whether the accused was properly identified during the incident. Though the accused admits being at the scene and witnessing the deceased being assaulted by persons other than himself, the evidence by the prosecution shows that the night was only moonlit and in the circumstances the court has to be cautious in handling the evidence of identification.

17. The issue of identification has been the subject of much discussion by all superior courts before which the issue has arisen. In **Wamunga - vs - Republic [1989]KLR 424**, the Court of Appeal held inter alia:-

1) *"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.*

2) *Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."*

18. The above principles, to which I wholly subscribe were earlier enunciated in **R-Vs – Turnbull & others [1976] 3 All ER 459 and in**

**Abdallah Bin Wendo & Another – Vs – R [1953] 20 EACA 166.** In the latter case, the court was faced with the issue of a single identifying witness under difficult circumstances.

19. This court is therefore under a duty to examine with the greatest care all the evidence which suggests or points to the fact that the accused was truly among others who inflicted the fatal injuries on the deceased. It is to be observed that the people involved in this case were brothers, cousins and other close neighbours and the issue of identification is therefore one of recognition rather than identification of a stranger, the court must however be careful to assess whether there were any underlying family factors that could have led to accused being singled out as the culprit. On the issue of identification the evidence by Membo, Collins and Kevin is key.

20. According to Membo, the accused was in the company of two others, namely Stephen and Wycliffe when the group removed the deceased from his (Membo's) house as they also assaulted him. The next day, the deceased died. In his testimony, Collins told the court that he was in the company of the accused, Stephen, Benard Isabwa and Wycliffe, when they went to Membo's house and removed the deceased therefrom. The accused and the other brothers took both deceased and Collins to the road junction and beat the duo with sticks from quava trees. The next day the deceased died from the beatings he had received at the hands of his brothers among them the accused.

21. Kevin stated during his evidence in chief that on the night in question, he was woken up by Stephen and asked to go and see his brother the deceased who was lying at the junction. On arrival there at the scene, he saw the accused, Wycliffe and Isabwa who told him (Kevin) that the deceased had stolen a polythene paper for covering bricks.

22. From all the above testimonies, I am satisfied that the accused was present at all the stages from the time the group looked for the deceased from his house, then to Membo's house when they fished the deceased out and up to the junction where they thoroughly beat the deceased. I am also satisfied that the accused and others had a common intention of assaulting the deceased, which they did. In brief, the identity and intention of the accused were not in doubt. There was moonlight and all the people involved in this matter are brothers cousins who could easily recognize each other.

23. The second issue for determination is whether the accused, in assaulting the deceased did so with malice aforethought. Clearly, there cannot be any doubt on this issue because of the extent of injuries inflicted upon the deceased. From the post mortem report, the deceased had non-extensive cuts on the left half of the chest, upper limbs and the entire back as well as huge blood clots under the back and one clot overlying the 8<sup>th</sup> and 9<sup>th</sup> ribs. The left kidney was also injured. In the doctor's opinion, the cause of death was shock following physical trauma. It is thus proved that the accused had the necessary malice aforethought in assaulting the deceased to the extent of reducing him to garbage.

**Summary**

24. In summary, I am satisfied that the ingredients of the offence of murder have been proved beyond reasonable doubt. It has also been proved that the accused acted together with others who are not before the court with the common intention of causing the death of the deceased or causing him grievous harm. I accordingly find the accused guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and I convict him accordingly under Section 322(2) of the Criminal Procedure Code.

It is so ordered

**Judgment delivered, dated and signed in open court at Kakamega this 9<sup>th</sup> day of May, 2018**

**RUTH N. SITATI**

**JUDGE**

In the presence of

.....Mr. Ngetich .....for state

.....Miss Andia.....for 1<sup>st</sup> accused

.....for 2<sup>nd</sup> accused

.....Polycap Mukabwa.....Court Assistant