



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 10 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

PETER WAKOLI SAKIELI.....ACCUSED

J U D G M E N T

The accused **PETER WAKOLI SAKIELI** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that **PETER WAKOLI SAKIELI** on the 12th day of February 2020 at Chelekei village in Kimilili sub-county within Bungoma County murdered **STEPHEN WEMELA**.

The case for the prosecution is that on 12.2.2020 PW1 Mark Simiyu Fungo was with P.C Kibor and were from Bahai walking home when they passed near the gate of the accused. He then saw the deceased and another person walking towards where accused was. He then saw when deceased reached where accused was, accused took out a panga he had hidden in jacket and cut the deceased who was his brother on the head. Deceased fell down while screaming. He accused then cut him again. He tried to tell the accused to stop. The accused then cleaned his panga and went to his home.

In cross examination by Mr. Wekesa he stated that the incident occurred at 6.30 p.m. and it was not dark. He stated that the accused cut the deceased on the head, chest and leg and denied that it was deceased who started the fracas.

PW2 MNW a minor aged 14 years and in standard 8 at [Particulars Withheld] primary school testified that she was from the river on 12.2.2020 at 6 p.m. when he saw deceased with Abraham Maseleche walking home. They were walking in front of her. When they reached near her grandmother's gate she then saw accused emerge and cut the deceased who was her father on the leg. He fell down. Accused again cut him on the chest. She knew the accused and saw he used a panga Exh.1.

PW3 Evaline Nangele Kinginya who is a neighbor of the accused testified that he saw the accused at his gate at 3 p.m. He stayed there for long. Later a neighbor called Justine told him accused was waiting for deceased to assault him. She went there to check and saw deceased with one Abraham. She then saw accused push the deceased who fell down and he cut deceased on the leg and chest. The accused then wiped the panga of the blood and left. She screamed and people came.

On being cross examined by Wekesa for accused, she stated that the incident occurred at 6 p.m. and that Abraham had left when the incident occurred and nobody spoke to the accused.

PW5 Justine Nanjala Khaemba the brother of accused testified that on 12.2.2020 he was going to a neighbor when he met accused on the road. He then saw deceased coming from the lower side towards accused. When deceased reached where accused was, he saw accused cut the deceased with a panga. The deceased fell down. He ran there and found deceased was not breathing. Police were informed and took the body away. He testified in cross examination that the accused used a panga which had a black handle.

PW7 Abraham Maseleja was on the road going home and deceased was behind him. After a short time, he saw accused struggling with the deceased. He then saw accused cut the deceased, wipe the blood of the panga and walked away.

In cross examination he stated he saw the incident clearly and that accused had a panga with a blank handle. He admitted he had drunk alcohol that evening.

PW8 the neighbor of the deceased was going to church on 15.2.2020 when she saw a panga on her fence. She had information that a panga

had been used in the murder of deceased. She informed George who sent Anthony who confirmed it was the one.

PW9 NO. 232794 P.C William Bor was with Mark (PW1) when they passed the accused whom they met on the road. After about 2 meters they met the deceased and Masenya. Shortly after he heard screams from behind them. He looked back and saw accused struggling with his brother the deceased. He then saw deceased fall down. He then saw accused wiping a panga and left the scene.

PW6 PC Richard Otolo received information of the murder incident and together with other officers visited the scene. They found the deceased lying on the ground and was dead. He informed the OCS who came and they removed the body. On 15.2.2020 he received a panga from George Namesanya and saw it had dry blood stains. He handed over to the investigating officer.

PW10 PC Samwel Kamau the Investigating officer visited the scene of the murder where they found the deceased who had a cut on the chest and leg. They took the body to the mortuary. He received information that accused was a suspect and had escaped. He later received a panga used as the murder weapon. Accused later surrendered himself to police where he was arrested and later charged with present offence.

PW11 Dr. Mohamed Noor Aden who performed the post mortem on body of deceased found he had bruises on right shoulder, cut on chest wall deep cut wound on lower limb, fracture of right rib cage penetrating to right lung and blood in the rib cage. He formed opinion that cause of death was due to haemorrhage due to injury to right lung by a penetrating sharp object.

The accused upon being put on his defence gave sworn evidence. He testified that on 12.2.2020 at 5 p.m. he was in Webuye where he buys and sells livestock. He stated that on that day he was not at home as he had gone to Chwele. He came back and found people had damaged his property by burning his house and stores. He went to police to report the matter when he was arrested on allegation of killing his brother. He denied in cross-examination that he had escaped the home.

Mr. Wekesa for accused filed written submission. He submitted that the accused was provoked by the deceased who called him a witch and therefore did not have the necessary mensrea. He submitted that the prosecution failed to prove the case beyond reasonable doubt.

The accused is charged with the offence of murder contrary to Section 203 of the Penal Code.

Section 203 of the Penal code provides;

“Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder.”

The law is well laid down, that to establish the offence of murder against an accused person the following four elements must be proved beyond reasonable doubt;

- a) The death of the deceased.**
- b) The unlawful cause of death**
- c) That in causing death the accused committed it with malice aforethought.**
- d) That there is direct or circumstantial evidence placing the accused at the scene of the crime.**

On the fact and cause of death of deceased PW11 Dr. Mohamed Noor Aden who performed the post mortem on body of deceased found that the deceased had cut wound on the chest measuring 5cm by 6cm, fracture of right rib cage with injury penetrating to the lung, and deep cut wound on left lower limb with a fracture. He formed opinion that the cause of death was due to bleeding due to penetrating injury to the lung.

He therefore confirmed the fact and cause of death. He also stated that the death was due to a penetrating injury to the lung by a sharp object. The unlawful act or omission that caused the death was therefore inflicting a penetrating injury to the lungs and bleeding from the several cut wounds.

The prosecution must establish that it is accused who inflicted the injuries that led to the death of the deceased.

PW1 Mark Simiyu testified that while on the way, he saw accused assault the deceased on the road and cut him with a panga on the head and deceased fell down. **PW2 Martha Nanjala Wamela** the daughter of the deceased was from the river when she saw accused push the deceased who fell down and then he cut the deceased with a panga. **PW5 Justine Nanjala** saw deceased coming towards where accused was standing and on deceased reaching where accused was she saw accused cut deceased with a panga and deceased fell down.

PW7 Abraham Maseleja who was at the scene testified he saw accused hold the deceased and they started struggling. Accused then cut the deceased with a panga and deceased fell down. **PW9 PC William Bor** also testified that he heard screams and when he turned to check he saw accused cut deceased on the chest.

The accused in his defence testified that he was not at the place where the offence occurred at the time it was alleged to have occurred. He therefore put forward an alibi defence. He stated that at the time the offence occurred he was at Chwele when he was informed that people had burnt his house and stores. He then went to the police station to report the incident where he was arrested.

While the accused who puts forward an alibi defence assumes no burden to prove his alibi, the prosecution can adduce evidence to displace his alibi defence by placing him at the scene of the offence at the time it occurred.

In this case all the witnesses Mark (PW1), Martha (PW2), Evaline (PW3), Justine (PW5), Abraham (PW7) and PC. William (PW9) were all at or near the scene where the accused and the deceased were. They all testified that they saw the accused at the scene. All of them know both accused and deceased as brothers and saw the accused cut the deceased with a panga and deceased fell down and died. The incident occurred around 6 p.m. during the day and visibility was good. I find that the accused was at the scene and his alibi defence has been displaced by the evidence of these witnesses who testified that they saw him at the scene and he is the one who inflicted the injuries on the deceased from which he died. I am therefore satisfied that accused is the one who inflicted the injuries on the deceased.

The other element the prosecution must prove is that the accused possessed the necessary intention or malice aforethought. Malice aforethought is defined in Section 206 of the Penal code as;

Section 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) an intent to commit a felony;

d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

From the evidence the accused was armed with a panga (exh.1) as he stood on the road waiting for the deceased. When eventually the deceased came he used the panga to cut him severely on the chest and leg. The weapon used, the panga which is a lethal weapon and the part of the body targeted, the chest, a vulnerable part of the body demonstrate an intention to cause grievous harm or death of the deceased. I am satisfied that the prosecution has proved that accused possessed the necessary intention to cause death to the deceased, and has therefore established malice aforethought.

Considering all the evidence I am satisfied that the prosecution has proved a charge of murder against the accused. I therefore find the accused Peter Wakoli Sakieli guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

DATED AT BUNGOMA THIS 30TH DAY OF MARCH, 2022

S.N RIECHI

JUDGE