



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE NO. 38 OF 2015
REPUBLIC.....PROSECUTOR
VERSUS
WILSON OMWOYO KOMBO ... ACCUSED

JUDGMENT

1. The charge facing **Wilson Omwoyo Kombo** (accused), is that of murder, contrary to S. 203 read with S. 204 of the Penal Code, in that on diverse dates between 21st June 2015 and 23rd June 2015 at Metembe Sub-location Metembe Location Marani District within the County of Kisii, jointly with another murdered William Getange Memba (deceased).

2. The case for the prosecution was that on 21st June 2015, the deceased arrived at the home of **Florence Kwamboka Kibagendi (PW 5)**, at about 10.00 pm while intoxicated. He asked for drinking water after saying that he was experiencing a stomachache.

Minutes thereafter, a son of Florence by name Jared appeared at the scene and questioned the deceased as to what he was doing there and where he had come from.

3. Thereafter, Jared ordered the deceased to remove his clothes and after complying he was set upon and assaulted by Jared. Florence reacted by screaming for help and attracting people to the scene. The deceased was rescued and taken to a nearby road from where he was taken to hospital by colleagues motor cycle taxi (boda boda) operators including **Dadius Arama (PW 2)**.

4. Before leaving for the home of Florence, the deceased had just parted way with his colleague, **Kefa Areba Mbicho (PW 3)** at about 9.30 pm. He (deceased) had allegedly conversed with Florence on phone before heading to her home.

Kefa, later heard that the deceased had been stabbed with a knife and was rushed to hospital.

5. **Jesicah Kerubo (PW 4)**, daughter of Florence and a girlfriend to the deceased was among the first people to answer the distress call by her mother. She was at the time in one house with her brother, Jared, who had earlier left the house while in possession of a machete (panga) and after hearing the dogs barking.

6. On arrival at her mother's home, Jesicah found the deceased naked and being held by Jared. She picked the deceased's clothes from inside her mother's house and took the deceased to nearby bushy grasses to hide, as instructed by Jared. She handed the clothes to the deceased's cousin named Dominic. She confirmed that the deceased was intoxicated but she had no idea as to why the deceased was inside

her mother's house. She also confirmed that the deceased had been beaten.

7. The deceased's brother, **Samuel Kegera Memba (PW 1)**, was asleep at home on the material 21st June 2015 at 10.00 pm when he heard his mother screaming. He woke up and proceeded to his mother's house where he learnt that the deceased had been stabbed with a knife and taken to hospital. He proceeded to the hospital accompanied by his mother. They found an injured deceased bleeding profusely but still able to talk.

8. He (deceased) allegedly told Samuel that he was stabbed by the accused, an assistant chief, who was together with Jared Kibagendi. Due to his serious condition the deceased was transferred to Kisii District hospital where he was treated and discharged but he was later to be returned there after his condition worsened. He died while undergoing treatment.

9. The post mortem report (P.Ex 1) by **Dr. Peter Morebu Momanyi (PW 6)**, indicated that the deceased died from severe left haemothorax secondary to blunt injury to the chest with multiple soft tissue injury.

The doctor opined that the multiple injuries were caused by blunt trauma and that the probable object or weapon used was blunt.

10. The deceased's colleague, Arama (PW 2), was on his motor cycle heading to a place called Miruka on that 21st June 2015, at about 10.00 pm, when his attention was drawn towards the direction of Florence's home where screams were heard. He stopped his motor cycle and on flashing its headlight ahead of him he allegedly saw the accused chasing the deceased and hitting him on the chest with a hammer after he (deceased) fell down.

Arama called his colleagues to the scene after which they rushed the deceased to hospital.

11. **IP James Kahiu (PW 7)**, received the necessary report and commenced investigations by recording statements from witnesses who implicated the accused. He gathered that the accused and the deceased had been involved in a fight. The accused was later arrested and charged with the present offence.

12. In his defence, the accused denied the offence and stated that he was at home on the material date and time when a commotion arose at the home of Florence Kibagendi (PW 5).

He proceeded to the scene to restore peace and found the deceased fighting with Jared. He (deceased) was rescued by Jesicah (PW 4) and moved to a nearby road from where he was taken to hospital as he was slightly injured.

13. The accused contended that he did not assault the deceased as alleged and that the deceased was injured as a result of the fight with Jared who escaped from the scene and was only arrested recently and placed in custody. He further contended that he was never involved in the said fight and did not know what transpired at the home of Florence prior to his arrival there.

14. At the end of the trial, the accused through the learned Defence Counsel, **Mr. Mokaya**, presented his written submissions and urged this court to acquit him.

The learned Prosecution Counsel, **Mr. Otieno**, in his oral rejoinder submitted that the case against the accused was proved beyond reasonable doubt as he was an assistant chief well known in the area and was duly identified. His role in the incident was not that of a peacemaker but an aggressor while in the company of another who has since been arrested and charged accordingly.

15. Learned Prosecution Counsel further submitted that there was ample evidence showing that the accused and the other person attacked the deceased thereby causing his death. He called upon this court to convict the accused and sentence him accordingly.

16. From the evidence and rival submissions, it is apparent that there was no dispute that the deceased

suffered death a day or two after being assaulted.

Under S.203 of the penal code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder and under S.206 of the penal code, malice aforethought is imputed where “inter-alia” there is an intention to cause the death or to do grievous harm to any person.

17. Herein, the harm caused to the deceased was grievous and it resulted in his death.

Indeed, the evidence by the doctor (PW 6) as reflected in the post mortem report (P.Ex 1) was that the deceased died from severe left haemothorax (i.e blood collecting on the left side of the chest) due to blunt injury to the chest with multiple soft tissue injury.

18. According to the doctor, the probable type of object or weapon used in causing the fatal injury was blunt.

The allegation by Samuel (PW 1), Kefa (PW 3) and to some extent, Arama (PW 2), to the effect that the deceased was stabbed with a knife and fatally injured was thus clearly discredited by the doctor’s evidence.

19. Samuel and Kefa indicated that it was the deceased who prior to his death told them that he had been stabbed with a knife.

Arama indicated that a hammer and a knife were used in assaulting the deceased.

Be that as it may, the basic issue arising for determination was whether the deceased was assaulted and fatally injured by the accused.

20. With the accused’s denial of involvement in assaulting the deceased, the identification of the assailant or assailants was a crucial factor. This would mean the identification of the assailant at the scene while in the act of committing the offence.

Evidence availed herein did not raise any dispute with regard to the presence of the accused at the scene. He admitted as much but indicated that he was there to restore peace after learning of a commotion that was in progress at the place.

21. The evidence has shown that the actual scene of the offence was the home of Florence (PW 5). That is where the deceased was assaulted and occasioned serious injury which later proved fatal.

The accused contended that he took no part in attacking and assaulting the deceased. It was not his obligation to prove his innocence (see, **Chemogong Vs. Republic (1984) KLR 611**) but that of the prosecution to prove his guilt beyond any reasonable doubt (see, **Mkendeshwo Vs. Republic (2002)1 KLR 461**).

22. In that regard, the evidence relating to the happenings at the home of Florence on the material date and time was most relevant.

Such evidence was provided by Florence (PW 5) herself and her daughter, Jessicah (PW 4). Both of them somehow implicated the son of Florence called Jared. They indicated that the deceased was assaulted by Jared after being found at the home of Florence. It was also indicated by Florence that her son Jared and the deceased engaged in a fight.

23. Both Florence and Jessica further indicated that they heard the voice of the accused after alarm was raised by Florence. Most importantly, they indicated that they did not see him assault the deceased with or without any weapon.

In essence, their evidence did not link the accused with the fatal assault of the deceased.

24. The evidence by Arama (PW 2), tended to directly link the accused with assaulting the deceased but it was unreliable for reasons that he was not at the actual scene(i.e the home of Florence) when the deceased was assaulted. He said that he saw the accused chasing the deceased while holding a hammer, yet Florence and Jessica mentioned nothing about the deceased being chased.

Jessica stated that she took the deceased to hide in some bushy grass near the road after he had already been assaulted.

25. Besides, the alleged identification of the accused by Arama in the hours of darkness was unreliable due to lack of adequate and favourable conditions for identification especially where the intensity of the alleged source of light was unknown. Herein, the alleged source of light was a motor cycle headlight.

Arama mentioned a third person at the scene where he allegedly identified the accused but said that he was unable to identify him. Was it possible for him to identify the accused if he could not identify the third person yet the two were together?

26. It is the finding of this court that Arama (PW 2) was not in a position to identify any person at the actual scene of the offence or anywhere near there. His evidence was contradictory and lacking in credibility and this was demonstrated by the fact that he talked of a fight between the accused and the deceased at the homestead of Florence, yet he was not there. He also talked about possession of a hammer and a knife by the accused, yet such items were not recovered from the accused or at all thereby implying that they were nonexistent.

27. The investigations officer (PW 7) confirmed that there was no recovery of the alleged murder weapon or weapons. He alluded of a fight between the accused and the deceased, yet the evidence of Florence and Jessica showed that if there was a fight, then it was between the deceased and Jared, son to Florence.

It is clear to this court that there was no reliable and credible evidence of direct identification of the accused as the person who assaulted and fatally injured the deceased.

28. The evidence by Samuel (PW 1) and Kefa (PW 3) implied that the accused was indirectly identified as the assailant by the dying declaration allegedly made to them by the deceased.

Samuel, said that the deceased told him that he had been stabbed with a knife by the accused. The said information was also allegedly given by the deceased to Kefa. It clearly implied that the deceased was occasioned fatal injuries by being stabbed with a knife, yet the usage of a sharp weapon against the deceased was overruled by the doctor (PW 6) who emphasized that the possible type of weapon used was blunt.

29. The foregoing discrepancy clearly shows that there was no dying declaration made to Samuel and Kefa by the deceased and if it was indeed made, then it was not reliable in as much as it sharply contradicted the doctor's evidence and that of other key witnesses such as Florence and Jessica.

It is also instructive to note that the investigations officer (PW 7) said nothing about a dying declaration by the deceased. This meant that such declaration did not exist and that the narrative in relation thereto was an afterthought.

30. Suffice to hold that the entire prosecution evidence against the accused was insufficient, incredible and unreliable for this court to hold him criminally culpable for the death of the deceased and enter a finding of guilt against him. The blame directed at him by Samuel (PW 1), Arama (PW 2) and Kefa (PW 3), was clearly a misdirection and this explains why another suspect was sought and arrested recently.

In sum, the accused is found not guilty as charged and is hereby acquitted.

[Delivered and signed this 2nd day of March 2017]

J.R. KARANJAH

JUDGE

In the presence of

CC Mohe/Dorothy

State Counsel – Ms. Mbelete

Mr. Omwega holding brief for Mr. Mokaya for accused

Accused