REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL (MURDER) CASE NO.6 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

DENNIS NTHENGE CHARLES.....ACCUSED

JUDGEMENT

1. The accused, **DENNIS NTHENGE CHARLES** was on 26.1.2009 charged with one counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on the night of 12th January 2009 at Ngelani Sub-location, Ngelani Location in Machakos District of the Eastern Province murdered **Albanus Mutisya Kavita**. The appellant took plea before Isaac Lenaola J (as he then was) on 18.2.2009 where he denied the charges and a plea of not guilty was entered.

2. The hearing of the prosecution evidence commenced in earnest on 13.2.2011 before Hon. Justice Dulu. The evidence was thus; that **Anthony Kioko Makenzi (PW1) o**n 12/1/2009 at 9.30 p.m. was at Ngelani market together with Nicholas Mbithi Kanini, Albanus Mutisya, Kilonzo Charles, the accused walking back home when the deceased and the accused went ahead of them and later he was startled by a scream from the deceased. He testified that he approached near where the deceased was and saw him holding his stomach and he said he had been stabbed with a knife. He told the court that the accused ran off. On cross examination, he testified that with the moonlight he saw the accused stab the deceased with a knife and after the stabbing he saw the accused running away and also saw the deceased falling down. When he fell down, the knife was on the ground and he saw deceased pull the knife and put it down.

3. **PW2**. **Nicholas Mbithi** testified that on 12/11/2009 he was heading home from the market in the company of the deceased when Charles Nthenge came and joined them and he started talking to the deceased. He testified that with the help of moonlight he saw the accused lift his hand and stab the deceased with a knife. He told the court that it is the deceased who removed the knife from his own body. It was his testimony that he took the deceased to Machakos General Hospital but was advised to report to Machakos Police Station and he obliged then returned the deceased to the hospital where he was treated and admitted. He told the court that on the following morning he heard that the deceased had died. When cross examined on his written statement, told the court that the name Kilonzo Charles was cancelled in the statement but he did not know the person who cancelled the name and the reason therefor. He testified that he saw the accused lift his hand and stab the deceased and then ran away and that the deceased removed the knife after he was stabbed and threw it down.

4. PW3. **John Kyalo Mailu** testified that on 2/1/2009 at 9.30 pm he was heading home from Ngelani Market in the company Nicholas Mbithi, Kioko Makenzi and Kilonzo Charles, Albanus Mutisya Kavita. He testified that the accused joined them and he and the deceased walked ahead while talking. He testified that the accused produced a knife and stabbed the deceased on the left lower abdomen whereupon the deceased fell screaming and removed the knife from his abdomen and threw it on the ground. He testified that the matter was reported to Machakos police station where they were given a stamped document which they took to the hospital. He told the court that he knew the accused as a neighbour and a member of his family for many years. He stated that he had no quarrel or disagreement with him. On cross examination, he recounted that the deceased indicated that he wanted to meet the accused first and later he saw them talking and walking together on the fateful night.

5. The hearing was taken over by Hon Justice Ogola who after informing the accused of the provisions under Section 200 and 201(2) of the Criminal Procedure Code, the accused elected to have the matter proceed from where the previous judge had left it. **Pw4 Pc Bernard Ojula** testified on 29.9.2016 that on 13.1.2009 he and another officer proceeded to the Chief's camp where the accused had been kept after being arrested by members of the public. He was informed that the accused had assaulted the deceased who was in the company of four friends and that the accused was charged with a holding charge of assault. He testified that on 14.1.2009 he received information that the deceased had died and that he commenced investigations then on 19.1.2009 the accused was charged with murder. On cross examination, he testified that the information he gathered from witnesses was that the deceased was stabbed when he went to a bar that the accused was doing business; that the accused had alleged that the deceased had created disturbance at the bar and this made some patrons to run away with unpaid bills prompting the accused to close the bar and look for the deceased. He testified that he was present during the post mortem; that he did not cross sign the alteration that he made on the statement where he cancelled the name of Charles Kilonzo from the statement of Nicholas Mbithi.

6. I took over the hearing of the matter and after informing the accused of the provisions under Section 200 and 201(2) of the Criminal Procedure Code, the accused elected to have the matter proceed from where the previous judge had left it. **Pw6 Dr. John Mutunga** from Machakos Level Five Hospital testified on 2.5.2017 that he had a post mortem in respect of the deceased that he conducted on 19.1.2009. He testified that the deceased had a wound on the abdomen that had already been stitched and that there was accumulated blood therein. It was his testimony that he formed the opinion that the cause of death was hemorrhagic shock due to massive bleeding and he produced the post mortem report that was marked as Exh 4. On cross examination, he testified that the date of death was 13.1.2009 and he did the post mortem nine days later but that the body was well preserved and not decomposed. He testified that the deceased had earlier on been operated on as seen by the stitches; that the anterior abdomen was cut by the doctor so as to access the stomach to do the stitching.

7. The court found that the accused had a prima facie case and he was placed on his defence. **Dw1** was the accused who testified that on 12.1.2009 he was a manager at his father's bar and while selling alcohol, the deceased in the company of Pw2 and Pw3 came to the bar and started harassing customers. He testified that the trio were ejected by Dw.2 and that the bar was closed at 10.30 pm and he went home and met no one on his way home. On cross examination, he testified that he was not happy with the conduct of the deceased and his two friends as they were drunk and had damaged several items in his bar though he did not report to the police. On reexamination, he testified that he was arrested before he could lodge the report to the police.

8. **Dw2** was **Andrew Mwanzia Mackenzie** who testified that on 12.1.2009 he went to a bar and at 9.30 pm, three persons arrived and started harassing customers in the bar. He testified that in the process of ejecting the three persons there was fracas and the three persons who were Pw2, Pw3 and the deceased left. He testified that the bar was closed at 10 pm and that the accused left and went home. He told the court that the accused was framed. On cross examination, he testified that he was drunk at the time the fracas took place and that he did not participate in the ejection of the deceased and his two companions. On reexamination, he testified that he was one of the customers who raised a complaint but he remained on his seat and that he left the bar in the company of the accused.

9. The defence closed its case and the parties canvassed the case vide submissions. The prosecution vide submissions dated 9.1.2020 argued that the evidence on record placed the accused at the scene of the crime and that Pw1 to Pw3 recognized the accused and witnessed him stabbing the deceased. In placing reliance on the case of **Anjononi & Others v R (1976-80) KLR 1566,** counsel submitted that there were no issues of mistaken identity. On the issue if malice aforethought, it was submitted that the accused armed himself with a knife with an ill intention against the deceased. It was therefore counsel's argument that malice aforethought within the meaning of Section 206(a) of the Penal Code was proven. Counsel urged the court to convict and sentence the accused of the offence of murder.

10. Counsel for the accused on the other hand in placing reliance on the case of **Awachi Mubarak v R (2014) eKLR** pointed out that the failure of the prosecution to call a crucial witness; *to wit* Charles Kilonzo who picked the knife was unfavourable to the prosecution case. Counsel pointed out that the prosecution evidence was full of inconsistencies. He submitted that Pw1 told the court that the deceased walked ahead with the accused and later he testified that they turned back and heard the deceased scream. Counsel took issue with the testimony of Pw1 that he was with Charles Kilonzo however the name was deleted from his written statement. Learned counsel submitted that the evidence of Dw2 corroborated the evidence of the accused that they left for home after the accused closed the bar. It was submitted that the inconsistencies ought to be resolved in favour of the accused. Counsel took issue with the failure to produce the knife and the clothes of the deceased as exhibits and placed reliance on the case of **Philip Muiruri Ndaruga v R (2016) eKLR.** The learned counsel submitted that the court should proceed and acquit the accused after finding that the accused tendered a plausible defence.

11. Having considered the evidence on record and the submissions of the parties, the issue for determination is whether the prosecution proved its case to the required standard. The burden to prove all ingredients of the offence of murder beyond reasonable doubt falls on the Prosecution in all save a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R 372.** In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

12. The four ingredients that the prosecution is required to prove in a charge of murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.

13. The postmortem report on the examination of the body of the deceased as tendered by Pw5 has not been objected to nor controverted. This ingredient of the offence was duly proved by the prosecution and which established that indeed there was death of the deceased and the cause established by the doctor who conducted the autopsy.

14. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held :

> "***Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property."***

15. The deceased in this case was found to have died from excessive bleeding and there was a wound on the abdomen. There was a suggestion by Counsel for the accused that there was no evidence adduced to show that the accused was at the bar and never at any one point met the deceased on his way home. It was upon the prosecution to ensure that the allegation that the accused stabbed the deceased was backed by supporting evidence hence I find it safe to presume that the death was unlawful.

16. Malice aforethought is the intention to cause death. It is an element of the mind which can only be inferred from the circumstances in which the death occurred. Courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is

used on the victim and the conduct of the assailant before, during and after the attack.

17. Pw1 to Pw3 did testify to witnessing the attack on the deceased. However there is certainty as to what was used as the murder weapon. Counsel for the accused took issue with the non-production of the murder weapon. However I find that whether or not the same was produced is of no major consequence. This is because at times it may not be possible to recover a weapon but the nature of injuries can speak to the type of weapon that was used. In this case, the post mortem report presented evidence to the effect that there was a penetrating object that caused injury to the deceased and resulted in intensive bleeding and I agree that the weapon must have been a knife though I am not satisfied with what was tendered in court and marked as MFI 1. Given the presumed force used on the deceased that resulted in massive bleeding as indicated in the post mortem report it can safely be inferred that death was the desired outcome of whoever the assailant was.

18. There was direct evidence in form of eye witness accounts linking the accused to the crime and there was also available circumstantial evidence that the accused was angry with the deceased for causing fracas at his bar. I am satisfied that the evidence of Pw1 to Pw3 is cogent and consistent and it identified the actions of the accused though it seemingly deliberately left out the actions of **Pw2** and **Pw3** that agitated the accused.

19. In the case of **Republic v Kipkering Arap Koske and Another (1949)16 EACA 135**, regarding circumstantial evidence the court held that:-

> ***"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt."***

20. The prosecution case suggests that the accused was the one who had an opportunity to kill the deceased because he was seen with the deceased and that he was angry with him. The accused testified that he was not alone with the deceased as he had left for home with Dw2. On the other hand, the accused made an allusion that DW2 was with him the whole time and assisted him to eject the deceased and his troop. However the evidence of DW2 is to the contrary since it is to the effect that Dw2 was seated the whole time in the bar and did not intervene by ejecting the trouble makers. This then points towards deliberate untruthfulness on the part of the accused and as such I do not believe that the alibi he purports to set up counters the evidence of the prosecution. In any event the evidence of the deceased's companions left no doubt about the accused's involvement in the murder of the deceased. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. I am not convinced with the accused's alibi. It is highly likely that the accused was angered by the alleged actions of the deceased and his companions in causing disturbances at his bar and that he decided to pursue the deceased and to teach him a lesson. This then formed the motive of the attack.

21. From the evidence on record, I am unable to find that other than the accused person, there are other persons who wanted or equally had the opportunity to kill the deceased and in this way leaving the evidence on record pointing unerringly towards guilt of the accused. As such the eye witness evidence against the accused corroborated by circumstantial evidence creates no doubt in the prosecution case as regards identification of the accused as the perpetrator.

22. I note that the conduct of the deceased and Pw2 and Pw3 could have agitated the accused and this could be considered as circumstances that amount to provocation that this court is duty bound to examine whether the same absolved him of the offence. The evidence on record is that Pw2 and Pw3 harassed customers and that they were ejected successfully and left.

23. Section 207 of the Penal Code deals with killing on provocation and it states:- "*When a person who unlawfully kills another under circumstances which but for this section would constitute murder, does the act, which causes death in the heat of passion caused by sudden provocation as hereinafter defined (in Section 208), and before there is time for his or her passion to cool, he or she commits manslaughter only".*

24. The requirements for provocation to reduce murder to manslaughter are as follows:-

> ***a. The death must have been caused in the heat of passion before there is time to cool.***
>
> ***b. The provocation must be sudden.***
>
> ***c. The provocation must be caused by a wrongful act or insult.***
>
> ***d. The wrongful act or insult must be of such a nature as would be likely to deprive an ordinary person of the class to which the Accused belongs of power of self-control.***
>
> ***e. The provocation must be such as to induce the person provoked to assault the person by whom the act or insult was done or offered.***
>
> **(See R v Andrew Mueche Omwenga (2009) eKLR)**

25. I shall proceed to analyze these elements so as to establish whether there was killing on provocation. According to the evidence of Pw1 to Pw3, the stabbing happened at about 9 pm and it was along the road. Dw.1 on the other hand testified that the harassment of customers happened at about the 9.30 pm. Because the killing happened along the road and not in the bar, I am unable to find that this was no killing in the heat of passion but the accused had time to cool off as he went after the deceased and even talked to him. Whereas I agree that the accused was provoked, I find that the actions of the deceased could have been contained by reporting the deceased to the police and having him charged for malicious damage and this was not provocation enough to cause the accused to kill him. This means that the defence of

provocation though set up by the evidence of DW1 and DW2 and Pw4, the same cannot negate the element of malice aforethought. Hence I find the defence of provocation is not available to the accused. It came out quite clearly in the evidence that the accused followed up the deceased after the fracas at the bar and on catching up with him he stabbed him in the stomach. The accused therefore had the requisite malice aforethought since he followed up the deceased even after the bar had been closed. He must have had an intention to kill him for causing disturbance in his accused's father's bar leading to loss of business.

26. Accordingly, therefore I find that the availed eye witness account, the evidence of Pw5 and the circumstantial evidence elicited from the testimony of the witnesses are successful in establishing the offence against the accused beyond reasonable doubt. The defence evidence has not cast doubt upon that of the prosecution which is quite overwhelming against the accused. He had the requisite malice aforethought in committing the killing the deceased.

27. In the result it is my finding that the prosecution has proved the charge of murder contrary to section 203 as read with section 204 of the Penal Code against the accused beyond any reasonable doubt. I find the accused guilty as charged and is convicted accordingly.

It is so ordered.

Dated and delivered at **Machakos** this **30th** day of **April, 2020.**

D. K. Kemei

Judge