



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 3 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

KENGA KAJEMBE.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Mr. Alenga for the state

Mr. Obaga for the accused person

J U D G M E N T

The accused has been facing trial for the offence of murder contrary to Section 203 of the Penal Code. The charge is founded on the evidence to the effect that on the 14.2.2019 at Burangi Village, Magarini Sub-County he murdered **Kea Katana**.

In support of the charge, the prosecution summoned the evidence of their five witnesses to prove it beyond reasonable doubt against the accused person. At the close of the prosecution case the defence asked the Court to make a finding in terms of Section 306 of the Criminal Procedure Code. The net effect of the admitted evidence shows on 14.2.2019 **(PW1) Rehema** was at Mangwe club selling palm wine. Part of the customers she served wine happened to be the accused and the deceased.

Further, the evidence by **(PW1)** indicates that in the course of the evening each of them ordered for 'wine' and sat at different locations. In the course of that social evening accused person left his chair and went to the deceased holding his head, took a knife in his possession and slit the neck. Thereafter the accused took flight leaving the deceased on the ground bleeding from the injuries.

The next witness **(PW2) Farah Karisa** told the Court that on 14.2.2019 he had taken palm wine to **(PW1)** to sell on his behalf. It was after a short while leaving the club he heard screams. On arrival at the scene, **(PW2)** stated that he saw the deceased lying on the ground with injuries and in pain pointed at the accused as the cause. According to **(PW2)**, accused person was also within the vicinity armed with a knife issuing threats that if anyone of them is a man enough they should henceforth try to intervene. At the same time **(PW2)** told the Court that arrangements were made to take the deceased to the mortuary having succumbed to death from the harm inflicted.

(PW3) – Dr. Badia who conducted a post-mortem examination on the deceased testified that she came to the conclusion that the death occurred due to haemorrhalsis shock due to cut wound on the neck.

(PW4) – Cpl Abdalla currently attached to Kizingo but formerly of Malindi Police Station told the Court that while at the station he saw the accused armed with a knife having surrendered and admitting to the crime. He therefore disarmed him of the knife placing him in police custody.

(PW5) Cpl. Abdalla Mawazo also a police officer from Marereni testified as the investigating officer to the murder. He told the Court that after various inquiries and witness statements recorded of **(PW1), (PW2) and (PW3)** he was able to establish that at the time of the incident accused and the deceased were in a palm wine club at Burangi Village. There is also the admitted evidence of the Senior Resident Magistrate Wasike who recorded the accused's confession statement after satisfying herself of the voluntaries thereof. The aforesaid statement was as **exhibit 4**.

At the close of the prosecution case it was obligatory for the Court to make a finding pursuant to the provisions of Section 306 of the Criminal Procedure Code.

The question which arises is whether from the evidence of the five witnesses the prosecution has discharged the burden of proof of a prima facie case. At this stage all that the Court is called upon to undertake is to decide whether there is evidence which proves the following

elements:

(a). The death of the deceased.

(b). Whether his death was unlawful.

(c). Whether the perpetrators in causing death had a malice aforethought.

(d). Finally, whether the prosecution has given reasonable evidence of identification of the accused and placing at the scene of the murder.

Defence case

The accused in his defence denied killing the deceased as alleged by the prosecution witnesses. He explained to the Court that on the material day, he was involved in wine tapping activity. Thereafter, a fight broke out with the deceased in which he suffered serious bodily harm. It was in those circumstances accused told the Court that he took steps to defend himself from the imminent danger to his life by the deceased.

Analysis and Resolution

The standard of proof:

The correct position in Law is as stated in the case of **Woolmington v DPP {1935} AC 462**. The predominant principle elucidated in this case is to the effect the state has the burden of proving each element of the offence against the accused person beyond reasonable doubt. As such, the accused bears no responsibility to disprove his or her innocence except in a few statutory cases as provided for under Section 111 of the Evidence Act.

In the instant case, from the testimonies of **(PW1)**, **(PW2)** and **(PW3)** it's clear that the deceased Kea Katana is dead. The injuries to the head captured in the postmortem report admitted as exhibit 1 were fatal. Second, whether the death was unlawfully caused by an act of omission or not? The Court was presented with the evidence of **(PW1) Rehema**, who stated that on the fateful day of 14.2.2019, she was at Mangwe Club. She served palm wine to the accused and the deceased in the presence of **(PW2) Furaha**. The accused ordered for three bottles of wine from which he retained one and passing in the two to the deceased. According to **(PW1)**, the accused and the deceased sat at different locations within the Club. In the course of that social evening, accused finished his one bottle of wine and decided to join the deceased who was yet to finish drinking his two bottles of wine. Further, **(PW1)** told the Court that she observed the accused getting hold of the deceased while armed with a knife which he used to cut the neck with it inflicting serious harm. Immediately thereafter, the deceased fell on the ground as the accused took flight from the scene. In this circumstances, the matter was reported to the clan elder and the police to take further action. These events were also witnessed by **(PW2)** who happened to be at the scene of the attack.

The postmortem report produced as an exhibit by **Dr. Fadya (PW3)** shows that the deceased body sustained deep cut wound on the anterior aspect of the neck exposing the cervical spine, and all soft tissue underlying around the spine column. The above exposition from the prosecution witnesses establishes that the deceased did not die from natural causes or accidental injuries but an attack inflicted by a fellow human being.

On the part of the accused he conceded that the injuries might have arisen in the course of defending himself. The Law on self-defence is provided for under Section 17 of the Penal Code in which a person may be criminally exonerated for an act or omission which occurs, independent of the exercise of his or her free will and as such prompted to use force against the victim of assault or death to repel an attack aimed at placing his life under imminent danger. (See the principles in **Regina v Palmer {1990} 12 CR Appeal S 585**, **the Queen v Kuzmack {1955} S.C.R. 292**, **Selemani v R {1963} EA at 446**). In **Mokwa v R {1976 – 80} 1 KLR 337** The Court of Appeal held:

“Self-defence is an absolute defence even on a charge of murder, unless, in the circumstances of the case, the accused applies excessive force.”

A near doctrine a kin to self-defence is proof beyond reasonable doubt existence of provocation. This is as defined under Section 207 as read together with Section 208 of the Penal Code. Here, 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 who is under his immediate care or whom he stands in conjugal, parental filial or fraternal relation or in 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.” (See also **Peter Kengon Mwangi v R {2014} eKLR**, **Elphas v R {2009} eKLR**, **Nabanga v R {1974} EA 176**

The twin doctrines of self-defence under Section 17 of the Penal Code and provocation in Section 207 of the same code remain to be the traditional analytical devices for distinguishing between murder and manslaughter in cases of intentional homicide.

Murder as contemplated under Section 203 of the Penal Code is where an accused person kills another person purposely and with deliberate premeditated malice, whereas manslaughter under Section 202 of the Penal Code is homicide committed by an accused person but in absence of malice aforethought.

In the instant case, the question for this Court to answer is whether the killing of the deceased was excusable on the basis of provocation and self-defence. In the instant case, the prosecution evidence from (PW1) and (PW2) showed that the accused and the deceased had been out for an evening of palm wine drinking. The accused and the deceased sat at different locations within Maweu Wine Club. However, earlier on accused made an order of three bottles of palm wine, two of which he gave the deceased. It did not take long before the accused could rise from the location he had sat to move to other side where the deceased was taking his palm wine. The accused when armed with a knife mutilated the body of the deceased targeting the neck area. The deceased at time became unconscious and bleeding from the neck they attempted to revive him but failed. That sharp instrument according to the pathologist (PW3) findings in the postmortem report would have been ultimately the cause of haemorrhagic shock due to deep cut wound on the neck. That in any event that became the actual immediate cause of death of the deceased.

Despite the recognition by the Court that a sudden quarrel ensued between the accused and the deceased, its clear from the evidence all that happened without any provocation from the deceased. In the first instance, it was the accused who moved from his seat to the position occupied by the deceased and before long a knife in possession of the accused was used to slit his neck causing grievous harm. The attack by the accused occasioned without any warning or provocation. It's inferred from the testimony of (PW1) and (PW2) that the accused attack was not necessitated by self-defence arising from imminent danger deemed to arise on the side of the deceased.

Using the benchmarks articulation of the doctrines of self-defence and provocation in the above authorities, the impulse to kill by the accused fall squarely on the element of unlawful act of omission. There was no partial excuse or justification that may be the basis of a reasonable explanation or excuse why he assaulted the deceased to death. Self-defence and provocation as a plea are therefore not available to the defence to diminish culpability of the accused person to be found guilty of murder.

Thirdly, the prosecution was required to prove the element of malice aforethought. This element is as defined by Section 206 of the Penal Code as either an intention to cause death of another human being or intention to do grievous harm or knowledge that the act causing death will probably cause the death of some person. Malice aforethought as an element of murder may be proved by direct or circumstantial evidence. On the surrounding circumstances, the Court in **Tubere s/o Ochen v R {1945} 12 EACA 63**. The findings of fact to be made consistent with the guidelines in **Tubere case** include, the nature of the dangerous weapon used, the gravity of the injuries inflicted, the indiscriminate acts of assault, the body parts targeted, the conduct of the accused before, during and after the commission of the crime.

In the instant case taking the inquiry of the witness statements made on oath by (PW1) and (PW2), each testified that the accused assaulted the deceased while armed with a knife in his possession. The prior conduct involved the bringing of palm wine for the deceased in which he returned one bottle releasing the other two for the benefit of the deceased. It did not take long before the accused gripped the deceased and using the knife targeted the neck occasioning deep cuts.

Further evidence on the nature of injuries is found in the testimony of (PW3) who stated as to the findings on examination as opined in the postmortem report exhibit 1. Contrary to the defence narrative, there was no imminent danger to the life or limb of the accused to warrant the excessive force used to inflict the fatal wounds. On the other hand, the sustained injuries to the neck were inflicted without any excuse or justification. A plain construction of the evidence by the prosecution constitutes malice aforethought on the part of the prosecution case proved beyond reasonable doubt.

On identification of the accused, the guidelines in **R v Turnbull {1977} QB 224** wholly apply to the circumstances of this case. The case depended wholly and substantially on the correctness and quality of the evidence from (PW1) and (PW2) respectively. The gravity of the evidence was good and free from any error or mistake which may impair a finding of a fact proved beyond reasonable doubt.

The accused did not dispute the purported identification side that the crime of murder was committed under the guise of self-defence. With that accuracy the accused is hereby squarely placed at the scene of the crime.

The upshot of all these accused is found guilty and convicted of the charge of murder contrary to section 203 as read with 204 of the Penal Code beyond reasonable doubt.

Verdict on Sentence

The convict herein has been found guilty and convicted for the offence of murder punishable under section 204 which provides for a maximum death penalty. However, following the Supreme Court Decision in **Francis K. Muruatetu V R [2017]** the mandatory nature of the sentence was declared unconstitutional that decision left a measure of discretion to trial courts to consider range of mitigatory and aggravating factors spectrum particular to each circumstances of a case.

In the instant case all convict has no previous record, but he was the main offender who participated in the killing of the deceased. It was unlikely he could have survived. That is deducible from the grievous injuries suffered by the deceased.

From the facts of the case this was an arbitrary deprivation of the right to life of another human being by the convict. It is a right which is a fulcrum of all other rights as expounded in Article 26 of the Constitution. The convict claims that he is a breadwinner and would prefer a non-custodial sentence. Again, this mitigation as a factor is of less consequences when weighed alongside the aggravating factors. As a result, the sentence I pass is within a factual of 27 years imprisonment having given credit of 3 years spent on remand custody pursuant to the provisions of section 333 (2) of the Criminal Procedure Code.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF SEPTEMBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr Mwangi for the State

2. Accused