Republic v Saiya (Criminal Case 48 of 2018)
[2024] KEHC 1654 (KLR) (23 February 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE 48 OF 2018

RN NYAKUNDI, J

FEBRUARY 23, 2024

BETWEEN

REPUBLIC .... PROSECUTION

AND

ISAIAH MAWABA SAIYA .... ACCUSED

JUDGMENT

1. The accused persons are facing a charge of murder contrary to section 203 and 204 of the penal code. It was alleged that on the 17/7/2018 at Bondeni-area Eldoret West Sub-County, accused persons jointly murdered Denis Omudete. They pleaded not guilty to the charge. As usual under Article 50(2) (a) of the *Constitution* they are presumed innocent until the contrary is proved by the state beyond reasonable doubt. That burden never shifts to the accused persons, save in rare exceptional circumstances as stipulated in Section (111) of the *Evidence Act*. See the principles in the cases of *Woolmington v DPPC* (1935) AC 462 *Kioko R* (1983) KLR 289. *Mbugua Kariuki R* (1976-80) KLR 1085 *Oremo v R* (1991) eKLR 22 In a murder charge as prescribed in section 203 of the *Penal Code*, the ingredients to be proved beyond reasonable doubt are:
    1. That the deceased named in the charge sheet is actually dead.
    2. That the cause of death was unlawful
    3. That the unlawful acts or omission committed by the accused persons were actuated with malice aforethought.
    4. That the accused persons were indeed positively identified and placed at the scene of the crime.
2. In the instant case the prosecution summoned the evidence of six (6) witnesses in support of the above ingredients.

3. As regards the first ingredient of proof of death of deceased PW5 Dr. Macharia who conducted the post mortem examination confirmed to this court that the deceased body was identified by Fred Olyama and Zablon Mamai prior to the postrmortem. This testimony by PW5 is in consonant with the guidelines in the following authorities *Kimweri v R* (1968) EA 452. *Nyamohanga v R* (1990-1994) (EA 462 *Ndiba v R* (1981) KLR 103 *R V Cheya and Another* (1973) EA 500. There is no evidence on the part of the defence to controvert prima facie medical evidence adduced to proof the fact of death of the deceased. That ingredient remains proven beyond reasonable doubt.

4. The next crucial ingredient deals with the cause of death and the law envisages that it must be proved to being unlawful. the *Constitution* in Article 26 protects and guarantee every citizen and other persons within our Republic the right to life. It goes further to state that a person shall not be deprived of life intentionally except to the extent authorised by this constitution or other written law. Its trite therefore for the prosecution to establish a link between the accused in the dock and the death of the deceased, victim of the offence as being unlawful.

5. In the case of *Guzambizi Son of Wesonga v Uganda* (1951) 15 EACA every homicide is presumed to be unlawfully caused unless there is evidence to the contrary that it is justified, excusable, natural, accidental etc. The unlawful act or omission of the accused must be proved to have occasioned the specific result of death. Where the cause of death is not the probable consequence of the unlawful act of the accused he or she should not be found liable of the indictment. in our legal system cause of death is usually proved by medical evidence produced by the prosecution pursuant to Section 48 of the *Evidence Act*. (See also *Waihi v Uganda* 1968) EA 278 *John Muwa Muli v R* (Mombasa CACRA No 96 of 1999.

6. In the case at bar as reflective of the post-mortem report exhibit 1, multiple wounds on the face. Cheek, mouth, mandible, parietal temporal region, left supra orbital region and skull fracture is crowded with high degree of findings that the deceased cut wounds on a variety of his body parts subsequently resulted in a fatality. There is no evidence of justification, self-defence, provocation, accidental or excusable loss of life on the part of the defence. I am satisfied that the cause of death as opined by PW5 was as a result of unlawful acts or omissions leaving no doubt that the prosecution has discharged the standard of proof vested in it by the *Constitution* and applicable laws.

7. The third ingredient of malice aforethought is at the core of the offence of murder as defined in section 206 of the *Penal Code*. True homicide in Kenya is established when the prosecution lays down evidence that accused had an intention to cause the death of any person or to occasion grievous harm and it matters not whether such a person is the person actually killed or not.

8. Further the code provides the features of knowledge that the act or omission causing death, was probable cause death of some person or whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not by a wish that may not be caused. This ingredient is manifested through the express or indirect conduct of the accused and it’s also always inferred from the surrounding circumstances of each specific case. See the principles in *Ogeto v R* (2004) 2 KLR 14 *Guyo Duba v R* CACRA No 89 of 1999, *Mandera v R* CACRA No. 59 of 1997 *Rev v Tubere S/O Ochen* (1945) 12 EACA 63.

9. The emphasis in Tubere case identified the following characteristics as capable of manifesting malice aforethought, the nature of the weapon used, the manner in which it is used, the conduct of the accused prior and after the crime, the nature of the injuries, and the part of the body injured.

10. In the case before me from the post-mortem report exhibit 1 malice aforethought is deducible as captured in the testimony of PW5. This was a brutal killing only well calculated and planned to kill the

deceased. There is an inference of express malice on the part of the perpetrator. See the case of *Ernest Asami, Bwire, Abanga alias Onyango v R* (CACRA No. 32 of 1990. The surrounding circumstances leading to the death of the deceased flow from the testimony of PW1 – John C Siprani, He recalled that on 17/7/2018 he was at the Busaa den and did quarrel with his wife about a relationship she had with Isaiah, the first accused. According to (PW1) the 1st accused also happens to be a resident of the same neighbourhood. On the aforesaid material day PW1 stated that the 1st accused went to their house in which the wife opened the door. That is when (PW1) noticed that the 1st accused was armed with a panga and a metal bar. In a little while (PW1) stated that the first accused uttered the following words "I have my own wife, this is your wife, I will finish you" That is when PW1 sought assistance of his friend (Dennis the deceased and one Brayo. On arrival, the 1st accused had left the compound, that is when PW1 decided that they step out to look for food at a nearby grocery. Unfortunately, the eatery place was closed. Therefore (PW1) confirmed to the court that they parted ways only soon thereafter he heard of screams to the effect that Deno, Deno has been cut, on the head.

11. Further to the screams, PW1 testified that he rushed to the scene only to establish that Deno, the deceased had been cut on the frontal area of the head which also affected the skull. This became a police case as the deceased succumbed to death out of the injuries inflicted by the assailant. Further in support of the prosecution case to discharge malice aforethought PW2 Elizabeth Ekai told the court that on 17/7/2018 she met with the deceased. In PW2 testimony the deceased was expected to return to her joint to have a meal but was never the case. While PW2 was in her house she was awakened by some screams. In response to the screams she found the deceased having been fatally assaulted lying down in a pool of blood.

12. As for PW3 Benard Wanjala in the night of 17/7/2018 he went out to check the safety of his sheep, simultaneously he heard some screams that is when he came to learn that the screams were about the killing of the deceased. It was at that scene PW3 observed that the deceased had sustained serious injuries. His body was to be collected by the police for Moi Teaching and Referral Hospital Mortuary for post-mortem examination. This evidence by PW1, PW2, & PW3 was corroborated with that of PW4 Corp Benard Biwott.

13. As for PW6 Sifuna Kakai he told this court on the role he played to carry out investigations which he did by visiting the scene, where he found the deceased on the ground with two blood stained iron bars next to the body. Through his investigation, 1st accused was arrested as one of the key suspects to have killed the deceased and duly processed to face the charge of murder contrary to section 203 of the *Penal Code*. The metal bars recovered processed as exhibits and also a jacket being worn by one of the suspects in court. The said jacket according to PW6 was blood stained.

14. The court had the advantage of scrutinizing the testimonies given by the prosecution witnesses and thereafter weighing it with the defence evidence as to whether any of them was involved in the commission of the trial. The first accused vehemently denied of being at the scene where the deceased was killed. As for the 2nd accused he alleged that on the material day he was in company of his girlfriend Wanjiru attending a birthday party. At the end of the social evening, having enjoyed the birthday and being served with alcoholic drinks they both left for home in a motorcycle. When they were dropped by the motorcycle rider, unfortunately a gang of people following them closely attacked them without any justification. The girlfriend managed to escape from that scene but as he walked home, the police officers on patrol arrested him alleging that he was one of the suspects who must have attached the deceased.

15. As mentioned elsewhere in this judgement the prosecution case was purely circumstantial. The threshold of it is as stated in the cases of *Simon Musoke v R* 1958 EA 715 *Tepere v R* (1952) AC 489

Ernest Bwire Abanga Alias Onyango v R (CACRA NO.32 of 1990. The parameters under which the case of circumstantial evidence is to be evaluated as correctly stated by the courts in the above cases is captured in this extract. "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused… In a case of circumstantial evidence one must look for complete chain of circumstances and not on snapped and scattered links which do not make a complete sequence. This court finds that this case is entirely based on circumstantial evidence while appreciating circumstantial evidence, the court must adopt a cautious approach as circumstantial evidence is "inferential evidence" and proof in such a case is derivable by inference from circumstances.

16. In this murder charge against the accused persons, the circumstantial evidence linking the 1st accused as the perpetrator flows from the testimony of PW1 who gave a chronology of events on the fateful day of the 17/7/2018 apparently being the same day the deceased was killed. It all started with a confrontation between PW1 and the 1st accused all about a relationship he may have had with PW1's wife. Indeed, the record bears me witness that the 1st accused went to PW1's house while armed with a panga and a metal bar ready to start a fight if the following words uttered by the 1st accused by anything to go by "I have my wife, this is your wife, I will finish you". These words are of great significance to this case in view of what transpired soon after PW1 called for assistance from the deceased and one Brayo. Apparently on arrival at the scene, the 1st accused had taken flight. Simultaneously, PW1 and the deceased walked out of the homestead to go and secure some food at PW2 premises. In a turn of events they did not have that meal but decided to part ways to their respective homes. In a spur of the moment screams were heard all over the neighborhood which all pointed to the strong indication that Deno the deceased had been killed. It was in those circumstances PW1, PW2, PW3, PW4, visited the scene of the crime. Immediately it was established that the deceased had been killed on the spot and next to the body was a blood stained metal bars. In the 1st instance there is direct evidence that when the 1st accused went to PW1's house to cause a commotion and ready to fight he was armed with a panga and a metal bar. These metal bars were the same ones positively identified placed next to the body of the deceased.

17. As per the prosecution case, the sequence of events between the encounter of PW1, the 1st accused and later entry of the deceased to assist in repulsing the 1st accused from endangering PW1's life is in close proximity to place him at the scene of this murder upon the deceased. That being the case, it goes without saying that there is no intervening factor to break the chain of events from the time the 1st accused went to PW1's house and soon thereafter purported to take flight on hearing the assistance being sought from Dennis, herein the deceased. It is the case of the prosecution that the deceased was alive on the 17/7/18 at Bondeni area as confirmed by PW1 whom they spent considerable time with that very night. The material evidence to proof existence of the 1st accused being involved in the murder of the deceased has not been controverted by any other evidence from the defence. Having appreciated the oral, physical, and documentary evidence on record, and placing them in the right perspective of the standard and burden of proof demanded of this case I am convinced to hold that the 1st accused is guilty of the offence of murder contrary to section 203 as read with section 204 of the penal code. That given admissibility of that evidence certainly, the 1st accused stands convicted of the offence and as pointed out in Section 204 of the *Penal Code*, sentencing hearings be conducted on appropriate sentence to be imposed as per the law established. When it comes to the 2nd accused I have weighed the evidence by the prosecution in this trial and giving each accused person his fair due as a

matter of right I am at pains to find cogent evidence to hold him culpable of the offence of murder involving the deceased. Notwithstanding the evidence it was found in the middle of that night having sustained some injuries and the police on patrol on interrogation became suspicious and eventually effected an arrest in respect of this indictment. First in the context of these proceedings there is no evidence led from the very beginning by the prosecution that the 2nd accused was acting in concert with the 1st accused to plan and execute the murder against the deceased. From the situational analysis of the two versions given by the prosecution on the 2nd accused there is no convergence to prove that the essential elements in the alleged offence as adduced are capable of pinning down the 2nd accused for this offence beyond reasonable doubt. It is to be noted that the 2nd accused appears not to have been on the same screenshot with the 1st accused to rationalize the application of the doctrine of common intention. I believe the better approach would have been for the prosecution witnesses to specifically avail credible and relevant admissible evidence to warrant indictment against the 2nd accused. There was no prima facie or probative evidence believable and in possession of the prosecution to warrant dragging of the 2nd accused to this criminal proceeding. As a matter of law and fact the standard of prove in a criminal trial of beyond reasonable doubt was never discharged by the prosecution to warrant any adverse findings being made against the 2nd accused. From the above it is clear tht the 2nd accused is free indeed and is hereby acquitted of any blameworthiness and shall be set free forthwith unless otherwise lawfully held. These considerations and the several pieces of evidence pieced together and taking cognizance governing various which leads me to a final decision that the 1st accused is to be held culpable for the offence of murder under section 203 as punishable within the framework of section 204 of the *Penal Code*. The effect of this is to call upon both the prosecution and defence counsel to make brief submissions on mitigation and aggravating factors for purposes of influencing the discretion of the court in sentencing.

Sentencing

18. Generally following convictions, the Senior Prosecution Counsel Mr. Mugun submitted on behalf of the state that the convict has no previous convictions that the court should take into account the seriousness of the offence and the intention to commit the homicide which resulted in the killing of the deceased. He therefore, urged the court to apply its mind in exercising discretion to pass a just and proportionate sentence for the offence. As for the convict the following arguments in support of mitigation were canvassed as dated on 23/2/2024;

    i. That I am remorseful and greatly repentant for the loss incurred by the victims family, to the society and fellow Kenyans for creating sense of insecurity.

    ii. That I am condemning any form of crime with the strongest terms possible and to urge the youth to embrace and exercise patience and contentment in their live no matter what.

    iii. That I am praying that the court puts my criminal record into consideration having found as such it would be fair to state that there is in fear that, I would pose a danger to the society if granted an acquittal sentence due to the term served in pre-trial custody is enough for someone to rehabilitation and transform for the better tomorrow.

    iv. That praying that, the above circumstances should not be constructed to suggest justification of the crime or an excuse to escape punishment but I humbly urge the court to find the circumstances as sufficient mitigation factors that cumulatively amount to substantial an compelling reason necessitating a deviation from the initially prescribed death sentence.

    v. That I take this opportunity to once again condemn the alleged offence with the harshest words possible and regrets that It never happened.

vi. That I am the only sole bread winner in my family being a widower and a father of six children whose care and protection has been compromised and their school attendance since my arrest.

vii. As per evidence on record and facts appreciated by the prosecution, I had no intent of aiding or abetting the murder of the deceased.

viii. That I am not the primary offender in this case but rather an accessory after the fact of murder.

ix. That therefore, pray for a non-custodial sentence and I promise to abide by the condition of the non-custodial sentence.

x. I never intended to commit the crime before that, but I fell victim of the same as was not the primary offender.

19. The sentencing objectives in Kenya have been captured in the *Judiciary Sentencing Policy Guidelines* at page 15 to be the following: -

xi. 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.

xii. 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

xiii. 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.

xiv. 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

xv. 5) Community protection: to protect the community by incapacitating the offender.

xvi. 6) Denunciation: to communicate the community's condemnation of the criminal conduct.

20. In the case of *Francis Karioko Muruatetu & Another v Republic*, Criminal Petition No. 15 of 2015, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

> " It is for this Court to ensure that all persons enjoy the rights to dignity.
>
> Failing to allow a Judge discretion to take into consideration the convict's mitigating circumstances, the diverse character of the convicts and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity."
>
> In the "Muruatetu Case", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;
>
> "(a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaption of the offender;

(h) any other factor that the Court considers relevant."

21. In the circumstances of this case I have considered the relevant aggravating and mitigating factors as advanced by the prosecution and the defence. In considering the appropriate sentence, I also bear in mind the seriousness of the offence, the manner in which it was committed and the victim psychological trauma for the demise of a loved one prematurely through a criminal act. The culpability of the convict in this matter, his motivation, intention and particular circumstances as captured in the record are of a nature that only a custodial sentence would serve the interest of justice. The court recognizes that the circumstances surrounding individual offences can vary greatly and that is so even before one comes to consider the individual offender and the appropriate individualized sentence. While the public may be yearning for a consistent approach to sentencing as a highly desirable outcome it is not to be expected that there would be uniformity in terms of actual sentences imposed by the same session judges or other judges sitting at different territorial jurisdictions. As for this convict at the back of my mind the gravity and seriousness of the offence against the right to life under Art. 26 of the *Constitution* without any excuse of justification will reflect on the sentence I am about to impose in regard to the convict. What are the ethos and aspirations of the Kenyan people today as they read the print media, digital platforms and radio pronouncement on the inherent danger faced by their fellow countrymen when it comes to the protection of their right to life as guaranteed by the supreme law? The interests of society and the community have never demanded for harsh and appropriate sentences for serious offences like murder intentionally committed and executed as they do now. How such punishment is to be crafted to be just and fair to society is moot.

22. In summary, I echo the words of the learned Author Burchell on *Principles of Criminal Law* 99 in which he explains the principle of crime and sentencing in the following terms;

> Punishment is an integral part of the concept of a crime. without the liability to punishment, there would be no distinction between penal and non-penal laws. Thus it follows that to render any act criminal in our law, there must be some punishment affixed to the commission of the act and where no law exists affixing such punishment there is no crime in law.

23. In the criminal justice system of Kenya punishment must comply with two legal principles to pass the test of legitimacy. First, any sanction, penalty or punishment should be reasonably defined and secondly, the statutory and regulatory framework scheme on imposition of sentences must meet the requirements of the principle of legality. In light of this I sentence the convict to 28 years imprisonment taking into account Section 333 (2) of the *Criminal Procedure Code* the period spent in remand custody since he was arraigned in court on 25/7/2018 be credited as a remission to this custodial sentence.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF FEBRUARY, 2024

In the Presence of:

Accused in person

Mr. Oyaro for the Accused present

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R. NYAKUNDI

JUDGE