



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL DIVISION

CRIMINAL CASE NO. 98 OF 2009

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

RICHARD MBAABU.....ACCUSED

JUDGMENT

1. The accused **RICHARD MBAABU ITHALIE** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are as follows:

“On the 6th Day of August, 2008 at Naathu Location in Igembe District of the Eastern Province murdered of David Mwiti.”

2. The prosecution called seven witnesses. The facts of the prosecution case are that on the 6th August 2008 the accused was seen chasing the deceased inside the land of the deceased’s father. When the deceased fell down, the accused cut him twice on the head then took his mobile phone and ran away from the scene. The deceased died two months later while undergoing treatment at Maua Hospital. The post mortem examination report P.Exh.2, shows that the deceased died due to cardio respiratory arrest secondary to severe head injury following trauma.

3. The accused was initially charged with assault in Maua CM’s Court on the 28th of August, 2008. However on 31st, December, 2008 the court in a short ruling declared that it had rejected the charge under section 89(5) of the Criminal Procedure Code (CPC), according to the hand written notes; and section 89(a) of the CPC as per the typed proceedings.

4. The accused in his sworn defence stated that the deceased was his father’s stepbrother. The accused put forward an alibi as his defence. He said he left his home at 6 a.m. for his shamba on the material morning. At the shamba he plucked miraa worth KShs.500/= . He stated that he sold it and returned home to find his child sick. The accused said that he gave the money to his wife. It is after he went to his mother’s place that he learnt that his uncles the deceased, one Julius Kavuti (PW5) and one Joseph Kobia had fought.

5. The accused stated that he confirmed about the fight between the three brothers from his grandfather.

The accused said that he visited the deceased in hospital and found him in great pain so he was unable to talk with him. That as he left the hospital, he met Kavuti (PW5) who warned him never to visit the deceased again. Thereafter PW5 arrested him and he was taken to court. He said he could not follow the proceedings and could not tell how he responded.

6. I have carefully considered the evidence adduced by both the prosecution and the defence. I have also considered the submissions by Ms. Nelima advocate for the accused and Mr. Mungai Senior Prosecution counsel for the State.

7. Ms. Nelima urged that the prosecution had not proved the charge against the accused since there was only one eye witness and the motive for the incident was not established. Counsel urged further that the accused was unconditionally discharged by Maua court where he had been charged and that consequently the discharge is a bar to subsequent proceedings against the accused. Counsel also urged that the section quoted under which the accused was discharged does not exist in the statute law.

8. Mr. Mulochi Prosecution Counsel made submissions in this case on behalf of the State. Mr. Mulochi urged that the evidence of PW1 was direct evidence and that he witnessed the accused cut the deceased on the head twice. Counsel urged that the findings of examination by the doctor, in the post mortem report produced by the Investigation's Officer, PW6 confirmed the injuries suffered by the deceased which also corroborated PW1's evidence.

9. Mr. Mulochi submitted that the evidence of the prosecution was consistent and that it placed the accused person at the scene of crime. Mr. Mulochi urged the court to convict the accused for the offence charged.

10. I will begin with the issue raised by Ms. Nelima regarding the effect of the discharge pronounced by the lower court. As I stated earlier, the hand written record shows that the accused was discharged under section 89(5) of the CPC. There was no defect on the recording the terms alleged by the defence as the section quoted in the typed proceedings [(89) (a) of the CPC] was a typographical error.

11. The section quoted was 89(5) of the CPC. That section provides that where a magistrate forms the opinion that a charge does not disclose an offence, the magistrate shall make an order refusing the charge.

12. The effect of that finding of rejection of the charge is that the accused named in the charge has no charge facing him. Such an accused stands discharged for lack of any charge against him. In the circumstances, such a discharge cannot be a bar to future arrest and charge against the accused, as the charge preferred against him was rejected by the court. The preferred charge ceased to exist the moment the magistrate made the pronouncement rejecting the charge. In the circumstances I reject the defence argument that the discharge pronounced by the lower court should be a bar to the current charge against the accused. Nothing turns on this ground.

13. The prosecution adduced the evidence of one eye witness. The eye witness was PW1. Regarding the evidence of a single eye witness, the court of appeal in **ABDULLAH BIN WENDO VS. REX 20 EACA 166** emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

14. I considered that the incident occurred at 10am. It was in a shamba next to where PW1 was working. PW1 was a neighbor of the accused, the deceased and their families. The accused was therefore well

known to PW1. There was no suggestions made that PW1 could have any motive to implicate the accused falsely with this serious offence and none was alleged by the defence.

15. The accused alleged that the two brothers of the deceased fought with the deceased, but denied he had any encounter with the deceased, or being the one who inflicted the deceased death. He gave the names of the brothers as PW5 and one Joseph Kobia. PW1 was Joseph Kobia M'Mutea. However PW1 was clear that he had no blood relationship with the deceased. The defence did not suggest to PW1 that he was lying about his relationship with the deceased.

16. PW5 said that he was a brother to the deceased and uncle of the accused. His evidence was that he heard screams in his father's shamba. By the time he went there, he found PW1 and Isaac, PW3. On the ground was the deceased already severely cut on the head. In cross examination, the defence did not suggest to PW5 that he was the one who caused the injuries that led to the deceased death. The accused alleged that PW5 warned him never to see the deceased in hospital. In cross examination, no question was put to PW5 in regard to accused visit to hospital to see the deceased.

17. I find that PW1 was an eye witness of the incident. I examined PW1 as he gave his evidence. He had a good demeanor and impressed me as an honest witness. There was nothing to suggest that he was implicating the accused falsely. I find PW1 was honest. He witnessed the incident at 10am, in broad day light.

18. In addition to PW1's evidence, PW3 followed by PW5 also heard the screams and went to the scene in that order. They found PW1 screaming. PW1 told them that it was the accused that attacked and cut the deceased. Even though PW1 was the sole eye witness of this incident, I find the evidence of PW3 and 5 gave credence to his evidence that PW1 initial report the moment he had an opportunity to make it was to implicate the accused for the offence.

19. Ms. Nelima made issue with lack of a motive for this offence. It is true no motive was given for this attack. PW5 the brother of the deceased testified that there was no conflict or land dispute within the family. Is lack of a motive fatal to the prosecution case? Section 9 of the Penal Code which deals with intention and motive provides:

“9(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility“

20. Section 203 of the Penal code defines murder and stipulates as follows:

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

21. In **Choge vs Republic (1985) KLR1**, the court of appeal held as follows:-

“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a

corroborative factor if the other evidence had been satisfactory which it was not."

22. It is clear from the cited case (**ChogeVs Rep**) that under section 9 of the Penal Code that motive is not an essential ingredient for the offence of murder. I am persuaded by that authority. I find that the failure by the prosecution to prove a motive for the accused attack on the deceased is immaterial to proving the charge facing the accused. Nothing therefore turns on this ground.

23. The other issue is whether the prosecution proved that the accused act against the deceased was motivated by malice aforethought. When considering whether malice aforethought could be inferred from injuries inflicted on the deceased the court of appeal in **MORRIS ALOUCH VS REP CR. APPEALS NO 47 of1996 (UR)** stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later.”

24. In this case, both the evidence of PW1 and the doctors finding at post mortem were at tandem that the deceased died of an injury on the head. The doctor found a skull fracture on the occipital region of the head which is the back of the head. PW1 saw the accused hit the deceased twice on the head with a panga. From the doctor’s finding the blows to the head caused a fracture. That is an indication that the blow was heavy and severe to be able to cause a fracture. I find that having hit the deceased twice on the head with a panga that the prosecution has proved that the accused had formed the necessary intention to cause death or grievous harm to the deceased. The offence charged has been proved beyond any reasonable doubt.

25. I have come to the conclusion that the prosecution has proved the offence of murder contrary to section 203 of the Penal Code as against the accused beyond any reasonable doubt. I reject accused alibi defence, find him guilty of murder and convict him accordingly.

DATED AT MERU THIS 12TH DAY OF NOVEMBER, 2014.

LESIIT, J.

JUDGE