



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Case 14 of 1995

REPUBLIC..... PROSECUTOR

versus

1. RUPHUS MBOGHO MWANEI..... FIRST ACCUSED

2 . EDWARD MWAREA (DECEASED)..... SECOND ACCUSED

3 . KWEKWE MALANDI..... THIRD ACCUSED

4 . MIRIAM MENZA..... FOURTH ACCUSED

JUDGMENT

Whilst awaiting his trial the 2nd Accused person in this case expired. The case against him has since abated.

The trial proceeded against the remaining three Accused persons who had pleaded not guilty to the offence of murder contrary to section 204 as read with section 203 of the Penal Code.

The particulars of the offence being that on the 18th of October, 1993 at Kishamba Village, Kishamba Sub-Location in Taita/Taveta District of the Coast Province jointly murdered Raphael Malandi.

In the opening address by the State a brief circumstances of the case to be proved by them was that Accused No.1 & 2 acted in concert with Accused 3 & 4 to kill the deceased.

The 1st and 3rd Accused are said to have been paramours. They intended to get rid of the husband to the 3rd Accused. Both 1st and 3rd Accused had children from their relationship. They were trying to get the deceased out of the way. At first the plan would be for Accused No. 2 to administer poison on the deceased. This they would do on payment from the proceeds that the deceased had from the sale of his cattle.

When the murder took place money was to be found under the bed where it is said it is normally kept, dug in the dirt ground.

What actually came out of the prosecution evidence is that on the material morning of 18.10.93 at 2.30 a.m., PW.1 was at a funeral when he heard screams and a commotion. PW.3 also stated he was at a funeral and heard screams coming from the deceased's house. Members of the public ran towards the house. They had by now informed the Assistant Chief PW.2 of the incident and at 3.00 a.m. the Assistant Chief found the deceased's body tied with a rope from the rafter.

The deceased's body was naked and kneeling. PW.5 the son of the deceased lived a kilometer away and came to the scene on that material day. He then found the door locked. On gaining access he found the body kneeling by the bed with a rope round it. He later identified the body during post-mortem.

It seems that members of the public were able to note footprints that led from the vicinity of the deceased's house. The foot-prints were followed with PW.1 & PW.3 being involved. Two foot-prints were bare footed. Two had sandals. The foot-prints were of a total of four people. These foot-prints ended in the house of the Accused No. 1 & 2. They were able to apprehend the Accused No.2 in the forest but Accused No.1 gave himself up at the police station.

The two Accused No.3 & 4 were apprehended and interrogated. Both stated that they heard a break-in. They fled out the back-door. They informed this to PW.7 an Inspector of Police.

A total of Kshs.6,007/- was recovered from the deceased's jacket pocket believed to be proceeds of the sale of the cows.

PW.4 stated on the material morning of 18.10.93 she heard only the noise of a whistle. She provided information in the prosecution case that the 2nd Accused was a medicine man, a witch doctor or wizard who did try to heal her son.

I presumed the prosecution brought in her evidence to try and prove that the Accused No. 2 may have intended to murder the deceased through medicine.

A post-mortem report was produced by PW.9.

The evidence next that was brought by the prosecution was of a charge and cautionary statement. The statement of Accused No.2 was never produced as this court ruled it was inadmissible.

The statement of Accused 1, 2 & 4 were produced.

In the evidence given by Accused No.1 with his statement to the police was that the 2nd Accused requested he assist in the killing of the deceased. He agreed to this. The door was to be left opened by his wife and money they were to be paid would be under the bed.

They found the door opened., went in, strangled the deceased then hanged him from the rafters.

In their evidence in court on their defence, Accused No.1 stated under oath that he did not know the deceased; he had no children with the Accused No.3 and wife of the deceased. He knew Accused No. 2 as one of the village youths. He heard the police were looking for him. He went and gave himself up at the police station.

The Accused No.3 in her unsworn statement said that she heard people break-in through the front door. She ran out the back with Accused No.4 - a guest of hers who had been looking for employment.

Accused No.4 stated she had been looking for employment. As it was late; Accused No.3 invited her to spend the night. People attacked the house at night. She ran out of the back door. They went away screaming and the whistle was blown. In the submissions the advocate for the Accused stated that apart from the confession statements given by the Accused persons there are no evidence, that proved their guilt.

The State Counsel still relied on his theory that the Accused No.1 and 3 were lovers. They being the move of the murder.

The assessors in their opinion found all the three Accused persons guilty as charged. Each of the assessors gave their own individual opinion. Accused No.1 was not reliable and appeared to be lying. The aspect that the Accused 1 & 3 were lovers was proved through their statement. It was Accused No.3 who showed the room where the deceased was and actually brought the rope.

The floor had been dug under the bed. This required to take time. Both Accused 3 & 4 were aware of this due to the time it would take to dig.

The door has been purposely left opened for the Accused 1 & 2 to gain entry is also an indication of the guilt of the Accused 3 & 4.

No case law has been submitted by any of the advocates.

I find in this murder trial a lot of emphasis was raised on the foot-prints that led from the deceased's house to the house of the Accused 1 & 2. Accused No. 2 was arrested in the forest but Accused No. 1 gave himself up at the police station. He did this on hearing that he was wanted by the police? He gave his confession to the police.

Apart from the confessional statement, the law requires that such statements be supported or corroborated by the evidence of the witnesses. Some independent evidence. This can normally be done where the police in their investigations connect the commission of the offence to the Accused persons.

The first being that of finger-prints. On using the scene the police should have taken finger-prints from the deceased's body and those of the three - four Accused. By doing this it is a connection to establishing whether the 1st and 2nd Accused were the ones at the scene,

A photograph of the scene of the deceased would have been of immense assistance.

Thereafter there was the issue of foot-prints being followed. These foot-prints were treated and followed at night. The same should have been photographed and the investigating officer shown how this was connected to the Accused 1 & 2.

After a charge and cautionary statement be taken from the Accused. This was duly done. These statements should not in the normal circumstances stand alone. They were admitted in evidence but must be supported with at least some independent evidence.

The motive of killing the prosecution stated was that of love. This was never proved. There was no evidence that an affair had been going on before with the two of them.

The other aspect is that the three Accused are said to have planned to administer poison on the deceased. This was in fact never proved.

The assessors are of the view that the fact the 1st and 2nd Accused spent time to dig under the bed and to leave the front door open is an indication that Accused 3 & 4 participated in the killing.

If they did participate they should never have made a report to the Chief.

I hereby find that there is a strong suspicion that the three Accused and another may have committed the offence but I would find that they be given the benefit of a doubt.

They are found Not Guilty.

They are set at liberty unless otherwise lawfully held.

Dated this 6th day of March, 1998 at Mombasa.

M. ANG'AWA

J U D G E