



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 45 OF 2011

REPUBLICPROSECUTOR

VERSUS

ABSOLOM OKWEMBA.....ACCUSED

J U D G M E N T

Introduction

1. The age of this file has taken it through the hands of 7 Judges either for mention for directions and/or hearing. The hearing was concluded before me on 29.11.2016
2. The accused person has been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that on the night of 19th and 20th June, 2011 at Eburnaka Village, Ebusundi Sub location, Wekhomo Location within the County of Vihiga, he murdered Shadrack Ondeko. The accused person denied committing the offence. The case has been ongoing since 29.06.2011 when the accused person first appeared in court. During the hearing of the case, the prosecution called 5 witnesses in its effort to prove the charge against the accused person.

The Prosecution Case

PW3, Alexander Ojuok told the court that the accused person herein and the deceased were good friends and that on 19.11.2011 at about 10.30 am, he saw both men seated under a tree at the deceased's home. At about 3.30pm on the same day, he saw the accused person and the deceased walking together towards the home of the deceased. Then on 20.06.2011, at about 9,00am, PW3 got news that the deceased had died. When he went to the scene which was just outside the house of the accused person, he confirmed that the deceased who was PW3's brother, had indeed died and been buried in a shallow grave just outside the house of the accused person. Police were called and they took away the body to the mortuary for preservation. PW3 is the one who identified the body of the deceased to Dr. Philip Athero, PW4 before Post-mortem examination.

4. J.A, a 15 year old class 7 pupil at the time testified as PW2 and told the court that he used to live with his grandmother in the same compound with the accused person but in different houses. The accused person is an uncle to PW2. PW2 stated that at about 8,00pm, he heard noises from the direction of the accused person who was telling somebody out there that he did not want to see anybody at his (Accused's) vegetable garden. PW2 testified that he knew the voice of the accused person well since they had lived in the same compound from the time he (PW2) was in nursery school and he was now 15 years old and in class seven. He continued talking until about 2.00a .m, saying that someone had stolen his (accused's)

vegetables. The accused was asking another person (whose voice PW2 could not identify to give him Kshs.20/= for the vegetables that had been plucked money. Since it had rained, PW2 did not venture out into the night to find out what the accused (who was his uncle) was grumbling about. PW2 remained in the house until about 5.00am when somebody knocked on his grandmother's house. He did not get up until about 6.00am when he woke up and the door was opened by one Obed who was sharing the house with PW2 that night. When PW2 got out of his grandmother's house, he saw what looked like a fresh grave outside the accused's person house, but PW2 did not pay much attention to it. He prepared himself and left for school.

5. While PW2 was at school, the chief of the area went for him and took him to the police station to record a statement. When PW2 was taken through cross examination, he informed the court that he did not tell anyone about the noise he had heard during the night and further that the accused person's house was 30 meters from the house where PW2 and Obed were sleeping that night.

6. PW1 was David Jeli Omuka who lived in the same neighbourhood as the accused person herein. He testified that on 20.06.2011 at about 5.00am, while he was still asleep in his house, the accused person visited him and knocked on the door, and asked to be given a cigarette. PW1 testified that it was not strange, that the accused person was at PW1's house at such time, because even he himself had gone to the accused person's house at such a time and asked to be given a cigarette.

7. Instead of giving the accused person a cigarette, PW1 gave him tobacco, and without any prompting at all, the accused person told PW1 that during the night, he caught a thief who was stealing his "Sukuma Wiki" vegetables and that he had killed the thief. On hearing what the accused person told him, PW1 locked the door behind him, leaving the accused inside and went to report the matter to the village elder. Thereafter PW1 went to the accused person's home and found what looked like a fresh grave outside the door of the accused person's house. A report was thereafter made to the Assistant Chief of the area who in turn informed the police. When the police went to the accused person's house, they dug up the fresh grave from which was recovered the body of Ondeko the deceased herein. From the testimony of PW1 the deceased was a nephew to the accused person. The police took photographs of the scene before taking away the body to the mortuary. PW1 testified further that bhang plants had been planted on top of the grave. He also testified that there was a Sukuma Wiki garden just outside the house of the accused person.

8. During cross examination, PW1 testified that she is an uncle to the accused person though they live in different compounds. He also testified that at the time the body of the deceased was exhumed, the accused person was not around since he was already at the police station.

9. PW4 was Dr. Philip Athero of Dolphine Nursing Home. He is the one who carried out post-mortem examination on the body of the deceased on 23.06.2011. Dr. Athero's observations were as follows:-

- The body was of an African male aged about 48 years and in good nutritional state with a height of 5'7'
- The body had a fracture dislocation of the right shoulder and right clavicle. There was also a fracture of the left leg below the knee. There was another fracture of the neck and a dislocation of the left shoulder joint. A further fracture of the 6th and 7th ribs on the left side as well as a dislocation of the right hip joint.

10. Dr. Athero formed the opinion that the cause of the deceased's death was fatal multiple injuries coupled with fractures and soft tissues injuries. He signed the post mortem report for death certificate No. 492296. The post mortem report was produced as PExhibit 1.

11. The arresting officer was No. 93053008 Ap Cpl Japheth Rono of Ekhusi AP Post in Emuhaya Sub-County of Vihiga County was PW5. He testified that on 20.06.2011 at about 7.20am, he received a telephone call from one village elder by the name Paul Odioko informing him that a suspect in a murder incident was about to escape. Together with other officers, PW5 went to the scene where they saw freshly dug soil next to the door of the suspect's house. At the time the suspect was hiding some 400 metres

away from his home. Scene of crime officers took photographs of the scene which photographs were marked for identification but not produces since the investigating officer was not called as a witness. PW5 arrested the accused person whom he identified in court, with the evidence of PW5, the prosecution closed its case.

The Defence Case

12. At the close of the prosecution case, the court ruled that the accused person had a case to answer. Upon courts compliance with Section 306(2) of Criminal Procedure Code, the accused person chose to give a sworn statement. He however, had no witnesses to call. He testified that on 18.06.2011 at about 7.00 am, he was in Nairobi where he used to work as a mason with M/s Kenya Builders. He boarded a vehicle from Kayole upto Machakos Bust terminus and then boarded a vehicle to Luanda. He was travelling to attend the funeral of his uncle, one Musilu Obuyenga. He arrived in Luanda at about 4.00pm and headed straight home using a motor-bicycle – boda boda. On arrival home, he met PW1 whom he had known since 2005. PW1 was milking the cows for the accused person’s mother, but when accused saluted PW1, PW1 did not respond with a greeting but only telling the accused person that he (PW1) did not say hello to his enemies. After Asking PW1 one other question, the accused left to the home of one of his uncles by the name David Okwemba where he had his supper and spent the night in his grandfather’s house in the same compound.

13. Came the 19.06.2011, he left for the deceased uncles funeral. On arrival at the funeral his maternal grandfather Daniel Omwalu asked him to keep a record of the offertory. He did so until 2.00pm when he handed over the collections to one of his cousins Absolom Okwemba Nehemiah as he went to make his uncle’s grave. He prepared the grave until about midnight. During the night he and others drank chang’aa so that by 6.00am the next morning he was drunk and tired. He decided to go back to Luanda to sleep.

14. On his way to Luanda, he vomited in the vehicle which he had boarded. He was thrown out of the vehicle at the Kima stage and hurt his nose. It was there at the Kima stage that the police arrested him and took him to the Kima AP Camp and placed in cells. He met PW1 at the cells but since he was drunk and tired. He fell asleep. By the time he woke up at 2.30pm PW1 was still in the cell but soon thereafter, PW1 left the cell in the company of an AP Officer.

15. The accused denied murdering the deceased. He told the court that he still denied the charge.

16. In the ensuing cross examination, the accused person stated that he did not have in his possession the bus ticket he used from Nairobi to Luanda on 18.06.2011. He also stated that PW1 was his stepfather, having inherited his mother after his (accused person’s) father died in 2005. He also testified that on 18.06.2011, he took supper at his uncle’s home, with his uncle, his uncle’s son and himself at the dinner table. The accused person also testified that he had spent time with some of his cousins on the night of 19.06.2011, he was not able to find any of them to testify on his behalf.

17. The accused also testified that there was a criminal case at Maseno court in which PW1 was charged with assaulting one of the accused person’s cousins. Regarding PW2, the accused stated that Jason Atola is his sister’s son and that though he had no grudge with him, PW2 lied to the court when he was giving his testimony. The accused person agreed with prosecution counsel that neither PW1 nor PW2 had been taken to task during their cross examination about the alleged lies. They had told the court. In response to a question from the court as to his capacity to remember the events of the morning of 20.06.2011, the accused stated “although I was drunk, on the morning of 20.06.2011, my memory was not unpaired. I usually remember things.” The accused person’s testimony closed the defence case.

Final Submissions

18. At the close of the hearing, Mr. S. Wekesa, counsel for the accused submitted that the prosecution has failed to prove the case against the accused person beyond any reasonable doubt. Counsel submitted that the evidence of both PW1 and PW2 does not connect the accused person to the alleged murder of the

deceased person. Counsel also submitted that there were glaring contradictions in the prosecution evidence and that in the circumstances, the accused person should be given the benefit of the doubt and be acquitted of the charge of murder.

19. On his part, Mr. Oroni Senior Prosecution Counsel submitted that though there was no eye witness account in this case, the presence of a fresh grave outside the door of accused's home was sufficient circumstantial evidence to connect the accused to the death of the deceased. He urged court to find and to hold that the prosecution has proved its case against the accused person beyond any reasonable doubt and to convict him accordingly.

Issues for Determination

20. After a careful analysis of all the evidence on record, it is clear that the prosecution's case turns only on circumstantial evidence. The issues for determination by this court are whether, from the said circumstantial evidence, the prosecution has proved the following:-

- That the deceased died.
- That the deceased died as a result of an unlawful act/omission on the part of the accused person and
- That at the time of committing the offence, the accused had malice aforethought as defined in Section 206 of the Penal Code.

The Law

21. The principles of circumstantial evidence have been the subject of many decisions of the superior courts. In the case of **Mwathi – vrs – Republic [2007]2EA334**, the court held inter alia, that “in the absence of eye witnesses the court must consider whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty. (**Rex –vrs – Kipkoring Arap Koske 16 EACA 135 and Teper V Republic [1952] AC 480** followed.”

22. It was also held in the case of **Ndunya – Vrs – Republic [2008] KLR 135** THAT “circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was accused person's guilty from circumstantial evidence to be sure that there were no other co-existing circumstances which would wake or destroy the influence “Also see **Kimeu vrs – Republic [2002] KLR 756**.

23. What the above authorities with which I fully agree are driving at is that the circumstances on hand should leave no lingering possibility that the offence may have been committed by a person other than the accused person herein.

24. In **Mwendwa – vrs Republic[2006] KLR 133**, the court held inter alia that “to prove a case based on circumstantial evidence, only every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution,

25. secondly, as is now settled law, the chain must never be broken at any stage.” Also see the case of **Mkendesho – vs – Republic [2003] 1KLR 461**

Analysis and Determination

26. Having set out the evidence and the law, I now return to the issues for determination remembering that the accused person has raised the defence of alibi. I shall discuss each issue in turn.

Whether the deceased died and cause of death

27. There is no doubt in this case that the deceased died. Dr. Philip Athero, PW4, who carried out the post mortem examination, told the court that he did so on 23.06.2011 and that the body he examined was that of Shadrack Ondeko as identified to him by Alexander Ojuok and Stephen Onnami. Alexander Ojuok also testified as PW2 and told the court that he was one of the two people who identified the body of the deceased for postmortem examination. He also testified to the fact that on the morning of 20.06.2011, he was present at the home of the accused person when the deceased's body was exhumed from a grave just outside the house of the accused person. PW4 confirmed that the deceased was his brother whom he had seen alive at about 3.30pm on 19.06.2011 in the company of the accused. As to the cause of death, Dr. Atheto testified that the cause of death was fatal multiple body injuries fractures and soft tissue injuries.

b. whether the deceased died as a result of the unlawful act or omission on the part of the accused person.

28. Before deciding this issue, I point out that nobody saw the deceased being beaten or assaulted, so we must piece the circumstances together to see whether they irresistibly point at the accused person as the person who killed the deceased. According to the defence of the accused, on the night he is alleged to have killed the deceased, he was at the home of his maternal grandfather attending the funeral of his maternal uncle and that he was arrested on the morning of 20.06.2011 when he was returning to his mother's home in Luanda. He also stated that he travelled from Nairobi on 18.06.2011. Though the onus is on the prosecution to prove its case, the accused person did not produce a bus ticket or such other evidence to displace the prosecution case that at all material times, he was at his home where the body of the deceased was found buried in a fresh grave just outside the door to his (accused person's) house. I have also carefully examined the record with regard to cross examination of PW1 and PW2 for any evidence to suggest that the accused person was not at his home on the material day. The conclusion I have reached regarding the defence of alibi is that it is an afterthought carefully concocted by the accused person during the defence hearing.

29. Now, what were the circumstances in this case, and the circumstances form a chain that remains unbroken throughout" first of all there is the testimony of PW3, Alexander who is a brother to the deceased. PW3 stated that the accused person and the deceased were friends and that on 19.06.2011, at about 10.30am he saw the two of them seated under a tree in the compound of the deceased. Later on at around 3.30pm, on the same day, he again saw the two of them walking together towards the home of the deceased. Then on 20.06.2011 at about 10.00am he watched as the deceased's body is exhumed from a grave at the door to the house of the accused.

30. Then there is the testimony of PW2 a nephew of the accused person. The accused person said he had no grudge with PW2, PW2's testimony was to the effect that between 8.00pm and 2.00am, he heard the accused talking to someone whose voice PW2 could not identify. He said he knew the accused person's voice very well because he had lived with him in the same home for many years. PW2 stated that the accused kept alleging that other person had stolen his vegetables and that accused wanted kshs.20/- for the plucked vegetables but the other man said he had no money. PW2 also testified that he had some banging sound from outside the accused person's house which was only 30 metres from the house where PW2 was sleeping. When PW2 woke up in the morning, he saw what looked like a grave outside the house of the accused, but he did not go near.

31. From the record, I am satisfied that PW2 was speaking the truth. Pw2 mentioned only two voices, that of the accused person which he knew very well and another voice which PW2 could not identify. That other voice must have been that of the deceased whose body was found in a grave at the door of the accused's house. I have no reason to think or even consider that PW2 was a liar. There is no reason advanced by the defence as to why PW2 could have lied against him. Since there was no grudge between them. The banging sound was the digging of the grave.

32. Then there is the evidence of PW1 whose testimony to the effect that the accused person went to his

(PW1's) house at about 5.00am on 20.06.2011 and told him about a thief he had caught in the vegetable garden remains unchallenged. The accused contention that there was a case between him and PW1 is farfetched because the accused person said the case was between PW1 and a cousin of the accused person. PW1 said that after the accused person told him his story, he (PW1) locked the accused person in his (PW1's) house, went to accused's house and saw a fresh grave outside the door of the accused's house. Later that morning, the body of the deceased was exhumed from that fresh grave.

33. It is my considered view that the circumstances narrated by PW3, PW2 and PW1 form a chain that remains unbroken throughout and I have no hesitation in reaching the conclusion that the death the deceased was caused by the accused person herein. The accused person had no lawful reason for killing the deceased. Even if he had caught the deceased, who was his friend taking vegetables from the garden without authority, beating the deceased to the point of killing him was not the solution to the theft or non-payment of the Kshs.20/- demanded by the accused person from the deceased.

c. whether the accused person had malice aforethought.

34. The definition of malice aforethought is found in Section 206 of the Penal Code which provides as follows;

“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.”

35. For the prosecution to succeed in establishing whether there was malice aforethought in this case, it need prove only one of the 4 circumstances listed above. It is my considered view that by beating the deceased repeatedly and by fracturing the limbs of the deceased, including a fracture of two ribs and fracture dislocation of the cervical neck, the accused person must have known that his acts that eventually caused the death of the deceased would probably cause the death or grievous harm to the deceased. It does not matter that the accused person did not care whether or not death grievous bodily harm would occur to the deceased. I am therefore fully satisfied that in committing the offence, the accused person had malice aforethought.

Conclusion

36. In conclusion, I find and hold that the prosecution has proved the charge of murder against the accused person beyond any reasonable doubt. I find the accused person guilty of murdering SHARDACK ONDEKO on the night of 19th and 20th June, 2011 and convict him accordingly.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 21st day of February 2017

RUTH N. SITATI

JUDGE

In the presence of;-

M/S Tarus (present).....for State

Miss Shirika holding brief for Mr.Wekesa (present).....for Accused

Mr. Polycap.....Court Assistant