



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

MURDER NO. 05 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

SAMUEL GITHINJI WAGURA.....ACCUSED

JUDGMENT

1. The accused was charged with the *Murder of Eliud Maina Kamau contrary to Section 203 as read with Section 204 of the Penal Code*.
2. The particulars of charge were that on the 21st day of February, 2018 at Muciiri Village, Lesirko Sub-Location, Nyandarua West Sub-County murdered Eliud Maina Kamau.
3. He pleaded not guilty and matter went into hearing. The prosecution called 5 witnesses and closed its case.
4. The accused gave sworn evidence on his defence.
5. The court directed that parties to put submissions but only defence who filed and served.

DEFENCE/ACCUSED SUBMISSIONS:

6. The offence the accused person faces is *Murder contrary to Section 203 as read with Section 204 of the Penal Code*.
7. For the prosecution to prove the case beyond all reasonable doubts against the accused person and secure a conviction on the charge of Murder, it has to prove 3 ingredients of the offence. These are as follows:

i. Proof of the fact and cause of death of the deceased.

ii. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused.

iii. Proof that the unlawful act or omission was committed with malice aforethought.

8. The court to consider the above ingredients in relation to the case before it.

9. Proof of the fact and cause of death of the deceased Eliud Maina Kamau:

10. The fact that Eliud Maina Kamau died on 21st February, 2018 is not contested.

11. **PW1 Dr. Karima Joseph Kinyua**, a medical officer in Nyahururu Sub County Hospital testified that on 26/02/2018, he conducted the post mortem of the deceased Eliud Maina Kamau whose body was identified by Stephen Kamau and Francis Gakoe Kamau. He produced the post mortem report in court as **Exb. 1** and also confirmed the death certificate in respect of the deceased.

12. **PW2 Edward Esanya, PW3 APC Francis Kamau, PW4 APC Joseph Maina Munyeki and PW5 CIP Stephen Ambani** all testified and confirmed the death of Eliud Maina Kamau.

13. That the death of the victim herein was proved as required by the law. The cause of death also is not contested and as stated by PW1, the

deceased succumbed when his head was fractured by a blunt object.

14. Thus confirmed that there is no controversy that the deceased actually died and that his death was resultant from a blunt injury to the head.

15. ***Proof that the said unlawful act or omission was committed with malice aforethought:***

16. The prosecution at the close of its case had not adduced any evidence showing that the accused person did anything unlawful that may have led to the death of the deceased Eliud Maina Kamau.

17. Accused side submitted state that the prosecution did not prove “malice aforethought” in this case.

18. “Malice aforethought” in ordinary parlance is the guilty pre-meditation. It is defined in **Section 206 of the Penal Code** as well as case law. In the case of ***Joseph Kimani Njau v Republic [2014] eKLR*** the Court of Appeal stated that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i. The intention to cause death.

ii. The intention to cause grievous bodily harm.

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.”

19. The prosecution did not adduce any evidence to demonstrate pre-meditation by the accused person or the motive of the alleged murder.

20. The prosecution failed to prove:

i. That the accused person desired to kill the late Eliud Maina Kamau. In other words, the prosecution did not demonstrate by way of evidence that the accused wanted or desired to kill the said deceased.

ii. That the accused intended or would have wanted to harm or cause grievous bodily harm to the late Eliud Maina Kamau or any other person and why.

iii. That the accused engaged himself in an act which he knew was potentially dangerous or was laced with serious risks that it would result to death or grievous bodily harm to the accused or anybody else.

21. The evidence on record is very silent as to why the accused would have wanted to kill the deceased or grievously hurt him. Indeed, the evidence on record with regard to the intention is in fact exculpatory because it exonerates the accused from blame.

22. The Investigating Officer confirmed that the reason why the accused struck the deceased was because he (accused) was trying to defend himself. The deceased accosted the accused in his (accused) home armed with a dangerous weapon and threatened to harm him. He did not heed the accused’s warning to stay away.

23. That self defence in every sense negates malice aforethought on the part of the accused. On his defence he stated:

“My name is Samuel Githinji Wagura. I live in Lesirko Nyandarua. I am a farmer. I don’t know Eliud Maina Kamau – deceased in the instant case.

I can’t remember 21st February, 2018, 8.00am morning alleged date of murder.

I now confirm on 26th February, 2018 I was taken to CID officer Ambani who interviewed me and I recorded a statement under inquiry. I signed it. I confirm the statement is having my signature.

I put same as evidence in chief.

My homestead was burnt after the incident and my family migrated from our land.

I put statement as my evidence.

I hit deceased using a statement. He had come to my home carrying a sword and was coming to attack. I hit him once to save my life. That’s all.

Cross – Examination: I used to see deceased. He did not injure me. He held it up to cut me but I hit him before he hit me. That’s all.

Re – Examination: We had land dispute with deceased’s brother. Previously his brother had cut me on night of previous day (shows court scar). I reported at Kasuku Police. Following day, 21st February, 2018 when deceased came armed with panga, I ran and he followed me when he caught up with me, I hit him with state and I hit him once. That’s all.”

24. That the prosecution failed to prove a very essential ingredient of the charge of murder in that malice aforethought (which is the “mens rea” element against the accused person) was not proved at all. It (malice aforethought) is supposed to be proved beyond all reasonable doubts like the other ingredients of the offence of murder. Simply stated there was no pre-meditation on the part of the accused in striking the deceased person and he only struck the deceased to defend himself.

25. The evidence tendered by the prosecution falls far short of the required evidential threshold that is expected to prove the charge of murder against the accused person.

26. The only thing the prosecution was able to prove is that Eliud Maina Kamau died after he sustained a blow on his head.

27. The prosecution was unable to prove that the accused did anything “unlawful” that caused the death because he did so in self defence and was exercising his right under **Section 17 Penal Code**.

28. It is also beyond argument that the prosecution did not prove or establish the motive or malice aforethought for the alleged murder. In the absence of such prove the charge of murder against the accused cannot hold.

29. Court to uphold the accused person right to defend himself as stipulated under **Section 17 of the Penal Code** by acquitting him of the charge of murder of Eliud Maina Kamau.

ISSUES ANALYSIS AND DETERMINATION

30. After going through evidence on record and submissions filed, I find the issues are **whether the ingredients of murder were proved beyond reasonable doubt? Is defence of self defence available?**

31. To start with for Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngarivs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

(a) 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.

THE DEATH OF THE DECEASED:

32. The fact that Eliud Maina Kamau died on 21st February, 2018 is not contested.

33. PW1 Dr. Karima Joseph Kinyua, a medical officer in Nyahururu Sub County Hospital testified that on 26th February, 2018 he conducted the post mortem of the deceased Eliud Maina Kamau whose body was identified by Stephen Kamau and Francis Gakoe Kamau. He produced the post mortem report in court as **Exb. 1** and also confirmed the death certificate in respect of the deceased.

34. PW2 Edward Esanya, PW3 APC Francis Kamau, PW4 APC Joseph Maina Munyeki and PW5 CIP Stephen Ambani all testified and confirmed the death of Eliud Maina Kamau.

35. That the death of the victim herein was proved as required by the law. The cause of death also is not contested and as stated by PW1, the deceased succumbed when his head was fractured by a blunt object.

36. Proof that the said unlawful act or omission was committed with malice aforethought.

37. The defence submitted that, the prosecution at the close of its case had not adduced any evidence showing that the accused person did anything unlawful that may have led to the death of the deceased Eliud Maina Kamau.

38. Accused side also submitted state that the prosecution did not prove “malice aforethought” in this case.

39. “Malice aforethought” in ordinary parlance is the guilty pre-meditation. It is defined in Section 206 of the Penal Code as well as case law. In the case of **Joseph Kimani Njau v Republic [2014] eKLR** the Court of Appeal stated that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

(a) The intention to cause death.

(b) The intention to cause grievous bodily harm.

(c) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.”

40. The evidence on record is very silent as to why the accused would have wanted to kill the deceased or grievously hurt him. Indeed, the evidence on record with regard to the intention is in fact, form and shape of an exculpatory nature because it is on a trajectory and tendency of exonerating the accused from blame.

41. The Investigating Officer confirmed that the reason why the accused struck the deceased was because he (accused) was trying to defend himself. The deceased accosted the accused in his (accused) home armed with a dangerous weapon and threatened to harm him. He did not heed the accused’s warning to stay away.

42. That self defence in every sense negates malice aforethought on the part of the accused. The prosecution did not adduce any evidence to demonstrate pre-meditation by the accused person or the motive of the alleged murder.

43. The prosecution failed to prove:

i. That the accused person desired to kill the late Eliud Maina Kamau. In other words, the prosecution did not demonstrate by way of evidence that the accused wanted or desired to kill the said deceased.

ii. That the accused intended or would have wanted to harm or cause grievous bodily harm to the late Eliud Maina Kamau or any other person and why.

iii. That the accused engaged himself in an act which he knew was potentially dangerous or was laced with serious risks that it would result to death or grievous bodily harm to the accused or anybody else.

44. That the prosecution failed to prove a very essential ingredient of the charge of murder in that malice aforethought (which is the “mens rea” element against the accused person) was not proved at all. It (malice aforethought) is supposed to be proved beyond reasonable doubts like the other ingredients of the offence of murder. Simply stated there was no pre-meditation on the part of the accused in striking the deceased person and he only struck the deceased to defend himself.

45. The evidence tendered by the prosecution falls far short of the required evidential threshold that is expected to prove the charge of murder against the accused person.

46. The only thing the prosecution was able to prove is that Eliud Maina Kamau died after he sustained a blow on his head.

47. The prosecution was unable to prove that the accused did anything “unlawful” that caused the death because he did so in self defence and was exercising his right under Section 17 Penal Code.

48. It is also beyond peradventure that the prosecution did not prove or establish the motive or malice aforethought for the alleged murder. In the absence of such prove the charge of murder against the accused cannot hold.

49. 28. Thus the Court upholds the accused person right to defend himself as stipulated under Section 17 of the Penal Code by acquitting him of the charge of murder of Eliud Maina Kamau.

i. Thus the charge is dismissed and accused released forthwith unless he is otherwise lawfully held

Dated and Signed at NYAHURURU this 17th day of February, 2022.

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CHARLES KARIUKI

JUDGE