



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL (MURDER) CASE NO. 57 OF 2011

BETWEEN

REPUBLIC.....PROSECUTOR

AND

PIUS MUCHEYWA MAINA.....ACCUSED

J U D G M E N T

Introduction

1. The accused person herein PIUS MUCHEYWA MAINA is charged with one count of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars of the charge being that on the 13th day of October, 2011 at Shibuya village, Shinyalu Division in Kakamega County, within Western province he murdered CETRICK INGOSI. The accused person denied the offence, thereby forcing the prosecution to call 5 witnesses in its attempt to prove the allegations against the accused person.

The Prosecution Case

2. The prosecution case is that on 13.10.2011, a bull fight took place at Shibuye, among the bulls fighting was one belonging to Hebert Sore Makatiani, who testified as PW2. He said he was an ardent fan of the bull fights and that is why he allowed his bull to participate. His bull lost the fight.

3. During the fighting, supporters of the various teams started fighting and according to Dominic Bulinda, PW4 he saw two boys engaged in a fight. The deceased went to separate the two but one of the two, who had a stick hit the deceased on the head with a stick, sending him to the ground in an unconscious state. PW4 (Dominic) helped to take the deceased to hospital by calling for help from a motorbike rider, Dominic testified that the person who hit the deceased on the head was not arrested, but that the accused person who was found hiding in the shamba was arrested. Dominic also testified that he did not witness the accused person assaulting the deceased.

4. PW5, Princema Litaba took the deceased to hospital. Firstly at around 5.00pm when deceased was given first aid and secondly at around 8.00pm when the deceased person's condition worsened. The deceased died while undergoing treatment at Mukumu mission hospital and just before he was to be taken to Kisumu for further treatment.

5. PW3 number 83213 police constable Abdidek Sharif Mohammed of Kakamega Police Station together

with Officer Nicholas Kaswira visited Mukumu Mission Mortuary on 14.10.2011 and saw the deceased's body. The investigating officer, inspector Nicholas Kaswira was not called to testify. At the close of the prosecution case, the accused person was found to have a case to answer and placed on his defence.

The Defence Case

6. The accused person elected to remain silent.

Submissions

7. Counsel for the defence filed written submissions and urged this court to make a finding that the prosecution had failed to prove the charge of murder against the accused person beyond any reasonable doubt, and to acquit him accordingly. The prosecution relied on the evidence on record.

Analysis and determination

8. The issues for determination are whether the prosecution has proved the offence of murder as set out in Sections 203 and 206 of the penal code. In other words, whether the prosecution has proved the death and the cause of the death of the deceased, and whether the death of the deceased was caused by an act or omission on the part of the accused person herein. Finally whether the prosecution has proved that in committing the offence, the accused has the necessary malice aforethought.

Whether the deceased died and the cause of death

9. There is clear evidence on record that the deceased died. Dr. Dixon Mchana who testified as PW1 and produced the post mortem report – PEXH -1 on behalf of Dr. Mdongochi Roselyne confirmed that the post mortem examination on the body of the deceased was done on 15.10.2011 at Mukumu Mission Hospital mortuary. The body of the deceased was identified by Josephat Shikandi and Kennedy Likabo. The cause of death was given as heart and breathing arrest due to blunt trauma on the head. According to the post mortem report, the deceased had an injury on the skull (head).

Whether the death of the deceased was caused by the accused person herein

10. It is my considered view that the evidence on record does not show that the death of the deceased was as a result of the unlawful acts or omissions on the part of the accused person. The evidence of how and where the incident occurred is given by Dominic who testified that while he was attending a bull fighting event at Shibuya a fight broke out among the competing teams. He said he saw two boys fighting and a third boy. The deceased herein went to separate the two fighting boys. In the process one of the two boys hit the deceased on the head with a stick. The deceased fell down and became unconscious. Dominic testified further thus "I saw the person who assaulted the deceased. He is not in court today. I know the accused..... the person who committed the offence was not arrested.....we went to Shinyalu police station, and we were given police officers. The police went to where we expected to arrest the offender. They arrested the accused who was hiding in a shamba and told him not to escape. The accused did not run away. I know the one who committed the offence as it was daytime."

11. From the above evidence by Dominic who witnessed the incident, the person who committed the act which led to the death of the deceased is still at large. From that evidence too, there is no indication that the accused person was one of the two boys who were fighting each other and whom the deceased tried to separate. Further, no reason is given by Dominic as to why the accused person was arrested. Save that he was found hiding in the shamba and therefore suspected to have been hiding because he may have hit the deceased. If the investigating officer had testified, he would have shed some light on why the accused person was arrested. He would probably have told the court that in fact the accused person was the one who fought with the boy who is still at large. But still, if that were so, the charge sheet should have read that the accused person committed the offence with one who is not before court.

12. In my humble view therefore, I find no connecting thread between the death of the deceased and the

accused person's arrest. As rightly submitted by defence counsel and as held by the courts suspicion no matter how strong cannot form the basis of inferring guilt on the part of an accused person. The prosecution in this case was under a duty to prove the allegations against the accused person beyond any reasonable doubt.

13. It is also not clear from the evidence how the accused person was arrested. The accused said nothing in his defence, thereby making it more difficult for this court to confirm how and why the accused person was arrested. In any event, the accused person was not under a duty to prove his innocence. The prosecution was under a duty to explain and prove that the death of the deceased was the result of some unlawful act/omission on the part of the accused person. All these doubts created in the mind of the court can only go to the benefit of the accused person.

Whether the prosecution proved malice aforethought

14. My considered view is that the prosecution having failed to connect the death of the deceased to any act of the accused person, the question of malice aforethought remains one of the academic interest only but a closer look at the evidence on record shows that the prosecution has failed to prove any of the circumstances set out under Section 206 of the Penal Code. The accused person's presence before this court was not or nor properly explained. He is not shown to have done anything that would connect him to the death of the deceased. All that there is mere suspicion which suspicion has no value as far as the accused person's culpability is concerned.

Conclusion

15. Having made the above findings I have reached the conclusion that the prosecution has not proved the charge of murder against the accused person. In the result. I find the accused person not guilty of the murder of Cedrick Ingosi. He is acquitted under Section 322(1) of the Criminal Procedure Code.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 11th day of May 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Juma (present).....for state

Mr. Osango (present).....for accused

Polycap.....Court Assistant