REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 39 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

JOSEPH MULUPI OKWIRI.....ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The deceased and the accused are father and son respectively. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence being that on the 25th day of September, 2012 at Butali Village, Butali sub-location, Kakamega North District Western Province, the accused murdered JOHN MULUPI OKWIRI. The accused denied the charge when he appeared for plea on 22nd October 2012 before Hon. Lady Justice B Thuranira Jaden. The plea of not guilty entered against the accused set the stage for a full trial.

The Prosecution Case

2. The prosecution called five witnesses, though it is to be noted from the outset that neither the doctor who did the post mortem examination nor the investigating officer were among those witnesses. From the record, this incident took place at around 4.00pm on 25th September, 2012. At that moment, Nathan Mulupi Mukhwani, (Nathan) who testified as PW1 was at his home when some neighbour's children, whose names he could not remember rushed to his home and informed him that the accused was beating the deceased. Nathan at once ran to the deceased's home and found the accused who was stark naked bending over his father the deceased and pressing the deceased's neck using a stick. The deceased was by then bleeding from the mouth. Nathan separated the pair and took the accused outside the single roomed house which he shared with the deceased. At the material time, the accused's own house had fallen down. The accused appeared drunk. Nathan also recollected that on many occasions the accused and the deceased, who both used to drink frequently, would quarrel.

3. Immediately after separating the accused and the deceased, Nathan made a telephone call to his village elder, one Henry Shitanda Waluvengo (Henry) who was PW2 in this case. PW2 was instructed to proceed to the scene which he did and on arrival thereat, he found the deceased lying on the ground in a bad state. Together with the deceased's family, PW2 took the deceased to Malava Hospital by 6.00pm and then returned to his home. On the following day, PW2 was informed of deceased's death.

4. Sometime on 26th September 2012, the in charge of the AP camp at Butali received information that a suspect connected to the deceased's death was hiding within Matioli Location. The informer told the AP that the suspect was on the run, so number 237576, APC Fredrick Kawondo (PW2) together with APC Simon Njogu armed themselves and left for Matioli in pursuit of the suspect.

5. On the way to Matioli PW2 and his team met with Kongoni Mulupi, PW4, (Kongoni) and on getting to the Matioli junction they found the suspect who was surrounded by a huge crowd. The suspect had been badly beaten. They re-arrested the suspect who was about to be lynched, and took him to Malava Police Station for custody. PW2 told the court that the suspect they arrested at the Matioli junction is the accused herein.

6. Kongoni confirmed that at about 5.00pm on 25th September, 2012, while he was at Shipala sub-location, he received news through Nathan to the effect that the accused herein had seriously assaulted his father, the deceased. Because he was not at home at the time, Kongoni telephoned Waluvengo, PW2 and gave him directions on what to do. On the 26th September 2012, Kongoni went to Malava

District Hospital only to find that the deceased had died. Kongoni also testified that the deceased and the accused who were father and son shared a one roomed house.

7. The last witness for the prosecution was Daniel Chemuche, PW5, (Chemuche) the chief of Matioli Location. He received a report that the accused had seriously assaulted the deceased on the 25th September, 2012. When he went to the deceased's house, Chemuche confirmed that the deceased had indeed died. It was Chimuche who with help of AP's from Butali AP Camp mounted a search for the accused and eventually found him at the Matioli junction.

8. During cross examination, Chemuche stated that when he showed the body of the deceased to the accused, the accused looked shocked but did not say anything.

The Defence Case

9. At the close of the prosecution case, the court ruled that the accused had a case to answer and put him on his defence. The accused elected to give sworn evidence. He did not call any witnesses. The accused stated that at about 4.00pm on 25th September 2012 he was at Shibanga Village where he and others had gone to ferry sugar cane. He got back home at about 6.00pm where his wife and children were. The deceased was not at home. On the following day he was apprehended by a crowd of people as he made his way to work at around 10.00am.

10. The accused also stated that before his death, the deceased had been ailing for 2-3months and that he (accused) did not take deceased to hospital because the deceased had refused to go to hospital. The accused also testified that he could not remember the day the deceased died nor could he remember any of the people he had worked with on the 25th September, 2012. The accused conceded that Nathan was his neighbor, but that Nathan told lies to the court when he alleged that he had seen accused assaulting his father on 25th September 2012. He alleged that he and Nathan had a dispute over the use of oxen which belonged to his (accused's) grandmother. The accused also denied running away from home on the evening of 25th September, 2012 after the deceased had been seriously assaulted.

11. It was also the accused's evidence that Kongoni was not being truthful when he stated that the accused could not be found at home on the evening of 25th September, 2012, though the crowd that arrested him on 26th September, 2012 alleged that he (accused) had killed his father.

Submissions

12. Mr. K. S. Ombaye, Counsel for the accused made final submissions in which he urged this court to enter a finding of not guilty due to lack of evidence. The thrust of counsel's submission is that the prosecution failed to adduce medical evidence as to how the deceased died and/or what caused the death of the deceased. Counsel also submitted that Nathan's evidence that he saw the accused assaulting the deceased falls short of proving the case against the accused beyond any reasonable doubt. Regarding the prosecution's failure to adduce medical evidence on the cause of the death of the deceased, counsel urged the court to infer that such evidence would have been unfavourable to the prosecution's case. Counsel placed reliance on ***Ndungu versus Republic [1984] KLR 487,*** in which the Court of Appeal quashed the conviction and set aside the sentence in a case where the prosecution failed to adduce medical evidence on cause of death of the deceased. I shall say one or two things about the ***Ndungu Case*** (above) later in this judgment.

Issues for Determination

13. The crucial issues for determination in this case are the following:-

a. Whether the evidence of Nathan, as a single identifying witness, is sufficient to form a basis for a conviction; and

b. Whether failure by the prosecution to avail medical evidence in the form of a post mortem report is fatal to the prosecution's case.

c. Whether the offence of murder, as defined under section 203 of the Penal Code was proved.

Analysis and Determination

14. For the prosecution case to succeed the prosecution must prove the following:-

a. The fact and cause of deceased's death.

b. That the death was as a result of an unlawful act or omission on the part of the accused and

c. That there was malice aforethought on the part of the accused when he killed the deceased.

15. Malice aforethought is defined by ***Section 206 of the Penal Code*** which reads:-

"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."***

16. I shall move on to consider the first issue, namely whether the evidence of a single identifying witness in the person of Nathan can form the basis of a conviction on such a serious charge as murder. In ***Abdalla Wendo versus Rex [1953]20 EACA 166***, the predecessor to the Court of Appeal for East Africa, was a case in which the only evidence before court was that of a single identifying witness. The court held as follows concerning the issue:-

"Although, subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification, especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances, other evidence circumstantial or direct, pointing to the guilt is needed."

17. This principle of criminal law was reiterated by the Court of Appeal in ***Nganga versus Republic [1981]KLR 483*** when it was held, *inter alia*, that

"The evidence of identification of a single witness should be carefully tested. Where an accused is unrepresented, it is the duty of the magistrate to question the witness to establish his recognition." In ***Kiriungi versus Republic [2009]KLR 638,*** the Court of Appeal held that ***"Even without any other evidence on identification, the court could rely on the evidence of a single witness to convict, subject only to a warning by the convicting court of the risks involved, ……."***

18. I carry along with me the above principles as I proceed to consider Nathan's evidence. First of all, the alleged incident in this case took place at about 4.00pm on 25th September, 2012. It was day time and there is no other evidence on record to show that there was an eclipse of the sun or other weather condition that would have made visibility on the fateful afternoon difficult. Nathan whose evidence I have carefully considered stated that when his neighour Makuto's children ran to his home and told him that the accused who had removed his clothes was beating their grandfather, the deceased, Nathan immediately ran to the deceased's homestead and entered the house of the deceased and found the accused, who was stark naked holding the deceased's neck and pressing it down using a stick. Nathan grabbed the stick from the accused and ordered him out of the house. By that time the deceased John Mulupi was already bleeding from the mouth as he uttered the words, " **I am dying. I am dying**" and crying out in pain. Though the deceased was taken to hospital thereafter on the same evening, by the morning of 26th September, 2012, he was dead.

19. During cross examination, Nathan conceded that his statement to the police did not contain the deceased's words "**I am dying, I am dying**." However Nathan was categorical that at the time, the accused was sharing a house with the deceased after his own house fell down. There is no indication from the cross examination that there was any form of dispute between the accused and Nathan, as suggested by the accused during his defence.

20. While appreciating the dangers of relying on the evidence of a single identifying witness, I am satisfied in this case that Nathan caught the accused in the act of trying to kill the deceased by pressing his neck with a stick. The deceased was already bleeding from the mouth by the time Nathan intervened. I therefore accept that Nathan's evidence is sufficient in placing the accused person at the scene where he was found by Nathan assaulting his father, the deceased.

21. It is also on record, though denied by the accused person that after committing the offence, the accused person fled from home but was apprehended the next morning in another location. In my considered view the accused who knew that what he had done was wrong and that he would be sought in connection with the same, chose to flee. Further the information about the accused person assaulting his father spread like wildfire from Nathan to Waluvengo to Kongoni and then to the police although the police did not testify. Waluvengo testified that when he got to the deceased's house, the deceased was in pain and crying that he had been hurt.

22. Closely connected with the issue of witnesses is the fact that the prosecution did not call the doctor who conducted the post mortem examination and did not also call the investigating officer. In ***Kiriungi versus Republic [Supra]*** the Court held, *inter alia*, that

"7. It was good practice for prosecuting authorities to comply with the requirement to call an investigating officer as a witness, but the mere failure to comply with it, could not automatically result in an acquittal. Each case had to be considered on its own circumstances in order to determine the effect of such failure on the entire case for the prosecution" and ***"8th It was not mandatory for the investigating officer to be called, unless there was an allegation that he would have said something adverse to the prosecution case."***

23. In this case, there is no allegation whatsoever that the prosecution's failure to call the investigating officer is because his evidence would have been adverse to the prosecution's case. The defence only urged the court in its submissions to make such a finding, but on a thorough consideration of the evidence on record, I do not think that such evidence would have added value to what I find overwhelming evidence on record. I believe Nathan's evidence that the accused was found in the act of strangling his father using a stick across his (deceased's) neck. I

also find that there is no doubt that the accused person was the only person who was with the deceased when the deceased was so fatally assaulted. I also find that accused was apprehended by members of the public and the local administration police re-arrested him and took him to Malava Police Station to face the law. In my considered view therefore, nothing much turns on the accused's complaint on the failure by the prosecution to call the investigating officer.

24. The second issue for determination is whether the prosecutions failure to avail the doctor who performed the post mortem examination in this case is fatal to the prosecution's case. This question is critical for the simple reason that in a murder case, the prosecution must not only prove the fact of death but must also prove the cause of such death. In the case of ***Ndungu versus Republic (Supra)*** the Court of Appeal said that ***"in some cases death can be established without medical evidence."*** This case together with ***Republic –versus – Cheya [1973] EA 500*** were cited with approval by the Court of Appeal in ***Dorcas Jebet Keter & another versus Republic [2013]eKLR*** where the appellants were found guilty, convicted and sentenced to death for the murder of one Hillary Malakwen who was found to have been tortured and burnt to death by the appellants and their accomplices, despite the prosecutions failure to produce a post mortem report. The court of Appeal quoted the following passage from the ***Cheya case*** in reaching the conclusion that failure to adduce medical evidence is not necessarily fatal to the prosecution's case –

> ***"Of course, there are cases, for example, where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be obvious that the absence of a post mortem report would not necessarily be fatal. But even in such cases medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence as supporting evidence of the cause of the death in the circumstances relied on by the prosecution."***

25. In the instant case, the accused person was found bending over the deceased and holding his neck while pressing it down with a stick, and by that time the deceased was already bleeding from the month. This is a case which in my considered view occurred under peculiar circumstances, involving a son and his father. Further, the fact that the deceased died in less than twenty four hours from the time of being assaulted by the accused person. I have no reason to doubt that the death of the deceased, of which Nathan, Waluvengo, Kongoni and Chemuche spoke occurred as a result of the unlawful acts of the deceased.

26. The Court of Appeal in the ***Dorcas Jebet Keter case (above)*** cited with approval a passage from the New Zealand Court of Appeal decision in ***Republic versus Harry (1952) NZLR 11 (3rd Digest Suppl)*** where it was stated by Oliver J that

> ***"At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence notwithstanding that neither the body nor any trace of the body had been found and that the accused has made no confession of any participation in the crime before he can be convicted. The fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt, the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."***

27. In the instant case, the accused person was found in the act of strangling his father by pressing the deceased's neck with a stick. The deceased was bleeding and although the deceased was taken to hospital, it was too late to save him because the damage was already done. There is no iota of doubt in my mind that the accused person killed the deceased under the circumstances describe by Nathan.

28. The final issue for determination, which is closely connected to the second issue is whether the accused acted with malice aforethought in attacking the deceased. There is no doubt in my mind that the accused acted with malice aforethought. The accused must have known that pressing down the neck of the deceased with a stick was bound to deprive the deceased of air and therefore cause him to die through asphyxia. In this regard, ***section 206(b) of the Penal Code*** is applicable and I so find.

29. From the above analysis, I am satisfied that the accused person herein Joseph Mulupi Okwiri, on the 25th day of September, 2012, at Butali Village, Butali Sub-Location in Kakamega North District of Western Province, murdered JOHN MULUPI OKWIRI. I accordingly find him guilty as charged and convict him of the murder under ***section 322(1) of the Criminal Procedure Code.***

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 12th day of October, 2018

WILLIAM MUSYOKA

JUDGE

<u>In the Presence of</u>

Ms Oduor for Appellant

Mr. Ngetich for Respondent