



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. 10 OF 2012

REPUBLICPROSECUTOR

VERSUS

JOSEPH MMBAYAACCUSED

JUDGMENT

1. *Joseph Mmbaya*, (the accused), has been arraigned before court with information of murder contrary to **section 203** as read with **section 204** of the Penal Code, (Cap 63), Laws of Kenya. Particulars are that on the 5th day of March, 2012 at **Lununu Village Shibwe** Sub-location in Kakamega County, he murdered **Chrispinus Shiambetsa**. The accused pleaded not guilty to the information and the prosecution called two witnesses in a bid to prove its case against the accused.

2. PW 1, **Tom Mboya boyo Shemetsa**, testified that on 4th March, 2012 at 7 pm his son died; and that according to information he had it was the accused that killed **Chrispinus**. The witness told the court that he was given this information by **Meja Imbala**. However, **Meja Imbala** did not know who the killer was. The witness told the court that he did not witness the killing himself. In cross examination, the witness told the court that a panga was used to kill the deceased but he did not know the killer.

3. PW2, **Benson Imbali**, told the court that on 5th March, 2012 at around 7 am, while in his house, he heard the deceased's wife, **Caroline Nanzala** scream. He rushed out and headed to the deceased's house where screams were coming from. He found the door locked from inside which forced him to kick the door open. **Carolyne** and the deceased's children were crying. In the house he found the two children aged 3 years and 1 year respectively with blood stained cloths. The deceased's body had cuts on the face and legs. He did not know who had caused the injuries.

He found the rear door closed but not locked. According to the witness, he had heard the deceased's wife complaining that her husband was involved in a love affair with the accused's wife. He however told the court that he did not know how the deceased met his death. He also told the court that the deceased's wife **Carolyne** never told him how the deceased met his death.

4. In cross examination, the witness admitted that he did not know who killed the deceased. He also told the court that **Carolyne**, the deceased's wife never told him what had happened to the deceased.

5. At the close of the prosecution's case, the accused was put on his defence and he gave a sworn statement. DW1 told the court that the deceased was known to him and was his neighbour. The accused told the court that on 5th March, 2012 at about 6 pm, he was at his home when he heard screams from the deceased's home. He went to the deceased's home and found the deceased's body with cut wounds. He however denied attacking the deceased. He told the court that he was arrested on 5th March, 2012 at

10am from his home by Administration Officers, and taken to the police station. DW1 denied that his wife had an affair with the deceased. He also told the court that he never heard the deceased fight with his wife, nor was he aware that the deceased and his wife had had a fight the previous day, 4th March, 2012. According to the witness, when he went to the deceased's home, he found the deceased already dead and his children sitting beside the body.

6. At the close of the defence case Mr Ondieki, learned counsel for the accused submitted that the prosecution had not proved its case beyond reasonable doubt and called for his client's acquittal. Learned counsel for the accused pointed out to the fact that the prosecution called two witnesses but none of them identified the accused as the person who killed the deceased. According to learned counsel, the prosecution never led critical evidence to prove the cause of death and relied on the case of *Ndung'u v Republic* [1985] KLR 487 and this court's decision in *Republic v Danstone Adolo, Kakamega Criminal Case No.53 of 2011*, to buttress his point.

7. This is a poorly investigated and prosecuted case. The accused faces information of murder, that on 5th August, 2012 he killed *Chrispinus Shiambetsa*, his neighbour. The prosecution called two witnesses, *Tom Mboya Shimetsa* and *Benson Imbali*, father and brother to the deceased respectively. *Benson Imbali* who testified as PW1 told the court that his son was killed but did not know who killed him. According to his evidence, he was told that it was the deceased who had killed the deceased. PW2 on the other hand told the court that he heard screams from the deceased's home, rushed there but found the door locked from inside. He kicked the door open and on entering the house, he found the deceased dead with cut wounds on the face and legs. The deceased's children were in the house crying, their cloths blood stained. The witness told the court that the deceased's wife never told him what had happened to the deceased. She only mentioned that the accused's wife was said to be having an affair with the deceased.

8. The accused, when put on his defence, gave sworn evidence. He denied killing the deceased. According to him, he heard screams from the deceased's home on the morning of 5th March, 2012 and when he went there he found the deceased dead. He denied causing the deceased's death.

9. The accused faces a serious charge which on conviction attracts death penalty. The information the accused faces requires the prosecution to prove that the accused, with malice aforethought, killed the through some unlawful act or omission. **Section 203** of the Penal Code provides:-

“Any person, who of malice aforethought causes the death of any person by an unlawful act or omission, is guilty of murder.”

The therefore prosecution must not only prove that there was the act of murder, but also that the act was actuated by malice aforethought. In other words that there was not only *actus reus* but also *mens rea*.

10. In a criminal trial, the prosecution has the legal burden to prove its case beyond reasonable doubt and in this case of murder there must be tangible evidence that the accused killed the deceased and that there was necessary malice aforethought. That is to say, there are three ingredients to be proved in a murder trial in order for the prosecution to obtain a conviction. That position was stated in the case of *Republic v Nyambura & others* [2001] KLR 355 thus:-

"There are three ingredients of murder which the prosecution must prove beyond reasonable doubt so as to have a conviction, namely-

a) The death of the deceased and the cause of such death.

b) That the accused committed the unlawful act which caused the deceased's death, and

c) That the accused had malice aforethought."

11. Regarding the first ingredient, there must be evidence that there was actual death of a human

being. The only evidence tendered in this trial was that of PW1 and PW2, who relatives of the deceased are. They told the court that they went to the accused's home and found the body of the deceased. The deceased was already dead. The body had cut wounds on the face and legs. That was the only evidence adduced to support death.

12. There is no dispute that there was a body which was said to be that of the deceased. PW1, PW2 and even the accused testified to that effect. They saw a body that they identified as that of the deceased. However, there was no evidence from a doctor or pathologist to confirm that indeed the body of the deceased was examined and the cause of death determined or established. Whereas there may have been a body, there was no proof of the cause of such death. The essence of medical evidence in murder cases was stated in the case of *Ndungu v Republic* [1985] KLR 487 where the Court of Appeal stated:-

"Though there are cases in which death can be established without medical evidence relating to its cause, as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution." (emphasis).

13. That point on the importance of proof of death and the cause thereof was again the subject of consideration by the Court of Appeal in the case of *Chengo Nikson Kalama v Republic* [2015] eKLR where the court again stated:

"It is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post mortem examination report of the deceased."

14. In this case, although PW1 and PW2 told the court that their relative was killed, there was no evidence of the deceased's body having been taken for medical examination. There was therefore no proof of death and the cause of such death. That means the first ingredient for murder has not been proved beyond reasonable doubt.

15. Next, the prosecution is required to prove beyond reasonable doubt that the accused caused/committed the unlawful act or omission that caused the death of the deceased. The prosecution must lead tangible and credible evidence to show that it was the accused's actions that caused the deceased's death.

16. The prosecution called two witnesses PW1 and PW2 in an attempt to prove its case against the accused. PW1 told the court that he did not know who killed the deceased. PW2 similarly told the court that he found the deceased already dead when he rushed to his house after hearing screams from the deceased's wife. He also told the court that he did not know who killed his brother, only stating that there was suspicion that the deceased could have been killed by the accused because of a love affair the deceased is suspected to have had with the accused's wife. There is however no evidence that there was such a love relationship between the two, or that the accused killed the deceased for whatever reason.

17. In law, it is the duty of the prosecution to prove its case against the accused beyond reasonable doubt and the burden never shifts to the accused. As stated in the case of *Republic v Gachanja* [2001] KLR 428:-

"It is a cardinal principal of law that the burden to prove the guilt of an accused person lies on the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities."

17. The accused, though put on his defence, denied committing the offence. He also denied knowledge of any extra marital affair between the deceased and his wife. The prosecution therefore did not discharge its burden in proving that the accused is the one who killed the deceased.

18. Both PW2 and DW1 told the court that they heard the deceased's wife scream which led to them rushing to the deceased's house only to find him dead. The deceased's wife who was present when the deceased died and was the first to scream attracting neighbours, was not called to testify in this case. It is not clear why she was not called or if there was something she knew about the murder.

19. Furthermore the alleged suspicion that the accused was the one responsible is without legal foundation. In law, suspicion alone however strong is not a basis for convicting an accused charged with a criminal offence. This position was well stated in the case of **Sawe v Republic** [2003] KLR 364 where the Court of Appeal stated-

"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

20. Having determined that the second ingredient for murder has not been proved, it will be futile for this court to venture to consider the third and final ingredient of murder, that is, whether the accused had malice aforethought. That would be a misadventure, that this court is not about to embark on.

From the evidence on record, the prosecution went into a wild goose in attempting to prove the charge of murder against the accused. The learned prosecutor was reluctant to call more witnesses, admitting as he did, that they would add no probative value to the prosecution's case. He knew he had hit a dead end. It is unfortunate but that is the truth.

21. In the end, I find that the prosecution has not proved its case against the accused beyond reasonable doubt. Consequently, I enter a verdict of not guilty and acquit the accused of the information of murder. I order that he be set at liberty forthwith, unless otherwise lawfully held.

Dated and delivered at Kakamega this 10th day of November, 2016.

E. C. MWITA

JUDGE