



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL CASE (MURDER) NUMBER 1 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

JOHN OBIELO ITAKA.....1ST ACCUSED

ASTON MBUTA ITAKA.....2ND ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

J U D G M E N T

Introduction

1. The two accused, JOHN OBIELO ITAKA and ASTON MBUTA ITAKA are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the 8th day of November, 2013 at Shidodo Sub-Location in Kakamega County jointly with another not before court, murdered JOSEPHAT MKABWA SHALIMBA.

2. The accused persons denied the charge and the matter went to full hearing. The firm of M/S Elungata Advocates was appointed to act for both the accused persons.

Prosecution Case

3. The prosecution called five (5) witnesses. PW1, Nancy Mable Nyaloya (Nancy) who was the only eye witness. She is the wife to the deceased. In her testimony she told the court that on the 8th Novmber, 2013 at 7.00am, the accused persons and another not before court went to their house, and Justus who is still at large claimed that his bicycle had been stolen and that the deceased was the one they suspected to have stolen the said bicycle. Justus started assaulting the deceased.

4. According to Nancy the two accused persons joined Justus in beating the deceased. The 1st accused was beating the deceased using kicks and blows whereas the 2nd accused was beating the deceased with a panga. The 2nd accused also slapped Nancy with a panga and she fell down.

5. After the accused persons had beaten the deceased they left the scene. Nancy also testified that the accused's father was at the scene together with one of the neighbours when all this was going on. After the accused left, Nancy took the deceased to the Kakamega General Hospital where he was treated.

6. The matter was reported to the sub-chief's office to one Tom Mwabalea before taking the deceased to hospital for treatment. The deceased was treated at Kakamega General Hospital, Mukumu Mission Hospital as well as other local health facilities for about a month before his health deteriorated and he died on 8th January, 2014. Nancy identified the accused persons who she said she had known for 38 years. She referred to the two accused as her sons.

7. On being cross examined by Mr. Elung'ata, Counsel for the two accused, Nancy explained that the deceased died some two months after he had been assaulted by the accused. She further explained that the other persons who witnessed the incident were her daughter, and two neighbours, Ernest Malura and Kizito Mwinami. Regarding a question as to why close neighbours did not come around, he told the court that they had all gone to work when the incident took place.

8. It was also Nancy's testimony that for the many years she and the deceased had been married, the deceased had never fallen ill. From her

testimony, the Court was informed that the deceased and the father of the two accused persons are brothers. In her view, the two accused whom she referred to as her sons, have been troublesome young men over the years, though their stubbornness did not prevent their grandfather from sharing out his land amongst his sons.

9. On re-examination by Mr. Oroni, Senior Prosecution Counsel, Nancy averred that her husband died as a result of the assault, and that the assault was occasioned by the suspicion held by the two accused that the deceased had stolen a bicycle belonging to one Julius. In her view it was not a land dispute that had led to the deceased's death.

10. When examined by the Court, Nancy testified that after the deceased's death the family of the two accused relocated to another area as advised by the area chief and in keeping with local custom.

11. PW2, John Matangwa Musindi (John) testified that he was one of the people who took the deceased's body to Kakamega General Hospital Mortuary in readiness for the post mortem examination which was conducted on 10th January, 2014. John attended the post mortem examination after identifying the body of the deceased to the doctor. He also testified that he took part in the burial of the deceased.

12. Number 66970, CPL Erick Ngetich testified as PW3. He is the one who received a telephone call from AP Makori of Khayega AP Post on 7th January, 2014 at about 10.40am informing him of the death of the deceased. Together with PC Njenga PW3 proceeded to the Khayenga AP Post at which they confirmed a report of the incident had been made by Safari Mukabwa and Aggrey Majimbo to the effect that the deceased had been assaulted on 8th November, 2013 at about 1.00pm and further that the two accused, who are nephews to the deceased, were among the assailants. After confirming the above details, PW3 proceeded to the scene for more information. At the scene, PW3 found the deceased's body lying outside the house and covered in a white bed sheet. After interrogating Nancy and other family members of the deceased, he got details of what had transpired on 8th November 2013, and from those details CPL Ngetich was satisfied that the allegation by the accused that the deceased had stolen the bicycle belonging to Justus was false, hence his decision to charge the accused with the offence of murder. CPL Ngetich however confirmed that the deceased died because of a simmering land dispute between his family and his brother's family.

13. Dr. Dixon Mchana Mwalundindi who conducted the post mortem examination testified as PW4. The body of the deceased was identified to him by two persons. On external observation, Dr. Mchana said he did not notice any defence injuries but internally he saw injuries on the left scalp above the ear but no fracture of the skull bone or its base. There was also bleeding below the covering of the brain with pressure on the brain. In the doctor's opinion the cause of death was bleeding in the brain following assault. He filled the burial permit, and also stamped it. The same was produced as Pexhibit 7. On cross examination Dr. Mchana testified that the injuries observed on the body of the deceased were mainly on the left side of the scalp which injuries the doctor said were about two days old.

14. PW5, Safania Mani Mukabwa, together with John, helped in taking the deceased's body to Kakamega General Hospital Mortuary. He also identified the deceased's body for post mortem examination and attended the same

Defence Case

15. Both accused were put on their defence after the court found that a prima facie case had been established against them by the prosecution. They chose to give sworn statements. They did not call any witnesses. The 1st accused JOHN OBIELO ITAKA testified as DW1 and denied that on the 8th November, 2013, he and his co-accused beat the deceased. He testified that on that day he was at his home which is about 50 meters from the deceased home. He claimed that he had no dispute with the deceased and added that the allegations made by Nancy in her testimony were not true. As far as the 1st Accused was concerned, the deceased had suffered a stroke and was being treated by a herbalist. He added that the person who reported the incident was a human rights activist who never testified in the case. The 1st accused also contended that the chief, sub-chief and village elder were not called to testify in the case. He claimed further that no medical evidence was given concerning the injuries suffered by the deceased.

16. On cross examination the 1st accused admitted that on 8th November 2013, he went to the house of the deceased in the company of the village elder and no other. He asked the court to read his statement which showed that there was a dispute between the families of the accused's father and deceased.

17. The statement further read that on 8th November 2013, the 1st accused heard screams from deceased's house and when he went there he found his cousin Justus and the deceased fighting. This part of the statement he also denied. He denied knowing Justus Willie Itaka.

18. The statement was further read to the effect that the 1st accused separated Justus and the deceased and that he did not notice any injuries on the deceased. This too he denied. When re-examined by Mr. Elungata he maintained that he never signed the said statement.

19. DW2, the 2nd accused testified that he was not at home when the incident occurred as he was busy ferrying customers on his motorbike as from 7.50am. He testified that there was no dispute between his family and the family of the deceased. He did not remember the day the deceased died though their homes were very close, being about 50 meters from each other. That two days after the deceased died he was arrested. He also testified that there was no grudge between his family and the family of the deceased.

20. On cross-examination by the prosecution, the 2nd accused testified that he did not know Justus Willie Itaka who was named as their co-perpetrator of the alleged crime and who was never arrested. He also recanted his statement to the police and the signature thereon.

21. The statement which was read to him stated partly that on 10th January 2014, he (DW2) learnt of his uncle's death but he did not go to the house of the deceased because he was a suspect. He denied that he told the police that the deceased fought with his brother Justus and maintained that he was not at home when the alleged incident happened. The defence closed their case without calling any other witnesses.

Submissions

22. Counsel for the two accused filed written submissions. He submitted that though it was alleged that the deceased was assaulted by the accused persons, the prosecution never led any evidence to confirm any report of assault and further that no evidence was produced to show that the deceased sought treatment in any health facility for the injuries allegedly suffered on 8th November 2013.

23. Counsel further submitted that though the deceased died early in the morning of 8th January 2014, a report to the police about the incident was not made until around 2.30pm. Counsel submitted that the prosecution case was weak and lacked the legal teeth and capacity to sustain the charge of murder.

24. The defence further submitted that the deceased herein could have died of other factors and/or injuries suffered on another date subsequent to the alleged fight with the accused persons. Counsel urged the court to dismiss the case and acquit the two accused of the charges.

Analysis and Determination

25. From the evidence, the incident herein allegedly occurred during the day on the 8th November 2013 at the deceased's home. One Justus who is a nephew to the deceased went to the deceased's house and picked up a quarrel with the deceased claiming that it was the deceased who had stolen his bicycle. Nancy was the only eye witness to the incident. She is the wife to the deceased. She was at home with her husband when all this occurred. She testified that the two accused persons joined Justus and they ganged up and started assaulting the deceased as a result of which the deceased sustained some injuries. The incident, according to Nancy, was witnessed by other villagers who did not testify.

26. Two months later the deceased died. A post mortem examination was performed on the body of the deceased by Dr. Mchana (PW4) on the 10th January, 2014 after the body was identified to him by John and Safania. Dr. Mchana, established that the cause of death was bleeding in the brain following an assault. According to the doctor the injuries were sustained two (2) days before the post mortem. PW3, CPL Erick Ngetich, investigated the incident after visiting the scene on the 7th January 2014 at 10.40am upon receipt of a report of a serious assault. This visit was made two months after the incident of the earlier alleged assault. The report stated that the deceased had been assaulted by his nephew on 8th November, 2013.

27. At the scene they found the deceased lying on a bed covered with a white bed-sheet. He interrogated Nancy and others and from the post mortem and his investigation he charged the two accused with murder.

28. Section 203 of the Penal Code defines murder as the causing by a person or persons with malice aforethought, the death of another person by an unlawful act or omission.

29. The prosecution therefore has the burden of proving the following three ingredients of murder in order to secure a conviction:-

a. The death of the deceased and the cause of death.

b. That the accused committed the unlawful act or omission which caused the death of the deceased.

c. That the accused had the malice aforethought.

30. In proving malice aforethought, there must be evidence proving that the death of a human being (deceased) occurred. In this case, the prosecution proved by providing the post mortem report (PEX 1) produced by Dr. Mchana after performing the autopsy that the deceased died. There were two people who also witnessed the autopsy and who identified the body for post mortem examination.

31. There is no doubt therefore that the deceased died and the cause of death was bleeding in the brain following an assault. The second element that the prosecution ought to prove is that the two accused are the ones who committed the unlawful act or omission which caused the death of the deceased. Nancy, was the only eye witness in this case. There was no other evidence to corroborate what she said. Although the incident occurred during the day and was said to have been witnessed by many other people, those other people were not called to testify or perhaps they refused to come to court to testify. From the evidence also, the investigating officer (PW3) started investigating the matter some two months after the alleged assault had been reported on 8th November 2013. The investigations commenced on the 10th January 2014 when the Investigating Officer visited the scene. It is then that he was told of what happened on the 18th November 2013 but I find that the police did not take this matter seriously after a report was made to them on 8th November 2013, and as such the purported investigations were substandard.

32. Secondly the post mortem examination points out that the injuries on the deceased were two (2) days old. Could this mean that the deceased was injured again after the assault on 8th November 2013? These injuries, as seen by Dr. Mchana were not consistent with the evidence that the deceased died as a result of injuries occasioned to him on 8th November 2013.

33. The gaps in the prosecution's case as highlighted above have created considerable doubt in my mind as to whether what Nancy told the court was true. Perhaps the testimonies of the accused are correct, though I do think that the accused spoke the whole truth. However, and as stated elsewhere in this judgment, the burden of proof lies on the prosecution and not on the accused persons in this case. The prosecution failed to discharge that burden, and the benefit arising from such failure can only go to the accused.

34. I also find that there were other crucial witnesses whom the prosecution failed to call in this case specifically the area chief, sub-chief, and the village elder. Failure to call these witnesses weakened the prosecution case the more. These would-be witnesses were mentioned by Nancy and it was upon the investigating Officer to make a follow up and summon the witnesses. Failure to do so was big blow to the prosecution case. I also find that though the accused have denied being involved in the incident, there seem to have been other unseen forces that influenced the course of investigations in this case.

Conclusion

35. The law is clear that the prosecution has the burden of proving the case beyond reasonable doubt. For murder, the prosecution needed to prove all the three ingredients of the offence. They failed to do so, and accordingly I find the two accused not guilty of the murder of JOSEPHAT MUKABWA SHALIMBA and acquit them of the same under Section 322(1) of the Criminal Procedure. Unless there is any other lawful reason for holding the accused persons in confinement, they are to be released 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 12th day of October, 2018

WILLIAM MUSYOKA

JUDGE

In the presence of

Mr. Ngetich for state

Eric/Polycarp - court assistants