REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 10 OF 2018

REPUBLIC ..... PROSECUTION

VERSUS

RAMADHAN KAZUNGU CHARO.....1ST ACCUSED

KATANA NZAI KOMBE ..... 2ND ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Mr. Karita advocate for both accused persons

JUDGMENT

The accused persons are charged with murder contrary to Section 203 and 204 of the Penal Code. For clarity purposes, it is alleged that accused persons on the night of 29th/30th June 2018 at Kakoneni Sub-location, Jilore Location Lango Baya Division, in Malindi – Sub-County jointly murdered **Bidii Charo Iha**. Each of the accused denied the charge.

In conducting their defence **Mr. Karita** appeared for the accused whereas **Ms. Sombo**, prosecution counsel appeared on behalf of the state. The evidence against the accused persons in summary is that; on 29.6.2018 **(PW1)** was at home with the deceased. They were to travel together to a charcoal burning site. In the course, **(PW1)** left for some time to have a meal leaving behind his radio on or about 10.00 p.m. however, when he came back the deceased was not on site. He was later to learn from the wife that the deceased had been attacked to death. on visiting the scene, **(PW1)** saw the deceased on the ground holding his hand alleging that the 1st accused inflicted the serious injuries. At the same time, **(PW1)** saw the 2nd accused meters away from the ground where the deceased was lying. Thereafter, on observations **(PW1)** saw the deceased having suffered injuries to the head, face and back. Further, **(PW1)** called out for help from one **Thoya (PW2)** to assist in taking the deceased to the Malindi Hospital. When **(PW2)** rushed to the scene, he met the deceased with multiple injuries. When asked what happened, **(PW2)** alleged that the deceased pointed towards the accused persons as the people culpable for the harm.

(PW3) Kadzo Nyanje testified that on the night of 29.4.2018, the deceased stepped out of the house and on his return he had all these injuries over his body. The injuries became serious necessitating him to be rushed to the hospital. In the presence of **(PW2),** the deceased identified the accused persons as the one responsible for the injuries.

According to the post-mortem examination report dated 5.7.2018 and produced as exhibit, the deceased was found to have suffered multiple cut wounds on the head. The pathologist opined that cause of death was severe head injury.

The evidence by **(PW4) – PC Thomas Simiyu** was forceful on the areas of police action took to record witness statements, oversee the postmortem examination and effect an arrest upon the accused persons to face a charge of murder in regard to the deceased. At the close of the prosecution case, each of the accused persons was placed on his defence.

The first accused in his defence asserted that on the night of 29.6.2018, the deceased called his mother a witch. It followed therefore a conversation ensued for him to demand of the deceased to explain why he was referring to his mother as a witch. According to the 1st accused without an answer, the deceased drew a nail and used it to inflict harm on the 2nd accused. This matter became a clan elder issue for him to intervene. However, on arriving at the clan elder's house since it was late in the night, he advised that the conflict be resolved in the following day. That is the last time he saw the deceased. When it came to third day he received information that the deceased had been attacked. He denied any incident in which he participated to assault the deceased.

On his part, **(DW2) – Katana Nzai** denied the offence but in his evidence alluded to the existence of bad blood between his grandmother and the deceased. The accused claimed that the deceased called the grandmother a witch which was later to be reported to the clan elder to mediate. When the clan elder referred them to go back the following day, it happened that information reached him that the same deceased had been attacked sustaining multiple injuries. According to the 2nd accused person from the time he parted ways with the deceased when they went to the clan elder, he did not have any encounter with him, again.

After the evidence of **(DW1)** and **(DW2)** there was also the testimony of **DW3 – Mwenda Mwamure** summoned to testify in support of the 1st accused defence. With regard to the charge, **(DW3)** alleged that it was the deceased who went to the house and referred to his mother as a witch. As the deceased words were intolerable, **(DW3)** told the Court that accused persons and others not before Court apprehended the deceased so that the matter can be adjudicated by the clan elder. As soon as they arrived at the clan elder, it was suggested that the matter be revisited the following day. Nevertheless, **(DW3)** stated that the deceased was left in the custody of the clan elder.

Determination

It is now time to address my view to the charge and the evidence as a whole to make a finding whether the prosecution satisfied the requisite standards set out under Section 107 (1), 108 of the Evidence Act and the principles in **Woolmington v DPP {1935} AL 462 and Miller v Minister of Pensions {1947} 2 ALL ER 372 at 373**. In this later case, **Lord Deming** stated as follows:

"That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course, it is doubt but nothing short of that will suffice."

The passage in the case of **Uganda v Dick Ojok {1992 – 93} HCB – 54** reads:

"That in all criminal cases, the duty of proving the guilt of the accused always lies on the prosecution and that duty does not shift to the accused persons except in a few statutory exceptions as provided in Section (III) of the Evidence Act Cap 80 of the Laws of Kenya and the standard required of the prosecution is that of beyond reasonable doubt."

It is now well settled that for an accused person to be convicted of the offence of murder the prosecution ought to prove the following ingredients:

(a). That the deceased is dead.

(b). That the death so stated was caused unlawfully.

(c). That in causing death the alleged offenders did so with malice aforethought.

(d). That in essence the prosecution evidence ought to place the accused at the scene of the murder.

I must now refer to each element of the offence and the weighted prosecution evidence.

(a). The death of the deceased

There can be no doubt from the prosecution witnesses **(PW1) – (PW3)** the deceased suffered injuries which culminated in him being treated at Malindi Sub-County hospital. The injuries apparently were inflicted in the night of 29/30. 6.2018. On the fateful, the deceased is alleged to have referred to the mother of the 1st accused as a witch. That did not go down well with the 1st accused and 2nd accused person who is also a grandson.

The prosecution evidence by **(PW1), (PW2)** and **(PW3)** touches on a fundamental aspect of the case outlining steps taken to have the clan elder deal with the dispute by way of mediation. It is however obvious from their evidence and that of the defence no amicable resolution was reached that fateful night. Further, **(PW3)** told the Court that the deceased arrived in the morning of 30.6.2018 with observable multiple injuries to the head.

That in all the circumstances of the incident it was agreed that he seeks further medical treatment. As I understand the evidence of **(PW1) – (PW3)** the deceased succumbed to death in the course of seeking medical intervention at the hospital. The pathologist positive findings in the postmortem report opined that the deceased by the name **Bidii Charo Iha** is dead. The accused persons are also entirely of the same position as to the death of the deceased. It must therefore be emphasized that the prosecution has discharged the burden of proof of beyond reasonable doubt on the death of the deceased.

(b). With respect to the unlawful act of omission, it is a felony to cause grievous harm to another person without excuse or justification. The prosecution claims in support of their case cumulatively from the evidence of **(PW1), (PW2)** and **(PW3)** is that in all the deceased was assaulted by the accused persons. Here it is stated that the accused persons travelled together with the deceased to consult the clan elder on the footing that their mother and grandmother has been called a witch by the deceased. There is reference that the clan elder did not mediate the issue owing to the time it was reported by the accused persons. It appears and plausibly true that on their way back home, accused persons attacked the deceased occasioning bodily harm. There was evidence by **(PW1), (PW2)** and **(PW3)** that the deceased reported to them as far as the injuries seen are concerned they were inflicted by the accused persons.

The defence as far as it went suggested that the deceased was left in the custody of the clan elder and therefore like anybody else they heard of the injuries from other members of the public including the clan elder. There is every indication as deducible in the post-mortem report that the deceased died as a result of the injuries inflicted by a third party.

The circumstances of this case show a certain similarity to those in **Rex v Kimbugwe s/o Nyogoli {1936} 3 EACA 129 and Ezekiel Musyoka Mutua & Another v R CACRA No. 7 of 1986.** With all these I find that every indicator on the part of the prosecution case shows that the deceased died of the injuries he sustained in the night of 29/30.6.2018. Its prudent to rule that the burden of proof as it relates to this element has been sufficiently discharged as required by Law.

(c). Certainly malice aforethought is so essential in murder crimes that without it the Court would be called upon to make a finding on unintentional offence of manslaughter. It is true to say that under Section 206 of the Penal Code, ***"the task assessing the presence or manifestation of malice aforethought involves enquiries to the following circumstances:***

(a). An intention to cause the death of another human being.

(b). An intention to cause grievous harm to that other person.

(c). Knowledge that the act or omission causing death will probably cause the death of some person, although such act is accompanied by indifference whether death is caused or not ….."

To that extent in a simple clear case the question whether the death of the deceased was accompanied with malice aforethought is for the prosecution to tender evidence on the nature of the lethal or dangerous weapons used, the manner in which they were used, whether the victim suffered out of an injury or multiple sustained injuries, the parts of the body targeted by the assailant and the

conduct of the alleged offenders during and after the incident. **(See R v Tubere {1945} 12 EACA 63).** To reach the conclusion that the killing was committed with malice aforethought it is necessary for the Court to rely in general terms the principles in **Tubere case (supra).**

Further, the principles in **Nanyonjo Harriet & Another v Uganda CR Appeal No. 24 of 2002 SC** thus:

"for a Court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act that caused the death, and if the accused foresaw death as a natural consequence of the act."

To that may be added the statement in **Msiwa & Another v R {1999} 2 EA 190** where the Court expressed itself that:

***"if a man takes a pistol points it at the head of another and pulls the trigger or takes a knife and drives it into the heart of another malice aforethought can be inferred. The act will be considered intentional killing."* (See also Philibert v R 1976 – 1985 EA 477) In Maina & Another v R {2009} 1EA 289, the appellants assaulted the deceased occasioning on him fatal injuries and the Court held that they intended to cause the deceased grievous harm or even to kill him."**

As already observed from the evidence of **(PW1) – (PW4)** whatever may have been the position of the assailants there is no denying that the effect of their action was to cause death or grievous harm. The reason for it was because of words of the deceased calling the mother and their grandmother a witch. The references on the nature of the injuries captured in the post-mortem report by the pathologist in its various forms identifies malice aforethought to be the motivation behind the unlawful acts of omission of the assailants. Given this state of affairs it is valid to hold that the evidence by the prosecution proves the element of malice aforethought beyond reasonable doubt.

Further, on this aspect of the case, I also need to mention that the assailants acted in a conspiratory manner to commit the crime. In **Maltaka & others v R {1971} EA 495,** it was stated that:

***"the act of conspiracy involves the participation of two or more persons, all the persons involved are liable of the offence charged. As to the question of common intention dealt with in Section 21 of the Penal Code, the Law envisages two or more people forming a common intention to commit a crime together, and the offence is actually committed by one or more of them."* (See Section 10 of the Evidence Act, Rasikal Jamnadas Danda v R {1965} EA 201, In R v Tabulayenka s/o Kirya & 3 others {1943} 10 EACA 5) the Court held that:**

"where a mob sets upon a suspected thief and beat him to death, every person forming the mob would be deemed to have formed a common intention with the rest to kill the thief."

The only exception to the rule would be cogent evidence availed to show that the offender being at the scene did not take in the actual killing of the deceased. In the present case, the evidence for the prosecution from **(PW1) – (PW3)** supports a narrative that the accused persons set out while armed with clubs and pangas with a common intention of attacking the deceased. In the course of execution of the offence, there is no time lapse between the time they visited the clan elder and subsequent departure to say that accused had no knowledge what happened to the deceased.

I move on to the issue of identification. Reading and appraising the facts before me, I refer to the judicial dicta in the cases of **Roria v R {1967} EA 583, Abdalla Bin Wendo v R {1953} 20 EACA 166.** To understand the test further on identification the Court in **Maitanyi v R {1986} KLR 198** held:

"That there is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complaints and or to the police."

I answer this issue as follows that evidence was led to the effect of the deceased dying declaration. Reference as made to Section 33 (a) of the Evidence on the import of the statement made by a deceased person relating to his or her death, which is admissible in evidence to support the cause of death. The circumstances of this case fully illustrate the judicial dictum in **Philip Nzaka v R {2016} eKLR** which reads interalia that:

"under Section 33 (a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements."

In the instant case from the evidence adduced by the prosecution and the accused persons it is clear that they were within reach of the scene of crime. Evidence has placed the accused persons as the last people to be seen with the deceased in the night of 29th/30th June 2018 as they left the clan elders homestead. There was evidence in the present case on the motive and intention to cause death or grievous harm. It all had to do with an allegation of witchcraft made by the deceased against their mother. I would observe that in the morning of 30.6.2018 when the deceased arrived home he made a revelation to **(PW3)** on the accused persons culpability to the injuries on his body. This kind of evidence is more peculiar to the case of murder which is the declaration after the commission of the crime and as to the fact and the party to who caused the fatal injuries. Looking at the evidence as a whole the dying declaration of the deceased is not the only evidence against the accused persons, there is the strength of other circumstantial evidence from **(PW1) – (PW3)** which actually militates against its admission. In the case of **Simon Musoki v R {1958} EA 715** the Court said:

"The Court said it is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

In applying these principles I am of the view that the defence by the accused lacks merit. Accordingly, I find the charge of murder contrary to Section 203 and 204 of the Penal Code proved beyond reasonable doubt and to that extent the verdict of guilty and conviction is entered against each of the accused person.

Sentence

The central task here is to weigh up the aggravating and mitigating factors of this case to carefully arrive at a fair penalty. Specifically, with regard to aggravating factors, the convict planned and used brutal violence against the deceased. On the part of the convicts each prayed for forgiveness on the strength that they are of good character, youth in age and the family is dependent on them for their daily provisions.

From this perspective death is disproportionate to the offence committed by the convicts. On this view culpability is particularly relevant to serve two purposes of punishment desert and deterrence. On this basis upon weighing aggravating factors and mitigating factors, it's a fact that the convicts killed the deceased foreseeably in furtherance of a grave felonious purpose that justify a length term of incarceration as proportionate to the offence.

Accordingly, I sentence each of the convict to 30 (thirty) years imprisonment with effect from 1st August 2018.

I hope this sentence provides a measure of peace for the family of the deceased.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

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