



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Marcos & another (Criminal Appeal 5 of 2018)
[2024] KEHC 3670 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL 5 OF 2018
SM GITHINJI, J
MARCH 20, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JOSEPH MUTISO MARCOS 1ST ACCUSED

ANDERSON KENGA CHARO 2ND ACCUSED

RULING

1. Joseph Mutiso Marcos and Anderson Kenga Charo were charged with the offence of Murder contrary to section 203 as read with section 204 of the [Penal Code](#) Chapter 63 of the Laws of Kenya.
2. The particulars of this offence are that on the 8th day of March, 2018 at Casaurina area in Malindi Sub County within Kilifi County, the accused jointly with others not before court murdered Peter Otieno Owino.
3. The trial commenced on 23/5/2018 before Justice Korir but the only two witnesses who gave evidence in this matter gave it in October, 2019 before Justice Nyakundi. Thereafter the prosecution was not able to avail any other witness and on 28/9/2023 this court denied them an adjournment prompting them to close their case. Prosecution did not submit but defence filed their submissions on no case to answer.
4. The issue for determination is whether the evidence by the two witnesses establishes a prima facie case against the two accused persons, so as to warrant them be placed on their defence.
5. Pw-1, an alleged eye witness stated on 8/3/2018 she was with the accused persons and a young friend of them called Mathias. They got into a pub for beer. As they had beer they were arrested by police on allegation that they intended to steal a motor cycle. She was charged alongside the two men. After two months stay in custody she was released on bail. Later she went for the hearing of the case. She was



with the deceased, his advocate and clerk, whose names are given by Pw-2 as Advocate Okuto and clerk Dismas Odhiambo. Pw-1 then talks of date 25th February, 2018 of which she claims to had spent time with the said persons. She then gets back to 8/3/2018, stating they went for the case and the Judge was not sitting. After the mention of the case they went to a hotel. She was with the deceased, the Advocate and his clerk. They had a meal. They proceeded to the stage to board a vehicle. The advocate and the deceased sat at the back while she sat next to the door. Before the vehicle left the stage she saw many boda boda riders pointing at them. Many people shouted at them. They disembarked from the vehicle. One of the persons held her hand and led her to the booking office. While there she heard the deceased being assaulted as well as the advocate, alleging that they were thieves. They then went and sympathized with her, saying the person she was with has passed on. In her case she was acquitted. She identified the assailants as were in court on the date of the attack. She identified them at the dock.

6. On cross-examination Pw-1 stated the people who removed them from the vehicle included the accused persons. The accused were the complainants in the case. They were also witnesses in a held public inquest. She alleged the accused persons pointed at them before the attack. She checked and saw the deceased being attacked by many people. When he was killed she was not present. She was not called to an identification parade.
7. Pw-2 the investigating officer stated they were called to the scene on 8/3/2018 at noon. They were told there was a victim of arson at Mayungu. At the scene there was a body on fire. They took the body to the mortuary in Malindi. Pw-1 identified the deceased as her husband. The officer discovered that the deceased had been charged with the offence of preparation to commit a felony in court No.1. On the material day he had attended the court where the case was adjourned. They walked to board a vehicle for Mombasa. They were with Advocate Okuto and clerk Dismas Odhiambo. The deceased was then attacked. On 25/3/2018 he proceeded to court No.1 and arrested the accused persons. They were prime suspects. Postmortem was done and there was a drawn sketch map of the scene.
8. I have carefully weighed the foregoing evidence. The evidence is not clear on the court Pw-1, deceased, the advocate and his clerk attended on 8/3/2018. It can only be assumed it was Malindi Law Courts given that the incident is alleged to had started at the stage and ended in Mayungu area. The assumption is only logical as the next nearest court is in Kilifi. Pw-1 says in her evidence in chief that when they disembarked from the matatu her hand was held and she was led to the matatu booking office. It's from there she heard the deceased and the advocate being attacked. She did not claim to had seen but heard, and she did not as well disclose details of what she heard. She never claimed to had known the accused persons voices, and there is no evidence that she recognized them by voice. Though on cross-examination she claimed to had seen, she never disclosed how far she was in the office from the point of attack, where she had sat within the office and the position of the scene in relation to her. Her evidence does not establish that from where she was in the booking office, she could clearly witness what was taking place near the matatu they had disembarked from. It appears from the evidence of Pw-2 that the deceased was killed and torched at Mayungu, a different scene from the one witnessed by Pw-1. Pw-1 in her evidence did not disclose how deceased was taken from the scene she was witnessing to Mayungu which really raises doubts as to whether she witnessed activities of the scene she described. She could have heard noises implying there were chaos and witnessed nothing.
9. The accused are said to had been the complainants in the case Pw-1 and the deceased were charged of attempting to commit a felony. They were allegedly in court on 8/3/2018, the day the deceased was killed. They are also said to have been witnesses in an inquest. Pw -2 in his evidence did not allege he arrested and charged them out of their identification by Pw-1 as having taken part in the murder of the deceased. His evidence implies, given the circumstances under which the deceased was murdered, they were prime suspects and he arrested them on 25/3/2018 in court No.1.



10. In the case of Republic-vs-Turnbull [1971] QR 227, the court had this to say in relation to identification/recognition of suspects; -

“..... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way.....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

11. In this case the circumstances under which Pw-1 got out of the vehicle and rescued, shows she must have been apprehensive, in great worry and fear. When she was taken to the booking office, generally she would have taken cover not to be discovered by the assailants who were attacking her partner or friend. I doubt that in such circumstances she was able to peep and witness what was happening. Deceased and the advocate are said to had been attacked by a crowd of people. It is not clear even if assumed she had ability to see how she was able to pick the accused persons. She never described them and what each did in attacking the deceased, even before he was ferried to Mayungu and torched. She may not have witnessed that but picked on the accused as the persons who had a cause to attack them. Their recognition or identification is not safe and is therefore unreliable.

12. There are disclosed eye witnesses who were not availed to give evidence. This are advocate Okuto and clerk Dismas Odhiambo. If called would have disclosed how they were attacked, by who, and how they escaped or survived. The failure by the prosecution to call these crucial witnesses, as well as the doctor who carried out the postmortem examination so as to establish the cause of death to the deceased, further weakens the prosecution case to an extent where it fails to establish a prima facie case against the accused persons.

13. The total sum of my finding is that a prima facie case is not established against the accused persons and are acquitted of the offence under section 306 (1) of the Criminal Procedure Code for want of reliable evidence.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20TH DAY OF MARCH, 2024

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

Ruttoh for the Accused Persons

Ms Ochola for the Prosecutor

Court; - Cash or Sureties are discharged.

20/3/2024

