



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 4 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

PETER MWAI MURIUKI.....ACCUSED

JUDGMENT

1. On 9th January 2012, at 5:00pm PW1 **Michael Maina Richard Wambu** opened his bar named Vuta Pumzi at Kiuu trading Centre. Customers began to stream in and about 7:30 pm one Peter Mwai Muriuki the accused who was a regular came in. By then **Simon Githae** PW2 was already there having a drink as well. Though the accused and PW2 knew each other, the accused did not join PW2 but went and sat alone.
2. Accused ordered a Vienna Ice which he paid for and continued to drink
3. About 8:00pm Dedan Thitu, the deceased came into the bar. According to PW2, he appeared drunk. PW1 said the deceased ordered his own Vienna Ice and went and sat with the accused.
4. For some reason the two began to 'exchange dirty words'. By then they were both drunk. They were shouting to the point where the bar owner had to tell them to leave. They were pushed to the door where the argument continued and the accused was heard to tell the deceased that they could not go together more than once.
5. The deceased used the front door to leave and as he was leaving while PW2 told the accused to return and sit down and told him, a fact that was confirmed by PW1, to leave by the rear door, which he did.
6. About 10 minutes later both, PW1 and PW2 heard and people saying outside '*he has stabbed him with a knife*', '*he has killed him*'. At the same time **Henry Wanjau Kimathi** PW4 a boda boda rider, was outside the bar about to transport a passenger. He also heard people saying the same and on inquiry was told '*Mwetheri has been stabbed with a knife by Peter*'. PW1 and PW2 rushed outside. The deceased was lying down bleeding and PW1 noticed that he had been stabbed on the left side of the chest, was not talking and had problems breathing. He died shortly. PW4 saw the accused trying to escape and stopped him. Members of the public caught up with him and almost lynched him.
7. PW4 and others went looking for medical assistance but the 'Mwetheri' died before they could get him to a hospital. The accused was taken to the AP post with injuries. PW3 John Chege the brother to the deceased was called and came to the scene. He noted that his brother had been stabbed and had died. Members of the public told him to check what was in his brother's pockets. He found some Ksh 440 which he gave to their mother. The body was removed by the police to the Mortuary at Mukurweini District hospital where he later attended the postmortem.
8. The chief Mutundu Location **Simon Mwangi Kiama** PW7 received the incident report at 9:00pm from his assistant chief that Thitu Mburati alias *Mwiyetheri* had been stabbed with a knife by Mwai Muriuki .He went to the scene which on the verandah of a shop next to Vuta Pumzi Bar. The assistant chief and APC Julius Mwangi from Kiuu AP post were there. The suspect had already been arrested and the murder weapon had been recovered. He remained there until the OCS came with officers about 10:00pm, photographed the scene, identified the witnesses and removed the body and took over the murder weapon.
9. From the evidence of PW5 **David Karitu Nyota**, the shop keeper, the is the one who sold the accused knife. The accused who was a regular customer went to his shop around 8:00pm. He bought a knife, sugar, soap and bread and left. A short while later he heard noise outside the shop. Ongoing out he saw *Mwetheri* standing with difficulty with blood oozing from his chest. He fell down. He went to find out who had stabbed him. It was then that accused was arrested by the crowd.
10. PW6 **James Ruringa Gathii** helped to recover the knife. He was coming from a bar around 9:00pm when he saw a crowd. He went to

check out and people were saying the person lying on the ground had been stabbed and the stabber had thrown the knife away. He had a torch and saw something shining not very far from where the deceased was lying and saw it was a knife. He pointed it out to the police officer and the officer picked it.

11. The Investigating Officer was No. 86297 Cpl Maurice Odhiambo. He accompanied the OCS Inspector Laura to the scene. They found that the suspect had been apprehended and the murder weapon recovered. He took over the murder weapon, he called scenes of crime personnel who came and photographed the scene, collected blood samples from where the deceased lay, took over the suspect's shirt which was blood stained, drew a sketch plan of the scene and later recorded witness statements. He also attended the postmortem which was conducted by Dr. Njuki and the report produced by PW10 **Dr. Kimathi Paul** on his behalf. The report confirmed that cause of death was massive left hemothorax with partial lung collapse secondary to a penetrating chest injury.

12. PW9 presented the suspect to the Psychiatrist for mental assessment wherein he was found fit to and on 1st February 2012 charged him with **murder contrary to section 203 as read with s. 204 of the Penal Code. That on 9th January 2012, at Kiuu Trading Centre in Nyeri County, he, Peter Mwai Muriuki, murdered Dedan Thitu Mburati.**

13. The exhibits he collected were received at the Government Chemist on 6th February 2012 and these were blood sample of the deceased, blood swab from the scene, blood sample of the accused together with his blood stained shirt, and a kitchen knife with a wooden handle. According to the exhibit memo, they were to be examined to ascertain the accused's and deceased's blood groups and their DNA profiles, whether the deceased's blood was on the knife and the accused's shirt, and whether the accused's blood was on his shirt and the knife. Vide a report dated 17th July 2014, the analyst PW8 Lawrence Kinyua Muthuri confirmed that the blood at the scene and on the knife belonged to the deceased. The blood on the shirt was that of the accused. The accused's blood was not on the knife, or at the scene.

14. At the close of the case for the prosecution I formed the opinion that the prosecution had established a prima facie case and the accused person had a case the answer under s. 306(2) of the CPC

15. The accused opted to make a sworn statement and not to call any witnesses.

16. He told the court that on the material date at 7:00pm he was at Vuta Pumzi Bar. He was drinking his Vienna Beer alone. About 30 minutes later the deceased came with his alcohol and sat across him at the same table. Deceased then told him that if he accused was circumcised, he could ask him a question. Accused demanded to know why the deceased was doing that. the deceased's response was to get hold of the accused, hit him onto the counter while insulting him and his mother very badly. There were other patrons. The owner of the bar ordered them out. Other people restrained the deceased but he continued to insult him .

17. He testified that one mzee held him and told him that people like the deceased would pretend start a fight with a person they knew had money and a phone so that they could rob them, and then pretend to end the fight by leaving.

18. He left the bar using a rear door. He went to the shop. Bought his items including the knife from PW5. They were packed for him in a plastic bag.

19. As he was just leaving the shop while at the verandah, he was hit with a piece of wood. He testified

'...the plastic bag I was carrying fell about a metre away. That is when Mwitheri alias Thitu got hold of me. He was with another who got into my pocket and took my money and my phone. Thitu was holding my neck. I got hold of his arm to free myself. The person who entered my pocket went to pick the items that had flown out of my hand. I was able to free myself from Thitu's grasp and twisted his arm. He was now behind me. His colleague came to stab me. He missed and stabbed Mwitheri. He began to chase me. He tried to stab me. I was able to twist his hand get hold of the knife and throw it away. He ran into the bar. They came three of them, led by the one who had stabbed Thitu. I tried to explain. This one began to beat me...a crowd...an AP...rescue(d) me ...to Kiuu AP Police Post.

20. He testified that those who assaulted him broke his left arm and the police never took him to hospital until 25th January 2012 where he was referred for X rays. He was also on anti-retroviral medication which the police had not allowed him to take but were ordered by the doctor to fetch for him.

21. The police obtained orders to have him held for longer for psychiatrist examination. They held him for another four days but never took him anywhere except back to court from where he was remanded at King'ong'o where he stayed for over 4 years before he was released on bond.

22. On cross examination the accused told the court that it was the deceased who found him seated at his own table quietly. He not only insulted him, but poured his (accused's) beer on him and told him to *'find a way to go home in the air'*.

23. He said he could not say that it was the knife he bought that stabbed the deceased because it had no special mark.

24. He said he did not name the person who stabbed the deceased to the police when he recorded his statement because he did not know him.

25. Ms. L. Mwai advocate for the accused submitted that the prosecution had not proved its case beyond a reasonable doubt to warrant a conviction. That the evidence was circumstantial and did not meet the required threshold. The knife was not dusted for finger prints, the government analyst's report did not connect accused with the offence, and accused gave a credible defence.

26. The state through Mr. Magoma submitted that there was no other knife at the scene, the deceased died from a stab wound, the accused's malice aforethought was demonstrated by his buying the knife.

27. The issue for determination is whether the prosecution has discharged its burden and proved the charge of murder facing the accused beyond a reasonable doubt. I find Justice M. Odero's definition of the ingredients of murder in Republic v Mohammed Dadi Kokane & 7 others [2014] eKLR useful:

The offence of murder is defined as follows by section 203 of the Penal Code:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:

1. The fact of the death of the deceased.

2. The cause of such death.

3. Proof that the deceased met his death as a result of an

unlawful act or omission on the part of the accused person(s), and lastly

4. Proof that said unlawful act or omission was committed with malice aforethought.

28. On the fact and cause of death, there is no doubt that Dedan Thitu Mburati died as a result of a stab injury to his chest. This was clearly established by the evidence of the pathologist in the postmortem report who observed 'a stab wound below the 2nd rib along the mid clavicular line ~4cm in length. It fractured the 2nd rib, and went through the mid segment of the left lung. This led to massive bleeding not only out of the body but into the lung which led to its collapse.

29. How did it happen? This case turns purely on circumstantial evidence. Joan Chebichii Sawe v Republic [2003] eKLR the Court of Appeal lay down the applicable principles;

In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.

30. The case for the prosecution is that after the altercation in the bar, the accused went to the shop, bought a knife and stabbed the deceased. That though nobody actually saw him the circumstances surrounding the stabbing point solely to the accused person.

31. In his defence the accused attempted to place before the court an alternative set of facts by introducing the alleged attack and robbery by the deceased and his accomplice. The first impression of his testimony is that it was an afterthought as in the 7 years the case has been in court it never came up.

32. The accused testified to having been attacked both verbally and physically, and threatened with harm by the deceased for no apparent reason. This altercation was witnessed by PW1 and PW2, the latter saying that they were exchanging dirty words. The accused testified that some of the insults hurled by the deceased included him and his mother and he could not repeat them. Surely this must have angered him. It would take a lot of self-control to take insults about one's mother lying down. In addition, when he was leaving the bar the deceased even threatened him telling him to find a path home in the air, a threat that he would not be safe walking home. He had just been warned that such people as the deceased could easily rob him. These facts point to the inference that the knife was not just intended for use at home.

33. According to the accused the deceased and another attacked him just outside PW5's shop. The accused himself said the shop was lighted. After he freed himself from the grasp of the deceased, he said the other person began to chase him to stab him. He was free and could have just entered the shop. How then would a fight, as violent as described by the accused and which took some time, ensue right outside the shop verandah, and the shop keeper and the other customers and the people in the bar next door would not notice. He did not shout for help, or call out to the shopkeeper outside whose shop he was being attacked. He said the AP officer who rescued him from the irate mob knew him, yet he did not tell him the deceased and other who were still there had attacked and robbed him. He was escorted to the AP post the same night. He did not report the same to the officers there, or at the police station or to court when he was taken there for holding orders and nowhere in his evidence does the accused say he ever complained anywhere that the deceased and others attacked and robbed him of his money and phone. The only complaint he raised was that the mob broke his arm. This gives the evidence of an attack and robbery on him a tinge of the afterthought.

34. Did the accused have a motive? The accused person had malice aforethought which from the facts was provoked by the insults and the unprovoked attack and threats by the deceased. It would appear that he decided he would not be caught off guard. So he decided to arm himself and no sooner than he had done that, the deceased showed up. The accused concedes that the deceased was stabbed, that he witnessed the stabbing but that it was by the deceased's accomplice, the robber, who was trying to stab him. That he struggled with this person, the robber, twisted his arm and threw the knife away. That this same robber had the mind and time after the stabbing to go into bar

and tell others i.e PW1 and PW2 that he the accused had stabbed the deceased while he the deceased was just there? What was the accused at that time? It does not add up? The robber already had his loot. This robber is not a person he knew, or who had a grudge against him? Immediately after the stabbing the PW5 the shopkeeper having heard the commotion came out of the shop. He found the deceased still standing but with difficulty and soon thereafter, fell down. The only person he mentioned that was there was the accused. There was no one else. The words that were shouted by people soon thereafter was that the accused had stabbed the deceased. The accused was caught by PW4 while trying to run away from the scene. There was no robbery.

35. The knife that was recovered at the scene was identified by the shop keeper as the knife he had just sold to the accused. It was found at the scene. It bore the deceased's blood a clear indication that it was the murder weapon. The accused argued that it was not dusted but in his own defence he said he got hold of it and threw it away. If his finger prints would have been found on it, that would have been the excuse.

36. The accused's statement of defence does not in any way challenge the case for the prosecution. I have pointed out its loopholes. The circumstances of this case are such that at that time and place there was no one else who had the motive, the opportunity and the weapon to kill the deceased except the accused person.

37. Granted, the accused had been threatened, attacked physically and verbally by the deceased, but there is no evidence that the action of stabbing the deceased was justified even in those circumstances.

38. I find therefore that the case for the prosecution proved against the accused and make a finding of guilt against the accused, and convict him accordingly for the offence of murder c/s 203 as read with s.204, under s. 322 (2) of the Criminal Procedure Code.

Delivered, signed and dated in open court at Nyeri this 24th January 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Jerusha

Mr. Magoma for State

Accused present

Ms. Wangeci holding brief for Ms. Lucy Mwai for accused:

I have no instructions on mitigation. Ms. Mwai will be here at 11:00am.

Court: Following the conviction, Accused's bond is suspended pending mitigation and sentence. He will be remanded in Custody at Nyeri G.K Prison.

Judge

24/1/19