



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 12 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JAMES IRERI WAMARI.....ACCUSED

J U D G M E N T

A. Introduction

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 21st April 2014, at Gikuru village Makima Location, Mbeere South District within Embu County murdered Joseph Murithi Wamari. He pleaded not guilty to the charge.

B. Prosecution Case

2. The prosecution called 9 witnesses in support of their case.

3. PW3 testified that the accused called him on phone and said that he had cut the deceased at his (accused) house. PW3 in the company of the area assistant chief proceeded to the accused's home where they found the deceased's lifeless body lying on its stomach. The accused later surrendered to one Jonathan Nyaga a neighbour of PW3 who then took him to PW5's home from where he was handed over to the police.

4. PW4 the government analyst produced his report on the outcome of examination of exhibits he received from the police officer who was investigating the case.

5. PW5 testified that he knew of an existing dispute between the deceased and the accused over sharing of miraa plants which dispute he had earlier tried to arbitrate. PW5 did not witness the incident of the deceased's death but was alerted by the large crowd in the accused's home on his way back from the grazing field. He further testified that he identified two pangas at the scene of crime, one belonging to the deceased and the other to the accused and further stated that the deceased's panga was blood stained.

6. PW6, Dr. Njiru conducted the postmortem on the deceased and formed the opinion that the deceased died due to a cardio pulmonary arrest due to either severe hemorrhage from severed main vessels to the neck or severed cervical 2nd cord.

7. PW7 testified that he visited the crime scene on the material day in the company of other police officers. He said he found the deceased's body lying on the ground in a pool of blood and saw two blood stained pangas of the scene which were seized as exhibits. PW7 further testified that before he left the scene, the area chief arrived with the accused who had earlier told a village elder that he had killed the deceased. PW8, Dr. Thuo examined the deceased and found him mentally fit to stand trial.

8. PW9 was the investigating officer who testified that in the course of the investigations he found that the accused had attacked the deceased for fencing off the accused's access to the miraa farm, after which the accused fled the scene of crime.

C. Defence Case

9. The accused gave a sworn statement. He testified that he could not have murdered the deceased as he had left him in the shamba harvesting miraa when he went fishing on the material day from 2.00pm-5.00pm. He denied committing the offence.

10. DW2 testified that on the material day he had been at his farm irrigating his crops from 10.00am to 6.00pm from where he saw the accused fishing at river Thiba from 12.00 noon to 5.00pm.

D. Analysis of the Law

11. The offence of murder can only be proven on satisfying the court of the three elements as was held in the case of **Anthony Ndegwa Ngari vs Republic [2014] eKLR**. The elements of the offence of murder identified as follows: -

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

12. PW6 who conducted the postmortem opined that the deceased died due to a cardiopulmonary arrest due to either severe hemorrhage from severed main vessels to the neck or severed cervical 2nd cord.

13. PW3 testified that the accused called him and informed him that he had cut the deceased. Upon inquiry by PW3 of his whereabouts, the accused refused to disclose his location. It is worth noting that on the material day at around 8.00 pm, the accused surrendered himself to one Jonathan Nyaga who was a neighbour of the PW3, PW5, in cross examination by the prosecutor, he further stated that the accused's panga was blood stained. The accused did not rebut this evidence. *PW6 the government analyst found that the two pangas sent to him were blood stained. Unfortunately, the DNA profile generated from the blood sample did not yield positive results.*

14. The accused raised an alibi defense which was to some extent corroborated by DW2. He said that he could not have murdered the deceased as he had left him in the shamba harvesting miraa when he went fishing from 2.00pm-5.00pm. DW2 testified that he saw the accused fishing at river Thiba from 12.00 noon to 5.00pm which evidence was variance with that of the accused as to the time accused was at the river.

15. DW2 said he was working in his shamba and could not have kept his eyes fixed on the accused for all those hours. There is high probability that the accused went to his home and found the deceased who PW7 said had blocked access from him to the miraa farm. Investigations revealed that the offence was committed between 4.00 – 6.00 pm.

16. In respect to the defense of alibi, I am alive to the principle that by setting up an alibi defense, the accused does not assume the burden of proving the alibi (**Ssentale v. Uganda [1968] EA 36**). The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt (**Wang'ombe v. Republic [1976-80] 1 KLR 1683**).

17. *However, the accused was required to raise the defense of alibi at the earliest opportunity to enable the prosecution and the investigating officer time to check it out to determine its veracity or lack thereof.* The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In **R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145**, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

18. The prosecution did not call for evidence to disprove the *alibi* raised by the accused other than cross examining the defence witnesses and therefore this court must weigh the *alibi* against the evidence of the prosecution. I have analyzed the *alibi* defence and compared it with the evidence by the prosecution.

19. It is noteworthy to recall the testimony of PW3 that the accused called him and told him that he had cut and injured the deceased. This testimony was not in any way rebutted by the accused either in cross-examination or in his defence. I found the testimony of PW3 credible in comparison with that of the accused which was contradicted by his own witness. Consequently, it is my view that the *alibi* put forth by the accused was an afterthought as well as untruthful.

20. This case is based on circumstantial evidence since no one saw the accused inflicting the injury that caused the death of the deceased. However, from the evidence the following facts may be drawn: -

a) That the accused and the deceased has an existing dispute on how to share "miraa" on their parents' land.

b) That PW7 in the course of his investigations confirmed that on the material day that the deceased had erected a thorn fence blocking access to the 'miraa' plantation which annoyed the accused when he returned home.

c) That an altercation arose from the act of the deceased which led the two men to become violent against each other.

d) That both the accused and the deceased were armed with pangas at the material time.

e) That PW7 recovered two blood stained pangas at the scene.

f) That the injuries that caused the death of the deceased were caused by a sharp object, a panga being a sharp object.

g) That the accused called PW3 and told him he had cut his brother (the deceased) with a panga.

h) That he later on the same evening surrendered to one Jonathan Nyaga, PW3 who took him to the police and handed him over.

21. It was held in the case of **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135**, in the Court of Appeal for Eastern Africa had this to say:

“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 reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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.”

22. It is my considered opinion that all the above listed facts put together point the guilty in the murder of the deceased to the accused in exclusion of any other person.

23. It is my finding that the Prosecution has proved beyond reasonable doubt that the accused committed the unlawful act which caused the death of the deceased which constitutes the ‘*actus reus*’ of the offence.

24. This court has a duty to determine whether the prosecution has proved malice aforethought on the part of the accused. In the case of **Nzuki Vs Republic [1993] KLR 171** the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

a) Intention to cause death

b) Intention to cause grievous bodily harm

c) Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

25. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a-e) is that malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case.

26. The report by the PW6, Dr. Njiru, confirmed the nature of injuries sustained by the deceased as deep cut wounds on the left side of the neck severing the carotid and jugular vessels extending to cervical and vertebral bones and spinal cord. The were indeed very severe injuries. It is these injuries that lead to the death of the deceased as herein outlined in review of the testimony of PW6.

27. The prosecution has further led evidence that the accused was armed with a panga and that a confrontation arose between the accused and the deceased at the end of which the accused panga was blood stained. The nature of the injuries sustained by the deceased in my view reveal that the accused intended to kill the deceased or at the very least cause the deceased grievous body harm. In my considered opinion, the intensity of the injuries is evidence of malice aforethought. As he inflicted the injuries, the accused must have had knowledge that the same were capable of causing death or grievous harm to him.

28. Consequently, I am convinced that the defence of the accused does not shake the solid case of the prosecution.

29. It is my finding that the prosecution have proved the offence of murder against the accused beyond any reasonable doubt. I find him guilty of the offence under Section 203 as read with Section 204 and convict him accordingly.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED THIS 25TH DAY OF MARCH, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Nduku for accused

