



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL (MURDER) CASE NO. 25 OF 2011
REPUBLIC.....PROSECUTOR
VERSUS
SILAS SANGALE ATENYA.....ACCUSED
J U D G M E N T

Introduction

1. The accused person herein was arraigned before this Honourable Court on 18th April, 2011 on one count of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars thereof being that on the 14th day of April, 2011 in Kakamega County, he murdered TS. The accused person denied committing the offence when he took plea on 26th May, 2011. As a result of that plea, the case was fixed for hearing. During the hearing the prosecution called 7 witnesses in its attempt to prove the case against the accused person.

The Prosecution Case

2. From the evidence of the 7 prosecution witnesses, the case for the prosecution was as follows;- on 4th April, 2011, the deceased and the accused, among other villagers, were attending a funeral ceremony for one Charles Shikoli who had died. The time was about 2.00am when Jared Museve who testified as PW2 (Jared) saw the accused person running away from Jared's home. At that same moment, Jared heard his brother Peter saying that he had been cut by the accused herein. According to Jared there were a number of pressure lamps (Optimus) hanging at strategic places in the compound of Charles Shikoli. Jared also said he saw T (The Deceased) with cuts on the head. Jared helped T to get into his (Jared's) house where he (T) slept until the following morning before being taken to the hospital. On 14th April, 2011, the deceased died.

3. It was also Jared's testimony that there were many people at the funeral ceremony and that a number of them were drunk. Jared also testified that he saw the accused person herein cutting the deceased with a slasher.

4. According to PW3, Peter Chungani (Peter) he was at Jared's house at about 2:00am on 4th April, 2011 when he saw the deceased being slashed by the accused and two other people. Then he saw deceased running towards him (peter) with the accused and other people chasing the deceased who had a cut wound on the head. As the deceased was running he uttered the words' "Sangale amenikata." Translated "Sangale has cut me".

5. At about 5.30am that same morning of 4th April, 2011, the deceased got up and went for treatment and returned later with bandages all over the head. Later, Peter was informed that the deceased had died.

6. PW4 Fednand Shinanda (Fednand) and PW5 Alfred Shinanda both identified the body of the accused for purposes of conducting a post mortem examination. The post mortem examination was conducted by Dr. Kinuthia Nyaga 2nd February, 2012.

7. According to the doctors evidence, the deceased had the following injuries;-

- Swelling on the left side of the skull with
- 6cm long laceration but with no fractures
- Blood clot under the brain on the right side

8. In the doctor's opinion, the cause of death was bleeding within the scalp as a result of assault. The post mortem report was produced in evidence as PExhibit 1.

9. Number 222164 APC Philip Kirwa of Kakamega East District headquarters testified as PW6, and stated that while he was at the station on 13th April, 2011, the accused person was taken to the police at Shinyalu and later to Kakamega Police Station. On 14th April, 2011, APC Kirwa learnt of the death of the deceased.

10. PW7 was Number 38881 PC Elphas Gatimu who stated that when he saw the deceased prior to the latter's death, the deceased had an injury and a swelling on the face when he (deceased) reported to the police station and claimed that the injuries had been inflicted by three attackers whom he could see with the help of moonlight. PW7 also stated that the deceased told him that the accused, being one of the attackers, was armed with a slasher while the other two attackers were armed with rungun. After recording statements, PW7 issued the deceased with a P3 form.

The Defence Case

11. At the close of the prosecution case, the accused person herein was placed on his defence. Upon due compliance with Section 306 of the Criminal Procedure Code, the accused person elected to give sworn evidence. He also called one witness. In his sworn statement, the accused person denied committing the offence. He also denied being present at the scene of the alleged crime; though he conceded that he used to see the deceased person in the area every now and then.

12. DW2 was John Muyekho Waiti the Deputy Principal at [Particulars Withheld] Secondary School. He produced a letter dated 25th May 2011 DExhibit 1- confirming that the accused was a student at the said school.

Final Submissions

13. In the final Submissions filed by M/S JJ Mukavale Advocate on behalf of the accused person, it was submitted that the prosecution case against the accused person has fallen short of the required standard of proof especially as regards the issue of identification of the accused under fairly difficult conditions at 2.00am. The position held by the defence is that none of the witnesses could say with certainty that they saw the accused person assaulting the deceased. Counsel urged the court to acquit the accused person and to set him free.

14. In response the prosecution stated that they wished to rely on the evidence on record.

Issues for Determination

15. After carefully considering the evidence as set out above, the issues that arise for determination, pursuant to the provisions of section 203 of the Penal Code are;-

- a) Whether the deceased died and what caused the death
- b) Whether it was the accused who caused the deceased's death through an unlawful act or omission.
- c) If the answer to (b) above is yes, whether the accused did so with malice aforethought.

Analysis and Determination

16. With regard to the issue of whether or not the deceased died there is ample evidence, including medical evidence showing that the deceased died and was buried by his family. The post mortem report PExhibit 1, clearly proves that TS died on 14th April, 2011. The cause of death is given as cardiopulmonary arrest due to head injury and subdural haemorrhage secondary to assault.

17. The more troublesome issue is whether the prosecution has proved beyond reasonable doubt that it was the act or omission of the accused person that caused the deceased's death. This issue is woven around the identification of the accused person. The evidence on record shows that the incident took place at 2.00am within the surroundings of a home where there was a funeral with many people, many of whom were drunk. The question is: was there adequate lighting by which the witnesses could clearly and positively recognize the accused whom they said was a neighbour? How far were each of the witnesses from the accused when they alleged they saw him cutting the deceased?

18. Courts have been categorical, that where the prosecution case rests on identification of an assailant under difficult conditions as was the situation in this case, then the trial court must exercise extreme care in assessing evidence of identification and warn itself of the inherent dangers of such evidence. In this regard, the court must address itself to the conditions prevailing at the time of the alleged identification of the assailant and the length of time, the witnesses had the assailant under observation. See the case of **Nzaro – vs – Republic [1991] 2 KAR 212 and also Odhiambo – vs – Republic [2002] KLR 241**. In the latter case, the court held, inter alia, that “the court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification.”

19. Applying the above principles to the instant case, I am of the considered view that identification of the accused person through recognition was neither positive nor free from error. The reasons are as follows. According to PW7, PC Elphas Gatimu, the deceased told him that he had managed to recognize the accused person and his accomplices with the help of moonlight. Even if that were so there is no clear description of how bright the moonlight was and how close the deceased was from the accused as the accused slashed him.

20. PW2 Jared gave the following version. “On 04.04.2011 at about 2.00am (night) I was at home attending funeral of my brother Charles Shikoli.... I was also with my friend TS..... When we reached my house, upon opening the door, we heard screams outside. I heard my friend Peter Chungani saying he had been cut by Sirius Shingare. I saw Sirius running. The other people ran but I didn't see them. I saw the accused also running away. There were lights. There was a pressure lamp, optimus. There were several pressure lamps..... I know Sirius Shingare before that day..... that night, he had a white t-shirt. He had a slasher.”

21. In cross examination, Jafred stated “there was a pressure lamp near my house. There were many people at the ceremony, some were drunk.”

22. PW3, Peter, who was in the company of Jafred stated;-

“I went with Jafred with the deceased coming with us. He was behind. Three boys followed us. There was light. There were lights outside and had lit fire I saw the accused. He had a black Jacket.” In cross examination, Peter stated inter alia, “Jafred was inside looking for a lamp.....there were about two pressure lamps. One was at the deceased's home,.....one

pressure lamp was hanging on a tree.....the attackers were using torches while chasing the deceased. Accused had a slasher. The incident took a short time.”

23. From the above, it is clear that there was a problem with lighting. While it was alleged by PW7 that the deceased had told him there was moonlight, neither Jafred nor Peter mentioned moonlight in their evidence. There is also the evidence that the incident took place in a fleeting movement among a crowd of people running around with some being drunk. Whereas Jafred testified that the accused person wore a white T-shirt, Peter testified that the accused wore a black jacket. Further whereas Jafred testified that there was a pressure lamp near his house, Peter testified that when the incident occurred, Jafred was inside the house looking for a lamp. Such contradictions in the evidence of key witnesses make it difficult for this court to believe that Jafred and Peter saw the accused slashing the deceased as alleged. It is likely that the accused did so, but the evidence of identification is too shaky to convince this court as to the identification of the accused person as the deceased person’s assailant. There is also contradictory evidence as to whether Jafred had taken alcohol that night. Jafred told the court that he had not drunk that night but Peter stated in cross examination. “Jafred is my brother. He is my elder father’s son. I can’t tell whether Jafred had drunk that night.”

24. It appears clear to the court that both Jafred and Peter were not able to clearly see what happened on the material night. The benefit of that doubt goes to the accused person.

25. Having settled the issue of identification in favour of the accused person, it follows that the issue of malice aforethought on the part of the accused person in committing the offence has not been proved. Though it is most likely that the accused was involved in attacking the deceased person, the evidence on record does not place the pointing finger on the accused person for the death of the deceased.

Conclusion

26. The upshot of all the above is that the prosecution has not discharged the onus of proving its case against the accused person beyond any reasonable doubt. I therefore find the accused person herein, Silas Shingare Atenya not guilty of murdering TS and accordingly acquit him of the charge under the provisions of Section 322(1) of the Criminal Procedure Code.

27. Unless otherwise lawfully held the accused person is set free forthwith. It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 13th day of July 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Ngetich (present).....For State

.....Mr. Shikhule for Mukavale.....for Accused

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