



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL CASE NUMBER 22 OF 2017**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**KEVIN MASONI ALIAS KEVO.....ACCUSED**

**J U D G M E N T**

The accused **Kevin Masoni alias Kevo** is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the night of 8<sup>th</sup> and 9<sup>th</sup> July, 2017 at Kimilili District within Bungoma County murdered **LAMECK MERIT WAKHUNGU**.

**PW 2 Collins Sangura Juma**, then a student at Pwani University was with the deceased on 6<sup>th</sup> July, 2016 where he was performing as a disk Jockey at Royal Palace Hotel Kimilili. As he was going out with the deceased he met his ex-girlfriend Ruth. Ruth then threw away the cap the witness was wearing. He left deceased trying to retrieve the cap. He rode a boda boda to the home of deceased leaving deceased behind. He waited for him but did not come. He went back to check. On the way he met Ruth, Lucy, Susan, Brooks and accused Kevin. The witness had a confrontation with Ruth. Accused then held him. The deceased came to separate them. The accused then released witness and started fighting with the deceased. The deceased hit accused who fell down. The accused then stood up and stabbed the deceased on the left ribs. The accused then ran away. The deceased was taken to Dreamland hospital where he was admitted. The next day the deceased died.

**PW 1, Dr. Wanambisi Caleb Wata** produced a post-mortem report prepared by Dr. Wafula. The deceased had cut wound below the chest between 11<sup>th</sup> and 12<sup>th</sup> rib; there was blood in abdomen and ruptured spleen. He formed opinion that the cause of death was due to ruptured spleen as a result of a stab wound.

**PW 3 No. 60587 CPL Richard Ombati** only received report from father of deceased that his son had been assaulted, and was admitted. He visited the deceased at Lugulu Hospital. He was later informed that he had died. He went and arrested the accused who was a suspect whom he found at the market.

The accused on being placed on his defence gave affirmed evidence. He stated that in February, 2017 he went to Kimilili to visit his sister Jackline Masoni who is married there. On the night of 8<sup>th</sup> July, he attended a funeral at Matuyu area, where he went at 7 p.m. and came back at 1 a.m. On his way home he decided to go and pick his girlfriend called Susan who was working at a club in Kimilili town. He saw her with 3 other people walking to where he was. When he met them, Susan explained that she had left the club early as there was fracas and that the girls she was with were her friends. He decided to escort Susan's friends.

On reaching at the junction which was 250 metres to his house, 4 people on a motorcycle came and stopped near him. Three of them came to him. PW 2 Collins was among the 3 people. He (PW 2) hit one of the girls. Accused asked Collins PW 2 why he was doing that. They then surrounded the accused. The deceased then hit accused with a fist and he fell down. Collins (PW 2) then took a knife and stabbed accused on the hand and then stabbed the deceased. The deceased fell down. The girls who were with accused advised him to leave. He then left with them. He went to his sister's house and a mob came and he went with them to the police station, where he was later charged with present offence. He stated that the girls who were with him did not come to court to testify although he had been given their statements.

On being cross-examined by Thuo for state he confirmed that the murder weapon was a knife and that he was able to see it clearly from the electric light at the junction. He stated that they were able to see each other.

Mr. Wamalwa R for the accused filed written submission. He submitted that the prosecution called only one witness. PW 2 Collins who testified that the deceased was accompanied by other people. These people recorded statements but were not called by prosecution as witnesses. He submitted that failure by the prosecution to call these witnesses should lead the court to draw an inference that had such witnesses been called their evidence would have been adverse to the prosecution. He referred this court to the decision in **Paul Karanja Gitari Vs Republic (2016) eKLR**.

Counsel submitted that the accused's defence clearly stated what transpired on the material day. His defence was clear, crystally static,

unshakable and candid. The defence testimony pointed a finger at PW 2 as the one who stabbed the deceased with a knife when the said PW 2 aimed to stab the accused.

The accused is charged with the offence of Murder contrary to Section 203 of the Penal Code. Section 203 provides: -

***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

In a charge of murder the prosecution must prove beyond reasonable doubt the 4 ingredients of the offence.

- a) The fact of death and cause of death.
- b) The unlawful act or omission causing the death.
- c) The existence of malice aforethought.
- d) That it is accused who effected the unlawful act or omission that caused the death of deceased.

**PW 1 Dr. Wanambusi Wata** who produced the post-mortem report of the deceased testified that deceased had a stab wound on the chest measuring 6 cm and that the spleen had been ruptured. He formed opinion that cause of death was due to a ruptured spleen due to the stab wound inflicted by a sharp object. The unlawful act that caused the death was of the stabbing of the deceased which led to a rupture of the spleen. He also confirmed the fact of death.

The prosecution must also establish the existence of malice aforethought on the part of the accused which is the *mens rea* of the offence. Section 206 Penal Code provides circumstances from which a court can discern malice aforethought. Section 206 provides: -

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.***

The deceased had a stab wound on the chest between the 11<sup>th</sup> – 12<sup>th</sup> rib measuring 6cm that ruptured the spleen. It was inflicted by a sharp object with force. The infliction of the stab wound on a vulnerable part of the body, the chest shows an intention to cause grievous harm or death as it did in this case. I am, therefore, satisfied that there existed malice aforethought in inflicting the injuries on the deceased.

From the prosecution and defence evidence, it is common ground that the accused and deceased were at the place where the offence was committed. It is also a common ground that there was a fracas arising from the relationship of girl's who were present at the scene. It is also not in dispute that the deceased sustained injuries during that night and who taken to hospital where he died. Was inflicted the injuries on the deceased?

**PW 2 Collins Sangare Juma** in his evidence testified: -

***“I waited but he did not come. I started going back. I met Ruth, Lucy, Susan, Broocks and one Kevin the accused. I approached Ruth and we had a confrontation. I stamped her. The accused then held me from behind on the neck. Accused started beating me. At that time deceased arrived and tried to separate us. The accused released me. The accused then engaged the deceased in a physical fight. The deceased her accused who freedom. The accused then stood up and produced a knife. Accused hen stabbed the deceased on the left ribs. I was about 2 metres away.”***

The accused in his defence explained the events and stated: -

***“The 3 people who had alighted came and one met at the junction. I did not know them. PW 2 Collins was among the 3 people. He hit one of the girls with a fist. I asked him why he was doing that. He told me I was behaving as if I knew much. They then surrounded me. Deceased was at my behind, Collins (PW 2) was ahead of me. The deceased hit me with a fist and I fell down. I stood up PW 2 Collins tried to stab me. He cut me on the hand; and then stabbed the deceased. The knife bruised my hand. The deceased then fell down. The other person who was on my right ran away. The deceased had fallen down. The girls told me to leave. We left and I escorted them to their house.”***

Both PW 2 Collins and the accused agree that the deceased hit the accused with a fist and accused fell down. The accused then stood up and

that is when the issue he saw Collin's with a knife aiming to stab him but instead stabbed the deceased. The explanation by PW 2 Collins is that when accused stood up, he took a knife and stabbed the deceased who fell down and accused ran away.

I have carefully considered the evidence. I am satisfied that it is accused and not Collins who inflicted the stab wound on the deceased. Collins confirms that it is accused who had the knife and it is him who stabbed the deceased. Accused's contention that it is Collins and not him who stabbed the deceased is not true.

I note from the evidence that the offence was committed and caused by a fight over girls between the accused who was with the girls and the deceased and his group who claimed one of the girls to be his girlfriend. I find that the deceased hit the accused with a fist and he fell down. When the accused stood up is when he stabbed deceased with a knife inflicting the injuries that caused the death of the deceased. It is clear that accused acted under provocation when he stabbed the deceased.

*208. (1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.*

*(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.*

*(3) A lawful act is not provocation to any person for an assault.*

*(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.*

*(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.*

I, therefore, find the accused **Kevin Masoni alias Kevo** guilty of the charge of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY JULY, 2021.**

**S N RIECHI**

**JUDGE**