REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 18 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MOHAMED HAKAR KEDIE.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Gekanana Advocate for the accused person

J U D G M E N T

The accused herein **Mohamed Hakar Kedie** was charged with the offence of murder contrary to Section 203 and 204 of the Penal Code. The specific particulars being that on the 14.2.2015 at Hindi Kibiboni in Lamu West Sub-County – he murder **Samuel Katana Hinzano.** He pleaded not guilty to the charge and pursuant to Article 50 (2) (G) of the Constitution, Learned Counsel **Mr. Gekanana** appeared on his behalf at the trial. **Mr. Mwangi**, the prosecution counsel represented the state.

In order for the prosecution to discharge the burden of proof did summon five (5) witnesses and in rebuttal accused elected to give a sworn testimony to challenge the indictment. It is trite that every accused person is to be presumed innocent until the contrary is proved by the state. (See Article 50 (2) (a) of the Constitution). The presumption of innocence remains the cornerstone of our criminal justice system throughout the trial unless and until cogent evidence has been called to proof the elements of the offence. That burden of proof vested with the state is by Law beyond reasonable doubt. **(See the principles in Woolmington v DPP {1935} AC 462, Miller v Minister of Pensions {1947} 2 ALL ER 372).**

It is therefore settled Law that the inquiry for a trier of facts for the offence of murder is for the state to establish the guilty of the accused beyond reasonable doubt, on the following elements:

(a). That the deceased is dead.

(b). That the death as proved was unlawfully caused.

(c). That in causing the unlawful death, the accused person was actuated with malice aforethought.

(d). That in all of the circumstances presented directly or indirectly the accused person was the one who participated in the commission of the crime what was the state's answer to the allegations made against him of killing the deceased.

(e). The death of the deceased and causation.

In the case at bar prior to on or about 14.2.2015, the deceased was apparently in good health when he made a visit to **(PW1)** club within Hindi – Kibiboni Lamu West. According to **(PW1),** a quarrel ensued between the accused and the deceased which triggered, words coming from the accused against the deceased. It was at that moment at the spur of the moment accused duly armed with a club hit the deceased on the head. Thereafter, **(PW1)** stated that the deceased rising up aimed at the accused with a knife but he was repulsed by a further attack from the accused. This necessitated the knife to fall down which in turn was used by the accused to stab the deceased resulting in the fatal wounds.

It was therefore the duty of **(PW1)** to inform **(PW2) – Joseph Karisa** of the incident. This report taken up by **(PW2)** was reported to the

police station, thereafter on visiting the scene he saw stabbed body lying on the ground.

The body was later to be collected by the police **(PW4)** for the mortuary at Mpeketoni. It was identified to the pathologist by **(PW3) Kazungu Mumba.** In reference to **(PW4)** testimony **PC Ole Shaku** – following the murder report from **(PW2),** he visited the scene in company of **Cpl. Wambua.** He proceeded to record witness statements with regard to the surrounding circumstances of the death of the deceased. At that point, **(PW4)** testified that they drew the sketch plans which were to be marked as **MFI – 2 (a)** and **(b)** and later produced as **exhibits 2 (a) (b)** respectively. However, **(PW4)** told the Court that despite frantic efforts the murder weapon was never recovered. The prosecution also produced medical evidence in the form of postmortem report by **Dr. Khalifa Swaleh** of Mpeketoni – Sub-County hospital. The specific cause of death was accurately determined by **Dr. Kamami** – who conducted the postmortem report to be internal bleeding, secondary to deep-stab wound to the left atrium of the heart. In more complex term, the doctor opined that the above injuries occasioned hypovolemic shock and cardio-resp-arrest. Therefore, the postmortem examination determined the death and cause of death of the deceased. The medical certification in determining the cause of death by **Dr. Kamami**, was broadly categorized in the chain of events leading to the death of the deceased. It reflects the most recent or immediate condition that led to the death of the deceased.

From the evidence it is true that the deceased was assaulted and at the time he suffered fatal injuries from which he passed soon thereafter the attack. As a consequence, the prosecution has proved beyond reasonable doubt the death and so caused by some unlawful act of omission. The two ingredients stand out as proven by the prosecution without any credible rebuttal from the defence.

(c). That the unlawful act was actuated by malice aforethought.

Intention to cause death is identical with the term of one malice aforethought defined under Section 206 of the Penal Code. The circumstances stated to manifest malice aforethought are as outlined in the aforesaid provisions. This include 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.

The predominant questions to infer malice aforethought are to be answered in line of the following characteristics, the gravity of the injuries inflicted, the type of weapon used to target the vulnerable parts of the body, the conduct of the accused before, during and after the attack. **(See Tubere v R {1945} 12 EACA 63).**

In the case at bar, **(PW1) Zawadi Keya** testified that the assault against the deceased began immediately there was an encounter in the club at Mpeketoni where she sold alcohol. It all began with the accused hitting the deceased on the head with a club which was immediately followed with a stab wound around the 4th intervertebral space, spine with lividae on the back.

(PW5) Dr. Khalifa who testified on behalf of **Dr. Kamami** on the postmortem examination testified as to the cause of death being the internal bleeding due to the stab wound to the left atrium of the heart. Malice aforethought as the mensrea of the crime connotes willful culpability which is also purposeful to cause death or to do grievous harm against the deceased. The primary acts of omission were of a nature and degree considered excessive beyond the conduct of a reasonable man. The repetitive unlawful acts of violence upon the deceased, in time and place readily draws one to conclude existence of malice aforethought. The evidence by **(PW5)** on the postmortem findings is consistent with the direct testimony offered by **(PW1)** who happened to be at the scene of the murder.

This corroborates the testimony of **(PW1)** who while testifying had said that without provocation, the accused first hit the deceased on the head with a club and thereafter dispossessed him of the knife inflicted further stab wounds. The definitive serious harm described by **(PW1)** became the very same ones identified by **Dr. Kamami** in the process of postmortem examination. As a general principle, the requisite intention could be formed on the spur of the moment. In this context, the **Court in Garry Payee v R SCA 4 of 2010** held thus:

> ***"It suffices to show that a secondary act took place as a probable consequence of the agreed first act. In this jurisdiction we do not need to look for the intention of the perpetrator to carry out the secondary act. Act that is necessary is that the secondary act took place as a probable consequences of the first act which they had agreed upon and committed against the victim of the offence."***

In all these, the Court must not lose sight of the fact that in murder crimes, death ensues in consequence of violence inflicted upon the deceased in the furtherance of committing a felony, at the scene. In this sense, malice aforethought as a key factor has been proved beyond reasonable doubt.

Of course, in the instant case, the piece of evidence on recognition came from **(PW1) Zawadi**. The preliminary inquiry which answers to the velacity and credibility of the recognition evidence came from **(PW1)** as guided by the principles in **R v Turnbull {1976} 3 ALL ER 549:**

> ***"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation." At that distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance."***

In furtherance of these principles the Court in **Abdallah Bin Wendo v R 20 EACA 166** had this to say:

"Subject to certain well-known exceptions it is trite Law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult……"

In ascertaining such matters on identification, there is no dispute that the accused never controverted **(PW1)** evidence on this issue. It seems to me that the accused was well known to the witness **(PW1)** before the attack against the deceased in **(PW1's)** own words accused was concerned above the whereabouts of the deceased at that time.

In view of the above, I remain satisfied that in terms of Section 107 (1) of the Evidence Act, the principles in **Miller v Minister of Pensions** and **Woolmington (supra)** that the accused person is guilt of the offence of murder contrary to Section 203 as punishable under 204 of the Penal Code and I do hereby convict him of the offence as per the provisions of the Law.

Sentencing verdict

The convict has been found guilty to a felony of murder contrary to Section 203 as punishable under 204 of the Penal Code. He has argued that the Court considers the mitigation and the period spent in remand custody. In considering the sentence, this Court is guided by the principles in **Francis K. Muruatetu v R {2017} eKLR**. Obviously this is a crime of violence within the meaning of Section 204 of the Penal Code.

These kind of crimes are best understood to involve a purposeful or knowing mental state, a deliberate choice of wreaking harm on another, rather than mere indifference to risk. As a matter of textual interpretation of the principles in **Muruatetu** and the plurality of sentencing guidelines an offence against the person which violates Article 26 of the Constitution calls for deterrence sentence. In short, I sentence the convict to a term of thirty (30) years imprisonment.

14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF DECEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. MR. MWANGI FOR THE STATE

2. THE ACCUSED PERSON