



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 9 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

BAKARI KAINGU SHUNGU.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Mr. Mayaka for the accused person

JUDGMENT

The accused has been charged with one count of murder contrary to Section 203 of the Penal Code as read with Section 204 of the stated code. The brief particulars of the case are that on the 3.4.2015, at Tsiara Mia village, Madamani Sub-Location, the accused murdered **Katana Karisa Kambi**. **Mr. Mayaka** advocate represented him at this trial while **Ms. Sombo** prosecution counsel appeared for the state.

The Prosecution case

It was alleged by **PW1 – Kadzo Katana Karisa**, that on 3.4.2015, she was sleeping in the same room with the deceased and in the course, he stepped out to smoke cigarette. It did not take long before (**PW1**) heard a distressful voice “*my wife I am dying, I am being killed by Bakari.*” – with regard to the scream (**PW1**) testified that she also left the bedroom towards the verandah that is when she was able to see the accused armed with a knife stabbing the deceased. As the struggle happened in the night, (**PW1**) tin lamp illuminated bright light to positively recognize the accused. Further, as the neighbours and **PW2** streamed into the compound in response to the screams, the accused took flight but not after inflicting serious physical injuries upon the deceased. She recalled that the accused dropped his shoes accidentally in the house as he left in a hurry.

PW2 – Kache Katana Kombe, the son to the deceased testified as one of those who woke up due to the alarm and distress calls from the deceased and (**PW1**). According to (**PW2**), he also left for the deceased house and on arrival he found the accused in possession of a knife at hand in which he was using to stab the deceased. He therefore, joined in the struggle to free the deceased from further harm of the accused. (**PW2**) further testified that he also sustained some injuries when he attempted to disarm the accused of the knife. It was **PW1** and (**PW2**) evidence that the deceased passed on immediately after the infliction of injuries by the accused. The body was later to be taken to Kilifi Hospital Mortuary and a report made to Ganze Police Station.

PW3 – Fatuma Kaingu Shungu, a resident of Bombolulu and a sister to the accused stated that on 3.4.2015 she received a report from the accused that he has killed the deceased. Following a tip off, the accused was arrested on 20.5.2015, at Lango Baya by **PW4 – APC Dennis Mutunga**.

PW5 – No. 219269 CPL Gabriel Kalama, testimony was to the effect that he accompanied (**PW4**) on 20.5.2015 to Malanga area to arrest the accused, as a suspect of murder. It was his evidence that he arrested the accused with assistance of **PW4**.

PW6 – No. 61451 Sgt Francis Rono, of Bamba Police Station testified that he received a report on the killing of the deceased from **Sgt Mutuku** of **APC Vitengene AP Camp**. (**PW6**) further told the Court that a decision was made to visit the scene and collect the body of the deceased. **PW6** testified that at the scene he was able to draw a sketch plan besides carrying out a quick inquiry from witnesses as to how the deceased met his death. He also participated in identifying the deceased body to the pathologist during the post-mortem examination.

According to (**PW7**), she was able to identify the signature of **Dr. Badan Ahmed**, currently on study leave in Egypt pursuing a masters

degree. It was the evidence of (PW7) the multiple stab wounds were noted as having been inflicted on the various limbs of the deceased body. She further pointed out **Dr. Badan** opined the cause of death as cardiac hemorrhage consistent with penetrative stab wounds below the xiphad. He produced the post-mortem as exhibit 5.

PW8, No. 78304 P.C. Stanley Maritim testified as the investigating officer. According to PW8 he went to the murder scene with other police officers amongst them **PW6 – Sgt Francis Rono**. The other second assignment by (PW8) was the recording of relevant witness statements who alleged on the deceased's death. PW8 further produced in Court the shirt and shoes as exhibits stated to belong to the accused recovered and credible to the prosecution case. Unfortunately, the witness stated that the murder weapon was never recovered.

Defence case

At the trial, the accused objected to the prosecution evidence that appeared to blame him wholly for the death of the deceased on the fateful day. Accused told the Court that it was the deceased while armed with a knife who went into his house at about 1.00 a.m. Thereafter a fight ensued between the two of them. On midway of the scuffle fearing for his life that the deceased was going to stab him with the knife he started to struggle over it. Seeing that he might be overpowered and be killed by the deceased he took the step of disarming him of the knife which he used to inflict the fatal injuries.

According to the accused it was the deceased who attacked him first before retaliating with force to avert imminent danger.

Analysis and Determination

The question for consideration therefore is whether the prosecution discharged its burden of proof of beyond reasonable doubt to sustain a verdict of guilty and subsequent conviction for the offence of murder against the accused person.

In Law a person charged with the offence of murder can only be found culpable and convicted for the offence when the following elements are sufficiently determined beyond reasonable doubt from the evidence adduced by the prosecution witnesses.

- (a). The fact of the death of the deceased named in the charge sheet.**
- (b). That the cause of death was unlawful.**
- (c). That in causing the death the accused did so with malice aforethought.**
- (d). Last but not least the accused can be positively identified and placed at the scene of the crime.**

It is trite that the prosecution bears the responsibility to prove the existence of any fact involving the charge against the accused in order for this Court to give Judgment in its favour. (See Section 107 (1) (2) and 108 of the Evidence Act). The burden of proof is ordinarily set under the threshold of beyond reasonable doubt, unfortunately the accused person bears no obligation to prove his or her innocence as provided for under Article 50 (2) (a) of the Constitution.

This was emphasized in **Miller v Minister of Pensions {1947} 2 ALL ER 372, R v Nyambura & 4 others {2001} KLR, Rex v Ismail Epuku s/o Achietu {1934} 1EACA 166**. In addition, the Court in **Longinus Komba v Republic {1973} LRT 127**, stated that:

“An accused person ought to be convicted on the strength of the prosecution case and not on the weakness of the accused defence, as the burden of proof, in criminal case is on the state to establish its case beyond reasonable doubt.”

Going by this standard of proof how has the prosecution fared in proving the case against the accused:

A. Death of the deceased

It is notable in the case of **Rex v Muhoja s/o Manyenye {1942} 9 EACA 70** that proof of death is an essential ingredient for the charge of murder. Thus in **R v Cheya & Another {1973} EA 500**:

“Proof of death is usually through medical evidence, although it may also be proved by way of cogent circumstantial evidence. The criterion on circumstantial evidence is as defined in Taylor, Weaver Donovan {1928} 21 CR Appeal R. 20 circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics.”

In the instant case, I have anxiously considered this issue of the death of the deceased. Taking into account the post-mortem report admitted as exhibit 5 and the evidence of witnesses who confirmed to have participated in the burial of the deceased, there is no iota of doubt as to his death. Therefore, taking the evidence by **PW1 (Kadzo Katana)** the wife to the deceased, **Kache Katana (PW2)** the son, **PW5 Cpl Kalama** and **PW6 Sgt Francis Rono**, police officers who participated in apprehending the accused and visiting the scene of the murder all reliably point to the deceased death.

The accused alluded to this fact in his defence that the altercation between him and the deceased resulted in inflicting the fatal injuries. There is no question **Katana Karisa Kambi** is dead.

(B). It is also incumbent upon the prosecution to prove beyond reasonable doubt that the death of the deceased was unlawful.

Under Article 26 (1) of the Constitution **“Every person has the right to life.”** A person shall not be deprived of life intentionally except to the extent authorized by this Constitution or other written Law (See Sub-Section 3).

In a murder charge it must be proved, that the accused committed some wrongful act which contributed in time with culpable mental state to be found guilty of the offence. This unlawful conduct is usually referred as the *actus reus*, which is in the form of an act or omission voluntarily triggered to cause death or to do grievous harm. The ultimate test of unlawfulness is that the accused person charged with the offence of murder acted without any excuse or justification. (See **Guzambizi v R {1948} 15 EACA 65**)

Possibly the most well-known justification, is that of self-defence or property. The other grounds recognized in our Law include provocation defined under Section 207 as read with Section 208 of the penal code, the valued Judgments of the Courts in various cases to date construe the guiding principles in the interpretation of Section 17 of the Penal Code on self-defence.

In the case of **Ahmed Mohammed Omar & 5 others v R {2014} eKLR** the Court held as follows:

“In the circumstances, is the appellants’ contention that they acted in self-defence plausible? Section 17 of the Penal Code states that:

“17. Subject to any express provisions in this code or any other Law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.” What are the common Law principles relating to self-defence? The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in **PALMER v R {1971} A. C. 814**. *The decision was approved and followed by the Court of Appeal in R v McInnes, 55 Cr. App. R. 551. Lord Morris, delivering the Judgment of the Board, said:*

“It is both good Law and good sense that a man who is attacked may defend himself. It is both good Law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.”

The above Common Law principles have been applied locally in several decisions. In **Robert Kinuthia Mungai v R {1982-88} 1 KAR 611**, the appellant visited a lady friend at her house and at 4.30 a.m., they were awakened by the deceased, who was also a boyfriend of the lady. He uttered threats to kill them both and attempted to strangle the lady. He also threw a hurricane lamp at the appellant and a piece of glass cut him above the eye. The appellant took his gun, which he was licenced to carry, and fired into the air. The deceased was not deterred, he continued with his threats. The appellant, fearing for the life of the lady, shot the deceased and killed him. The appellant was charged with murder but the High Court convicted him for manslaughter. On appeal, this Court held that the appellant had acted in the course of defence of the person and also for the purpose of preventing a felony and quashed the conviction. In **Robert Kinuthia Mungai v R (Supra)**, the Court held that it is a doctrine recognized in East Africa that excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the Court to regard the offence not as murder but as manslaughter. But if the defence of self-defence is upheld, a conviction for murder cannot be sustained.”

With regard to the accused setting up of the defence of self the rebuttal evidence must disclose the following characteristics in order to destroy the prosecution case.

- (a). The accused can only resort to force in response to an attack against him that is unlawful itself.
- (b). The attack to repulse an unlawful act must be inevitable.
- (c). The accused can only invoke the defence of self against a legally protected interest i.e. life, limb or property of which he has a substantial interest or right.
- (d). It must be necessary to resort to force as last available alternative.
- (e). The extent of the force must be necessary and reasonable in the circumstances of the case.

These requirements are objective normative requirements and with regard to this defence, the Court in **Oloo s/o Gai v R {1960} EA 86** and **Chan Kau v R (2) {1955} 2 W.L.R 192** held:

“In cases where the evidence discloses a possible defence of self-defence, the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder, and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any defence apart from that of insanity.”

In assessing the reasonableness of the force used the Court should ask three key questions guided by the Common Law approach in **Palmer v R (supra)**

- (a). Was the use of force necessary in the circumstances i.e. was there a need for any force at all? and

(b). Was the force used reasonable in the circumstances.

(c). Whether on the basis of the facts as the accused believed them to be, a reasonable person would regard the force used as reasonable or excessive.

In the instant case, I have considered the chain of events as narrated by **(PW1)**, **(PW2)** and **(PW3)** that led to the death of the deceased. The Court has also considered the evidence of **(PW7)** depicting the gravity and multiple injuries suffered by the deceased as captured in the post-mortem report.

It follows, that in the version of the accused it was the deceased while armed with a knife who went to his house in the night to effect an attack. That the prevailing circumstances called for his retaliation in self-defence to avoid an assault.

In respect to these two versions, I take the following view: I find that based on facts of the case and the supporting evidence from **(PW1)**, **(PW2)** and **(PW3)** the circumstances under which the murder was committed took the form of an unlawful act of inflicting bodily harm against the deceased. The harm caused by the use of excessive force as explained by **(PW1)**, **(PW2)** and **(PW3)** is traceable to the accused. It is particularly important to note that contrary to the accused version the scene of the crime was not in his house but at the home of the deceased.

Here the accused's life was not in danger to warrant him to act in self-defence. The evidence of **(PW1)**, **(PW2)** and **(PW3)** is corroborated in all material aspects with that of **Dr. Khadija (PW7)** testifying on behalf of the pathologist who performed the post-mortem examination. It is apparent that the deceased sustained multiple stab-wounds. This cannot be said to be essential and reasonable defensive force against an aggressor in the formulation of the accused defence. Unsurprisingly, the accused delegated responsibility of the crime to the deceased. In order to establish that it was legally justified in attacking the deceased, the exercise of the right of individual self-defence, the accused has to show that the attacks had been initiated and targeted against him, for which the deceased was responsible, and that those attacks were of such a nature as to qualify the use of excessive and deadly force. Notably, it becomes clear from the prosecution case that establishes accused aggression against the deceased in his house while armed with a knife is inexcusable.

As a result, the fatal attack seemed at best, not to qualify as an instance of both legality and legitimacy to use such a force. All those put together this was not justifiable homicide by virtue that it was not done on unavoidable necessity, or advancement of public justice or for the prevention of any forcible and atrocious crime upon the accused. It stands in this matter that the Law does not forgive the accused for the strands of the evidence did not fall within any of the known exceptions. In other words, the prosecution evidence negates the suggested justification of self-defence by the accused.

Accordingly, it is sufficient to find that the prosecution has discharged the burden of proof of beyond reasonable doubt that the deceased death was unlawful.

(C). Beyond the above elements is identifiable requirement for the prosecution to prove malice aforethought.

The framework of this ingredient is to be found in the definition provided and or Section 206 of the Penal Code. Thus, malice aforethought as commonly used in our criminal justice system in the offence of murder incorporates the following:

(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

How does the prosecution prove malice aforethought. Whether the accused acted with this mental state is a factual matter under Section 206 of the Penal Code. This proof involves inferences and manifestation drawn from the set of circumstances by way of evidence in a given case to show what the Court in **Tubere s/o Ochen v R {1945} 12 EACA 63** expressed in the following language:

“That is the duty of the Court to determine and establish the weapon used, the manner in which it is used. The part of the body targeted and injured, the conduct of the accused before convicting, during and after the crime, and demonstrating that the accused took certain steps to facilitate the murder malice aforethought can be either express or implied. It is deemed to be implied if the evidence shows that the accused intentionally committed the act, the natural and probable consequences of the act was dangerous to human life, that at the time the accused unlawfully acted, he or she knew the act was dangerous to human life, but she deliberately acted with conscious disregard for human life. (See **Pakumba s/o Fundikila & Another {1947} 14 EACA, Rex v Kariuki wa Njagga {1934} 1EACA 149)**

In the present case evidence on record from **(PW1)**, **(PW2)**, **(PW3)**, **(PW4)**, **(PW5)**, **(PW6)** and **(PW7)** demonstrate that the accused killed the deceased with a knife and that the use of that lethal weapon clearly inflicted multiple stab wounds to the body of the deceased. The vulnerable parts of the body targeted and injured were positively identified by the direct evidence of **(PW1)** and **(PW2)** to involve the chest, abdomen, the sternum and the cardiac region. After the accused completed stabbing the deceased he took flight from the scene only to surrender himself to the police with a defence that he had killed in self-defence. The fact that the accused armed himself with a dangerous weapon, left his house for the deceased in the night of 3.4.2015 and to use all necessary force to kill the deceased. This dangerous act brings the offence within the definition of Section 206 (a) and (b) of the Penal Code as a manifestation of malice aforethought.

The defence by the accused to the effect that he acted in self-defence does not negate malice aforethought both express or implied from the circumstances on the unlawful killing of the deceased. Reference to the intent to inflict serious bodily harm can be deduced from findings made by the pathologist evidence (PW7). On the post-mortem examination, (PW7) opined on the cause of death to be cardiac hemorrhage arising out of the stab wounds.

The prosecution case speaks of malice aforethought in terms of the state of mind of the accused and it does so frankly without resort to fiction. The evidence postulates the absence of justification, excuse or sufficient mitigation under Section 17 of the Penal Code to diminish the level of culpability that would otherwise exonerate the accused or diminish the offence to manslaughter.

Therefore, on the evidence it could not be resisted that the accused guilt has been established beyond reasonable doubt as required for the offence of murder contrary to Section 203 of the Penal Code. There was inadequate evidence from the accused to disconnect him with the offence charged arising out of provocation in Section 208 and self-defence under Section 17 of the Penal Code. The upshot is that the prosecution succeeds in securing Judgment for both the verdict of guilty and conviction for the offence against the accused person.

Sentence

The impression of sentence by this Court is weighed substantially between the aggravating and mitigation factors. From the proceedings the convict did intend to cause the death of the deceased and pursuant to that intent contributed to his death in a manner that was significant.

At the sentencing hearing the convict submitted on the basis of the committed murder he seeks leniency from the Court. Whatever the motive of the murder this specific intentional and unlawful act compared with mitigation incapable of attracting a lenient or less punishment.

In my view both as a deterrent measure and rehabilitation of the convict long term imprisonment is sustainable. These considerations reflect fundamental principles of criminal justice. To that extent, I sentence the convict to a term imprisonment of 30 years with effect from 3.6.2015.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF DECEMBER , 2020

.....

R. NYAKUNDI

JUDGE