Republic v Hamisi & another (Criminal Case E008 of 2023) [2024] KEHC 6235 (KLR) (31 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6235 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL CASE E008 OF 2023

WM MUSYOKA, J

MAY 31, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

FRANCIS HAMISI ..... 1ST ACCUSED

EMMANUEL ANDERA SIKUKU ..... 2ND ACCUSED

JUDGMENT

1. The accused, Francis Hamisi and Emmanuel Andera Sikuku, face a murder charge. It is alleged that on 2nd April 2023, at Esidende village, Bukhayo Central Location, Nambale Sub-County, within Busia County, they murdered Patrick Otieno Makali. They denied the charges, and a trial ensued, where 6 witnesses testified.

2. PW1, John Richard Mwale Okello, was a community leader. He testified that he got a report that the deceased, Patrick Otieno Makali, had visited the home of Mapesa Benjamin, on 1st April 2023, at night, while carrying an axe. The deceased did not do anything there, and PW1 advised that he would handle the matter in the morning. The next morning, the deceased himself visited PW1, to report that the 2nd accused had set his house on fire, and PW1 advised him to report the matter to the police. PW1 then visited Mapesa, and while there, he heard screams from the home of Anyango Nyongesa, a grandmother of the deceased, and the 2 accused persons, who testified as PW3. He rushed there, and found the 2nd accused with a jembe or hoe, cutting the door to the house of PW3, while the 1st accused was nearby, injured. The 2nd accused managed to break the door down, and removed the deceased from therein. The 2nd accused and the deceased began to fight, but when PW3 screamed, the 2nd accused dragged the deceased away. The 1st accused then hit the deceased with a hoe stick on the head, while the 2nd accused was holding him. Thereafter, the 2nd accused hit the deceased on the head with a stone, the head split, and the deceased died. He stated that the deceased was lying on the ground, when he

was hit by the 2nd accused, with the huge stone, on the head and the chest. The 2nd accused then went away to his home, and came back, and they waited till the police came. The police viewed the body, took notes, and arrested the 2nd accused. By then the 1st accused had left for hospital. The police took away the stone, but the hoe stick was never recovered. He stated that the deceased and the 2 accused persons were brothers. He described the deceased as a bhang smoker and an abuser of alcohol.

3. PW2, Jane Adhiambo Makali, was the mother of the deceased and the accused persons. She stated that on the evening of 1st April 2023, she heard noise from the direction of the houses of her sons. The 1st accused reported to her that he had been stabbed by the deceased. He went to the house of the deceased, but said the deceased was not there. The 2nd accused came out of his house, and set the house of the deceased on fire. Thereafter, the 2nd accused went and cut down sugarcane and trees belonging to the deceased. In the morning, of 2nd April 2023, the deceased came to the house of PW2, and the 2nd accused person then came and found him there. The 2nd accused was armed with a jembe, and he hit the deceased with it. The deceased rushed and entered the house of PW3, who was her mother-in-law. The 2 accused persons then broke down the door to the house of PW3, and brought out the deceased, and began to beat him with jembes. PW2 tried to restrain them, but to no avail. She screamed, and left the scene. She later heard that the 2nd accused had killed the deceased with a stone. She went to the scene, and found the deceased lying dead, with a stone on his chest, which she took and placed on the ground. The police came, and removed the body, and took away the stone and the jembes. She said that she was not aware of what the sons were fighting over. She said that she did not see who hit the deceased with a stone. She described the deceased as troublesome.

4. PW3, Anyango Nyongesa, was the grandmother of the deceased and the 2 accused persons. She saw the accused persons and the deceased, on the morning of 2nd April 2023, running, while armed. The deceased entered her house, and the accused persons began to hit her door with jembes. She screamed, and a crowd formed. The door was broken down, and the accused pulled the deceased out, and began to beat him. No one intervened. She said that she did not know why the 3 were fighting. She said that the 1st accused had an injury on the head, and she heard that it had been inflicted by the deceased. She said that she was not present when the deceased was hit with the stone, for that happened at the road, and not at her compound, and she had not followed the 3 to the road, where the accused had dragged the deceased to. She said that she did not see jembes being used on the deceased, but she saw both accused persons assault the deceased. She described the deceased as troublesome, a person with kiburi, arrogance, who died because of his kiburi.

5. PW4, Dr. Dancan Nabuya, a medical officer, conducted post-mortem on the body of the deceased. The body had lacerations on the right parietal region, a deep laceration on the frontal part of the head, and a skull fracture of the head on the right frontal area, being a crush injury inflicted by a blunt object. Internally, he noted a skull fracture on the right front area of the head. He formed the opinion that the cause of death was severe head injury, secondary to blunt force trauma. He stated that the laceration injuries to the head could not have been caused by the stone produced in evidence, but the crush injury could have been caused by it.

6. PW5, No. 86640 Police Corporal Douglas Wamalwa, was from the scenes of crime, and he produced photographs that he took at the scene. PW6, No. 77780 Police Constable Geoffrey Tonui, was the investigating officer. He detailed everything that he did in the course of the investigations.

7. I put the accused on their defence, on 20th December 2023. Both testified on oath, but did not call witnesses.

8. The 2 accused persons gave a similar narrative, that on the morning of 2nd April 2023, they heard the deceased beating their parents, and they went there to resolve the issue. The deceased was very hostile,

and so they decided to lock themselves inside the house of their mother. The deceased then attacked them, cutting the 1st accused, on the head and temple. They pushed him out of the house, and locked themselves inside. They screamed, and a crowd came, and beat the deceased.

9. The accused filed written submissions. I have read through them, and noted the arguments made.

10. The elements of the offence of murder are proof of the death, the cause of it, the involvement of the accused in the causation, and the fact that the accused caused the same with malice aforethought.

11. On the death, there is ample proof that the deceased died. PW1, PW2 and PW3 were at the scene where he died, and they saw his dead body. PW4 conducted post-mortem on his dead body. PW5 took a photograph of the dead body of the deceased. PW6 visited the scene, and saw the body of the deceased, and it was him and other police officers who removed it from the scene.

12. On the cause of death, the evidence of the medical officer, PW4, is crucial. He testified that the body had a crush injury on the head, caused by a blunt object. He formed the opinion that it was the head injury which caused the death.

13. On the role of the accused in the causation, the available evidence is that the accused and the deceased had an active disagreement that morning, which was witnessed by family members and neighbours. 3 of them testified to being present when it happened, PW1, PW2 and PW3. They saw the 2nd accused break down the door to the house of PW3, where the deceased was hiding, and dragging the deceased from that house, and that he, the 2nd accused, began to assault the deceased, and he was joined in that exercise by the 1st accused. The said witnesses saw the 1st accused hit the deceased with a hoe stick on the head, and then the 2nd accused took a huge stone, and smashed it on the head of the deceased. PW1 stated that the deceased died after he was hit on the head with that stone. It could be that the decisive blow was hit by the 2nd accused, but, through the entire event, he was acting in concert with the 1st accused.

14. The last consideration should be whether the accused persons caused that death with malice aforethought. What constitutes malice aforethought is defined in section 206 of the *Penal Code*, Cap 63, Laws of Kenya. One, it is a direct intention to cause death, usually signified by a verbal expression of a desire to kill. Two, it is an intention to cause grievous harm, or to cause a bad injury, which results in death. This is usually inferred from the circumstances. Three, it is knowledge that the act causing death could cause death, or grievous harm, but the perpetrator is indifferent to the consequences. Four, it is an intention to commit a felony, such as assault or battery or whichever. These four would suffice for the purposes of this discussion.

15. The question then is, were the injuries inflicted on the deceased so inflicted with an intention to kill him, or with an intention to cause to him a bad injury, or were they caused recklessly and indifferently, or was the intention to commit some sort of felony? The killer blow was the hit on the head with a building stone. The head is a vital body part, which houses such vital organs, as the brain and the nose, and it should be deemed, should death occur, from an injury inflicted to the head, to have been so inflicted with an intention cause death, or grievous harm. The injury in this case was to the head. The head was crushed, for the medical officer described the injury as a crush injury to the head. The deceased, according to PW1, died after he received that blow to the head with that stone. A blow of that kind, in that part of the body, must have been calculated and intended to cause death, or to cause a very bad injury, or the person causing it must have been indifferent to whether it caused death. I am persuaded that the death was caused with malice aforethought.

16. What do I make of the defence by the accused, that the deceased was killed by a mob of angry villagers. The incidence happened in broad daylight. There were many people present. 3 of them testified. A mix

of relatives and neighbours. Indeed, 1 of them was 1 of the parents of the accused, that they alleged the deceased was beating. The said witness, PW2, did not testify she or her husband to being beaten by the deceased. What she told the court was that the deceased had come to the home to greet his father. The narratives from these witnesses were vastly contrary to the death of the deceased having been caused by a mob. They were very clear that the death was caused by the actions of the 2 accused persons, who were the aggressors, in the first place.

17. What about the possibility of provocation by the deceased? It was alleged that the deceased had injured the 1st accused the previous night, and that the 2nd accused was angered by that, and caused damage to the property of the deceased that very night. It could be that the deceased first injured the 1st accused. That happened in the evening of 1st April 2023. The accused vented their anger, by destroying the property of the deceased. There was no evidence that the deceased attacked them in the morning of 2nd April 2023. What emerged was that the accused invaded him, when it transpired that he was at the house of PW3. He did not provoke them on 2nd April 2023, and if there was any provocation on 1st April 2023, the same ought to have had dissipated by the morning of 2nd April 2023.

18. There was the evidence that the deceased was a troublesome person, and an abuser of narcotics and alcohol. PW3 said that he died because of his own arrogance. It could be that the deceased was a bad element in the community, however, that was no justification for his killing. If he had wronged anyone, the civil and lawful way of addressing that should have been to make a report to the authorities, not to take the law in own hands, by assaulting him so badly as to cause his death.

19. Overall, it is my finding and holding that the offence of murder has been sufficiently proved against the accused persons herein, and I do hereby convict them, under section 322 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya.

20. For the purposes of sentence, I direct the Busia County Director of Probation and Aftercare Services to assess the antecedents of the accused persons, and to take the views of the family of the deceased, and the community, and thereafter file a report, within 14 days. The matter shall be mentioned thereafter for receipt of the report, mitigation and sentence. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 31ST DAY OF MAY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Were, Advocate for the accused person.