



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL CASE NO 6 OF 2014

REPUBLIC

VERSUS

BENSON NYAMAI

JUDGMENT

INTRODUCTION

1. The Accused person, Benson Nyamai, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the offence were that :-

On the night of 19th September 2014 at Merarai Village in Taveta Sub-county within Taita Taveta County, jointly with others not before the court murdered MZUNGU MEOLO LESIAMANGA (PETER).

2. This matter was initially heard by Mureithi J on 8th July 2015 when he took the evidence Rosemary Riziki Mzungu (hereinafter referred to as "PW 1") and Marko Ibrahim Julius (hereinafter referred to as "PW 2"). This court took over conduct of this matter on 21st September 2015 and continued from where the said Learned Judge had reached after both the Accused person and his counsel confirmed to the court that it could proceed accordingly.

3. The Prosecution called a total of six (6) witnesses to demonstrate the following ingredients of murder:-

a. Proof of the fact and cause of death of the deceased;

b. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused; and

c. Proof that the said unlawful act or omission was committed with malice aforethought.

d. The Accused person's Written Submissions were dated 22nd March 2016 and filed on 23rd March 2016 while those of the State were dated 30th March 2016 and filed on 31st March 2016.

THE PROSECUTION'S CASE

PW 1 testified that she was the deceased's wife. She told the court that on 19th September 2014, at about 6.00 pm, she was walking to Mkocheni Village having spent her day at the market selling cabbages, when she received a call from Mzungu Meolo Lesiamanga (Peter) (hereinafter referred to as "the Deceased")

informing her that he was being beaten and that their Rekeke home had been set on fire. She said that it ordinarily took two (2) hours to walk from Mkocheni Village to Rekeke.

5. It was her further evidence that when she enquired from the Deceased who had committed the act, he told her that it was some young men who he did not know. She immediately called Omari and Lotodo, who were their neighbours at Rekeke and asked them to check on him.

6. She said that when she got to Rekeke, she found that the two (2) men had already arrested the Accused person who she identified in the dock. Police came and took the Deceased to KCMS Hospital, Tanzania but he succumbed to his death two (2) weeks later.

7. During her cross-examination, PW 1 stated that she did not know the Accused person although the Deceased informed her that he had been burnt by a young man who was dark in colour and whose name he did not know. She also stated that her neighbour was a person known as Mohamed Ng'ame, a squatter who had been given land to cultivate by Francis Ngule.

8. PW 2 told the court that he received a call from his aunt, PW 1, and one Chaka informing him what had befallen the Deceased. Together with one Lukeweni (also known as Lotodo), they went to check on the deceased. They took fifteen (15) minutes to get to where the Deceased was. He said that it was a few minutes after 7.00 pm and it was dark and he had carried a torch.

9. It was his averment that when they reached the drain from the shamba, they found the Accused lying face down with his head on his arms. He said that the Accused begged them not to beat him as he had not done anything wrong. They left him and proceeded to the shamba where they saw the Deceased burnt and lying on the side near his cabbages.

10. He said that the Deceased did not speak to him and he went to follow up on the Accused where they had left him but when he got there, the Accused was nowhere to be seen. He told the court that since the Accused had entered the drain which is used for irrigation in the shamba, he followed the foot prints to a hiding place in the banana plantation where he said he found the Accused sitting inside the banana trees.

11. It was his testimony that they "arrested" the Accused and on their way, they found the Sub-Area Chief Erick Mumu who had come with two (2) Administration Police officers who arrested the Accused.

12. During his Cross-examination, PW 2 stated that the Accused person was new to the village but that he had previously seen him working at Mwenda's shamba. He also stated that he did not know the Accused person's name but he was certain it was the same person they arrested on the material date and time.

13. He said that the Accused person told him that he had been employed at Fredrick Ngule's farm and that he did not note any of the Accused person's face or skin having been burnt. He contended that the Accused person appeared drunk from the way he was walking and talking. He further stated that there were many people who worked at the shambas in that area and others who guarded tractors and tomatoes at night. He, however, said that he was not certain as to the person who burnt the Deceased's house.

14. During his Re-examination, PW 2 stated that the banana plantation where the Accused was found was at a distance of one (1) acre from the Deceased's shamba and reiterated that he had seen the Accused person working at Mwenda's shamba.

15. Fredrick Ngure Mwanyalo (hereinafter referred to as PW 3") was the same person Mureithi J had recorded as Francis Ngule. The diction by the witnesses may explain why the name was recorded in the proceedings as both "Ngule" and "Ngure" by both the said Learned Judge and this court.

16. PW 3 told the court that he knew the Accused person physically as he used to see him doing casual jobs at Kimundia area, Kimala Sub-location. He stated that on the material date at about 9.00am, the Accused person approached him and asked for work to guard tomatoes on his farm.

17. He said that he hired and gave him Kshs 250/= to buy a torch and batteries. He said that he had earlier asked about the Accused person's character from unnamed persons who confirmed that the Accused person was of good character. He stated that he did not know if the Accused person ever went to his farm as had been agreed but that he was told by his friend Ng'ame that there was a person who was suspected to have been stabbed by the Accused person and that work on his farm had not been done.

18. During his Cross-examination, he stated that it was normal for casual workers to ask for work and that the distance from the Deceased's farm to his farm was which was about five hundred (500) – five hundred and fifty (550) metres. He averred that he did not know if the Accused person stabbed the Deceased.

19. During his Re-examination, PW 3 reiterated that he hired the Accused person to guard his tomatoes but he did not know if he went to guard his tomatoes as agreed. He said that he last saw the Accused on 19th September 2014 at 2.00pm.

20. No 90090281 Sergeant Enock Osoro (hereinafter referred to as "PW 4") told the court that he was called by the Deceased's daughter, Jackline Mzungu, who informed him that the Deceased had been stabbed. He woke up the Assistant Chief and other youth from that area and proceeded to the scene of crime. He said that before they reached the Deceased's shamba, they met the Accused person amongst a group of people who wanted to lynch him and the Deceased who was in critical condition. He confirmed that the Accused person was the same person he saw on the material date and that he had never seen him at Kimala before 19th September 2014.

21. No 56444 George Ochieng (hereinafter referred to as "PW 5") stated that he took over the investigations in this case from PC Koech. His evidence was that the Accused person had already been arrested and charged for arson by the time he took over the matter herein. He stated that he interrogated the Accused who confirmed that he had been employed as a watchman by one Fredrick Nguire and that both Marko and Omari identified having seen the Accused person at the scene.

22. During his Cross-examination, PW 5 confirmed that the Accused had been newly employed in PW 3's farm which was about eight hundred (800) metres from the Deceased's farm. He stated that he did not seek to establish if there were other people working in the vicinity and that the only reason the Accused was arrested was because he was near the vicinity of the burnt house, he was found lying in a drain and that he ran away when he was found by PW 2 and Omari but he was caught in a thicket. In his estimation, the fire started at 5.00pm.

23. He further stated that on interrogating the Accused person, the Accused told him that on the material date he was going to work when people accosted him and told him he had burnt a house. He could not remember if the Accused person gave him the name of his employer. In his Re-examination, PW 5 stated that the place the point of arrest of the Accused person was far from the farm he was to guard.

24. Dr Jackton Mwanyalo (hereinafter referred to as "PW 6") confirmed that the cause of the Deceased's death was burn wounds related complications. Although counsel for the Accused had objected to the production of the Post Mortem Report that had been conducted by Dr Oyoo by PW 6, the court admitted the same in evidence as the same was in line with the provisions of Section 68(i)(a) of the Evidence Act Cap 80 (Laws of Kenya).

THE DEFENDANT'S CASE

25. After the court found that a *prima facie* case had been established against the Accused person, he was put on his defence. He opted to give sworn evidence but did not call any witnesses to testify in support of his case. In his evidence, he reiterated the version of the story he gave to PW 2 and PW 5.

26. He stated that he left his home area in Kibwezi on 21st June 2014 and went to Taveta. He said that he had worked on several farms in Kimundia for a few weeks and that on the material date, PW 3 approached him while he was working at Mwenda's farm and asked him to guard his farm that evening.

He said that PW 3 gave him a sum of Kshs 200/= to purchase a torch.

27. He said that he left Mwenda's farm at about 1.00pm and went home at Rekeke to rest. He added that he walked from Rekeke to Kimundia, a journey that took one (1) hour and arrived there at 7.00pm. It was not too dark at the time. It was his testimony that quite a distance before he reached PW 3's farm, he heard screams ahead. He said that he soldiered on but then met a group of people near a trench. He identified PW 2 as one of those people as he used to see him in Kimundia.

28. He said that they asked him where he was going but before he could tell them that he was going to "Mtaita's" shamba, they accosted him and started beating him. He showed the court scars on his face and chest that he said were inflicted by a panga. It was his evidence that he was not involved in the Deceased's death and that he never saw any smoke in the Deceased's shamba that was about three hundred (300) metres from PW 3's shamba.

29. He denied ever having known the Deceased or PW 1 and that he only got to know where the Deceased's shamba was when he was taken to the scene by officers from the Criminal Investigation Department (CID).

30. During his Cross-examination, the Accused person reiterated that he left his house for PW 3's shamba at 6.00pm from. He did not call any witnesses to confirm his alibi. He also stated that he never saw the house burning and only heard screams ahead of him and that he had previously not known where the Deceased's shamba was.

LEGAL ANALYSIS

31. As was rightly submitted by the Prosecution, the fact that the Deceased was burnt and that his cause of death was a result of the said burns was not in dispute. The court did not therefore deem it necessary to delve into arguments relating to the fact and cause of the Deceased's death.

32. The question that this court was being asked to establish was whether or not the Deceased met his death as a result of the unlawful acts or omissions by the Accused person and whether or not the said unlawful act or omission was committed with malice aforethought on the Accused person's part.

33. The Prosecution argued that its case was based on circumstantial evidence. In support of its case, it referred the court to the case of Musoke vs Republic [1958] EA 715 citing with approval Teper vs Republic [1952] AL 480 in which it was stated as follows:-

"It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

34. It also placed reliance on the case of Julius Maina Ndirangu vs Republic [2001] which it said was premised on similar facts in which the Court of Appeal stated as follows:-

"...The Appellant was arrested from a hideout in socks but no shoes suggesting that the shoes must have either dropped somewhere, in the course of his escape, or that he removed and dropped them somewhere to enable him escape with ease. He did not explain why he did not have his shoes on. That was a fact peculiarly within his knowledge. Likewise the appellant was duty bound to but did not explain why he had to carry a lot of money in his pocket. If as he said, the money was part of proceeds from his business in Nairobi, it was clearly a matter peculiarly within his knowledge why he did not first bank it or if it was not necessary to bank it, why he had to carry it along with him. Section 111(1) of the Evidence Act, Cap 80 Laws of Kenya places that burden on him."

35. It did appear to this court that the basis of the Prosecution's circumstantial case was the Accused person's arrest and his subsequent conduct after his said arrest. It submitted that the Accused person's

defence was more of an alibi defence as he had stated that he was not at the scene of the incident where the Deceased was burnt.

36. It made reference to the case of Stephen Ondieki Ongeto & 2 Others vs Republic [2016] eKLR while citing the cases of Victor Mwendwa Mulinge vs Republic [2014] eKLR and Karanja vs Republic [1083] KLR 501 where the Court of Appeal rendered itself thus:-

“... in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all other evidence to see if the accused’s guilt is established beyond reasonable doubt, take into account the fact that he has not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that it is an afterthought.”

37. From PW 1’s evidence, she appeared to have arrived at the scene of the crime at about 8.00pm as she said that it took two (2) hours to get there from Mkocheni where the Deceased called her at about 6.00pm. Mureithi J had observed that she appeared not to understand time as she had overestimated time by about one (1) hour which in his assessment was thirty (30) minutes.

38. The time PW 1 arrived at the farm could not therefore have been easily ascertained. A proper estimation of time of when the Accused person and PW 2 and Omari met appeared to have been at about 7.00 pm or thereabouts as had been stated by both PW 2 and the Accused person. Notably, PW 2 said that it that it took him fifteen (15) minutes to get to the Deceased’s farm and that they got there a few minutes past 7.00pm. The Accused person also stated that he got to Kimundia at 7.00pm.

39. Having said so, from the facts of the case, it was therefore not in dispute the Accused person was within the vicinity where the alleged offence was committed at about 7.00pm or thereabouts. The evidence that PW 2 said that he found the Accused person facing down in a drain covering his head or that he was found near the scene of the alleged offence was not conclusive inference of his guilt. The Prosecution had a duty to discharge the burden that the Accused person was the one who was responsible for the death of the Deceased.

40. The question for determination by this court then was whether or not the Accused person had displaced the burden that was placed upon him by the provisions of Section 111(1) of the Evidence Act Cap 80 (Laws of Kenya) by demonstrating that he was not the one who committed the offence he had been accused of.

41. Section 111(1) of the Evidence Act provides as follows:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

42. The circumstances under which the Accused person was alleged to have been arrested at the material time were material. This was because the area he was alleged to have been arrested was not well lit. Indeed, PW 2 had told the court that it was already dark by the time he got there and that he was carrying a torch.

43. From PW 2's evidence, he found the Accused person lying on the ground next to the drain. He spoke to the Accused person who asked him not to beat him as he had not done anything wrong and left him lying there.

44. On his part, PW 5 was emphatic that when Omari and PW 2 saw the Accused person, he started running away and was found in a thicket. He said that they saw the Accused person's footsteps and found him in a trench where he started running away but they caught him in a thicket, a short distance from the scene.

45. Evidently, PW 2's and PW 5's evidence of how the Accused person was arrested was inconsistent and contradictory. Having said so, PW 5's evidence sounded more realistic but he was not at the scene. His evidence was mere hearsay as he did not even tell the court who told him that that is what had transpired. This court was therefore very hesitant to accept that that was the correct version.

46. The above notwithstanding, PW 2's evidence did not sound believable to the court. In his approximation, the distance between the Deceased's house and the drain and/ or trench was about half (1/2) acre. There were other surrounding farms. He did not demonstrate whether he found the Accused person by happenstance or if he searched for him in the area until he found him in the drain.

47. It was by chance, it was incumbent upon PW 2 to have told the court as much. If he searched around, he needed to give a more detailed account of his search and his justification of why he concentrated his search in that area as there were other shambas in that area.

48. Going further, PW 2 did not adduce any evidence to suggest why he did not believe the Accused person when he told him that he was a security guard at Ng'ane's farm particularly because he had seen him previously at Mwenda's farm.

49. As the discovery of the Accused person in the drain was material as it was already dark and the area was expansive and his evidence was to say the least sketchy and disjointed, this court found PW 2's evidence of where he first met the Accused person not to have been credible.

50. Turning to the second time PW 2 is said to have found the Accused person between banana plants, this court also found the evidence to have been incredible. Undoubtedly, tracing footprints in a farm at night would be an arduous task. With such poor visibility, it was not clear how PW 2 managed to trace the Accused person's footprints to another shamba, which he referred to as "Ashiamari's farm." How far this farm was from the drain, though a material fact, was not demonstrated.

51. PW 2's explanation that "they" were able to trace the Accused person hiding between banana plants by following his footprints because he had initially hidden in a drain with water, did not sound plausible at all more so because these banana plants were said to be at another nearby shamba. If indeed that is what transpired, PW 2 failed to adduce evidence in greater detail showing how they managed this very difficult feat in the night.

52. As was rightly pointed out by the Prosecution, the Accused person had a burden of exonerating himself by explaining what he was doing in the vicinity of the Deceased's house. To discharge this burden, the Accused person stated that he had been hired by PW 3 to guard his tomatoes on the material date, a fact that PW 3 confirmed. He did not need to call "Mtaita" who was PW 3 as a witness as the Prosecution had already called him as a witness.

53. His alibi of where he was during the day was not relevant as had been contended by the Prosecution for the reason that it did not adduce evidence to demonstrate that the house was burnt during the day. PW 5's contention that in his estimation, the house was burnt at about 5.00pm was neither here nor there as he did not lead evidence to show how he came to that conclusion in his capacity as an Investigator herein. As was observed hereinabove, his evidence was merely hearsay which had no probative value to this court.

54. Although the Prosecution had submitted that motive was not a necessary ingredient to prove a charge

of murder, it was incumbent on it to show that the Accused person actually committed the offence. Mere suspicion was not sufficient proof. The fact that the Accused person was at the vicinity as was stated by PW 2 was also not proof that he committed the offence.

55. Notably, the Accused person said that he did not know the Deceased or PW 1. The Deceased did not know him otherwise he would have told PW 1 who exactly had burnt their house. PW 2 and PW 3 had seen the Accused person working in Mwenda's shamba a few days before.

56. Additionally, the Prosecution failed to establish that no other person was in that vicinity. This was critical as PW 2 told the court that there were other people who guarded farms in that area. His testimony was that the Accused person was arrested for saying he was a security guard at PW 3's farm, for running away and hiding in a nearby farm or PW 5's evidence that the Accused was charged because of his suspicious conduct after being found by PW 2 and Omari were insufficient to prove the Accused's guilt. Notably, PW 2 said that he did not note any of the Accused person's clothes, face or kin having been burnt.

57. Having discounted PW 2's testimony that he initially found the Accused person in a drain and soon thereafter followed his foot prints in another shamba, the court found that the Prosecution's evidence not to have discharged the Accused person's evidence that he was actually going to guard PW 3's farm when he was accosted by PW 2 in the company of a mob of people.

58. The court found and held that defence given by the Accused person far outweighed the evidence that was adduced by PW 2 as he is the only one who seemed to have been present at the time of his arrest. The Accused person's evidence was not an afterthought and demonstrated what may have happened on that particular date.

59. His sworn evidence was unshaken during Cross-examination by the Prosecution. It showed co-existing circumstances that weakened or destroyed the inference that was advanced by the Prosecution that he burnt the Deceased's house in which the Deceased suffered fatal injuries as he ably explained why he was in the vicinity on the material date and time.

60. No one saw him burn the Deceased's house or cause injuries to the Deceased. Mere suspicion was not sufficient to have led to the Accused person being charged with the offence of the murder of the Deceased. In fact none of the witnesses provided any proof that the Accused person was the one who murdered the Deceased.

61. The circumstances of this case were thus distinguishable from those in the case of **Julius Maina Ndirangu vs Republic** (Supra) as he ably explained why he was at the vicinity at the material time, a fact that was confirmed by PW 3 who testified in support of the Prosecution's case. The Accused person was thus able to create a reasonable doubt as to his guilt in respect of the offence he had been accused of as required in the proviso of Section 111(1) of the Evidence Act.

62. In the case of **Republic vs Mjomba Jason Mwambili [2016] eKLR**, this court rendered itself on the issue of circumstantial evidence when it stated as follows:-

“Circumstantial evidence can be accepted when an accused person's guilt can be inferred based on the evidence adduced by the prosecution in which case it can only be displaced by an accused person giving his side of the story. The chain of events in a case based on circumstantial evidence must be so connected that an accused person would find it difficult, if not impossible, to extricate himself or herself from the unlawful act he is being accused of. In this case, the Prosecution completely failed to prove its case that was based on circumstantial evidence.”

63. This court found and held that the Prosecution did not prove its case beyond reasonable doubt as the evidence fell way below the standard required in a murder case. To say the least, the investigations herein were shoddy and marred by weak and incredulous evidence.

64. Having carefully considered the evidence that was adduced by both the Prosecution and the Accused person, the court found that the Prosecution had not proven that there was any malice aforethought on the part of the Accused person. It adduced insufficient evidence to demonstrate that the Accused person was the person who burnt the Deceased's house and that he is the one who caused the Deceased's death as a result of his actions.

65. In a nutshell, the Prosecution was unable to demonstrate that the Deceased met his death as a result of the unlawful acts or omissions on the part of the Accused person or that the alleged unlawful acts or omissions were committed with malice aforethought.

DISPOSITION

66. For the foregoing reasons, this court has no option but to find that the Accused person was not guilty of the offence that he had been charged with.

67. This court therefore orders and directs that the Accused person be and is hereby acquitted under Section 215 of the Criminal Procedure Code and that he be set free forthwith unless he be held for any other lawful cause.

68. It is so ordered.

DATED and DELIVERED at VOI this 7th day of April 2016

J. KAMAU

JUDGE

In the presence of:-

Ratemo..... Accused Person

Miss Mukangu Republic

Simon Tsehlo– Court Clerk