



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL(MURDER) CASE NO. 24 OF 2013

REPUBLICPROSECUTOR

VERSUS

LINET OMENGO BWAKALI.....1ST ACCUSED

PATSON BWAKALI OMENGO.....2ND ACCUSED

J U D G M E N T

Introduction

1. The two accused persons are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence as stated in the charge sheet are that Linet Omengo Bwakali (1st accused) and Patson Bwakali Omengo (2nd Accused) on the 7th day of April, 2013 at Musango Village, Maraba Sub-Location in Mumias District within Kakamega County jointly murdered Simon Amulunji. They pleaded not guilty to the offence.

The Prosecution Case.

2. The prosecution called eight witnesses. PW1 Prisca Josiah told the Court that she received information from Maurine Amulunji (PW2) that their son had been killed. This was on the 8.4.2013 at about midnight. She went to the scene at about 5.00am. This was at Musango village. She explained that PW2 was the deceased's wife and that she (PW1) reported the incident at Shianda Police. She was accompanied by the Village elder. The deceased was her 7th younger brother. The deceased body was later taken to St. Mary's hospital by police from Mumias Police Station.

3. She explained her relationship with the two accused persons, 1st accused being her sister in law whereas the 2nd accused is her step brother. She added that she found the 1st accused at the scene. She did not witness the incident.

4. PW2 Maureen Amulunji testified that on 07.04.2013 she received information of the death of the deceased who was her husband from her brother in law Rajab Wanga who testified as PW4. She went out of her house and found the body of the deceased lying outside her house. She informed her father in law

and the village elder and the following morning they reported the incident at Shianda Police station.

5. PW2 claimed that there was blood at the scene and that the deceased was injured on the head. The 1st accused is her sister in law whereas the 2nd accused is her brother in law.

6. PW3 James Ondako Okumu the village elder of Musango Village testified that on the 7.4.2013 at 11.00am he received information of the death of the deceased from 4 people. He went to the scene and saw the body of the deceased. He reported the incident to police the next morning. He arrested the 1st accused and claimed that the 2nd accused was arrested one(1) month after the incident while hiding in another village. On cross examination he indicated that he received the information about the incident from Abdalla Manyasi Rajab Wanga and Pumpy Wanga.

7. PW4 Ramadhan Rajab Wanga testified that as he was heading home on the 7.4.2013 at about 8.30pm he heard screams from the home of his neighbour, Patson Bwakali. He went to the said home and found the body of the deceased on the side of a cattle den. There were people at the scene already. He enquired from the accused persons what had happened but they refused to tell him anything because they claimed that he never used to visit their home. He then decided to notify the deceased's wife and relatives of the incident.

8. PW5 Abdalla Manyasi Weimi was informed about the death of the deceased by PW4. The information he was given was that Patson had killed Simon Amulunji. He went to the scene together with PW4. On enquiring from Patson on what had happened Patson threatened him. Thereafter they notified the village elder PW3 and the next morning reported the incident at Shianda Police Station. The police visited the scene the next day 8.4.2013 and only found the 1st accused person at home. He did not witness the incident.

9. On cross examination he explained that the deceased was a brother to the 2nd accused and that the two were not relating well as they quarreled all time. He also stated that the 1st accused was the cause of the quarrels as she used to report the deceased to her husband on petty issues.

10. PW6 Hassan Wanga testified that he received the report of the murder while at Mumias on the 7.4.2013. He identified the deceased's body for post mortem examination.

11. PW7 Rajab Ramadhan Wanga testified that he was attracted to the home of the accused persons on the 7.4.2013 by screams. He went to the said home where he found people at the scene. He saw the deceased's body lying near the shamba boundary between the deceased home and that of the 2nd accused. He asked the 2nd accused and the crowd at the scene to tell him what happened but he did not get an answer. He then rushed and informed the deceased's wife and others of the deceased's death including the village elder. The matter was reported at the Shianda Police station but it was the police from Mumias Police Station who took the body away. He indicated that he did not know what may have happened between the deceased and his brother, the 2nd accused person herein.

12. He clarified during cross examination that the body of the deceased was found in the shamba of the 2nd accused person.

13. PW8 Dr. Juma Khayombe produced the post mortem report prepared by Dr. Oluoch. The post mortem examination was done on the 10.04.2013 at St. Mary's Hospital. PW8 took the court through the post mortem report and the opinion of Dr. Oluoch was that the cause of death was severe head injury. The report was produced as PEX1.

14. At the close of the prosecution case this court found that the prosecution had established a prima face case against the accused persons and they were placed on their defence.

The defence case

15. The accused persons opted to give sworn statements. They did not call any witnesses. DW1 Linet Omengo testified that on the 07.04.2013 at about 11.00pm she was in her house when she heard people outside her house. She woke up her husband, the 2nd accused and they both went to check who those people were. As she and 2nd accused were getting out of their house, she heard footsteps of people running. Her husband had a torch with him and when they went around the boma together they saw a person lying down on the boundary between their shamba and the shamba of the deceased. The head of the person was facing their cattle boma while his feet were facing the deceased's shamba. They moved close to the body and identified it as that of the deceased. She raised an alarm and people responded. Together with her husband they made a report to the village elder who promised to look into the matter in the morning. In the morning she was taken to Shianda police station by the village elder. She claimed to have identified two (2) of the people who were running away. The two people were Ramadhan Rajab wanga and Abdalla Manyasi, PW4 and PW5 respectively.

16. DW2 Patson Omengo Bwakali told the court that on 07.04.2013 at about 11.00pm he was at home asleep when he heard voices of people outside his home. He got up together with his wife and went to check out who those people were. He had a torch in his hand. When they were outside he saw people running towards Lusumu river which is a river nearby.

17. He then went towards his cattle boma and saw a person lying near there. He moved closer to the person and saw with the help of the torch that it was his younger step brother who was lying there. They decided to inform the village elder who told them he would look into the matter the next morning. The next day he got up at 5.00am and left for Luanda for business. After getting permission from his employer he returned to his home at 10.00am and found when the deceased's body had already been taken away.

18. He was cross examined by Mr. Oroni and during the cross examination, he reiterated his earlier testimony. He added that he was able to recognize two people from among those who ran away that is Ramadhan Rajab Wanga and Abdalla Manyasi Wanga. He claimed that he gave the said names to the village elder and the police on the 07.04.2013. He also testified that the deceased was his step brother and that he did not have any grudge against him

Submissions

19. The accused persons through their advocates filed final written submission. They submitted that the only reason and/or connection between the accused persons and the death of the deceased was that the body of the deceased was discovered near their cowshed which does not mean that they are the ones who committed the offence of murder.

20. Counsel also raised issue with the post mortem report which they claim was not produced by the doctor who performed the autopsy. They further contended that the prosecution did not lead any evidence showing the intention and action by the accused persons to kill the deceased and further that malice aforethought was not proved.

The Law

21. It is trite law that the prosecution must prove their case beyond reasonable doubt. The accused persons in this case have been charged with murder contrary to section 203 as read with Section 204 of the Penal Code. Section 203 of the Penal Code defines murder in the following terms.

“203Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” It follows therefore that the ingredients of the offence of murder are;-

(a) Malice aforethought and

(b) An unlawful act or omission on the part of the accused.

22. Section 206 of the Penal Code on the other hand defines malice aforethought 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 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.

Issues for Determination

23. The issue for determination in this case is whether from the evidence on record the prosecution has proved that the accused persons are the ones who killed the deceased with malice aforethought. This court has also to determine whether the deceased's death was as a result of the unlawful act or omission on the part of the accused persons.

24. An analysis of the prosecution's case reveals that the evidence by PW1, PW2, PW3, PW4, PW5 and PW6 is hearsay evidence. PW4 testified twice. He is the same person as PW7. His testimony is the same. No one saw the accused persons inflicting any injury on the deceased person. The incident might have occurred elsewhere because according to the totality of the evidence on record, there was no blood where the body was found. The accused persons alleged the body was thrown on their shamba which borders that of the deceased. None of the prosecution witnesses has claimed in their testimonies that they saw the two accused persons with the deceased on that day. Not even the wife of the deceased claimed that the deceased was with the accused persons during the day. It is in doubt therefore that the accused persons killed the deceased. The body was only found in their compound and they (accused) claim that the said body was taken there by other people some of whom they identified as being Ramadhan Rajab Wanga and Abdalla Weimi Manyasi.

25. It is the considered view of this honourable court that the prosecution failed to lead any evidence showing the intention and action by the accused persons to kill the deceased nor did the prosecution prove any malice aforethought on the part of the accused persons. As it is, therefore the prosecution has failed to prove their case against the accused persons beyond any reasonable doubt as required by law. The accused persons have properly removed themselves from blame by demonstrating that the body of the deceased was thrown into their compound by people who they mentioned during their testimonies.

26. Accordingly I find the accused persons not guilty of the offence of murder. The evidence adduced by the prosecution did not establish the charge against the accused persons to the required standard. I give the accused persons the benefit of doubt and acquit each one of them from the offence under Section 322(1) of the Criminal Procedure Code. Unless there is any other reason to hold the accused persons in custody, they are to be released therefrom forthwith

Orders accordingly.

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

RUTH N. SITATI

JUDGE

In the presence of:

.....Miss Andia Holding Brief for Mr. Ondieki (present)....for Accused

.....Mr. Jamsumba (present).....for State

.....Mr. Polycap.....Court Assistant.