



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 19 OF 2015

LAWRENCE WAMITI MUTHONI.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTION

JUDGMENT

By an information dated 22nd September 2015 Lawrence Wamiti Muthoni was charged with the offence of murder c/s 203 as read with s.204 of the Penal Code. The Particulars were that on the 22nd day of August 2015 at Kicker's Club in Nyeri Town within Nyeri County within the Republic of Kenya he murdered David Kagwanja Murage.

The case for the prosecution here is that on that 22nd August 2015 David Kagwanja Magana, (PW1) Michael Kinyua Muthui (PW3), Rosemary Wairimu Karimi (PW5) and David Kagwanja Murage (deceased) were leaving club Kickers along Gakere Road about 10:00pm. They found their friend Samuel Nderitu PW2 being beaten by the accused, one Lawrence Wamiti Muthoni who was the bouncer at the club. He was known to some of them as they frequented the club for their entertainment. The deceased rushed to separate them.

According to PW2 upon his being separated by deceased he ran out, and went home. He only learnt about the deceased's death the following day. According to PW1, David Kagwanja Magana, a cousin to the deceased, after deceased separated the 2 and PW2 ran out, he saw deceased confronting with the accused. He saw the deceased fall down. He rushed to where the accused was but accused who was armed with a rundu, pushed him out, throwing him down. He fell down the stairs.

He got up and went to where he was but by this time the deceased was crawling his way out and was bleeding. The people around him thought he was bleeding from the stomach but there was nothing. It is when PW1 pulled down his trousers that he saw that he had been stabbed between the thighs. By the time the police came he was unconscious. He was taken to Outspan hospital but due to the doctor's strike he could not be treated. He was taken to Mathari Hospital. At 4:00am he and others who were waiting for him were sent home. He learnt that he had died later around 11:00 am.

In cross-examination he told the court that the deceased was his cousin, and that Rosemary PW5 had joined then as she came from Belles which was just above Kickers. He said he had taken alcohol, was drunk but not very drunk. He said he did not see the accused stab the deceased, he did not see the knife but he saw the accused attack the deceased.

He denied that he, the deceased and PW2 attacked the accused and that it was the accused who reported to the police. He said he saw his cousin fall but did not know why he had fallen. He said his cousin the deceased fell outside the club at the corridor near where the taxis were.

On re-examination, he testified that he did not see the accused stab the deceased, he only witnessed a confrontation and that when the deceased fell they were just the two of them, accused and the deceased.

PW3 Michael Kinyua Muthui also testified that they found the accused who was known to him as the club bouncer beating PW2 on the stairs leading out of Kickers Club. They went to intervene. The deceased separated them. PW 2 escaped. Accused began to order them to leave. A confrontation arose between the deceased and the accused. He PW3 was watching from a distance and saw accused grab the deceased. He noticed that the deceased was injured. He went to report to the police about the assault on PW2 and deceased. The police came and took the deceased to hospital and he and others except PW2 accompanied him.

On cross-examination he said he had taken alcohol but was not very drunk. He said that it is deceased who actually separated the two and the rest intervened by demanding an explanation as to why the bouncer was attacking them. He testified that the accused stabbed the deceased but he did not see how it happened.

On re-examination, he said after the intervention they decided to go speak to the owner of the Club but the deceased went back inside – that is when the accused grabbed and attacked him- that the confrontation was just between the two of them.

PW5 Rosemary Wairimu Karimi was in the company of David Kariuki, Joseph Waititu and Jackline Nyambura and they started their drinking in different entertainment joints – finally at Belles above Kickers Club. As they were going to Belles at the parking lot they found the accused arguing with the deceased. All of a sudden, the deceased fell and blood began to flow from his body. She went, sat down and put his head on her legs while another friend came with a scarf and tied his leg where he was bleeding. PW3 rushed to police station and reported and the police came. The deceased was taken to hospital and they followed. At Mathari hospital, his blood stained clothes were given to her as he was wheeled to theater. At 4:00am they were told to leave only to learn at 11:00am he had passed away. She identified the blood stained clothes and shoes Exhibit 2 to 5.

On cross-examination she said that she had been on a drinking spree with her husband David Kariuki and their 2 friends – which started at Kickers at 3:00pm – they left for Belles at 8:00pm, left at 9:30pm for Happy times and came back to Belles around 10:00pm. It was when they were coming back to Belles that they found the accused and the deceased violently pushing each other – in what appeared to be a fight. She could see them from about 15 meters away. She knew each one of them before. She said she did not see the accused stab the deceased- but she saw the deceased fall. She said though the light was not very good she could see.

On re-examination, she testified she could see clearly. That she witnessed what she described as the end of the fight between the accused and the deceased. She said she was not drunk.

PW7 NO.72539 PC Ferdinand Kazungu was assigned the case on 23rd August 2015 at 13:00hrs. He collected the fact as stated by the witnesses above through the statements they recorded. He visited the scene with one IP Kamau who took photos outside Kickers Bar, Gakere Road. IP Kamau did not testify neither were the photos produced. He also visited Mathari Hospital where he saw the body of the deceased and assessed the injuries. He noted stab wounds on both his thighs and one beside his umbilical cord.

At the station he found the accused who had come to follow up on a report of assault which he said he had made on 22nd August 2015- alleging to have been assaulted by 4 people, one of whom was armed with a knife. He placed the accused in cells.

The post mortem was conducted by Dr. Obiero Okoth PW8 who found extended midline laparotomy incision which was sutured. -Extended anteromedial incision with sutured laceration of the femoral vein on the left.

-sutured stab wound with oblique orientation right proximal medial thigh.

Cause of death – exsanguinating hemorrhage secondary to sharp trauma excessive bleeding from stab wound.

PW6 Justus Gikandi Kagwanja uncle to the deceased attended the postmortem.

PW4 Julius Muiruri a clinical officer with specialty in psychology presented the mental examination report on the accused.

The accused was on 22nd September 2015 then charged with murder c/s 203 as read with 204 of the Penal Code. It was alleged that on 22nd August 2015 at Kickers Club in Nyeri Town within Nyeri County Republic of Kenya he murdered David Kagwanja Murage. He denied the charges.

Upon the closure of the case for the prosecution the accused was put on his defence. He made a sworn statement.

He told the court that on the material night he was at work as the bouncer Kickers Club. About 10:00pm he went out to get tea but in the corridor towards out of the club he was attacked by three people whom he did not know. He got hold of one of them whom he threw at the taxi bay and the other three ran away. He did not stab anyone. No one had a knife. He went back to work and later to the police station where he reported about the person he had thrown out.

He recorded his statement on 23rd August 2015. He also produced 2 statements recorded by two watchmen, Samuel Ngari Gatitu (deceased) DEX 2 and Adan Dante Asuma DEX 3. Each had witnessed the incident where he was attacked. One had since left his place of work while the other had died.

On cross-examination the accused told the court that on 22nd August 2015 he was at work at Kickers Club as the bouncer. He confirmed that the deceased was indeed in the corridor at Kickers club. That he was attacked by people he did not know in that corridor- and later confirmed that the deceased was indeed one of the persons who had attacked him. He confirmed that he fought with the said people and they injured him. He denied injuring one of them.

He denied stabbing the deceased/or the deceased being stabbed by anyone because no one had a knife. He reported to the police.

Under re-examination he said he threw one of his attackers out into the taxi parking place. The accused relied on his statement to the police and the statements recorded by 2 watchmen in his defence.

Upon perusal of his own statement to the police, he stated that on 22nd August 2015 he left the club at 22:45 for tea but was attacked by four people one of whom had a knife that the one with the knife hit him on the mouth and he began to bleed but he managed to throw that one person who had the knife onto Gakere Road at the taxi rank. That the person who was armed with the knife was injured by his own knife and the other three escaped, leaving the injured one lying on the taxi rank. He went and reported to the police who went to the scene and took the

said person to hospital. He was advised to collect his P3 later which he did after recording his statement.

Samuel Ngare Gatitu recorded his statement on 28th August 2015 saying that he saw four people attack the accused person. He used his phone to call a police officer – he saw one of the attackers lying down and the others walking away, while the accused also appeared to walk away from the scene.

Adan Bante Asuma recorded his statement on 23rd August 2015 he was the watchman for Optimax building where both Bells and Kickers Bar were situated.

On the material night he was on duty when he saw four people attack the accused person three of whom he knew by physical appearance and one of whom had a knife. He alerted the accused that one of the attackers was armed. That a struggle ensued between the accused and the one armed with a knife, the accused grabbed him. The others were beating him also- but he threw the one with the knife on the road.

The accused sustained injuries on the mouth. The one who had the knife managed to stand tried to escape but he was injured and sat down. His group joined him as the accused went to report to the police who came and took the person to hospital.

The accused closed his defence.

In submissions the counsel for the accused person raised four issues: -

- That the witnesses were on a drinking spree and none the accused stab the deceased being
- That the place where the stabbing took place was not explained- whether it was inside Kickers bar or insider the parking lot.
- That the scene of crime was photographed but the photos were not produced, neither did that officer testify. Relying on **Nanyuki HC CR. Appeal No.16/2016 Geoffrey Maina Ndung'u vs. Republic** (Kasango J) urged the court to draw the inference that the evidence of this officer would have been adverse to the case for the prosecution.
- That one Aden Bante a watchman at the scene had recorded a statement but was not called by the state again because his testimony would not have supported the case for the prosecution. Counsel urged the court to find that the prosecution had failed to prove the case beyond a reasonable doubt and to acquit him.

Mr. Magoma state counsel submitted that the accused had not denied being with the deceased on the material night- he was the bouncer at Kicker's Club on that night. That the prosecution witnesses established that the accused was having a confrontation with another person, the deceased separated them, went out but accused followed and stabbed him and fled.

That it was not true that it was the accused who reported to the police but one Michael Kinyua –PW3. That the fact of accused using a knife against the deceased he knew what harm it could cause, and him fleeing was evidence of his knowledge; that the deceased was merely the good Samaritan who went out of his way to keep peace only to find himself killed. He urged the court to make a finding of guilt.

In a quick rejoinder the counsel for accused submitted that this was an offence that carried the death sentence and it was the duty of the prosecution to establish their case to the required threshold. He urged the court to find as incorrect the submission by Mr. Magoma that the accused had denied being with the deceased that the only contact the accused had with the deceased was that of bouncer that it was denied that the accused had had any confrontation with PW2.

That there was no evidence that the accused fled after stabbing the deceased as no one saw the deceased being stabbed. That the scene where this is alleged to have happened was not conclusively proved – which is why it was important to call the scenes of crime personnel.

That the investigating officer was cross-examined on the statements of the 2 watchmen which the defence had produced –which statements confirmed that a group of four people had attacked the accused and he had reported to the police that it was the police who changed the story whereby the complainant now became the accused. That the witnesses who were with the deceased were on a drinking spree hence the contradictions, omissions, gaps in the evidence making it fall below the threshold required.

The issues for determination arise from the ingredients for murder s.203 of Penal code states: -

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

The prosecution must prove beyond a reasonable doubt that there was death of another person-through an unlawful act or omission. -with malice aforethought.

Malice aforethought is defined under s.206 and will be established by evidence of one or more the following circumstances: -

- An intention to cause death of /or to do grievous harm to any person, whether that person is the person actually killed or not.
- 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.

-An intent to commit a felony.

-An intention to facilitate the flight/escape from custody of any person who has committed/attempted to commit a felony.

Fact of Death

It is not in dispute that David Kagwanja Mugane is dead. His death was confirmed by the pathologist who conducted the postmortem. The PW1, PW3, PW5, PW6 and 7 all confirmed that he died- his uncle PW6 attended the postmortem. Hence that fact of death is not in dispute. Even the accused in cross-examination confirmed that he learnt later that one of the persons who had attacked him had died.

What caused his death: -

This fact was established by the witnesses who were present that he was found to have stab wounds on his thighs. This fact was established by the pathologist that the cause of death was excessive bleeding from a stab wound in the thigh among other wounds.

How did he sustain this wound? Unlawful Act or omission of the Accused person?

It is a fact that nobody saw the accused stab the deceased. In fact, the prosecution witnesses who witnessed the confrontation between the accused and the deceased were categorical – none of them saw the accused stab the deceased. None of them saw any weapon. The consistent fact in their testimony was that the accused person and the deceased were engaged in some kind of struggle – just the 2 of them and it is out of this struggle that the deceased fell down, with injuries which were noted because he could not walk and was trying to crawl. All they could see was blood oozing from his body and it was on examination that they saw it was from his thighs. Hence it is clear to me from the evidence that the person with whom deceased had a close body contact before collapsing on the ground was the accused. There was no evidence of any other confrontation or any other intervening act by the deceased or any other person.

Hence in my view the prosecution witnesses established that the only person who could have inflicted the injury that was found on the deceased was the accused person.

In his defence the accused said he was attacked by four people. He denied that any of the four people had a knife. However, from his own statement to the police he said he was attacked by 4 persons one of whom was armed with a knife. The statements he relied on in his defence Adan Bante- the watchman whose evidence the prosecution did not call, clearly stated that one of the persons who attacked the accused was armed with a knife and that indeed the accused person struggled with this person while the others were beating him and managed to throw this person towards the parking lot.

Adan Bante states that he saw the accused grab the person armed with a knife and struggle with him. He saw the accused throw this person towards the taxi parking lot, he saw this person try to stand and fail, eventually sitting down- where his group regrouped around him. He saw that the accused had sustained injuries too, he saw the police come and take that person who he said was armed with a knife, and had attacked the accused with others, and was over powered by accused, being taken by the police to hospital. That person eventually died. It is therefore not true that the police twisted the case turning the complainant into the accused person. The saying goes: Dead men tell no tales. Two people fought. One died. The surviving had to answer the questions as to what happened.

Hence, there is no direct evidence but the circumstantial evidence speaks for itself. I am guided by the Court of Appeal case in Ahmed **Abolfathi Mohammed & Another vs. Republic (2018) eKLR** which stated that with regard to circumstantial evidence-

“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... Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstance or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence”.

I am satisfied that there are no other co-existing circumstances which would weaken the inference of guilt on the part of accused as described in **DHALAY SINGH V. REPUBLIC, CR. APP. NO. 10 of 1997** reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”

In my view the chain of circumstantial evidence with regard to the actus reus tightened only around the accused here.

Malice aforethought

The prosecution witnesses saw the accused person in a confrontation with the deceased. PW2 testified that when the deceased intervened – he disappeared he did not witness what followed.

Accused testified that he was attacked by some people one of whom “I got hold of and threw him out to the taxi bay” the other three ran away. It is this person that he threw out to the taxi bay that had injuries and died- there is no evidence of any other confrontation between the deceased before this or after this.

The evidence he produced confirms that he grabbed the deceased and struggled with him and deceased had a knife- deceased was injured, had stab wound. It is not possible that deceased could have stabbed himself – the only logical inference from those facts is that during that

struggle the deceased was injured by the accused who threw him out onto the parking lot where he was unable to stand.

It is evident that the accused person had not intended to kill the deceased but acted with such violence that the deceased sustained injury that led to his death.

Hence, it is my view that the prosecution did not establish malice aforethought. I find that even though the object that caused the stab wound was not found, there is evidence from the injuries on the deceased's body, Adan Bante's statement the accused's own statement to the police, the statement of Samuel Ngare that a knife was involved. The prosecution witnesses may not have seen the deceased being stabbed but the evidence was there. The accused caused death of the deceased but without malice aforethought.

In view of that I find that the charge of manslaughter under section 202 of the Penal Code as read with s.205 of the Penal code has been established. I substitute the charge of murder c/s 203 as read with 204 of PC to with manslaughter c/s 202 as read with s. 2015 of the PC. I find the accused guilty and convict him accordingly.

Dated, delivered and signed this 30th April 2019 in open Court at Nyeri.

Mumbua T Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Mr. Njuguna Kimani for accused

Mr. Gitonga holding brief for Mr. Magoma state counsel

Accused person

Records

Mr. Gitonga- Accused be treated as first offender. I do not have his records.

Mitigation

Mr. Njuguna- the accused is a first offender. He is 34 years old. He is a family man. He has three school going children. He is remorseful and seeks the mercy of this court. He prays for a lenient sentence.

Court:

1. The accused's BOND IS SUSPENDED PENDING THE SENTENCE.
2. THE PROBATION OFFICER TO AVAIL PRESENTENCE REPORT WITHIN 14 DAYS
3. This order be served on the County Probation Director Nyeri for compliance.
4. Mention on 14TH MAY 2019

Accused RIC at G.K King'ong'o Prison

Judge