



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO, 64 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

AYUB MUNENE.....ACCUSED

JUDGEMENT

1. The accused herein was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the penal Code Cap 63, Laws of Kenya**.The particulars of the offence are that on 16th July 2018 at 19:30 hrs at **Kula Mawe** area in **Isiolo Sub-County** within Isiolo County murdered **Humphrey Wachira**.
2. The prosecution called five witnesses.
3. **Pw1 Abed Mugambi** testified that he was coming from a hotel when he saw the deceased running and fell. The accused followed holding a knife. The accused scratched him with the knife and he jumped aside. The accused went ahead and found the deceased had fallen and he started stabbing him. At the time he was standing 5 metres away, there were security lights hence he could see the whole ordeal.
4. He told the court that the accused person tried to run but he was caught by members of the public. The deceased was also taken to Isiolo General Hospital. He would later learn that the deceased had succumbed to the fatal injuries.It was his further testimony that she was familiar to the accused person since he was a fellow loader and that he had worked with him for one year before he disappeared. He denied robbing the accused in the company of the deceased or having a grudge with the accused. He stated that the accused was attacked by a mob and was arrested five minutes after stabbing the deceased.
5. **Pw2 Ezekiel Mando John** testified that he was at a shop when his colleague, **Kanduthi**, informed him that the deceased had been stabbed. The shop was 10 metres away from the scene. That he arrived at the scene with a torch and identified the deceased who was at the time bleeding profusely from the ribs downwards. That he had known the deceased for a long time as a lorry driver and sand loader. It was not too dark at the time and he had a torch.
6. He further informed the court that on arrival at the scene he called a taxi and took the deceased to hospital. On arrival they put him on a stretcher and he later assisted in buying bandages and tablets. The wife of the deceased and her sister arrive and he left thereafter. He later returned to the hospital the next morning when he was informed that the deceased had passed on. In cross-examination he denied that the deceased was a thief. He stated that he used to accompany the deceased in his sand loading trips.
7. **Pw3 Mercy Kendi**, wife of the deceased testified that she had been married to the deceased for 15 years and had two children. That on the material day she was called by a lady known as Salome who informed her that her husband had been stabbed. That she called her sister who accompanied her to the hospital. He later learned from her sister's husband that the accused was apprehended by member of the public.
8. It was her testimony that on that material day at the hospital he found a man not known to her at the time who she requested to stay with her husband as she reported the matter to the police station. That she left the hospital at midnight but on coming back the next day she was informed that the deceased had passed on.
9. She told the court that they later on the next day reported to the police about the death of the deceased. She was also present at the post mortem where she confirmed that the deceased sustained injuries on both sides of the ribs at the back of the neck and on the buttocks.She also testified that she was familiar to the accused because he used to stay in the same area. He was however not familiar whether they had any dispute with the deceased.
10. **Pw4 Dr. Mohammed Abdi Kadi** presented the post-mortem report. It was his testimony that the deceased had stab wound on the left hypochondriac region below rib cage on the left. He also had multiple stab wounds on the buttocks, back and front thigh. In total there were 16 stab wounds. He formed the opinion that the cause of death was due to shock due to multiple stab wounds that led to loss of blood. He produce the post mortem report as **Pexh 1**.In cross-examination he stated that shock usually comes when somebody loses fluids including

blood and this leads to dropping of blood pressure leading to death.

11. **Pw5 Corporal Joseph Wekesa** attached to Isiolo Police Station testified that on the night of 16/7/2018 at around 7:30 p.m. the accused person was brought to the police station by member of the public among them **Pw3 Mercy Kendi**. That the members of the public alleged that the accused had stabbed someone. He stated that he immediately controlled the irate mob and locked the accused person in the cells for his own security and safety. That he proceeded to the Hospital where he confirmed that the deceased had injuries on both thighs and abdomen. That the accused was also treated of his injuries on the head and discharged. He also stated that at the time of his arrest the accused person never state that he was attacked by robbers.

12. It was his further testimony that on the next day he was informed that the deceased had succumbed to the injuries. The case was taken by the officers from D.C.I.O. He identified the accused on the dock and stated that he did not know the accused person prior to him being brought to the station by the irate mob.

13. **Pw6 P.C. Stephen OchiengOtieno** testified that he attended the post-mortem which was conducted at Isiolo General Hospital. That he interrogated and recorded witness statement and in particular Pw1 stated that he saw the accused person stab the deceased. That later arraigned the accused person and a charge of murder was preferred.

14. In cross-examination he stated that the accused never informed him that he had been attacked and robbed. He however stated that he had no proof that he interrogated the accused person.

15. **Dw1 AyubMunene** testified that he was at work until 6:00 P.M. that on his way home he passed by the marked and bought sukuma wiki, cooking oil and potatoes. He also passed by a local bar and drank a beer at Kshs. 200/= and given change of Kshs. 800/=. That on his way home he was attacked by Pw1 and the deceased. Pw1 pickpocketed him the kshs. 800/= from his back pocket. It was his testimony that during the robbery he was hit on the head by the deceased and Pw1. That he decided to go and report to the station. That on his way a taxi stopped and he was informed to board the same. That on boarding the same he saw Pw3. He asked them to take him to the police station but upon arrival PW3 informed the police to place him in custody. That he was placed in custody for four days and later on taken to Isiolo law courts where the court ordered that he be taken to hospital. He stated that it was Pw1 and the deceased who had attacked him. That the deceased was not known to him but he could see him at the bar where he occasionally visited. In cross examination he denied stabbing the deceased and stated that it was the irate mob who had stabbed the deceased.

16. The accused person has also filed its written submissions which I have duly considered.

Analysis and Determination

17. The accused is charged with the offence of murder. **Section 203** defines the offence of murder and requires proof of the following if the offence of murder is to be established, malice aforethought on the part of the accused, death of the deceased, the cause of the death and an unlawful act or omission on the part of the accused resulting in the death of the deceased. **Section 206 defines Malice aforethought** as follows;

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.

See Republic v M O O [2019] eKLR

18. The first issue I wish to deal with is the cause of death. **Dr Mohammed Abdi Kadir** formed the opinion that the cause of death was due to shock due to multiple stab wounds that led to loss of blood. He produce the post mortem report as **Pexh 1**.

19. The next issue is whether the accused caused the death of the deceased. Pw1 testified that he was leaving a hotel when he saw the accused running after the deceased and later on stabbing him. It was his evidence that the accessed was accosted and beaten by a mob. Pw3 and the investigating officer confirmed that the deceased was taken to the police station by an irate mob. Pw3 was particular that he found the accused near the scene at a shop owned by one, Muthee, and that she took the initiative of taking him to the police station. The accused person in his defence stated that Pw1 and the deceased had tried to rob him. I have considered the weight of the prosecution evidence and I do find that the accused persons line of defence as an afterthought and full of inconsistencies. It is wildly peculiar that the accused would be escorted to the police station in the same vehicle (taxi) that Pw3 was in. The investigating officer clearly stated that the accused person never informed him that the deceased and Pw1 tried to rob him on the material date. Even if this court was to consider that the deceased and Pw1 had tried to rob the accused person the amount of force used cannot be perceived as an act of defence.

20. In **Mokwa Vs Republic, [1976-80] 1 KLR 1337** relied heavily by **Maraga J** (now the CJ) In **Republic V Andrew MuecheOmwenga**

[2009] eKLR the Court of Appeal held that self-defence is an absolute defence even on a charge of murder unless, in the circumstance of the case, the accused applies excessive force.

21. The Learned Judge further also relied on the case of the said English case of **Palmer Vs R.**, [1971] 55 Cr. App. R. 223 at p. 242 quoted with approval by the Court of Appeal in **John Njoroge Vs Republic**, Cr. App. No. 186 of 1987:-

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation....If the moment is one of a crisis for someone in imminent danger, he may have to avert the danger by some instant reaction.”

22. I wish to discredit the accused person’s narrative. The accused person was in a mode of flight when Pw1 first saw him. He had evaded, what was from his narrative were persons robbing him, to then approach the deceased and stab him sixteen times cannot be justified as a reasonable amount of force. I therefore do find that the accused person caused the death of the deceased.

23. The next issue is whether there was malice afterthought. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. In *Moo versus Republic* (supra) the Court held that what can be deduced from section 206 (a) to (e) is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial.

24. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

25. The accused person herein used a knife and a considerable amount of force to inflict injuries to the deceased. He also left the scene only for him to be accosted by a mob thereafter. The post-mortem report shows that the deceased had sustained injuries in the ribs, multiple stab wounds on the buttocks, back and front thigh. The aforesaid injuries were clearly intent to inflict death and or grievous harm. I therefore do find that the prosecution has proved malice aforethought on the part of the accused and find him guilty of the offence of murder and convict him accordingly.

HON A. ONG’INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 27TH DAY OF FEBRUARY 2020.

In the presence of :

C/A: Kinoti

Accused:- Present in person

State: Ms Mbithe for state.

Mr Ogoti Advocate for accused – Mr Igweta Advocate holding brief.

HON A. ONG’INJO

JUDGE

Ms Mbithe

I pray for time to find out if there are records.

Order: Mention 19.3.2020 for records, mitigation and Victim Impact Statement. Accused remanded in custody.

HON A. ONG’INJO

JUDGE