



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 106 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

SIMON MWENDA KABURU.....ACCUSED

J U D G M E N T

1. **SIMON MWENDA KABURU** (“the accused”) has been charged with the offence of murder contrary to *section 203 as read with section 204 of the penal code CAP 63 of the laws of Kenya*. The particulars of the offence are that, on 6th December, 2013 at Kagaene market, Mbeu location in Tigania west district within Meru County, the accused murdered **JEREMIAH KAUGIRIA** (“the deceased”). He entered a plea of not guilty and the prosecution called six witnesses to prove its case.

2. **PW1 Bernard Ntoiti Ngeera** testified that he worked at the CDF offices at Kagaene. On the material day at about 11:00 am, he was in the office when the accused came and started to urinate near the CDF office. The accused was smelling alcohol at the time. **PW1** asked accused to leave and as they were walking away from the CDF offices, they met **Jeremiah Kaugiria (“the deceased”)** who was the chairman of the market to whom **PW1** narrated what had transpired. The deceased asked the accused why he had urinated in public. All over a sudden, **PW1** heard the deceased scream that the accused had stabbed him.

3. At the time the stabbing took place, the only people present were, the accused (on the far right) the deceased (at the middle) and **PW1** on the left. On hearing the scream, he turned towards the deceased and saw blood oozing on the right side of the deceased’s abdomen. **PW1** raised alarm and the accused took off whereby members of the public pursued him. The accused dropped a ‘Kimindo’ (a knife) and surrendered. The mob wanted to kill him but he was rescued by police officers who took him to Kagaene A.P camp. The deceased was taken to hospital but died on arrival. The murder weapon was surrendered to the police

4. **PW2 Ibrahim Mureithi Milwa** stated that on the material day when coming from home, he found people at the market and when he joined them, he found that his brother, the deceased, had been stabbed. The deceased was vomiting blood and on his right side below the ribs, blood was oozing from a stab wound. He decided to take him to hospital and called his other brothers. However, on arrival at the Meru Level 5 hospital the deceased was pronounced dead. They took the body to the mortuary after making a report with the police.

5. **PW3 John Koome** told the court that he was a mason. On the material day, he was working next to a road within Kagaene market when he saw people running after someone away from the market. On inquiry, he was informed that the people had arrested the person who had stabbed Kaugiria. He identified the accused as the person who had been arrested. On 10/12/2013, he accompanied **PW2** and Moses Thurania to Meru general hospital to identify the body for post mortem. He saw the body with a stab wound on the right lower abdomen.

6. **PW4 Musa Thurania** told the court that on the material day, he was called by **PW2** while he was in Meru town and informed him that his younger brother, the deceased, had been stabbed. He found **PW2** and the deceased at the Meru Teaching and Referral Hospital. The deceased had an injury on the right lower side of the abdomen with blood oozing out. On 10/12/2013, he accompanied **PW2** and **PW3** to the mortuary for postmortem after which the body was buried.

7. **PW5 DR. Siad Mohammed** testified that he had been working at the Meru level 5 as a medical officer for 3 years. He produced the postmortem report as **PEXh2**. Externally, the body had a deep cut at the right femoral triangle, a cut measuring 5 cm width and 8cm depth and presence of large clots of blood. Internally, the cardiovascular system was severed with right femoral artery and vein damage. The cause of death was opined to be exsanguination due to severed right femoral vessels. On cross examination, he told the court the death was caused from the site of the puncture and the bleeding.

8. **PW6 NO.68898 CLP Peter Wafula** was at the time attached to Nchiru police station doing investigation duties. On the material day at around 14.00hrs, the accused was brought by APC Felix Mwaniki and APC Mburie who were attached to Kagaene AP post. They brought the accused on the alleged charge of Murder of Kaugiria. The officers told him that the accused had been subjected to mob justice by members of the public. AP Mwaniki handed him a knife suspected to have been used to stab the deceased. It had blood stains. He went to the mortuary and confirmed that the body had a fresh stab wound on the lower right side of the stomach. He interviewed the staff at the CDF offices from whom he established that the accused was urinating in public and when he was asked about it, he became violent, drew a knife

from his pocket and stabbed the deceased. The knife was produced as **PExh1**, the sketch of the scene as **PExh3(a) and (b)**, the soil sample **PExh4** and the exhibit memo form as **PExh5**.

9. In his defense, the accused told the court that on the material day, he left his place of work in Tharaka Nithi in the morning and headed home. He was taking money that was required to procure birth certificates for his children to enable them sit for their national examinations. He alighted at Kagaene stage and looked for a public toilet to relieve himself but there was none. He found a shop nearby which had a corridor. He entered the toilet in that shop with a view to relief himself.

10. When relieving himself, three men accosted him and asked him why he was urinating there. He apologized to them but they pounced on him, took his mobile phone and were joined by 4 others. One of them whom he alleged to be **PW1** drew a knife and injured his finger. The money he had fell down and the attackers fought over it. He was hit in the stomach and did not know what happened thereafter. The attackers stripped him naked and and dragged him out of the building. People pounced on him but he was rescued by police officers. He was taken to the Police post then Nchiru Police Station. He denied killing the deceased.

11. The counsels made oral submissions which the court has considered. The accused is facing a charge of murder. The definition of murder as contained in **section 203 of the Penal Code** gives rise to four ingredients of the offence which the prosecution must prove beyond reasonable doubt. These are; **the fact of the death of the deceased, the cause of such death, proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person and lastly, proof that the said unlawful act or omission was committed with malice aforethought.**

12. On the fact and cause of death, **PW1** testified that when he saw the accused urinate next to the CDF offices, Kimiri sublocation, he called the deceased, who was the chairman of the market and informed him about that fact. The deceased came and he, **PW1** and the deceased started walking away from the CDF offices. When they were moving away from the said offices, the accused stabbed the deceased on the right side of the abdomen. The deceased was taken to hospital by among others, **PW2** but died on arrival. **PW2 and PW3** attended the postmortem. **PW5** produced the post mortem report which should that the body had a stab wound on the right femoral triangle. The report concluded that the cause of death was exsanguination due to the severed right femoral vessels. Accordingly, I am satisfied that the prosecution established the fact and cause of death to the required standard.

13. As regards the 3rd ingredient, **PW1** told the court that after finding the accused urinating outside the CDF offices, he pleaded with him to stop and asked him to leave. **PW1** called the deceased and told him what the deceased had done. The deceased came and joined the. He questioned the accused on what had happened. The three started to walk away from the CDF offices. All over sudden, **PW1** heard the deceased scream that he had been stabbed. At the scene, they were only the three of them. The deceased would later die from the stab wound.

14. In his defense, the accused told the court that he was urinating in a washroom along a corridor of some shop when he was accosted by three people. The three questioned him why he was urinating there. Although he asked for forgiveness, they attacked him, took his mobile phone and grabbed his money from his coat. They were joined by four other men and one of them drew a knife. He tried to grab the knife but was hurt on his finger. He stated that it was **PW1** who had a knife. He denied having fought anyone as he was attacked by a mob and was rescued by police officers.

15. From the evidence on record, no one saw the accused stab the deceased. The prosecution relied on circumstantial evidence. The incident occurred at a public place in broad day light at about 11.00 am. **PW1** stated that when the deceased was stabbed, there were only three people present, **PW1**, the accused and the deceased. That he only heard the deceased scream that he had been stabbed. That turning to where the deceased was, he saw blood ooze out of the stab wound on the right side abdomen below the chest. That when **PW1** screamed for help the accused dropped a knife, locally known to as '**kibindo**' which had blood stains and took to his heels. However, the members of the public caught up with him and wanted to lynch him. He was however, rescued by police officers who arrested him and took him into custody.

16. In **Erick Odhaimbo Okumu V Republic [2015] EKLR** the court of appeal cited the case of **Abanga Alias Onyango V Republic CR.APP. NO 32 OF 1990(UR)** and stated that:-

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests;

i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii) Those circumstances should be a definite tendency unerringly pointing towards guilt of the accused;

iii) The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”.

17. The accused admitted that he was at the scene. He stated that it was **PW1** who had the knife. That he was hurt on his finger while trying to hold **PW1**'s hand. That it was **PW1** and six others who had attacked him and robbed him of his money. That he lost over KShs.20,000/- in the scuffle. That those who attacked him dragged him out of the toilet and people set upon them. That it is then that police officers rescued him.

18. It was for the prosecution to prove its case beyond any reasonable doubt. The testimony of **PW1** was firm. It was not misplaced by the defence of the accused. There was no reason for **PW1** who called for help from the deceased for him to turn around and stab him to death. The accused was clearly accosted while acting irresponsibly in public. He did not deny that he was smelling alcohol at the time. The alcohol he had consumed may have led him to relieve himself in public next to a public office which had to the altercation with **PW1**. He was not amused that the deceased and **PW1** were questioning him about what he had done.

19. The testimony of **PW3** corroborated that of **PW1**. He was at his working place within the market tying a beam on top of a building when he saw a group of people in hot pursuit of someone. That person was running away from the market. Shortly thereafter, he saw the crowd return. On inquiring, he was informed that the crowd had arrested the person who had stabbed Jeremiah, the deceased. The person arrested happened to be the accused whom he identified. The testimony of **PW1 and PW2** was clear that the accused attempted to run away after the incident. It displaced his defence that he was dragged from inside a toilet where he was relieving himself. It could not be that he would be dragged from the toilet and once outside the crowd bay for his blood for no reason.

20. The only irresistible inference is that, after the stabbing, the accused attempted to run away but was pursued by members of the public. When they caught up with him, they set upon him because he had stabbed the deceased. Luckily he was rescued by police officers. His defence in my view was an afterthought. It did not add up. The deceased did nothing to deserve a fatal stab. He was only doing a public duty, to keep the market clean. I am satisfied that it was the accused who stabbed the deceased with a knife which led to his death.

21. The next issue is whether the accused had malice aforethought. Section 206 of the Penal Code provides to the effect that malice aforethought is deemed to be established by evidence proving, inter alia, an intention to cause the death or do grievous harm on a person. By stabbing the deceased with a knife in the abdomen, the accused knew or had reason to believe that he will cause him grievous harm. The injuries disclosed in the post mortem report were so atrocious that they were by themselves evidence of malice aforethought on the part of the accused.

22. Accordingly, I am satisfied that the prosecution has been able to prove beyond reasonable doubt that with malice aforethought, the accused caused the death of the deceased.

23. I find the accused guilty of the offence of murder of JEREMIAH KAUGIRIA and convict him of the offence of murder under **Section 322 of the Criminal Procedure code, Cap 75 Laws of Kenya.**

DATED and DELIVERED at Meru this 21st day of February, 2019.

A. MABEYA

JUDGE