



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 40 OF 2013**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**DAVID MANOAH OLANDO ..... 1<sup>ST</sup> ACCUSED**

**ISAAC MANOAH ..... 2<sup>ND</sup> ACCUSED**

**GODRINE MATERE ..... 3<sup>RD</sup> ACCUSED**

**TOM WANYONYI (DECEASED) ..... 4<sup>TH</sup> ACCUSED**

**TIMOTHY MAKOKHA ..... 5<sup>TH</sup> ACCUSED**

**HEZRON MUKWAMI LUCHEVELI ..... 6<sup>TH</sup> ACCUSED**

**ENOCK JEREMIAH ASHIKANGA ..... 7<sup>TH</sup> ACCUSED**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Background**

1. The accused persons were jointly charged with the offence of **murder contrary to Section 203 as read with Section 204 of the Penal Code** the particulars thereof being that on the 13<sup>th</sup> August 2013 at Buchesani Village, Shingoto sub-location, Shibuye Location of Kakamega East District within Kakamega County, unlawfully murdered Japhet Muchesia Ashikhanga. The 4<sup>th</sup> accused, Tom Wanyonyi passed away during the pendency of this case.

**The Prosecution Case**

2. The prosecution called 7 witnesses to testify support of in their case. PW1 Emily Ambayi Mukanda, PW2 Francis Wahalia Ihumba, PW3 Synus Matingoye Masheti, PW4 Damaris Mawanga Shisia and PW5 Joseph Muwangal testified that they did not see who killed the deceased who was also known as Mr. Kilemba in the neighbourhood because he always wore a turban. PW1 was a neighbour to the deceased and she was in the house when unknown people came to the house of the deceased claiming to be police officers and after those people left she went into the deceased's house together with her husband and a lady called Julieta and they found the body of the deceased lying on the floor of the house. PW1 neither saw nor witnessed the killing of the deceased.

3. PW3 testified that on 12<sup>th</sup> August 2013 two people on a motorcycle went to his shop and asked him for directions to the house of the deceased. One of those people was the 1<sup>st</sup> accused person. PW3 however testified that he did not know who killed the deceased. PW4 testified that the deceased and the 1<sup>st</sup> accused were his brothers and that they did not have any bad blood between them. PW5 also testified he knew all the accused persons, but he could not tell who killed the deceased.

4. PW6 Dr. Dickson Mchana conducted the postmortem examination and filled post mortem report. The cause of death, in the doctor's opinion was multiple cut wounds caused by a sharp force trauma following assault. From his examination, the deceased had various cut wounds on the left chest, collar bone, ribs and on the neck. He produced the postmortem report as Pexhibit 1.

5. The investigating officer number 33937 Inspector Peter Momanyi testified as PW7. After being informed of the death of the deceased, he

went to the house of the deceased where he found the body which had multiple deep cuts on the face, neck and shoulder. He conducted his investigations and arrested some suspects. The 1<sup>st</sup> accused was mentioned by some of the witnesses, that is why he arrested him. PW7 however did not indicate his reasons for arresting the rest of the accused persons.

### **Defence Case**

6. The Court found that the prosecution had established a prima facie case against the accused persons and they were placed on their defence. The 1<sup>st</sup> accused in his testimony informed the court that the rest of the accused persons were all related to him as well as to the deceased person. When he was informed of the death of his brother he went to court and sought an injunction which gave him authority to take the body of the deceased for burial. He produced the court order as D exhibit 1. They had filed a succession case over their mother's land. He was also charged with the offence of assault alongside the 2<sup>nd</sup> accused, the 7<sup>th</sup> accused and someone called Lazaro and they were acquitted which led him to file a malicious prosecution suit. He testified that if there was any dispute in the family the dispute was being handled in court. He denied any involvement in the killing of his brother as he was at home with his wife on the night of the killing. He did not know who PW2 and PW3 were.

7. DW2 was the 2<sup>nd</sup> accused. He testified that he was also in his house with his wife on 13<sup>th</sup> August 2013 and was informed of the death of the deceased by his uncle, at 10pm. He was arrested as a suspect on 16<sup>th</sup> August 2013. He denied any involvement in the murder.

8. DW3, being the 3<sup>rd</sup> accused, learnt of his brother's death while he was at his home. He testified that he was not involved. He was arrested as a suspect after 4/5 days after the death. He knew that the deceased and the 1<sup>st</sup> accused had a land dispute but he did not have any differences with the deceased person.

9. The 5<sup>th</sup> accused person, who testified as DW4, stated he knew the deceased person but he did not know how he died. His father, the 1<sup>st</sup> accused person is the one who informed him of the death on 13<sup>th</sup> August 2013 at 10pm. His brother, the 2<sup>nd</sup> accused was arrested on 16<sup>th</sup> August 2013 and when he went to find out why his brother was under arrest, he was also arrested. He was not aware of any dispute between the deceased and his brothers.

10. DW5 was 6<sup>th</sup> accused person. He is the eldest brother to the deceased. He was informed that his brother had died though he was not told when the death occurred. He did not know when. He was later arrested on 17<sup>th</sup> August 2013. He did not know anything to do with his brother's death. He was also not aware of any land dispute between the 1<sup>st</sup> accused person and the deceased or any others. He denied committing the crime.

11. DW6 was the 7<sup>th</sup> accused person who is son of the deceased. He was informed by the 1<sup>st</sup> accused person of the death through a phone call at around 10.00pm on 13<sup>th</sup> August 2013. He was then arrested on 19<sup>th</sup> August 2013 as a suspect. He stated that he did not kill his father. There was however a land dispute within the family but he knew that the same had been resolved in a succession cause. He also recollected that there had been a dispute over his father's body.

### **Issues for determination**

12. The issues for determination in this case revolve around **Section 203 of the Penal Code** which reads as follows:

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

13. From the above section, the prosecution must prove:-

- ***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 person resulting in the death of the deceased***

14. **Malice aforethought** is defined under **Section 206** of the **Penal code** as;

***“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.”*

### **Analysis and Determination**

15. With the principles set out under above, the next step is to consider and confirm whether the evidence adduced proves the ingredients of the charge of murder to the required standard.

16. Malice aforethought has indeed not been established. From the evidence that was adduced before the court, none of the witnesses testified that any of the accused persons had the intent to commit the felony. The prosecution has not in any way established any of the circumstances set out under **section 206 of the Penal code** (above). PW3 testified that he saw the 1<sup>st</sup> accused on 12<sup>th</sup> August 2013 on a motorcycle with another person who was not before court when they asked him for directions to the deceased's house. He however further testified that he did not know who killed the deceased person. The only reason why the investigating officer linked the 1<sup>st</sup> accused person to with the incident is the testimony by PW3 that the 1<sup>st</sup> accused told him on 12<sup>th</sup> August, 2013 that he (1<sup>st</sup> accused) wanted to see the deceased. In my humble view, such evidence, without more, cannot be said to link the 1<sup>st</sup> accused person to the death of the deceased.

17. If indeed the investigating officer intended to base his reasons for arresting the 1<sup>st</sup> accused person on circumstantial evidence the following ought to be looked into by the court as was established in the case of **Abanga Alias Onyango V. Rep Cr. A No.32 Of 1990(Ur)** in which the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These are:

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

18. On careful examination of the evidence on record, I find that the three tests have not been satisfied to point towards the guilt of the 1<sup>st</sup> accused person or any of the other accused persons for that matter.

19. From the evidence of the prosecution witnesses as well as that of the defence it is clear that there was death. PW6 conducted the postmortem examination and confirmed that the death occurred and that the cause was multiple cut wounds. In addition to that the postmortem indicates that the multiple cut wounds were as a result of sharp force trauma following assault. None of the prosecution witness was an eyewitness so no one testified as to the cause of death linking any of the accused persons to the scene or as having inflicted the injuries on the deceased. In the absence of the eyewitness accounts and in view of the extremely weak circumstantial evidence there is nothing to link any of the accused persons with the death of the deceased.

20. Lastly is the issue of whether or not the prosecution proved an unlawful act or omission on the part of the accused persons leading to the death of the deceased. There is no such evidence on record linking any of the accused persons to any unlawful act or omission that could have resulted into the death of the deceased.

### **Conclusion**

21. In conclusion I find that this case was so hopelessly and carelessly investigated that it cannot succeed. That being the position I find and hold that none of the six living accused persons is guilty of the murder of JAPHET MUCHESIA ASHIKHANGA. They are each acquitted of the charge under **Section 322(1) of the Criminal Procedure Code**. Unless there is any other lawful reason for holding any of them in custody, they are to be released therefrom forthwith.

It is so ordered.

Judgment written and signed at Kapenguria

**RUTH N. SITATI**

**JUDGE**

**Judgment delivered, dated and countersigned in open court at Kakamega on this 12<sup>th</sup> day of October, 2018**

**WILLIAM MUSYOKA**

**JUDGE**

### **In the Presence of**

Mr. Ondieki for Appellant

Mr. Ngetich for Respondent

Eric/Polycarp - Court Assistants