



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE MURDER NO. 95 OF 2010

BETWEEN

CHARLES TATIRO IRESA ACCUSED

AND

REPUBLIC RESPONDENT

JUDGMENT

BACK GROUND

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on 12.1.2010 at Misani village in Masangora sub-location Kehancha Division of Kuria West District within Migori County murdered JONNES TIBAYA MOHERE.
2. On 8/11/2011 he pleaded not guilty to the said charge before M.A. Makhandia J as he then was and on 19/3/2013 this trial commenced before Justice R.N. Sitati who took the evidence of all prosecution witnesses and put the accused on his defence.
3. On 21/1/2015 this matter was placed before me when direction were taken for the matter to proceed for defence hearing before me on 29/4/2015 when the defendant testified.
4. It should therefore be noted that I did not have the advantage of hearing and seeing the prosecution witnesses but has had the benefit of reading and analysing the evidence herein for the purposes of this judgment.

PROSECUTION CASE

5. Pw1 Christine Wankio Tibaya testifies that on 12/01/2010 they had gone for a wedding to Tanzania and returned home at about 6.pm. together with the deceased. They passed through the home of the accused mother whom the deceased stopped to talk to while the witnesses waited for him from a distance. The accused thereafter emerged with a panga to where the deceased and his mother were talking and attacked the deceased.
6. It was Pw1's evidence that upon seeing the attack she ran home and called her brother in law who raised an alarm together with her attracting people to the home but the accused and the deceased were not found at the scene. They thereafter followed the blood trail to the river where the body was found with cut injuries on the left leg and head.

7. Under cross examination she stated that she heard the accused asked the deceased who allowed him to have an affair with his mother before attacking him and that she was able to recognise the accused since there was moonlight and she was very near to him.

8. Pw2 SAMSON SINGIRA MOHERE on 13/01/2010 at 7.00a.m. Received information from his son Josephat Mohere Singira that his brother had been killed. They reported the matter to Kehancha police station and was sent for a doctor by the OCS who performed post mortem before handing over the body to them for burial on 14.1.2010. He later heard that the deceased was killed because of a love affair with the mother of the accused.

9. Pw3 SAMSON MOHERE testified on oath that on 11/01/2010 the deceased together with his wife had gone for a wedding in Tanzania and that pw1 told him that on their way back they passed through the homestead of the accused who attacked the deceased with a panga.

10. Pw4 PC Simion Pasha Wachira testified on oath that on 12/1/2010 while on duty he received a report on the death of the deceased whose body was lying at Misani village. He proceeded to the scene accompanied by the medical Superintendent Dr. Okello of Kuria and found the body in a trench. After removing the body from the trench Dr. Okello conducted a post mortem on the body which was lying a few meters from the homestead of the accused mother which homestead had been set ablaze.

11. It was his evidence that the deceased was attacked by the accused while he was talking to his mother. He tried to escape but because of the injuries he fell into a trench. Upon investigation he was able to establish that the motive of the attack was the love affair between the accused mother and the deceased who was his age mate and which was not acceptable to the accused.

12. When put on his defence the accused gave unsworn evidence and stated that on 27/10/2010 he was at his butchery business when at 11.30a.m the officers asked him whether he had business licence and since he did not have any he was arrested and taken to the police station where he was assaulted and asked to write a statement before was brought to court on 28/10/2010 and charged with an offence he did not commit.

13. It was his further evidence that his mother who is alleged to had spoken with the deceased died in 1992 and that if there was a love affair between the deceased and his mother that would have been an issue for his father who was still alive.

SUBMISSIONS

14. At the close of the defence case Mr. Majale for the state opted not to make any final submissions while Mr. Kaburi for the accused submitted that the prosecution case against the accused was not proved beyond reasonable doubt that the accused was involved in the death of the deceased. It was submitted that no malice aforethought was made out by the prosecution that the accused had reasons to assault the deceased.

15. It was submitted that the incidence took place at a foot path frequented by many people and that apart from pw1 no any other witness who saw the accused or pw1 at the scene was called. It is further submitted that no post mortem report was produced to show if there was a deceased person and what caused his death. It was therefore submitted that the motive of the action of the accused person as stated through the evidence of pw1 was disapproved by the accused testimony that his mother was dead as at that time. In support of these submissions the accused submitted the following cases

1. HIGH COURT OF KENYA AT KISIII CRIMINAL CASE NO. 68 OF 2009 R V GERALD OMARE & 2 OTHERS.

2. HIGH COURT OF KENYA AT KISII CRIMINAL CASE N. 23 OF 2009 R V ISAAC GIKENYE GABRIEL.

16. With the evidence as analysed here and the submission above it is now upon this court to determine whether the prosecution has succeeded in proving the charge of murder against the accused person beyond reasonable doubt.

17. The offence of murder is statutorily defined under Section 203 of the Penal Code as follows:-

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

18. Section 206 of the Penal Code defines malice aforethought in the following terms:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances.

(a) An intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing the death will probably cause the death or grievous harm to some person whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused;

(c) An intent to commit a felony as an intention by an act or omission to facilitate the flight or escape for custody...”

19. There are therefore the following ingredients which must be proved by the prosecution beyond reasonable doubt in order to convict the accused of the charges and these are:-

(a) The fact of the death of the deceased.

(b) The cause of the said death as proof that it was as a result of unlawful act or omission on the part of the accused and that it was committed with malice aforethought.

20. On the fact of death, it has been submitted by the accused that in the absence of the post mortem report the state failed to prove the death of the deceased person. The issue therefore for determination is whether the death of the deceased was proved beyond reasonable doubt.

21. From the evidence tendered, it is clear that the death of the deceased was confirmed by the following witnesses:-

Pw1's evidence was as follows:

“We followed the blood and at 4.00a.m. On Thursday morning we found my husband by the river. My husband was bleeding and already dead. He had injuries on the left leg and head.”

22. Pw2 SAMSON SINGIRA MOHARE had this to say:

“I saw the deceased body just beside the river... The doctor and a police officer accompanied me to the scene. The doctor operated the body after which we were given the body we thereafter took the body home. After I got burial permit we buried body on 14/01/2010.”

23. This evidence was corroborated by pw3 SAMSON MUHERE and pw4 PC SIMION PASHA who was accompanied by Dr. Okello who performed post mortem on the body of the deceased and further confirmed that the deceased had a sharp cut on the left leg. All these witnesses were able to identify the body of the deceased and indeed confirmed that the same was dead.

24. I am therefore not persuaded by the submission by the accused advocate that the omission on the part of the prosecution to produce the post mortem report was fatal to the prosecution case. It is my finding that the fact of the death of the deceased was proved beyond reasonable doubt through the evidence of the witnesses herein.

25. In this holding I find support in case of **WAHIIH & ANOTHER V UGANDA (1968) EA 278** where Spry JA had this to say.

“There have been cases in East Africa where persons have been convicted of murder although the body of the victim was never found and the case against the appellant depended entirely on circumstantial evidence. There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violent that it could not but have caused immediate death...”

26. On whether the death of the deceased was caused by the accused with malice aforethought, the evidence of Pw1 Christine Wankio Tibaya is that she saw the accused emerge with a panga and went straight to where the deceased was standing with his mother and cut the same on the leg. She was about ten meters away from them and was able to recognize the accused. Under cross examination she stated that there was a problem between the deceased and the accused over a love affairs with the accused mother. She further testified that she heard the accused say:-

“Who allowed you to have an affair with my mother.”

27. I therefore find as a fact that the accused had motive in attacking the deceased as a result of an alleged love affair with his mother since the evidence of pw1 who said she knew of the love affairs was corroborated by that of Pw4 PC Simion Pasha Wachira whose evidence was that he interrogated members of the public and relatives of the deceased and established that the cause of the attack was the love affair between accused's mother and the deceased who was of the same age as accused and therefore the relationship was not acceptable.

28. It is therefore clear that the accused had an intention to either cause the death or to do grievous harm to the deceased who died as a result of the action of the accused and therefore his defence that even if there was a love affair between the deceased and his mother that would have been for his father to deal with is not believable in view of the evidence tendered herein. Further the defence of the accused that he was arrested for operating business without licence is displaced by the evidence of Pw4 who testified that after the attack and the subsequent death of the deceased, the accused disappeared and he had to issue a warrant of arrest. He was thereafter arrested on 27/10/2010 by AP at Taranganya.

29. I am therefore satisfied that the accused armed with a panga set upon the deceased and the action of the accused had no other out come rather than death or grievous harm to the deceased who indeed died as a result of the said actions. The prosecution case against the accused was therefore proved beyond a reasonable doubt and therefore convict the accused person of the offence of murder contrary to Section 203 of the Penal Code.

Delivered, signed and dated at Kisii this 2nd day of July 2015.

J. WAKIAGA

JUDGE

In the presence of:

Mr. Kaburi advocate for the accused.

Mr. Mojale advocate for the state.