



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 110 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

STANLEY KAMAU NTUMBI.....ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that on the 24th day of November, 2014 at Maili Saba in Dandora within Nairobi County murdered **JOHN NJUGUNA KIMEMIA**. He pleaded not guilty to the said charges and to prove its case against him the prosecution called a total of ten (10) witnesses. When put on his defence, the accused gave sworn statement of defence and called two witnesses.

PROSECUTION CASE

2. The prosecution case was that the accused and the deceased grew up together with in the Dandora Area of Nairobi and were good friends and did their activities as youths together. On 24/11/2014 according to the evidence of **PW3 JOSEPH KINYANJUI WANJIRU** who was a bodaboda operator had agreed with the deceased to take him somewhere. They met at a place near the chief camp and were joined by the accused on his motor bike. The accused then performed stunts with his motor cycle and the deceased laughed at him and asked whether he could do it again. The deceased then placed a bet for Kshs.500/-. The accused tried the act again but failed at the 3rd round.

3. It was his evidence that at that stage the deceased laughed again stating that he knew that the accused could not make it, to which the accused asked him why he was laughing. An altercation rose between the two with the accused threatening to fight the deceased which he declined stating that he respected the residence of the Area. The accused then requested that they go fight somewhere else. He then took then both the accused and the deceased on his motorbike. After one hundred meters they met another friend called Markos, whom the accused asked him to carry, which he did. After a short distance the accused suggested that he fights with the deceased, who agreed to the challenge. The deceased then asked him to check whether the accused had carried a knife, which he did by searching him and found a knife on him, which he said was Markos and when he turned he saw the deceased hit he accused with a fist causing him to fall down. At that stage an old man who was standing by alerted him that the accused had another knife.

4. He then saw the accused holding a small knife in his hand and the deceased called out his name. When he asked the accused what he had done, the same told him that he had stabbed the deceased. He then requested the accused to help him take the deceased to hospital before two of his friends warned him of doing so. Markos agreed to help him take the deceased to the hospital and they left the accused at the scene with his friends. They took the deceased to a local clinic before going to Mama Lucy Hospital where he was later referred to Kenyatta National Hospital where he died while undergoing treatment.

5. **PW4 COSMAS KINGOO KITUA** Corroborated **PW3's** evidence and confirmed that the accused came with a motor cycle to where they were and failed to perform a stunt and when they laughed at him he started to abuse the deceased. He then challenged the deceased to a fight and suggested that they go to "Kanyasi" for the fight. At that stage he left for his home only to shortly thereafter see people at the dispensary. He was then told that the accused had stabbed the deceased with a knife. It was his evidence that the accused and the deceased used to have very many friendly fights.

6. **PW5 ISABELA INGATI** confirmed that the deceased was taken to ARCH Medical clinic where she used to work at, with information that he had been stabbed. She confirmed that he had a stabbed wound and noticed that he had internal bleeding. She therefore referred them to Mama Lucy hospital. She confirmed in cross examination that the deceased had only one stabbed wound and was unconscious when taken to the clinic.

7. **PW6 MARGARET KATUKU** stated that she had left the deceased with the accused, **PW3** and one Kitua at home while she was going to her place of work. At about 12.00 she received a call from Mama Njoki who told her that the accused had stabbed the deceased with a

knife. She then followed him to Mama Lucy Hospital. **PW7 DONALD MUSINDE SIMIYU** assisted in taking the deceased to the dispensary and to Mama Lucy. **PW1 MARGARET MUNGEI MUNGELI** was called by the mother of the deceased on phone with information that he had been stabbed with a knife. She followed him to Mama Lucy where he told her that he had been stabbed by the accused over a dispute. It was her evidence that the deceased died as they were planning to transfer him to Kenyatta National Hospital. On 28th November, 2014 she attended to the post-mortem mortem examination and identified the body.

8. PW2 DANCUN NDOLO was informed by PW1 that the deceased had died and joined in funeral programs. On 19th November, 2015 the mother of the deceased informed him that the accused had been spotted at Ongata Rongai which he confirmed the following day when they spotted him at the bus stop. He then went to Ongata Rongai police station and made a report and sought assistance to arrest him but the police declined. He then called the police post at Saika for assistance who went and arrested the accused who was identified to them by the mother of the deceased.

9. PW8 DR. J ODUOR performed post-mortem examination on the body of the deceased which had a stab wound on the left side of the chest between the 3rd and 4th ribs and 4th and 5th ribs and confirmed the cause of death to be chest injury due to penetrating trauma. **PW9 PC HILARY KIBOR** was instructed to go to Ongata Rongai and arrest the accused which he did together with PC Owade, the same having been pointed out to them by the mother of the deceased. **PW10 PC JESSE WANJALA** on 24/1/2014 received a report at Dandora Police Station on allegation that the accused had stabbed the deceased. He carried out investigations and confirmed that the accused had challenged the deceased to a fight at which he stabbed him with a knife. He later on interviewed **JOSEPH KINYANGO MARKOS** and visited the scene. The accused recorded his statement before Inspector Mwangi. He stated that the accused ran away after the incidence.

10. In cross examination PW10 stated that they never recovered the murder knife. He stated that they tried to track Marcos but did not find him.

DEFENCE CASE

11. On behalf of the defendant, the accused stated that after supplying milk he went to their usual place of meeting where he met the deceased and Martin Kinyanjui and the deceased requested for his motor cycle to perform a style (stunt) and he told him that he could not manage. It was his evidence that when he gave the deceased the bike, he was unable to perform the style (stunt) and caused the bike to fall down. The deceased then stated to abuse him. After they settled the altercation the deceased agreed to go buy him bangi and along the way his mother called him so he did not go with him. He then did his milk delivery and thereafter transported people up to 11.00 p.m. The following day he only saw Martin Karanja and on 26th November, 2014 learned of the death of the deceased while he was at Ongata Rongai where he had gone to check on a job which he started on 27th November, 2014 until 20th November, 2015 when he was arrested without being told why he was arrested.

12. It was his evidence that at the police station he was informed that he was being charged with murder. He confirmed that he had known the deceased for ten years and that on the material day the deceased was abusing him before they agreed to go for bangi. In cross examination he confirmed that he was arrested after one year from the date of the commission of the offence and that he used to meet with the deceased frequently. It was his evidence that he did not know how the deceased met his death but was told that he was attacked by thugs. He confirmed having not attended the funeral.

13. DW2 EDWARD KINYANJUI MWANGI stated that he had employed the accused from 2012 to August, 26th 2014. It was his evidence that the same was on duty on 24/11/2014 distributing milk and that the same had told him that there was a job of matatu touts which he had secured for which he released him. In cross examination he confirmed that he did not have any means of monitoring the accused activities while on duty. **DW3 JOSEPH OUMA OKECH** stated that he had not heard of any report on the accused whom he had known since childhood and that he did not like fighting, earning him the name "Kamau muoga". He stated that he had never heard of any bad report on the accused.

SUBMISSION

14. At the close of the defence case the accused made written submission while the prosecution relied upon the evidence on record. On behalf of the accused it was submitted that the evidence of PW3 was staggered, contradictory and conflicting and was therefore not a credible witness. It was submitted that where the credibility of any prosecution witness is in doubt, it is not safe to convict on such evidence for which the case of **PNW v REPUBLIC [2017] eKLR** was submitted in support. It was stated that as per the evidence of PW4, the deceased laughed at the accused when he fell down from motorcycle while performing stunts and upon which a scuffle emerged which dispute was settled, thereby corroborating the evidence of the accused. It was submitted that the evidence of PW3 which the prosecution relied upon to prefer charge against the accused was not corroborated and therefore it was not safe to connect the accused on the circumstantial evidence for which the case of **JOAN CHEBICHII SAWA Vs REPUBLIC (2003) eKLR** was submitted in support. It was further submitted that the accused did not have the intention to kill the deceased as the disagreement between them had long ended by the time the accused, PW3 and the deceased left for Siranga. It was submitted that suspicion should not take the place of legal proof for which the case of **REPUBLIC VS ELIZABETH ANYANGO OJWANG (2018) eKLR** was submitted.

DETERMINATION

15. To sustain a conviction on a charge of murder, the prosecution is in law required to prove beyond any reasonable doubt the following elements of the charge:-

a) The fact and cause of death.

b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.

c) That it was caused with malice aforethought as defined under Section 206 of the Penal Code.

16. The fact and the cause of death of the deceased were not disputed in this case. **PW3 JOSEPH KINYUA** testified that he was with the deceased when he was stabbed with a knife. He took him to a local clinic with the assistance of **PW7 DONALD MASINDE SIMIYU** where he was attended to by **PW5 ISABELLA INGATI** who referred them to Mama Lucy Hospital for further treatment. **PW6 MARGARET MUNGELI KATHUKU** his mother, **PW1 EMMACULATE MWONGEI** and **PW2 DUNCAN NDOLO** both relatives of the deceased confirmed his death. The cause of death was proved through the evidence of **PW8 DR. JOHANSEN ODUOR** who performed post-mortem examination of the body which had two stab wounds on the chest which results into collapsed lung. As a result of his examination he formed an opinion that the cause of death was chest injuries due to trauma. I am therefore satisfied that the fact and cause of death was proved beyond reasonable doubt.

17. On whether the said death was caused by unlawful act on the part of the accused:- **PW6** the mother of the deceased in his evidence stated that on 24/1/2014 in the morning she had left the deceased, the accused, **PW3 JOSEPH KINYANGU** and **PW4 Cosmas Kitwa** together while she was going to work. This evidence was corroborated by both **PW3** and **PW4**. The accused in his defence confirmed that they were together that morning as was their usual custom. It was **PW4's** evidence which was corroborated by the accused that at some point in the morning, the accused fell down from his motor cycle while performing a stunt and the deceased laughed at him which did not go well with him and a scuffle and altercation arose between them. Being youths the accused challenged the deceased to a fight as a means of resolving the dispute.

18. It was the evidence of **PW4** that the accused went for his milk delivery and when he came back to the scene he suggested that they should go for a fight at a place known as "Kanyasi" and the accused told the deceased to take him to his home so as to get his motor cycle. This evidence was corroborated by **PW3 JOSEPH KINYANJUI** who carried both the accused and the deceased on his motor cycle and picked on the way one of their friends known as "MARKOS" who suggested that they should go and buy 'bhangi'. He testified that along the way the deceased suggested that they should fight to which the accused agreed and for the purpose of the fight he suggested that the accused be searched.

19. It was the evidence of **PW3** that he had searched the accused and retrieved a knife from his body only to be alerted that the same still had another knife. He was clear in his evidence that he saw the accused with a knife after he was told by an old man who was standing nearby. It was his evidence that the accused confessed to him having stabbed the deceased. This account was corroborated by **Dr. Oduor** and **PW1** who visited the deceased at Mama Lucy where the deceased told her that he had been stabbed with a knife by the accused. **PW4** confirmed that the accused and the deceased had agreed to fight each other and he left them while on the way to the site of the fight while going back home thereby putting both the deceased and the accused together.

20. The defence in their submissions challenged the credibility of the **PW3** as a witness but I am satisfied that he was a credible witness. His evidence was corroborated by that of **PW4** and the accused in his defence whose only point of departure was that it was the deceased who had performed the stunt with accused motor cycle and failed before abusing him but confirmed that he was together with **PW3** and the accused on his motor cycle but left them along the way to Jehova Jire Primary School which account I find unbelievable and an afterthought having placed himself at the scene. **PW3** a material eye witness was a friend of both the accused and the deceased and I therefore find no reason why he should make up a case against the evidence when looked at against the evidence of **PW10 PC JESSE WANJIRA** the investigating officer who confirmed the fight between the accused and the deceased.

21. The accused defence and that of his witness did not remove him from the scene. **DW2 EDWARD KINYANJUI MWANGI** confirmed that although he had employed the accused who was on duty on 24th November, 2014 distributing milk, he did not have control of the accused scheduled and did not know his whereabouts on the material day. **DW2 JOSEPH OUMA OKECH** was a character witness of the accused who confirmed that he was a friend of the deceased. **DW2** further confirmed that the accused on 25th of November, 2015 soon after the commission of the offence left his employment thereby corroborating the prosecution witness.

22. From the evidence tendered and whereas there is the pending issue of the role played by one "Markos" in the fight between the accused and the deceased whose whereabouts is rains unknown having taken into account the evidence of **PW3** that he is the one who advised the accused not to assist in taking the deceased to the hospital and having found that the evidence of **PW3** was credible and believable. I am satisfied that the death of the deceased was caused by unlawful act on the part of the accused person and nobody else.

23. The final issue is whether the said death was caused with malice aforethought which is defined in **Section 206** of the Penal Code thus:

"Malice aforethought shall be deemed to be established by evidence proving one or more of the following circumstances:-

(a) An intention to cause death 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, by a wish that it may not be caused.

(c) Intention to commit a felony."

24. The evidence tendered before the court shows that after the accused failed in his attempt to perform a stunt, the deceased and the youths who were thereat laughed at him, which did not go well with him. In their youthful nature they decided to settle the altercation which followed through a fight. The evidence of **PW4** was that once they settled for the site of the fight, the accused went back home alleging to get his motor cycle which he confirmed in his defence. **PW3** who was with them confirmed that he searched the accused and retrieved a knife, giving the deceased false hope that the accused was not armed and that the fight will be fair youthful affair, while unknown to him

the accused had a 'secret weapon' I am therefore satisfied that the accused had formed the necessary malice aforethought as evidence through his carrying two knives with which he intended to cause grievous harm to the deceased and succeeded in causing his death.

25. I have also looked at the conduct of the accused immediately upon the commission of the offence in leaving the area for Ongata Rongai where he lived at for a period of over one year thereby depicting a guilty mind. Whereas the deceased in his youthful nature thought that the fight will be their usual youthful affairs, it is clear from the evidence on record that the accused intentions were not that youthful.

26. By going back to this house while he knew that they had agreed to have a friendly feud and by carrying two knives which he concealed on his body, I am satisfied that the same has formed the necessary malice aforethought thereby eliminate the issue raised by the defence that he deceased had proved the same by abusing his parents and relatives. Even if it is the deceased who had challenged the same to a fight, the accused had time between the time when he left their earlier meeting site to his home and to the avenue for the fight to think over his action. I have also taken note of the place on the body of the deceased which was hit by the accused and find that he intended to cause either death or grievous harm to the deceased as stated herein.

27. I am therefore satisfied that the prosecution proved all the elements of the offence of murder and accordingly find the accused guilty of the murder of **JOHN NJUGUNA KIMEMIA** on 24th day of November, 2014 contrary to **Section 203** of the Penal Code and convict the same accordingly.

Dated, signed and delivered at Nairobi this 30th day of January, 2020

.....

J. WAKIAGA

JUDGE

In the presence of:-

Ms Gikonyo for the State

Mr. Chiuri for the accused

Court clerk: Karwitha

Accused person - present