



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 43 OF 2016

REPUBLIC..... PROSECUTOR

VERSUS

SOLOMON CHUCHU KARAMI.....ACCUSED

JUDGMENT

1. The Accused person is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code, the Information stating that on 21st March 2015 at **Chuchu Quality Butchery** in Guthunguri Township of Kiambu County, he murdered **David Mwendia Maina**. The Accused denied the charges and was represented by Mr. Mathenge.
2. Through six prosecution witnesses, the prosecution presented the following case. The Accused person was during the material period operating a butchery in Guthunguri Township. Apart from raw meat, the Accused also sold a local sausage commonly known as " *mutura* " outside the butchery. **David Mwendia Maina**, the deceased herein, and his friend **Robert Kabiru Njoroge (PW1)** were regular customers of the Accused. On the night of 21/03/15 at about 8.30 p.m. the deceased and **PW1** stopped outside the butchery of the Accused where *mutura* was displayed for sale. The deceased ordered some of the delicacy but before long, a dispute erupted between the deceased and the Accused, the latter who was attending the *mutura* stand, and holding a knife. The dispute related to change allegedly owed by the Accused to the deceased or a debt owed by the deceased to the Accused.
3. Whatever the case, as the altercation continued, the Accused used his knife to stab the deceased on the chest. The deceased collapsed while bleeding profusely. The Accused and other members of the public mobilized **Simon Njoroge Wanjiru (PW2)** who had a vehicle close by to rush the deceased to hospital. The deceased however died on the same night. The incident was reported to police at Guthunguri Police Station by the Accused, **PW1** and relatives of the deceased. Police visited the scene and commenced investigations. The investigating officer **CI Raphael Mulwa (PW6)** collected two knives from the Accused's butchery and recorded statements.
4. The postmortem examination was carried out by **Dr. Edith Wachera (PW5)** on 25th March 2015 [erroneously stated as 25th April 2015 which is inconsistent with the fact that the blood sample of the deceased taken at the post mortem was received at the Government Chemist on 1st April 2015, per the report by **Elizabeth Waithira Oyiengo (PW4)**]. The post mortem report (**Exhibit 4**) documents a stab wound traversing the anterior chest wall through muscles, pleura, and left lung and a comminuted fracture on the right frontal skull. The cause of death was severe chest and heart injury with excessive hemorrhage.
5. On 1st April 2015, an exhibit memo form [**Exhibit 2**] was prepared by the police to forward the deceased's blood sample, soil samples collected at the scene of the crime, two blood-stained knives collected from the butchery of the Accused and a buccal swab sample taken from the Accused. **PW4** upon examining these items concluded that the soil samples and knives were stained with blood of human origin but these samples only generated partial (inconclusive) DNA profile. The Accused was subsequently charged.
6. Upon being placed on his defence, the Accused elected to make a sworn statement but did not call a witness. He confirmed that he operated a butchery at Guthunguri township and that the deceased and **PW1** were his customers. He asserted that he sold raw meat inside the butchery and cooked meat which was displayed outside the butchery. He stated that on the material day at 8.30 pm the deceased and **PW1** came to his butchery. The two were drunk.
7. He testified that **PW1** had ordered cooked meat as the deceased stood outside the butchery. That as he attended to the orders "*Kabiru (PW1) came back saying Mwendia (deceased) had stabbed himself while outside*". That he then accompanied **PW1** outside and met the deceased lying down and bleeding. That he accompanied **PW2** to take the deceased to hospital. Soon they were joined **PW1** and the deceased's brother and all were presently informed that the deceased had succumbed to his injuries and that they should report to the police. They complied. He denied having caused the deceased's injuries or threatening **PW1** about revealing this fact.
8. He added that at any rate he too was with the family of the deceased at the time the group, including **PW1** and himself went to report to the Guthunguri Police Station. He said he had no dispute with the deceased or **PW1** both being his regular customers. He admitted that two knives were collected from his butchery by police. He said that he and **PW1** were initially detained by police on 22.3.15 before recording

their statements, following which **PW1** was released.

9. The court has considered the evidence on record and submissions made at the close of the defence. There is no dispute that the deceased, **PW1** and the Accused were well known to one another; that the Accused was approached at his butchery on the material right by **PW1** and the deceased one of whom ordered some meat; that the deceased sustained fatal injuries while at the Accused's premises; that the Accused mobilized **PW2** to drive the deceased to a hospital close by; that the deceased succumbed to his injuries; and that **PW1** and the Accused were arrested on the next day.

10. Although there is a dispute as to how the deceased sustained the fatal injuries while at the Accused's premises, the cause of his death is not in dispute. The postmortem form produced by **PW5** describes the external appearance of the deceased as follows:

“-Blood stains on both palms

-Anterior chest wall with stab wound approximately 3 cm long with downward trajectory at 5th intercostal space on left side.

-Right forehead with bruise approximately 5 cm diameter.”

11. As for the internal appearance, the report states:

“1) Respiratory System:

- Stab wound traversing anterior chest wall (muscle, pleura, lung (left)

- Hemorrhagic fluid in pleura.... “

2) Cardio-vascular System:

-Myocardial tissue, pericardium with stab wound approximately 3 cm long. Hemorrhagic fluid in pericardial cavity.....

5) Head:

-Right forehead with bruise extending through whole thickness of scalp.

-Comminuted fracture right frontal skull approximately 5cm in diameters.”

12. The stated cause of death was the chest and heart injury which caused excessive bleeding. If indeed any person inflicted the chest injury that penetrated the deceased's chest injuring the lung and heart and causing massive bleeding, an intention to cause death or grievous harm such as envisaged in Section 206 of the Penal Code could be inferred on the part of such assailant.

13. Section 206 of the Penal Code provides that:

“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)....;

(d)...”

14. In the case of **R v Tumbere s/o Ochen [1945] 12 EACA** cited with approval by the Court of Appeal in **Joseph Wanjohi Ndung'u v. Republic [2020] eKLR**, the court identified certain elements to be considered in order to infer malice aforethought from a set of facts, to be:

1. the nature of the weapon used;

2. the manner in which it was used;

3. the part of the body targeted;

4. the nature of injuries inflicted either a single stab-wound or multiple injuries; and

5. the conduct of the accused before and after the incident.

15. The question that falls for determination in this case is whether it is the Accused person, who of malice afterthought, committed the unlawful act that caused the death of the deceased. The sole prosecution eyewitness in this case is **PW1**, who, on the admissions of the Accused was in the company of the deceased at the time of the incident in question. As expected, the defence has by its submissions strongly attacked the evidence of **PW1**, including his assertion that he was in the company the deceased at the material time, which fact was admitted by the Accused in his testimony.

16. Be that as it may, **PW1** told the court that an altercation arose while the deceased and **PW1** were at the Accused's butchery making a purchase, and that the Accused stabbed the deceased in the chest. That subsequently while he and the Accused were alone, the Accused told him that they should report that the deceased fell on a knife or he would kill him.

17. This witness was cross examined at some length by the defence, and eventually admitted, an issue strongly emphasized in submissions, that the initial report made at the police station had stated that the deceased had slipped and fallen on a knife, fatally injuring himself. The witness was confronted with the Occurrence Book (OB) entry No. 39 of 21st March 2015 which though not marked for production by the defence is contained in the Investigation Diary in the Committal Bundle. The OB entry was made at 22.30 hours, which would admittedly be about an hour or two since the deceased and **PW1** visited the Accused's butchery reads in part that:

“SUDDEN DEATH REPORT

Now to the station is the following people namely Solomon Chuchu Karani.... who runs a butchery opposite Posta in Githunguri township and Robert Kabiru Njoroge.... and both report that while they were at the Chuchu butchery, one namely David Maina picked a knife and started using to eat meat while he was drunk then he slipped and fell on the said knife and went straight to the heart and started bleeding profusely ...”(sic)

18. Prior to being shown this report during cross examined **PW1** had stated:

“Other people came to the hospital including Gichinga and brother to the deceased. I told them what had happened, but we didn't talk. We all went together to the station including the Accused. I knew even the deceased's brother was there also. I told them that Chuchu had stabbed deceased. The group was there when I reported. The station is an open place. I told police at the Report Desk what had happened.... the family members were there.”

19. On being shown the transcript of the OB entry the witness stated:

“I did not make any other report to the police station. Accused threatened my life.... I ran away from Naivasha. But I told Mr. Ongaria (investigating officer) when he was recording my statement. Chuchu threatened me on the day of the incident. I told Sam (investigating officer) that Chuchu had threatened me. I did not tell the police about the threat when I was reporting.”

20. During re-examination **PW1** stated:

“Chuchu told me that we report that deceased had fallen on the knife. But on Sunday when recording the statement alone, I recorded the truth. Chuchu had threatened me with death if I told the truth. He made the threat while at the hospital.”

21. Evidently, the police did not believe the narrative of the incident as reported and decided to take in the two initial reporters for further questioning on 22nd March 2015, culminating with the statement by **PW1** implicating the Accused in the death. There is evidence, even from the Accused's account that indeed there was opportunity for the Accused and **PW1** to be alone, at the hospital as the deceased's relatives came to the hospital later, because **PW2** having driven the Accused and deceased to hospital left immediately.

22. Moreover, there are several pointers that the report made at the police station initially was patently false, for the key reason that it is not plausible that a man holding a knife would fall on such a knife with the sharp end pointing onto his torso. And secondly, that on falling on such knife, it would plunge so deeply into his chest as to penetrate his chest, through the rib cage and penetrate through the lung and into the heart as **PW5** explained. Thirdly as described, the stab wound was inclined on a downward trajectory. How a knife held in the hand of the victim could penetrate the chest of the knife holder in such a manner is hard to conceive.

23. During cross examination **PW5** stated:

“The penetrating stab wound (was) on the left-hand side of the chest. If the stab emanated from self, the depth would be superficial”.

24. In the natural and logical course of things, if a man holding a knife in the hand fell forwards as suggested in the defence, the probability would be that the he would drop the knife or if happened not to fall off but instead lodged on his body, it would not be on the chest within the proximity of the heart and lungs but perhaps the abdomen. Secondly, the injury caused would not be a penetrating one unless the man was somehow impaled on the knife, which would hardly be possible if he fell while holding the knife in his hand.

25. Therefore, the account given to the police as a first report was an obvious lie. The position, severity of the deceased's injury strongly points at a deliberate stab by a third party, not accidentally by self during a fall. There is no suggestion whatsoever that **PW1** inflicted the

injury on the deceased and indeed, the defence in cross- examination of **PW1** did not suggest that to him; or that the Accused and **PW1** were inside the butchery while the deceased was outside the butchery during the purchase of whatever it was by **PW1**, and that only after **PW1** had gone outside did he return to report the alleged falling and injury of the deceased.

26. The unshaken evidence by **PW1** is that he and the deceased stood outside the butchery of the Accused while the deceased bought and ate some meat or *mutura* from the display or stand outside, which was manned by the Accused. The Accused evidently faced the two customers whom according to **PW1** had their backs turned to the road. That spot is the position where according to witnesses the body lay and must be the place of the stabbing, by a person facing the deceased hence landing a stab on the left chest.

27. The Accused's undisputed involvement with the deceased immediately after the stabbing, through mobilizing transport, abandoning his business premises to accompany the deceased to hospital, and remaining there until he was declared dead, speaks volumes about his culpability. In comparison, **PW2** left the hospital soon after dropping off the deceased. The Accused's conduct is inconsistent with the behavior of a businessman towards an allegedly drunk customer who suffered a strange misfortune he had nothing to do with while outside his premises, but more consistent with that of a man laboring under guilt. In his defence, the Accused suggested that in doing this he was helping a friend, which does not seem to be the case and was not put to **PW1** to confirm or deny.

28. The evidence by **PW1** is that at the moment of stabbing, the three men stood across together outside the butchery. The report that the deceased fell in a knife does not convince, which means either one of the two men – Accused or **PW1** stabbed him. Had the deceased been stabbed by **PW1**, there would be no reason for the Accused to not state it to police and before this court. In my considered view, in the circumstances described by **PW1**, it is believable that it was the Accused who stabbed the deceased– after all, knives with human blood though its source was unidentified, were retrieved from his butchery. The only plausible explanation for the Accused's efforts thereafter to secure evacuation of the deceased and treatment was his involvement with his injury.

29. In those circumstances, it is believable that while at the hospital the Accused using threats or persuasion had convinced **PW1** to give the false narrative contained in the initial report to police. The Accused had ample opportunity and in the circumstances of the case every reason to concoct the lie in order to hide his guilt in the matter. **PW1** having just witnessed the murder was possibly vulnerable to such manipulation but he redeemed himself by the next day when police took him in for questioning.

30. Despite the defence casting the witness as an incorrigible liar who was either not at Accused's butchery with the deceased on the material night, or if present was too drunk to follow what was happening at the butchery, in the lengthy cross- examination of **PW1**, it was never suggested that the Accused was inside the butchery serving **PW1** while the deceased remained outside, and that on stepping out **PW1** returned to inform the Accused that the deceased had fallen on a knife. Given the evidence by **PW1** asserting the presence of **PW1**, deceased and the Accused outside the butchery during the stabbing, that omission cannot be a mere oversight. The omission suggests that the Accused's defence is an afterthought.

31. Thus, upon testing and weighing the testimony of **PW1** against all the circumstances and evidence in this case, the court is convinced that even though **PW1** together with the Accused initially made a false report, **PW1** nevertheless did on the very next day tell the truth and not to save himself as there is no evidence at all pointing to his culpability in the stabbing. The court is convinced that **PW1** told the same truth to the court during the trial. There is nothing to support the defence assertions that the witness was coached or his evidence worthless. Indeed, it appears that much of **PW1**'s evidence on the events of the material evening was confirmed by the Accused in his own sworn testimony, the key point of contention being only the stabbing of the deceased. The Accused's denial of the stabbing act is in my opinion totally displaced by the prosecution evidence taken as a whole.

32. There is no requirement in this case that to prove a certain fact, the prosecution ought to have called any certain number of witnesses. Section 143 of the Evidence Act provides:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

The Court of Appeal in the case of **Erick Onyango Ondeng' v R [2014] eKLR** reaffirmed the provision. The defence referred to an unnamed person who was allegedly inside the butchery and other traders in the area during the offence and asserted they ought to have been called to testify. As this court has found, the material incident, namely the stabbing occurred outside the butchery where cooked meat was displayed for sale. Indeed, other witnesses called, such as **PW2** who operated a business next door to the Accused and **PW3** who was in a shop right across from the butchery at the time did not witness the incident. In my opinion such were merely peripheral persons and the only probative value of their evidence would have related to the fact of the presence of the deceased lying injured outside the butchery.

33. Applying the principles articulated in **Tumbere s/o Ochen** to the stabbing incident described by **PW1** alongside the pathologist's report, there can be no doubt that the unlawful act of the Accused was accompanied by malice aforethought. Accordingly, I am satisfied that the prosecution has discharged its burden of proof to the required standard. I therefore will find the Accused guilty and convict him as charged.

DATED AND SIGNED ELECTRONICALLY ON THIS 16TH DAY OF MARCH 2021.

C. MEOLI

JUDGE DELIVERED AND SIGNED AT KIAMBU ON THIS 23RD DAY OF MARCH 2021.

M.KASANGO

JUDGE

In the Presence of:

.....**For Prosecution**

.....**For Accused**

Accused present

C/A;.....

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