



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL (MURDER) CASE NO. 46 OF 2009
REPUBLICPROSECUTOR
VERSUS
IBRAHIM KUYA KWENDO.....1ST ACCUSED
ALFRED AMUMASI WEKHOMO.....2ND ACCUSED
JUDGMENT

Introduction

1. The two accused persons Ibrahim Kuya Kwendo and Alfred Amumasi Wekhomo are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that the two accused persons on the 3rd day of October, 2009 at about 7.00 p.m at Ekhangaba Village, Ebuhandu sub-location Wekhomo Location in Emuhaya District of the Western Province jointly murdered one KENNEDY OMONDI

2. The charge and all its ingredients were read to both accused persons in a language that they understood (Kiswahili) and they denied the same and a plea of not guilty entered. M/S Musiega was thereafter appointed to act for both accused. It is worth noting that the case herein was heard by two other judges before this court took over the same after it complied with the provisions of Section 200 of the Criminal Procedure Code

Prosecution Case

3. The prosecution called a total of six (6) witnesses. PW1 Mike Abubakar Wanga testified that on 3.10.2009 at 7.10 pm his children told him that Kennedy was dying outside. He ran out and found Kennedy had fallen inside his compound and was bleeding from the chest and Kennedy kept saying in Kiluhya “ Adamba has killed me “Adamba has killed me “. He also saw the accused persons herein who were running away as it was not dark. He could see them 30 meters away.

4. Kennedy was an employee of pw1's sister in law Gladys. He knew the accused persons who lived in their village. The 1st accused also known as Adamba is his immediate neighbour. He reported the incident to the Assistant Chief Grace Adino who called police officers from Ebulako. The police came after 45 minutes and found the deceased had died. They interrogated him (PW1). He gave them the names of the accused persons. The 2nd accused was arrested before the body of the deceased was taken away.

5. PW1 added that his sister in law lived 15 metres away from him. On cross examination by Mr. Musiega he told the court that the deceased did not name “Ibrahim Keya” as his killer but he named “Adamba” He also told the court that he described the accused’s attire to the police and told them that the two suspects had a panga and a knife though he did not give this information about the panga and the knife to the court.

6. He further explained that he was not present when the 2nd accused person was arrested but maintained that he saw both accused persons running away from the scene. On re-examination by Mr. Karuri for the state PW1 clarified that “Adamba” is the same person as “Ibrahim Keya,” the 1st accused.

7. Gladys Asachi Galinga (PW2) told the court that the deceased was her employee who had worked for her for three (3) years. She testified that on 3.10.2009 at 7.30pm she found PW1 doing first aid on the deceased who died in the process. She saw the deceased who had a cut on the right hand and a wound on the chest. PW1 told her that the deceased had told him, “Adamba” has finished me.” She told the court that on her way home that evening she met two boys who were armed, one had a panga and the other one had a club. She identified the two as the accused persons in court. The 1st accused was her pupil in school while the 2nd accused was a neighbour. She explained that “Adamba” is the nick name of the 1st accused.

8. When cross-examined by the defence counsel Mr. Musiega she explained that she told the police that “Adamba” had been named by the deceased. She was shown her statement and maintained that she told the police everything that she had testified about but the police did not record everything she told them. She maintained that she saw the accused person’s at 7.30pm.

9. PW3 CIP Salim Hamisi Mwabuya No. 216846 told the court that she received a call from the Assistant Chief Ebulando Sub-Location, one Grace Adino on the 3.10.2009 at 19.00hours, informing him that someone had been stabbed to death at the home of Gladys Asachi, PW2. He then called Sgt Ombima the in charge of Emabungo AP Camp and asked him to visit the scene. He also went to the scene in the company of CPL Chekuto and PC Obungo where they met AP Sgt Ombima who had already taken the body. He viewed the body and saw 2 stab wounds on the left side of the chest and a cut wound on the left palm. The 2nd accused had also been arrested by Sgt Ombima. He then took charge and took the body and the suspect to Mbale Hospital and to Luanda Police station respectively.

10. On 4.10.2009 at 19.45 hours the 1st accused was taken to his station by Ap’s from Emuhaya where he was locked up and later charged in court. No exhibit was recovered at the scene. On cross examination he explained that he took 20 minutes to reach the scene. He further told the court that he did not state in his statement where the body was collected from, nor did he say what the chief told him. He only confirmed that he received a call from the chief about the murder incident. He also did not know where the accused persons were arrested from.

11. Albert Kwendo PW4 testified that court that on the 3.10.2009 he returned home after attending a funeral in the neighbourhood. His father Willis Kibira called him and asked him where his children were and he told him they were not at home. His father went ahead and told him that Ibrahim Kuya Kwendo had killed an employee of Ibrahim Nakuti. PW4 went to the scene where he saw the deceased on the ground but he did not move close to the body. The body was later taken away by police.

12. Dr. Francis Odira (PW5) carried out the post mortem on the deceased’s body which was identified to him by Hudson Ojali Omondi and Ibrahim Nakuti to be that of Kennedy Omondi. After examination, he formed the opinion that the cause of death was massive bleeding into the chest secondary to a stab wound that perforated the chest. He produced the post mortem report which is marked as PExhibit 1.

13. He also produced a P3 form signed by Dr. Masika Collins who he had worked with and who examined Ibrahim Kwendo and found that he was mentally stable to stand trial marked as PEX2 and the one for Almasi who was also found to be mentally fit to stand trial marked as PEX3.

14. On being cross examined by the defence counsel, he explained that the stab wound in the right chamber of the heart was not the cause of death.

15. PW6 PC Veronica Waithera No. 88398 stationed at Vihiga Police Station told the court that on the 8.10.2009 she was in the company of PC. V. Naibei and their driver PC. Fred Sikuri. She received instructions from the DCIO CIP Albert Tawaya to go to Emuhanda village to collect a knife which was an exhibit in this case. The knife was said to be at the home of Albert Kwendo who gave it to them and she handed it over to CIP Tawaya. She told the court that the knife had been taken to the government Chemist for analysis and had not been returned.

16. On cross examination she explained that the knife was said to be with the father of the accused but she denied that the case was handled negligently. The prosecution closed its case and this court after considering the evidence on record found that the prosecution had established a prima facie case against the accused persons jointly and they were placed on their defence.

Defence Case

17. The accused persons chose to give sworn statements but did not call any witnesses. DW1 Ibrahim Kuya testified that on the 3.10.2009 he was at home with his father, mother and siblings cooking. He denied that he was seen at the home of Gladys Galinga (PW2) together with his co-accused. He also denied knowing his co-accused before they met at Vihiga Police Station. He also denied the nick-name of Adamba. He told the court that his nick name was Kuya, and that there were many people in his locality known as Adamba. He also denied quarreling with the deceased and threatening to kill him as he maintained that he did not know him. He added that he was arrested on 4.10.2009 and was taken to Emuhaya AP Camp and then Luanda Police station but was not informed why he was being arrested. He claimed that he was connected to the 2nd accused when he was brought to court.

18. On cross examination by Mr. Oroni from the ODPP DW1 explained that he is also known as Kwendo. He maintained that he did not know pW1 and that they did not cut the deceased as alleged. He also confirmed that PW2 was his teacher but maintained that she did not tell the court the truth. He added that his nick name was not Adamba and that his home was about 1.5KM from the school.

19. DW2 Alfred Alumas Okweingot testified that on the 3.10.2009 he was at home with his father at about 7,pm and was preparing to make supper when some police officers passed near their home and asked for directions. He claimed his father asked him to show them the direction but they instead arrested him for no apparent reason. He was taken to Luanda Police Station then Vihiga Police Station. While at Vihiga Police Station, he was taken to a hospital where they took blood from his right hand. He told the court that he did not know the deceased in this case nor did he know the 1st accused.

20. He also told the court that he did not know PW1 and PW2. He claimed that there was no identification parade done to ascertain the assailants of the deceased. On cross examination by Mr. Oroni he maintained that he met the 1st accused in court and that on the day PW1 alleged to have seen him he was at home with his father Fredrick Ali who is now deceased and cannot testify. He explained that he was arrested by the police as he gave them directions.

21. He maintained that he did not know PW2 and why she gave false testimony. On re-examination by Mr. Musiega he told court that no weapon was produced in court and that his father died in 2015 when this case was on going. The defence closed their case at this juncture.

The Law

22. Murder is defined under Section 203 of the Penal Code as Follows:-

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder” It is a cardinal Principle of law that in criminal cases the legal onus is always on the prosecution to prove the guilt of an accused person to the required standard which is

beyond reasonable doubt.

23. It is provided under Section 107 of the Evidence Act Cap 80, Laws of Kenya that:-

1. whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. when a person is bound to prove the existence of any fact it is said the burden of proof lies on that person”

24. It is trite that an accused person does not assume any burden to prove his innocence in a criminal case. He is obliged only, if he so wishes to give an explanation or to raise a defence to the charge which is probably or possibly true. If he does this then he discharges his burden of proof and his explanation or defence must be accepted.

Issues for Determination

25. There are three ingredients of murder which the prosecution must prove beyond reasonable doubt so as to earn a conviction namely:-

- a. The death of the deceased and cause of that death
- b. That the accused committed the unlawful act which caused the deceased's death and lastly
- c. That the accused had malice aforethought

26. The issue for determination in this case is whether these three ingredients of murder have been proved beyond reasonable doubt.

Determination

27. The first ingredient of the death and the cause of death of Kennedy Omondi has been proved. All the prosecution witnesses testified to the fact that the deceased died. Dr. Francis Odera who testified as PW5 stated that on 09.10.2009, he received post mortem form from a police Officer named Peter Njoroge with a request to carry out post mortem on the body of Kennedy Omondi. The body of the deceased was identified to him by Hudson Ojati Omondi and Ibrahim Nakuli. After performing the post mortem examination, which revealed 2 stab wounds on the left chest and one stab wound on the right side of the chest, he formed the opinion that the cause of death was massive bleeding into chest cavity secondary to a stab wound.

28. The second issue for determination is whether it is the accused persons jointly or one of them who caused the penetrating stab wounds into the left side of the deceased's chest. I must point out that the evidence on this point is scanty, either through a deliberate cover-up or post investigation and for this reason it has not been shown beyond peradventure that it is the accused person who inflicted the fatal injuries on the deceased. It is very likely that they did so but the evidence is not there.

29. PW2 Gladys Asachi whom the deceased worked stated that as she returned home at about 7.30pm on the fateful day, she met the 2 accused persons who were armed with a panga and a knife. This was outside her compound. However, this piece of evidence was not included in her statement to the police, thus making it doubtful whether indeed she saw the accused persons armed with panga and knife as alleged. Granted that PW1 knew both accused well, details of the evidence leading to the death of the deceased had to be properly given and documented.

30. PW1, Mike Abubakar Wanga in whose compound the body of the deceased was found alleged that at 7.10 pm, his children told him that the deceased was dying outside. He ran out and found the deceased on the ground and bleeding from the chest and that before the deceased died, he told him in Kiluhya “

Adamba has killed me.” PW1 also alleged that as he checked on the deceased, he saw the two accused persons running away from a distance of 30 metres. PW1 also said that the other name for the 1st accused, Ibrahim Kuya is Adamba.

31. However, during cross examination, it transpired that PW1’s statement did not bear the name Adamba as being an alias for the 1st accused and that during his testimony in court, he had not said so.

32. The law is clear that where the case for prosecution rests entirely on identification, even if it be a case of recognition when such identification/recognition is under difficult circumstances and is disputed by the accused, the court has to treat such evidence with circumspection since if it is relied on can cause miscarriage of justice. The evidence by PW1 would have been good evidence if the same had been chained together from the police statement to the oral testimony in court, if that had been the case, then the dying declaration by the deceased would have come in handy to assist the prosecution case.

33. Even the testimony by PW4, Albert Kwendo offers little help for prosecution case because of the Lacuna in the evidence by PW4. PW6, No. 88393 PC Veronica Waithera did a bad job of her assignment of retrieving the murder weapon. She alleged to have recovered the murder weapon but the same was never produced in evidence. There was also no indication whether the knife had been taken to the Government Chemist for analysis.

34. The above being the position there is no concrete evidence linking the accused persons to the death of the deceased, though my sixth sense tells me they did it but my sixth sense remains just that in the absence of evidence to support the same.

35. Having reached the above conclusion, I do not find it necessary to consider the issue of whether or not the accused person’s acts/omissions were motivated by malice. No such acts/omission on the part of the accused persons have been proved

Conclusion.

36. The upshot of the above analysis is that the prosecution has failed to prove the charge of murder against the two accused persons beyond any reasonable doubt. Accordingly, I find them not guilty and acquit them under Section 322(1) of the Criminal Procedure Code. Unless otherwise lawfully held they shall be released from prison custody forthwith.

It is so ordered,

Judgment delivered, dated and signed in open court at Kakamega this 16th day of March 2017

JUDGE

In the presence of;-

Mr. Ng’etich (present).....for State

Mr. Musienga (present).....For both accused

Mr. Polycap.....Court Assistant