



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL (MURDER) CASE NO. 50 OF 2011
REPUBLICPROSECUTOR
VERSUS
HUDSON IMBANGA.....ACCUSED
J U D G M E N T

Introduction

1. The accused herein is 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 on the 31st July, 2011 at Chanda Village, Muhundu Sub-location, Muhundu Location in Vihiga County within Western Province the accused murdered Damala Imbanga. He pleaded not guilty to the charge.

The Prosecution's Case

2. In support of the charge against the accused herein the prosecution called a total of eight witnesses. PW1 Janet Aseyo Angala a teacher by profession testified that on 30.7.2011 at about 10.00pm she was woken up by dogs which were barking and moving about in her compound. She decided to check what was causing the dogs to be so restless and on getting to the rear door she asked who it was. The accused then answered that he was the one who was outside the house.

3. Pw1 testified that she knew the accused who stayed 500 metres from her home. She had known him for about seven (7) years. He was a member of the family where she was married.

4. According to PW1 the accused wanted to see her husband who was not at home at that time. The accused told her that he wanted to report that he had killed Mamushere Damara Imbanga. On receiving the report PW1 sent an SMS to her husband requesting him to call her but he did not. Her husband came back home at about 11.pm and she told him what the accused had told her. Her husband told her that he would look into the matter the following day.

5. PW1 also recalled that the accused on another occasion had made the same allegations that he had killed Mamushere but those allegations turned out not to be true. Her husband nevertheless went to Mamushere's home the next day and when he got there he called her and confirmed that Mamushere had died. Mamushere was about eighty (80) years. PW1 identified the accused in the dock and stated that she had no grudge with him.

6. On cross examination by Miss Mahuni PW1 testified that she did identify the accused by his voice

though she did not see his face. She also testified that she did not witness the accused killing the deceased.

7. PW2 Robert Amuhaya Inyanje the area chief Muhudu Location testified that on 31.07.2011 at 11.00pm he arrived at his house and was informed by his wife (PW1) that the accused had come at about 10.00pm and told her that he had killed their grandmother Damara Imbanga who was over eighty 80 years old. He did not believe the report at first because the accused had previously and on several occasions claimed the same but it had turned out to be a lie.

8. The following morning PW2 sent his elder sister Noreka (PW3) to go to their grandmother's house and see what had happened. At about 8.00am PW3 gave him a report that indeed her grandmother had died. He went to the scene and confirmed that his grandmother had died. He observed injuries on the right side of her head and on the leg and in PW2's view, the deceased had been hit by a piece of wood which was found next to where she was lying. He called the in charge of Muhudu Police station. Later the body was taken by police from Serem Police Station. He testified that the accused was at the scene that morning though that accused was not alcoholic, he smoked bhang. He did not find any reason why the accused killed the deceased herein. He identified the piece of firewood (PEX2) and also identified the accused who was in the dock. He stated that he had no grudge against the accused.

9. On cross examination by Miss Mahuni PW2 confirmed his earlier testimony and explained that the deceased did not die of any other cause other than beating. He added that he saw no blood on the wood produced as PEX2.

10. Pw3 Noreka Khalivizi Inyanje testified that on 01.08.2011 at about 8.00 am she received a telephone call from her brother Robert who testified as PW2. That PW2 asked her to go and confirm if it was true the accused had killed Mamushere.

11. She went to Mamushere's home and found that Mamushere was dead and was covered in a blanket lying on her bed. She observed the injuries on her head and leg. When the Chief came he asked the accused person for the weapon he had used and the accused went and brought the piece of firewood PEX2. She explained her relationship with the accused that they were cousins that is accused is the son to her mother's brother. She asked accused why he had killed Mamushere but he did not answer. She confirmed to the court that that she had no grudge with him and identified him as he was sitting in the dock.

12. On cross examination pw3 explained that she did not witness the death of the deceased and that the accused brought the piece of firewood from the maize plantation. Pw4 Isaac Ibaya Shamora a farmer from Siekuti Village Muhudu Sub-Location testified that on 1.08.2011 at about 9.30 am he was called by his son Kevin Ikutu who told him that the accused wanted to see him. The accused is the son of his first cousin from the mother's side. He rushed home and found accused standing outside PW4's house. He observed the accused who looked frightened. He asked him what happened and he (accused) told him that he had beaten his grandmother and she was dead and he was afraid to go back home alone.

13. That the accused claimed to have acted in anger. PW4 then accompanied the accused to his home where he found the body of deceased lying on the bed with face up. He observed the injuries on the deceased's face and leg. They took the deceased body to the mortuary at Vihiga District Hospital.

14. PW4 also told the court that the accused had stayed with the deceased for about fourteen years. The deceased was over 80 years and the accused persons stay with the deceased was punctuated with complaints. He pointed out the accused who was sitting in the dock. On cross examination PW4 explained that the accused told him that he had killed the deceased without intending to do so and that the accused and deceased had had small disputes over some cows owned by the deceased.

15. PW5 Charles Vic Mukabuti a farmer from Siekuli Village Muhudu Sub-Location told the court that on 01.08.2011 at about 9.30am the accused went to his house and told him that he had killed his grandmother (mama mushere) the previous night at 8.00pm for the reason that she had threatened him

that she would call the boys from Kisumu to beat him up. PW5 said he and others went to the deceased's home where he called out her name three times but she did not answer. At that point accused told him that the deceased was already dead. PW5 did not enter the deceased's house then but decided to inform the deceased's grandchildren first. It is when the grand children came that he entered the deceased house. He observed the deceased body which was lying on the bed covered with a blanket.

16. When the assistant chief enquired to know who killed the deceased and why and with what weapon, the accused went behind the kitchen and brought a piece of wood, PEX2. Thereafter accused was arrested and taken away by police. He pointed at the accused who was seated in the dock.

17. PW6 Dr. Munyika Kitagwa from Vihiga County and Referral Hospital produced the post mortem report prepared by Dr. Moenga, now deceased. The same was not objected to by Miss Mahuni and was produced as PEX1. PW6 explained the contents of the post mortem report and concluded that death was caused by excessive internal bleeding which was consistent with injuries and findings and also compressed brain matter which resulted to respiratory cardiac arrest

18. PW7 No.80076586 CPL Charles Wanyonyi testified that while he was working at the Muhudu Ap Post on 01.08.2011 at about 8.00am he received a telephone call from area chief informing him that his nephew Hudson had killed his grandmother. He went to the home of the deceased saw the deceased's body lying on the bed covered with a blanket. He also saw the injuries. He re-arrested the accused and took him to Muhudu AP Post and later to Cheptulu Police Post where he booked him.

19. PW8 No.70213 Sgt Herbert Majani attached to Serem Police Station within Vihiga County on general investigation duties took over investigations of this matter from No. 63135 CPL Joseph Ngaira who was transferred to Lamu. He produced a long piece of wood which was marked as PEX2. He testified that from the history of the case the accused and deceased lived in the same compound and that their differences arose out of the accused's bestiality with the grandmother's cow, and that when the deceased pointed this out to the accused and even told him not to take the cow to the house the accused took PEX2 and hit the deceased with it. He also identified the accused who was in the dock.

20. PW8 was cross examined by Miss Mahuni for the accused and in his response to the question, he where he explained that he did not know where PEX2 was recovered from. He admitted that he did not visit the scene of crime nor did he take PEX2 to the Government Chemist for analysis. He also admitted that he did not carry out investigations into the bestiality claims against accused and that his investigations into the matter started with PW4.

21. After the prosecution closed its case this court found the accused to have a case to answer and put him on his defence.

Defence Case

22. The accused opted to give a sworn statement but he did not call any witnesses. He testified that on the 31.7.2011 he returned home at about 9.00pm but before he could enter his house the deceased called him from her house. The deceased asked him to inform the chief that she had been injured by her cow and that the chief should go in the morning and assist her. The deceased did not allow him to enter her house. Early the next morning on 01.08.2011 he woke up and went to the deceased's house, pushed the door open and took the cow out.

23. He thereafter entered the deceased's bedroom and found her lying on the bed quietly. He discovered later that she was dead. He ran out and informed Charles Karuti a neighbour on what had transpired in the night. Charles accompanied him back to the house. He also informed PW4 that his grandmother was dead. PW4 also accompanied him to the house. At the home they found the police who alleged that it was him who had assaulted his grandmother. He was asked for the weapon but denied the allegation and gave them the whip his grandmother always used. He claimed that the rungu produced was not the right one. He added that his relationship with his grandmother was good and that he had no grudge against her.

24. The accused also testified that his grandmother was over 80 years old and always complained of hunger. He was cross examined by Mr. Ng'etich and during the cross examination, the accused person explained that his house was next to her grandmother's house and that his grandmother did not want him to enter her house because she was living alone and was old. He testified further that his grandmother lived with her cow in the four bedroomed house which he described to the court. He claimed that for the five (5) years his grandmother had stayed with the cow, it had not injured her. He told the court that he knew PW1 and PW5 and reiterated his earlier testimony on how he found his grandmother sleeping on her bed on the 01.08. 2011. He denied giving the police PEX2 and maintained that he did not kill his grandmother.

Analysis of Evidence.

25. The evidence herein already shows that the incident herein occurred in the deceased home. The accused lived with the deceased in the same compound. The accused confirmed that he had a conversation with the deceased on the 31.7.2011 at about 9.00pm. It is the same night that the accused visited PW1's house but at about 10.00pm an hour after having the conversation with the deceased. PW1 stated she was able to identify the accused by his voice when he called her from outside her house. PW1 testified that she had known the accused for about 7 years and that the accused told PW1 that he had killed the deceased herein and that he wanted to report the same to PW2 who was the area chief who unfortunately was not at home, prompting him to go back home. The next day he went to the home of his neighbours PW4 and PW5 and told them that he had killed the deceased herein. A post mortem report "PEX1" was produced by PW6 which report showed that death was caused by excessive internal bleeding consistent with injuries and findings and also compressed brain matter which resulted to respiratory cardiac arrest. PW7 re-arrested the accused whereas PW8 investigated the case. He produced a long piece of firewood PEXH2 and gave a history of the case.

26. PW8's findings were that the accused and deceased lived in the same compound and their differences arose out of the accused's bestiality with the grandmother's cow. When the deceased pointed this out to the accused the accused hit her with the piece of wood PEX2. PW8 did not however, interrogate this allegation further.

Issues for Determination

27. The issue that arises for determination in this case is whether from the evidence on record the prosecution has proved that the deceased died at the hands of the accused with malice aforethought. This court has also to determine whether the deceased's death was as a result of the unlawful act/omission on the part of the accused.

28. The law is clear that the prosecution must prove its case beyond reasonable doubt. The burden is always on the prosecution. The locus classicus on this issue of burden of proof is the case of **DPP – VRS – WOOLMINGTON [1935] UKHL 1** where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. This burden never ever shifts to an accused person.

29. In this particular case the prosecution witnesses PW1, PW2, PW4 and PW5 relied on what they were told by the accused. As earlier analysed the accused placed himself at the scene of crime on the 31.07.2011 at 9.00pm. It is evident from the testimony by the prosecution witnesses that the accused lived in the same compound with the deceased.

30. Section 203 of the Penal Code defines murder in the following terms. " **any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder**" Thus the central ingredients of the offence of murder are;-

- a. malice aforethought and (b) an unlawful act or omission on the part of the accused.
- Section 206 of the Penal code defines malice afore thought in the following terms;-

“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;-

a.

b.

31. The accused testified that the deceased told her that she had been injured by her cow and she wanted the area chief to assist her. He claimed that the deceased did not allow him to enter her house but later states that he went into the deceased’s house the next morning to remove the cow and that it was at that moment when he saw the deceased’s body lying on her bed, dead.

32. From the evidence the injuries sustained by the deceased show that she was hit on the face. The deceased was eighty years old. Any force would cause her injury at that age. The accused must have known that what he did to the deceased that night because he lived with the deceased in the same compound and anything else that may have happened in that compound on the material night would have been in the knowledge of the accused person.

33. There is no evidence of an attack in the deceased’s compound that night. The accused and the deceased had differences over the cow and the accused used to talk about killing the deceased to both PW1 and PW2, I therefore find that the accused had been preparing to kill the deceased over a long period of time. He pre meditated on his actions time and again and he always declared his intentions to the people around him. He was properly identified by PW1 for his voice was known by her having stayed with him for over seven (7) years. It is clear that the accused was afraid after killing the deceased and thus he decided to inform the prosecution witnesses especially the chief who he did not find at home but informed his wife PW1.

34. It is my considered view that after killing the deceased, the accused person panicked and sought solace from PW4 and PW5 and informed them so that they could protect him from any possible mob attack.

35. PW6’s evidence analyzed the injuries, which injuries the accused person attributes to an attack by the deceased’s own cow. This theory by the accused is displaced by his own testimony and I find it hard to believe it. In my humble view that was an afterthought since the chain of circumstances places the accused person squarely at the scene of crime.

36. The evidence shows that the accused person untied the cow from the deceased’s house the same morning deceased was found dead on her bed. The cow would not have killed the deceased and even laid her on the bed and covered her with her jacket and the blanket. The accused’s evidence is clearly an afterthought and it is not true. Though it is not clear where the murder weapon was traced from, it is evident that the deceased was hit on her face and the injuries she sustained led to her death. I therefore find that the prosecution has proved its case against the accused person beyond reasonable doubt. The accused person is found guilty as charged and he is convicted accordingly under Section 322(1) of the CPC.

Orders accordingly

Judgment delivered read and signed in open court at Kakamega this 7th day of February,2017

RUTH N. SITATI

JUDGE

In the presence of;-

M/S Andia for Mahuni(present).....for accused

Mr. Jamsumba (present).....for state

Mr. Polycap.....Court Assistant