



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL CASE NO. 99 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

BENSON KIMANI WACHIURI alias KACHWADI.....1ST ACCUSED

DOUGLAS MARIUKI HARON alias SANSIRO.....2ND ACCUSED

JUDGMENT

Benson Kimani Wachiuri alias Kachwadi (*First Accused*), and Douglas Mariuki Haron alias “Sansiro” (*the Second Accused*) were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (*Cap. 63, Laws of Kenya*).

2. The prosecution alleged that on the 27th day of September 2010 at KCC Estate in Naivasha Municipality in Naivasha District within Rift Valley Province jointly with others not before the court, murdered FREDERICK ONYANGO OYUGA (*the deceased*).

3. To establish or prove the offence of murder, the prosecution must lead evidence to show that the accused with malice aforethought killed the deceased. “**Malice aforethought**” sometimes referred to by esoteric phrase “*mens rea*” - guilty mind, is established by evidence where any of the four ingredients set out in Section 206 of the Penal Code are established -

1. 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,
2. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied with indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused,
3. an intent to commit a felony,
4. aiding a person who has committed or suspected to have committed a felony to escape from lawful custody.

4. The prosecution called mine witnesses to prove its case against the accused. PW1 – PW4 had

testified before the First accused was reported to have died in prison custody on 23rd June 2011. The case against the First Accused therefore abetted in terms of Section 360 of the Criminal Procedure Code. The Information was duly amended and read against the Second Accused on 2nd December 2011, and the trial proceeded with the evidence of PW5 – PW9 and the accused, when he was put to his defence. Though the accused denied being anywhere the scene of the crime, the evidence against him was overwhelming. This was the evidence from PW1 (the wife of the deceased, (PW2, a neighbour of the deceased, PW5, a neighbour, PW6, (*one of the investigating officers*), PW7 (*a firearms examiner*), PW8 (*the Doctor*) and PW9 (*a Scenes of Crime Officer*).

5. PW3 and PW4 merely identified the body of the deceased for purposes of the post-mortem by PW8, the Doctor.

6. It was PW8's evidence that he carried out a post-mortem autopsy on the body of the deceased, and these were his findings. There was blood oozing from the nose, mouth, and left side of the back, with a wound on the right ear, 1 cm diameter (*entry*) with burnt edges and another on the left side of the neck – 3cm in diameter (*exit*), a wound on the ankle 1 cm in diameter with burnt edges (*entry*) and another on the left side of upper back 2 cm diameter (*exit*). The respiratory system with shattered left lung with massive haemothorax. The doctor put the cause the death to **firstly** severe respiratory failure due to shattered left lung, and **secondly**, to massive blood loss due to gun shots. The question which therefore begs answers is who fired the gunshots, the accused or the first accused who was an accomplice with the second accused, or some other accomplices such as “Freddie” who is said to be at large?

7. It was the evidence of PW1, the wife of the deceased that after their normal chores on the fateful day, she, (*a casual at a vegetables company in Naivasha*), and the deceased, (*a fish monger, also in Naivasha, and a Supervisor at KARI – station Naivasha*) returned home. She found the deceased had already arrived at home when she returned from her work. Finding no provisions (*food items*) for the evening meal, the deceased went out to buy some, and returned shortly thereafter.

8. The first accused (*now deceased*) arrived and called out the deceased that her husband informed him that he was tired, and he switched on the TV, and stayed until about 9.00 p.m. when her friend and neighbour (Rebecca Akinyi (PW5) left after news started.

9. It was PW1's testimony that immediately Rebecca left, the door to their house was merely closed, and not locked, two people pushed the door and burst into the house. She knew one of them called **“Freddie”** or **“Lankan”**.

10. Recollecting the events of that early night, after being dismissed by the deceased, the First Accused (*now deceased*) as stated, returned at about 8.30 a.m. and that her husband went out and had a word or spoke to the First Accused, and her husband returned into the house. However as Rebecca was leaving and the door was closed but not locked, *“Freddie and Kankan”* burst into the house with a gun AK 47, a big gun. It was Freddie who had the gun. The house (*a small room*) had an electric bulb, her husband was holding their child, “Freddie hit her husband, switched off the bulb on and off and on again, and then shot my husband, three times and then left laughing. The people outside the door opened the door for him and he left. Her screams attracted her neighbours, and the first person to arrive was Tobias (PW2). Her husband was dead.

11. It was also PW1's testimony that the accused were persons who were doing business with her husband. She was of the view that “Freddie” and “Kankan” were gunned down by the Police about one month following her husband's killing.

12. PW1 however testified that she did not know “Douglas” the second accused or the accused currently, as she had never seen him, but knew “Kachwadi”, the first accused (*deceased*).

13. In cross-examination PW1 averred that it was “Freddie” and Kachwadi who killed her husband. She reiterated that it was the First Accused who visited her house twice, and 6.30 p.m. and 8.30 p.m. She was however informed that it was “SANSIRO” who was guarding the deceased's door outside, probably

until the job was accomplished.

14. PW2, after hearing the screams of PW1, came out his house which was about ten metres from that of his neighbour, came out holding a stick, and he saw a person standing by the door of Ongaga, (*the deceased*), and when he shouted - "what is going on there? That person whom he used to see but did not know his name, shone a torch at him. So he threw his stick and hit the person by the side. That person took the stick and smashed the light bulb, and was on him before he realized what was happening. His little daughter came out but was of no help to him, so he struggled with the assailant until he knocked him down, but the assailant hit him by the eye, and he let him lose. The assailant then ran and opened the door for the person who was in Onyango's house, and they both disappeared into the darkness.

15. When he eventually went into Onyango's house he found that he had been shot on the forehead.

16. In cross-examination PW2 stated that he did not see any of the two accused.

17. PW3 and PW4, identified the body of the accused for the purposes of the post-mortem.

18. PW5, Rebecca, corroborated the evidence of PW1 that she had been in PW1's house and that it was she who opened the door, when the two assailant entered PW1's house and shot her husband. She however did not see the assailants, and neither did she witness the killing.

19. PW6, sought the persons mentioned by PW1 and had the two accused arrested at KCC Estate. His evidence corroborated that of PW1 that the accused visited the deceased's house twice, once at 18 hrs and again at 9.00 p.m., with another person whom she could only describe by appearance.

20. PW7, the firearms examiner testified that he examined and established the ammunition used to shoot the deceased was of 7.67 mm calibre and used in AK 47 rifles, and that the ammunition was fired from one gun, and AK 47 Rifle, a firearm that is common in the criminal world.

21. PW9, was the scenes of crime officer and took twelve photographs of various positions of the deceased as he lay on the ground.

ANALYSIS OF EVIDENCE

22. To establish malice aforethought, the evidence must show that the accused was involved in any of the three circumstances set out in Section 206 of the Penal Code cited above.

23. In this case, it was the evidence of the accused that he had been invited by the first accused (*now deceased*) to go fishing on the material. He went to the appointed area, but that his friend, the first accused never turned. He went to the shop of one Thiongo and waited for his friend between 9.00 – 10 p.m. but the friend never turned up. He dozed off in the seat until the next morning.

24. However on the next day the 28th day of September 2010, at about 6.00 a.m., he heard a knock at his door, and when he opened, he met the first accused, his friend Benson Kimani who informed him that Onyango had been murdered that night. He learned later that it was "Vincent", a friend of Kimani who informed the Police that he was involved. This accused stated that he had no knowledge about a firearm. None of the witnesses mentioned his name in the entire prosecution.

25. This accused was mentioned by Kimani to Vincent as the persons involved in planning the murder of the deceased. Section 20(1) of the Penal Code sets out the category of persons deemed to be principal offenders and Section 20(3) thereof says -

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment as if he had himself done the act or made the omission, and he may

be charged with doing the act – making the omission.”

And Section 21 of the Penal Code provides -

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

Whether or not this accused and the deceased accused had formed an intention to prosecute an unlawful purpose in conjunction with one another, is a question of fact or evidence. The evidence in this case is that the deceased accused, informed one, Vincent that this accused was involved in the prosecution of the unlawful purpose, namely, the killing of the deceased Onyango.

This accused had told the court on oath that he waited for Benson Kimani his friend at Thiongo's garage from 9 – 10.00 p.m. He also told the court that he dozed on the bench until the next day. It is not clear what the “next day” meant because he also told the court his friend Benson Kimani knocked at his door at 6.00 a.m. and informed him that Onyango was killed. If he is being truthful did he sleep in his house or as he also claims, on a seat at Thiongo's garage. The Constitution erects in every corner a veritable wall of protection of the accused. To ask him to produce “Thiongo” would be to shift onus of proof of his guilt, and a prosecution witness is battered on every word he utters. The court will consequently never know whether this accused one of the two persons who burst into Onyango's house, leaving “Freddie” and “Kankan” to shoot the deceased Onyango, while they kept watch outside his door, or whether this accused is the person who wrestled Tobias (PW2) and scratched the eyes to loosen his grip, and then run away.

If “Kachwadi” the deceased accused informed Vincent, and Vincent was not charged, that this accused was involved in the murder of the deceased Onyango, then the evidence would have been necessary, but it would have had problems. The information having come from the deceased accused, would have been evidence of an accomplice. The evidence given by a co-accused person against another should only be considered if it is evaluated and found believable and if it is corroborated by independent evidence pointing to the guilt of the accused, and it is implicated the person giving it (**MATHEKA VS. REPUBLIC [1983] KLR 351.**

In this case, the person who implicated this accused is himself dead. The evidence of PW1 was that it was “Freddie” who shot her husband and went laughing. It was also the evidence PW7 one of the Investigating Officers that Onyango was executed because he was perceived by the accused to be an informer on them. More importantly, none of the prosecution witnesses mentioned his name as being part of the gang that raided the deceased's Onyango's house and killed him. In other words there is no independent corroborative evidence to the information by “Vincent” given to him by “Kachwadi” the first accused who is now deceased.

This accused may indeed have been part of the group that arranged to have Onyango killed. There is however no evidence upon to base a conviction upon him.

In the circumstances, I must, in terms of Section 306(1) of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*) find him not guilty of the offence contrary to Section 203 as read with Section 204 of the Penal Code and I acquit him accordingly.

I direct that unless otherwise lawfully held, he be set free forthwith.

It is so ordered.

Dated, signed and delivered at Nakuru this 5th day of December, 2014

M. J. ANYARA EMUKULE

JUDGE