



**Republic v Nangeso & another (Criminal Case 37 of 2018)
[2024] KEHC 1735 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 37 OF 2018
SC CHIRCHIR, J
FEBRUARY 22, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

CALEB AGANI NANGESO 1ST ACCUSED

JOSEPHAT AMAM ALIAS NGWIRI 2ND ACCUSED

JUDGMENT

1. The 1st and the 2nd accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.
2. The particulars of the offence are that on the 18th day of June 2018 at kapchemwani village, Galona sub-location Gisambai location in Hamisi sub-county within Kakamega County murdered Joram Kavosi Agani
3. They denied the charges and the matter went to full Trial. The prosecution called a total of 8 witnesses.

The Evidence.

4. Pw1 was Linet Shavanga the wife of the deceased. She testified that she knew the 1st accused and the 2nd accused since they were her neighbours. She identified the first accused as Alex and stated that he was her in-law. She identified Accused 2 as Josephat and a neighbour.
5. She stated that on 18/6/2018, her husband was on leave and had come home from Kitale where he worked. She on the material day, she had some noise coming from the deceased step-mother's house which was within the same compound as their house. She informed the deceased, who insisted to go out and investigate what was happening. He left with her 16 year- old son for the step- mother's house. She later heard one of her husband's brothers exclaiming that they have killed their brother. She ran



towards her step- brother's house to see who was being "killed". She found that the deceased had been beaten. He was unconscious. He was in a sitting position being supported by the step- mother. The step – mother was saying "they have killed him". The deceased was not bleeding but he had a swollen face. He was being held outside the house. They took him to the house, changed his clothes and took him to mbale hospital. The deceased was not admitted. He regained consciousness

6. They went home using a motorbike. He walked alone into the house, took some tea and told her she will tell her what happened the next morning. The deceased later told him that, while he was on his way to the step- mother's house, Caleb (1st accused) emerged from a trench and attacked him. He sat on his chest and strangled him, such that he could not scream. The deceased was fine the following day. Visitors came to see him. Accused No. 1 came too, at about 11am. Accused 1 and the deceased sat and talked. Caleb gave the deceased ksh. 500. When the deceased sought her opinion on what to do with the money, the witness took it and gave to the 1st Accused's child with instructions to give it to the 1st accused. She further stated that the 1st Accused then called the deceased on phone to complain. About the return of the money. Since then Caleb has never gone back to her house. That day in the evening the deceased's condition deteriorated. he was taken to kakamega County hospital the following day and put in ICU . He died on Saturday. The first accused disappeared upon the death of the deceased but he was later arrested.
7. She further stated that the deceased informed him that on his way to his step- mother's he first met Accused 2 and they talked; that Accused 2 also stepped on him. According to the witness there were was no feud between the deceased and the Accused persons. She also stated that she has no difference with the Accused persons.
8. On cross examination, she confirmed that the deceased referred to the 2nd accused person as Ngwiri. She admitted that she did not record the claim that the Accused sat on the deceased. She further stated that she was distressed as she was yet to bury her husband. Her statement was marked as MFI D 1. She stated that she reported what the deceased had told her, she further stated that on Tuesday night, the deceased was hallucinating and saying his own things. A CT scan was done, and it showed that there was blood in his brain. She further testified that it was only the two of them when the deceased told him what had happened.
9. She further testified that on Tuesday morning, Caleb was among the visitors in the house and the deceased told the people that he knew the people who had attacked him.
10. On re-examination, she stated that she could not tell the – state of mind of the deceased when he narrated to her what had happened. She recalled that he was weak and he had swelling on his head. She claimed that when she recorded the initial statement she had been distressed and had not mentioned that the accused had informed her about his attackers.
11. PW2 told the court that he knew both Accused persons, the deceased and PW1 as they were all neighbours.
12. He testified that on 18/6/2018 about 7.30 P.M, they were watching football when he was called by his neighbour, Evans and was informed about some screams coming from nearby. He and victor went towards the direction of the screams and they met with Linet and Joyce. When they arrived on the scene, they found the Japheth (pw5) holding the deceased claiming that his brother was beaten by the Caleb, Ngwiri and Lugara.
13. The witness stated that he assisted Japheth to lift the deceased l and went home. He later learnt about the deceased 's demise.



14. At cross examination, he stated that at the scene of the crime, he met the deceased and his brother (PW5); that as he was walking in, he met Gwiri walking away. Lugara came following him. Gwiri then fled. He never saw the 1st accused.
15. Pw4 testified that on the material day, 18/6/2018, he was at home around 7-7.30 pm when he heard noises coming from the maize plantation and when he went to investigate, he found many people at the scene including the deceased who was on the ground.
16. He recalled that his brother Japheth was holding the deceased claiming that he had been beaten by some people and that he mentioned the first Accused as one of the people who assaulted the deceased.
17. On cross examination, he stated that the incident happened in his maize farm and when he went to investigate, he found about 20 people gathered although none of the accused person was present at the scene and that PW5 was shielding the deceased.
18. He avers that the deceased mentioned the 1st Accused, as he was being held by Japheth. He stated that he did not know what led to the deceased being beaten by the crowd.
19. PW5 testified that on 18/6/2018 at around 7.30 pm he was at home when a lady come into their compound claiming that people were throwing stones, they rushed to see to see what was happening. He heard someone shouting that they had arrested someone who had been causing trouble. They rushed to the maize planation where he found a crowd had formed, only for him to find that it was his brother, the deceased, lying on the ground. The deceased told him that it was the first Accused who had assaulted him. Later the deceased wife, Linet and his sister Joyce arrived while carrying torches..
20. He claimed that he recognized some of his brothers' attackers named "Ngwiri, Caleb Agani and Lugala from the village.
21. He testified that the 1st accused was their brother and the 2nd accused was a neighbour however he did not know of any existing grudge between and the deceased . He further stated that the following day the first Accused gave the deceased kshs. 500 as reimbursement for motor cycle expenses.
22. On cross examination, he insisted that he told the police about the fact that the deceased had informed him that the first Accused threw him in the trench. The time was 7.30 pm , darkness was closing in. He found about 7 people surrounding the deceased . They were stepping on the deceased. He said he saw the first Accused stepping on the deceased and trying to push him back to the trench. He identified Caleb through his voice. He also stated that he saw ngwiri hitting the deceased on the head.
23. On re- On re-examination, he stated that he found 4 people attacking the deceased but only 2 of them were in court. He was not able to identify the others.
24. PW 6, was the the deceased' son. He testified that on 18/6/2018 at around 7 p.m. he was home with his mother and the deceased, when they heard screams. He and the deceased grabbed torches and went to investigate the source of the scream. They did not see anyone but then the 1st accused who was in a trench jumped and held his father by the neck and started shouting that he had found him. The crowd started forming and began beating his father .
25. He recalls seeing the 1st accused assaulting his father and holding him by the neck until his uncle (pw5) came to intervene The crowd dispersed.
26. During cross examination, he reiterated that he was with his father at the maize planation when they were attacked by the 1st Accused. He identified the 1st accused person but stated that he did not see the 2nd accused person.



27. PW 7 testified that on the material day 18/8/18, he was at home when he heard stones being thrown at his mother's house which he claimed had been happening on several occasions.
28. He later heard people shouting that they had found the people who were throwing stones and when he went outside, he saw the deceased being attacked and later saw the deceased brother Japheth (pw5) chase the attackers away.
29. The investigating Officer was prosecution witness NO. 8. He testified that on 26/6/18, the wife to the deceased came to the station to report that her husband had been attacked on 18/6/18 but died while receiving treatment at kakamega general Hospital.
30. The police accompanied the deceased wife to the scene of the crime and later to the hospital. On 2/7.18, the post mortem was conducted by Dr. Mchana at kakamega General hospital. He attended post-mortem with two of the deceased's relatives. The report indicated that the deceased died of a head injury. He produced the post mortem report as PEXB No. 1.
31. The Accused persons were put on their defence.
32. On 23.2.2023 the court was informed that the first Accused person had died and the court made an order declaring the charge against the first Accused to have abated.
33. The 2nd Accused opted for a sworn statement.
34. He told the court that on the material day at about 7.30 pm , he was from the shops when he heard shouts " thief" , " thief", "mjawi"(witch), but he ignored the noises. He told the court that he never went to the scene; that the prosecution witnesses lied . He never killed the deceased. He further stated that he was never subjected to any identification parade. He knew the deceased, as they were neighbours.

Determination

35. The only issue for determination is whether the prosecution has proved its case beyond reasonable doubt.
36. For Prosecution to secure a conviction on a charge of murder, it has to prove three ingredients against an Accused person. In Anthony Ndegwa Ngari vs Republic [2014] eKLR, the ingredients were listed as follows:
 - (a) that the death of the deceased occurred;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
37. On the first element, according to the post-mortem report, the deceased died of severe head injury caused by a blunt force trauma following an assault. The body of the deceased was positively identified by the deceased wife Pw1 and his brother Jamin Agani.
There is therefore sufficient evidence adduced to prove that the deceased died and the cause of death was an assault on his person.
38. The 2nd question to pose is whether the 2nd Accused caused the death of the deceased. From the evidence of pw5 and pw6, it emerged that there were more than two people involved in the attack of the deceased. This was therefore a case of what is commonly referred to as mob justice. On the participation of the 2nd Accused, the following extracts of some of the witnesses are relevant:



- a) PW5 testified that when he heard commotions coming from the maize plantation, and arrival at the scene, he saw the 1st accused (now deceased) and the 2nd accused as well as one Lugala attacking the deceased. He testified that when he able to identify the deceased attackers as he made attempts to shield him. . He further stated that he saw a group of ten people. The 2nd Accused , identified as Nwiri left with one of them. It was 7.30 pm, it was slightly dark. He hear the voices of the 1st and the 2nd Accused.. He also saw their faces. It was not very dark , there was sufficient light. The light was enough for him to identify them. The 2nd Accused was a neighbour from the next Ridge. At the scene, the 2nd Accused kept on saying that the deceased was causing trouble in the village, even after the witness had arrived and had told the crowd that they were attacking his brother. He further sated that he saw the 2nd Accused stepping on his brother. Darkness was closing in. the people were stepping on and kicking the deceased. The 2nd Accused was hitting him on the head. On cross- examination, he stated that Ngwiri came and started stepping on the deceased.
- b) PW2 told the court that as he walked towards the scene in response to the commotion he met the 2nd accused walking away , followed by Lugari. The 2nd Accused then fled. This corroborates PW5’s testimony that Ngwiri left the scene with one other person.
- c) According to pw5 and pw1 the accused persons, the deceased and the witnesses were all village mates, they knew each other.
- d) .on the issue of identification, although pw5 admitted that darkness was setting in , he stated that it was not completely dark’ he could identify the attackers at close range, as he tried to shield the deceased from further attacks . He further sated that he heard the 1st and 2nd Accused’s voices and saw their faces. The nd Accused has argued that there was no identification parade held to identify him. However the parade was not necessary as the witnesses and the Accused knew each other well. According to pw1 they were village mates and knew each other. Thus the evidence of pw5 and pw2 places the 2nd Accused on the scene. In a case of mob justice, either the presence , participation in, or the actual attack on the deceased make the accused culpable for murder. (see.....)
39. Further according to the evidence of pw1 and pw5, the deceased named the 2nd Accused as one of the attackers . According to pw1, towards the evening of the next day the deceased told her that he first met the 2nd Accused , and talked to him and that the 2nd Accused turned and hit him. Also according to pw5, as he held the deceased , the deceased told him that Ngwiri, (2nd accused), caleb and lugari had attacked him. Thus under his dying declaration the deceased named the accused as one of the attackers.
40. A dying declaration is an exception to the rule against hearsay evidence. Section 333 of the *Evidence Act* state as foolows:.....
41. Caution is advised where a conviction is solely based on a dying declararation. Although it is now trite law that corroboration is not necessary, in this case the declaration was corroborated by the evidence of pw5 and pw2 who testified to seeing the 2nd accused on the scene. Am satisfied that the prosecution evidence has proved beyond reasonable doubt that the 2nd Accused participated in the attack of the deceased which attack led to hid demise..
42. On malice aforethought, Section 206 of the Penal Code gives the instances when malice aforethought can be inferred . It states that:- “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 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 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;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

43. In the case of Hyam v DPP {1974} A.C. the Court held interalia that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

44. In the case of Daniel Muthee v Republic Criminal Appeal No. 218 of 2005 (UR) Bosire, O’kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

45. I take judicial notice of the fact that the head is a sensitive part of a human body as it houses the brain, a critical organ in the body. The accused must have known that the stepping on the deceased head that went on had the potential to kill him. It was an act of malice aforethought within the context of section 206 (b) of the penal code.

46. In conclusion , it is my finding that the prosecution has proved its case. I do find that the Accused is guilty of murder contrary to section 203 as read with section 204 of the penal code and I hereby convict him a charged.

47. For purposes of sentencing the Director of probation and Aftercare services, Kakamega county is hereby directed to conduct an inquiry on the antecedents of the accused person within 14 days from today’s date.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF FEBRUARY 2024.

S. CHIRCHIR

JUDGE.

In the presence of :

