



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mweri (Criminal Case 6 of 2015)
[2022] KEHC 15407 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 15407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 6 OF 2015**

A. ONG'INJO, J

OCTOBER 24, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

JUMA KATANA MWERI ACCUSED

RULING

1. The accused Juma Katana Mweri is charged with the offence of murder contrary to section 203 as read with section 204 of the *penal code*.
2. The particulars are that the Accused on the 11th day of January, 2015 at Mlango 'B' Village in Ganze District within Kilifi County murdered Kazungu Charo Karisa Mwambire.

Summary of Prosecution Case

3. The prosecution called six (6) witnesses.
4. PW1 was Katana Chumo Ngolo. He testified that both the Accused and deceased were known to him. On January 11, 2015 there was a funeral in the village. He went to sleep and at 4.00 am he went out for a short call where he found deceased who was 5 meters from him suffering from injuries. He went to inquire what had happened from the village elders. He found accused and brother to the Deceased and asked them what happened. Accused told him that he had fought with the deceased. They proceeded to the scene with elders and saw that deceased had a stab wound. They started to carry deceased to hospital but he died. The Accused, father to the accused and Bosco Kitsao went to the police station. The police came to the scene and took the body. He further testified that Katana Mweri and Karisa had separated the accused who was fighting with the deceased and that he had never deferred with deceased. The family of the deceased and Accused lived mutually and deceased and Accused used to herd cattle together. On cross examination he testified that he had not known of any difference between accused and deceased.



5. PW2 was Karisa Kahindi, deceased was his brother and Accused is his uncle. On 11.1. 2015 at a funeral vigil, a scuffle started between the Deceased and Accused, the Accused wrestled Deceased to the ground. He restrained Accused from attacking Deceased and tried to take away the weapon that Accused had but he was not able to. They restrained Accused with his father and the father led him home. He thought the matter had been resolved but later, Mr Katana Ngolo called out that there was someone who had fallen near his house and was crying saying that he had been injured. He saw it was the Deceased who had been stabbed, on left side of his arm penetrating to left side of the chest/ribs. They called the village elder Bosco Kitsao as they did not have phones and called motorcycles to take Deceased to hospital but he died before he could be taken to the hospital. Bosco called the police and they collected the body. He went to view body of deceased with other villagers but by that time Accused had gone to Ganze police station. He testified that they never deferred with the Accused.
6. PW3 was Bosco Kitsao. Accused was his neighbor and son to his step mother. Deceased was also known to him. On 11.1.2015 he was asleep when around 4 am he was woken up with Mzee Katana Mweri Idza who told him that Accused had stabbed Deceased. Katana is the father to the Accused. He went to take Deceased to hospital, he was lying behind the house of PW1. He was bleeding from his stab wounds from his left forearm to his ribs. They made a makeshift bed to carry deceased but he died. Accused father went to report matter to the chief. They found Accused and took him to the police station. He was talking incoherent when placed in custody. He didn't see the weapon used to stab. Deceased was an uncle to Accused and they used to go to the field together.
7. On cross examination he testified that Deceased and Accused were drinking when the scuffle ensued. And Accused father is the one who reported to him that the two had been fighting.
8. PW4 was Katana Mweri Idza. Accused was his brother's second son. Deceased was son to his niece. On January 11, 2015, at 4.00 am he was woken up at wife and said Deceased had deferred with Accused. He went to the scene and separated him. He held Accused while Deceased older brother held him. He instructed Accused to go home. After five minutes Katana Chumo came and told them that Deceased had been stabbed. He saw that Deceased had been stabbed. He went and reported to the village elder Bosco who accompanied him back to the scene. He found a make shift bed to carry victim to hospital and they called the chief when they failed to get a motorbike. However, Deceased died before they could get him to hospital Accused went to report matter to chief and he was instructed to take Accused to Ganze D.O office and the D.O called the police. While at Do's office Accused got an epileptic attack. They went back to crime scene with the police but they didn't recover any weapon. The cause of the fight was a beer bottle. Deceased had borrowed a bottle that he failed to return. The Deceased and Accused used to be friends.
9. PW5 was 231085 superintendent David Wafula. On 11. 1. 2015 he called and informed that Chief of Sokoke that Deceased had been killed by Accused person. They had fought over a local brew. He assigned CPL Ben Songoina to visit the scene and organized transportation of body to Kilifi hospital. On January 12, 2015 Accused led them to a house where they recovered the knife which was the murder weapon but it did not have blood stains. Accused had picked knife from kitchen and told the mother he was going to stab Deceased. The mother reported to the father the next day. The Deceased and Accused had fought but had been separated by neighbors. Deceased had died on his way to hospital. Accused was booked by a colleague and he noted that Accused was epileptic and he appeared not have been of sound mind. On January 24, 2015 Accused tried to escape but he was apprehended. During recording of the statement, accused exhibited strange behaviors. The chief was the one who convinced him to sign the statement.



10. On cross examination he said that he had not gone to the crime scene himself on the night of the murder and knife recovered did not have blood stains and during interrogations on the 22nd the Accused was normal.
11. PW6 was Dr. Bernard Otieno, testifying on behalf of Dr Suleiman who did the postmortem. He testified that Deceased was 27 years. Observations made were that he had a deep penetrating cut on the left mid arm with an entry point diameter of about 4 cm and an exit point diameter of about 6 cm. The cause of death was severe hemorrhage. He produced the postmortem report marked as EX P1 dated January 15, 2015

Defence

12. Defence called one witness the Accused person who gave sworn evidence.
13. Accused testified that on January 11, 2015 he defered with deceased and a scuffle ensued between them. The deceased attacked him with a knife and stabbed him on the left side of the mouth and right hand (Showed scar). Deceased wanted to run but hit a wall to his house and his mother cried out. Deceased fell off and was stabbed by his own knife on his abdomen. The mother cried out. Other villagers came to their home. He remained at the scene
14. On cross examination he said that he did not know which death he was charged with. He had defered with Deceased when they were drinking palm wine. He further said that when Deceased fell on the ground, his mother told him to get water to clean the wound on Deceased forehead and he did. He further testified that he was the one who bought the palm wine and they had fought when he poured his palm wine. There were two confrontations between the Accused and Deceased he never brought any knife from his house nor did his father take him to the police station.

Summary of Submissions

Accused Person's Submissions

15. It was submitted that the Prosecution did not prove all elements of murder to the required standard as provided in *Republic v Dorothy Awuor Juma* [2018] eKLR. There was no eye witness to the murder of the Deceased and murder weapon recovered had no blood stains. It was further submitted that the person who killed the Deceased did not have malice aforethought as the Deceased had a singular stab wound on his left side below the armpit and he cause of death was loss of blood and he would have survived had he gotten medical attention sooner. PW1, PW2 and PW4 also testified to the fact that there was no bad blood between Accused and Deceased and Accused went to the police station willingly. Moreover, malice afore thought cannot be proved if the actus rues has not been proved.

Analysis and Determination

16. Section 203 of the *Penal Code* defines murder in the following terms: "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."
17. In Mombasa High Court Criminal Case 42 of 2009, *R v Daniel Musyoka Mwasia and 2 others*, the court expressed itself as here under: The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder: a. Proof of fact as well cause of death of deceased person. Proof that death of Deceased resulted from an unlawful act or omission on the part of the Accused person. Proof that such unlawful act or omission was committed with malice aforethought.



18. Having considered evidence from the prosecution and the defence It is not in dispute that Deceased died. All prosecution witnesses attested to this fact and PW6 Dr. Bernard Otieno, produced the post mortem report that indicated that Deceased had a deep penetrating cut on the left mid arm with an entry point diameter of about 4 cm and an exit point diameter of about 6 cm. The cause of death was severe hemorrhage secondary to assault.
19. From evidence provided it is not in dispute that a fight ensued between the Accused and Deceased because of local brew. PW2 was an eye witness to the fight between the Deceased and Accused and even separated the two. It is the assertion of the Accused person that there was no eye witness to the murder of the deceased and circumstantial evidence provided was weak. However, all factors considered it is clear that Accused stabbed the Deceased. This is because the deceased had not fought with any other person on that night and he was found stabbed just a few minutes after he had fought with Accused person. PW3, PW4 and Accused person's father while on the way to report the matter, came across Accused and took him to the police station. Further the Accused person led PW5 the investigating police officer to where he had kept the murder weapon and it was retrieved from under the roof. From the foregoing I find that this element of causing death from an unlawful act or omission was proved.
20. On whether accused was actuated with malice aforethought section 206 defines malice aforethought in the following terms: "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances ;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; 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; an intent to commit a felony; 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.
21. In the case of *Hyam v DPP* [1974] AC the court held inter alia that: "Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."
22. In *Rex v Tubere s/o Ochen* [1945] 1Z EACA 63, Eastern Court of Appeal observed: "In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.
23. In *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No 32 of 1990) the court held: "the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased."
24. In the present case it was well provided in evidence that the Accused and deceased were drinking at the vigil and Accused person had given deceased a drink that he was to return but failed to. A fight ensued in which PW2 and others had to intervene. They thought the fight had been ended because the accused was seen going towards the direction of his home, only for a few minutes afterwards, the deceased was found with injuries on the ground groaning in pain and seeking help. Accused and deceased were friends as they used to herd cattle together. Their fight was not premeditated. It was because of drunkenness that they fought.
25. From the foregoing I find that the element of malice aforethought was not proved to the required standard. I therefore that the Accused is not guilty of murder but rather manslaughter for which he is



convicted under section 322(1) of the *Criminal Procedure Code* cap 75.was not met beyond reasonable doubt.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24TH OF OCTOBER 2022

HON LADY JUSTICE A.ONG'INJO

JUDGE

In the presence of: - at 3.49 pm

Ogwel, Court Assistant.

Accused present in person.

Mr. Ngiri for State.

Ms. Musyoka Advocate for Accused.

COURT: Mention for mitigation on 3.11.2022 for victim impact statement and presentence report.

HON LADY JUSTICE A.ONG'INJO

JUDGE

24.10.2022

