



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 1 OF 2015

REPUBLIC

VERSUS

1. FADHILI JOHNSON

2. AMANI BAYA MWARO

JUDGEMENT

The accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code. The particulars of the offence are that the accused on the night of 27.12.2014 at unknown time, at Mkomani location in Lamu West Sub County within Lamu County, jointly with others not before court murdered Dokota Daado Dado. The accused denied the charge and the prosecution called eight witnesses.

PW1 MOHAMED DADO is the deceased's son. He testified that he used to work in a farm in Lamu. On 27.12.2014 at about 3.00 pm he was at the farm with his wife (PW2). His father who is the deceased had gone to visit them from Mpeketoni. At about 4.00 pm he went to the market to take milk. He returned at about 7.00 pm and his wife informed him that two people had gone there looking for the owner of the farm. She did not give him their names. His brother and his father were there. Since the house was small he organised for his father to sleep outside. They went to sleep at about 9.00 pm.

It is PW1's evidence that while sleeping at the house he heard the door being hit. He saw two people entering the house. They had a torch. He was able to identify the 1st accused. The two people also had a knife. He picked a cooking stone and threw at them. He managed to hit the 1st accused on the upper arm and he dropped the knife. They ran away and he chased them. He hit one of them as he was chasing them. It was dark and there was no moonlight. He checked his father but could not see him. It was about 2.00 am. He went to notify neighbours and they started looking for the deceased. They recovered a knife and a copy of an identity card at his home. They found his father already dead about some metres from the house in a bush. The deceased had a stab wound under the arm. The body was taken to the mortuary. The accused were arrested in the morning. It is his other evidence that it is the 1st accused who introduced him to the farm owner. He did not know the 2nd accused. The 1st accused had left employment one month before the incident. His brother was sleeping in the room with them. His wife was the first person to hear the door being banged and she woke him up. He was able to identify the 1st accused as he had a torch and there was a quick flash on his face. It was a small torch which could be having only one battery. He did not know how the accused were arrested but they were beaten up and were bleeding.

PW2 NURU SIYAD MWALIMU is PW1's wife. On 27.12.2014 the deceased visited them at about 3.00 pm. He then went to Lamu town and was to return. Two people went to their home and asked for the owner of the farm and her husband. He knew all of them but only knew the name of one of them. It was the 1st accused. When her husband went home he informed him about the two people. At night, the deceased said it was hot and he decided to sleep outside. They went to sleep at about 9.00 pm. While asleep he heard the door being opened. He saw people. One of them had a torch and a knife. She screamed. PW1 picked a stone and hit one of them. They came out but did not see the deceased. They went to inform their neighbours. They recovered a knife plus a photocopy of an identity card. The deceased's body was later found. The accused were arrested. She was not able to identify the person who had a knife and a torch as it was dark.

PW3 OSMAN MBARUFA DAKA is a farmer in Lamu. On 28.12.2014 he got information that the deceased had been killed. He went to the scene and saw the body. PW1 informed them that he had seen two boys who killed his father. They followed footsteps upto a house which had three people. One of them greeted them and told them that he was sorry for the deceased's death. They went to Lamu Jetty looking for the two boys. They went to the house where the two boys were living and the 1st accused started running away when they saw them. He was arrested. The 2nd accused was in the house. It is his evidence that one of the three men they met at the gate of the first house asked them whether they had picked an identity card. That person was also arrested but was released by the police. They were a big crowd while they were looking for the murder suspects. PW1 was not with them.

PW4 MOHAMED KANCHORI KOKANYA is a mason and a neighbor to PW1. On 28.12.2014 at about 3.00 am he was asleep when PW1 informed him that they had been invaded by three people. PW1 also informed him that he had identified the 1st accused. They looked for the deceased and woke up other neighbours. They followed footsteps but they foot steps disappeared. He was the first person to see the deceased's body which had a stab wound. The matter was later reported to the police.

PW4 GEORGE LAWRENCE OGUDA is a government analyst based in Mombasa. On 5.1.2015 he received from P.C. Leonard of Lamu several exhibits. This included the deceased's blood (marked A), the green kanzu (marked B), a knife (marked C), blood of 1st accused (marked D (i)), a blue t-shirt (marked D (ii)), 2nd accused's blood (marked E (i)) and a purple t-shirt of the 2nd accused (marked E (ii)). He found exhibits B, C, E, D (ii) and E (ii) had human blood. He found that the blood in the kanzu matched the blood on the knife as well as the blood of the deceased. He also found that the blood on the blue t-shirts marked D (ii) matched with the blood of the 1st accused. The blood on the purple t-shirt marked E (ii) did not match with any of the blood samples of the deceased, the 1st and the 2nd accused. He prepared his report on 26.2.2015.

PW5 P.C. LEONARD OCHOLA was stationed at the Lamu police station. On 28.12.2014 at about midday he was instructed to investigate the case which had occurred that night. He was given a blood stained green kanzu that belonged to the deceased, a blood stained knife, a blue t-shirt and a purple t-shirt both blood stained. He prepared an exhibit memo and forwarded to PW4. He recorded witness statements. PW1 informed him that he had identified the 1st accused. His investigations revealed that the 1st accused's father used to work at the farm where PW1 was working and when he left he had his son (1st accused) employed. The owner of the land later employed PW1. The deceased was killed while sleeping outside. There was a third suspect who is still at large. There was a copy of an identity card in the name of Majaliwa Kazungu Karisa that was discovered at the scene. The said Majaliwa had not been traced. One Ngumbao Kadenge was arrested in relation to the identity card but it was found that he was not the one who had Majaliwa's identity card. The body was found about 50 metres from where the deceased was sleeping. There was no blood where the body was found. It is his evidence that the deceased was killed where he was sleeping.

PW7 DR. SWALEH HASSAN NYALE produced a post mortem report on the deceased. The post mortem was conducted on 28.12.2014 at Lamu District hospital. The deceased was about 60 years old. There was a stab wound on the right side of the chest. The cause of death was cardiopulmonary arrest

due to the stab wound. The post mortem was conducted by Dr. Timamy who resigned in 2015. PW8 CPL. JOHN WAMBUA was based at the Lamu police station. He is a scene of crime officer. On 28.12.2014 he visited the scene and took several photographs of the body. The body was about 50 metres from where the deceased was sleeping.

In their defence each accused gave sworn testimony. The 1st accused Fadhil Johnson Safari testified that on 27.12.2014 he was in Lamu. He left home at about 7.00am and went to work. He went back home at 5.00 pm took supper and slept. He was living alone in the room. The 2nd accused also lived in the same house but in a different room. He was 18 years at that time and had no identity card. In the morning, many people went to the house and showed him an identify card. He told them that the identity card was not his. The people informed him that the face on the identity card looked like his. He was beaten and taken to the scene of crime 5 kilo metres away. He did not know the deceased. He was arrested by members of the pubic. There were around 100 people. When he was beaten he started bleeding and his shirt was removed at the police station.

The 2nd accused Amani Baya Mwaro testified that on 27.12.2014 he was at home in Lamu. He returned home from work at about 4.00 pm. A friend of his called him at 4.30 pm and they went to take alcohol. He returned at midnight and slept in his room. In the morning, he heard noise. He saw the 1st accused being assaulted. He tried to enquire what was the problem and those assaulting the 1st accused said **“mwingine ndiye huyu”** – This is the one. They were taken to the scene where they found a dead body. He did not know PW1. They were beaten by members of public and were bleeding.

Mr. Obaga, counsel for the 1st accused submitted that the case has not been proved beyond reasonable doubt. The ingredient of motive is lacking. There is no link between the 1st accused and the deceased. The deceased arrived in Lamu and was killed on the same day. There was nothing to be robbed in the house. The identification of the accused is not proper as the incident occurred at night. There was no light in the house. The intensity of the torch light is not given. The conditions were not favourable for positive identification. PW2 was not able to identify any one. The identity card found at the scene does not belong to the accused or his relative. Blood samples were taken but do not implicate the accused.

Mr. Shujaa, counsel for the 2nd accused submitted that the 2nd accused who was not identified. The circumstances prevailing at that time were not conducive for positive identification. The incident occurred inside a house and at night. It was dark and there was no light. PW1 alleged that he was struggling with one of the assailants and the torch light illuminated on one of the accused. That identification was just a glance and is not free from error. PW2 was not able to identify any of the accused yet she alleged that she knew them. PW2 denied that there was torch light. There is no evidence implicating the 2nd accused. He was only arrested because he was found in the same house with the 1st accused.

The prosecution evidence does prove that indeed the deceased died of a stab wound that was inflicted on him on 27.12.2014. The main issue for the court is whether it is the accused persons who killed the deceased. The prosecution evidence is mainly grounded on that of PW1. It is the evidence of pw1 that he was able to identify the 1st accused that night when the deceased was killed. PW1 and PW2 knew the first accused physically and by name. PW2 was not able to identify any of the attackers that night.

In the case of **NJENGA & 10 OTHERS V REPUBLIC [1992] KRR, 1** while citing the unreported case of **CLEOPHAS OTIENO WAMUNGA V REPUBLIC, (Criminal Appeal No. 20 of 1989)**, the court of Appeal stated as follows on evidence of identification.

“It is trite law that 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 a basis of a conviction.”

In the case of **BARAZA V REPUBLIC [1992] KRR 98**, the Court of Appeal held as follows: -

Where an appellant is convicted on the basis of visual identification, the trial magistrate or Judge should, before convicting in reliance on the correctness of identification, warn himself of the special need for the caution and must give reason for such need bringing out in his own way the possibility that a mistaken witness can be a convincing one.

It is the evidence of PW1 that he was woken up by his wife PW2. He saw two people. Their house had only one room. That is why the deceased slept outside. One of the attackers had a knife and a torch. It is his evidence that the torch was flashed on his face. That is the attacker flashed the torch on PW1's face. It was a small torch. PW2 was with PW1 but could not identify the 1st accused. It is PW1's further evidence that he had a short struggle lasting less than one minute with the other attacker.

As held in the above authorities, where the only evidence is that of identification, the trial court has to be satisfied that indeed the witness or witnesses alleging to have identified the accused clearly identified him. In other words, the identification evidence should be free from doubt. The circumstances under which the witness identified the accused is a major factor in making a conclusive finding that the accused was indeed properly identified.

The incident occurred at night. It is the evidence of PW1 that it was dark. He hit the 1st accused with a cooking stone and he dropped the knife. The light used to identify the 1st accused was from a small torch. Given the evidence on record, it is not clearly established beyond reasonable doubt that PW1 was able to positively identify the 1st accused. The incident occurred at night. It is the evidence of PW1 that the torch light was the source of his identification. The torch was one with about one battery according to PW1. The intensity of the light is not well established. Further, if the torch light was flashed on the witness's face (PW1), it would be quite difficult for the same witness to identify the person flashing him. At least PW2 could have been able to identify the 1st accused since the torch light was not flashed on him. PW2 could not identify the 1st accused. The evidence on identification is quite doubtful. I cannot conclude with finality that the first accused was positively identified.

There is the evidence of PW2 that the 1st accused went to PW1's house the same afternoon looking for PW1 and the farm owner. That could be a possibility. However, it cannot be assumed that the 1st accused had gone to the farm during the day to kill the farm owner or PW1. It can also not be concluded that the 1st accused again went to the farm that night with another person. The 1st accused was not aware that PW1's father had gone to visit him.

The evidence against the 2nd accused is very weak. PW1 did not identify him that night. The same applies to PW2. She did not identify the 2nd accused. The 2nd accused did not go to the farm with the 1st accused during the day. He was only arrested because he used to sleep in the same house with the 1st accused. That cannot be a reason for his involvement.

The defence evidence is that the accused did not commit the offence. The entire defence evidence raises doubt on the prosecution case. The medical evidence by PW5 on blood tests does not enhance the prosecution case. The blood testing results does not connect the accused with the offence.

Given the evidence on record, I do find that the identification of the 1st accused by PW1 is not fool proof. PW2 was at the scene but could not identify the 1st accused. The evidence on record does not connect the 2nd accused with the offence. The prosecution has not proved its case beyond reasonable doubt. I do find that the two accused are not guilty of the offence of murder as charged. They are hereby acquitted of the murder charge and shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 16th day February, 2017.

S.J. CHITEMBWE

JUDGE