



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 27 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

LEIRIYO LEARAMO RASHID alias STEVE.....ACCUSED

JUDGMENT

The charge

1. Leiriyo Learamo Rashid alias Steve, hereinafter called “the accused”, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence read as follows:

LEIRIYO LEARAMO RASHID alias STEVE: On the 31st March 2016 at about 9.00pm at Ziwani Estate along Quarry Road in Starehe District within Nairobi County murdered Gideon Ondieki Omwenga.

2. The accused denied committing this offence. He is represented by Mr. Wamwayi, learned counsel.

Prosecution Case

3. Seven witnesses have testified for the prosecution. The evidence is straight forward. On 31st March 2016 at about 8.30pm, Francis Mwaura (PW1) was in a Club where they do gym exercises and outdoor games when he heard screams from a woman he named as Adhiambo. The screaming woman was calling for help. Francis rushed towards the source of the screams. He was followed by other people including Tonny Amolo (PW2). Francis told the court as follows in respect to what he witnessed upon arrival at the scene:

“Adhiambo told us to help the two men fighting. One man was sitting on another man. I went to hold the one sitting on the other. I noted he had a knife and I got scared. I did not know the two before. I know the accused in court. I knew him after the incident. Accused was the one sitting on the other. He had a short Somali sword stabbing him. I found him stabbing the other man repeatedly. I told him to stop but he did not stop. He was stabbing all over the body. The other man was not saying anything. With help of other people I snatched the knife from him. We removed his shoe laces and tied his hands.”

4. Tonny Amolo Owade (PW2) was also in the same gym with Francis. He testified that at 8.30pm on 31st March 2016 he was in the gym in Ziwani when he heard screams from a woman calling for help. He went to the scene. He told the court that on arrival:

“We found two people one on top of the other stabbing him. I knew one of them the accused. He used to sell miraa in Ziwani. I had known him for 6 months. He was the one sitting on the other man. He was holding a knife and was stabbing the man on the back. It was a long knife like a Masai sword. We snatched the knife from him and removed him from the victim. We used shoe laces to tie him up.”

5. Alex Odhiambo (PW3) a resident of Ziwani had just arrived home at about 8.30pm on 31st March 2016 when he heard screams from behind his house. He rushed to the place and found Francis and Tonny, his friends holding, a man and another man lying on the ground. Alex identified the man being held by Tonny and Francis as the accused before the court.

6. Evidence shows that Francis Mwaura called IP Noor Abdikadir (PW5). IP Noor was on patrol at about 8.30pm on that day when he received the call. He was informed about the suspect arrested by members of the public within Ziwani after he was found stabbing another man. IP Noor went to the scene and found one person tied up and another man on the ground bleeding. IP Noor recovered a knife which was stained with blood. He took over the custody of the suspect. The victim was taken to Guru Nanak Hospital and the suspect to Kamukunji

Police Station. IP Noor identified the accused as the suspect he found arrested by members of the public.

7. The deceased died while undergoing treatment. His body was moved to the City Mortuary where it was examined by Dr. Dorothy Njeru. The doctor found that the death of the deceased was caused by chest injuries due to penetrating sharp force trauma (stab wounds).

8. After the investigations were completed the accused was charged with this offence.

Defence case

9. The accused was placed on his defence. He gave a sworn defence. He told the court that he did not know the deceased in this case. He testified that at about 8.00pm (he did not say which date) he was walking in company of his wife Fatuma Yusuf when a man attempted to grab Fatuma by force. A disagreement arose when he asked the man why he wanted to grab Fatuma. The man attacked Fatuma and the accused tried to separate them. A fight broke out between them. He said that the man had a knife; that the accused hit the hand of the man holding the knife making the knife fall down; that they held each other and started struggling; that the man pushed the accused down; that while on the ground Fatuma took the knife and stabbed the man twice. He testified that Fatuma screamed and this attracted people who gathered at the scene. Police were called and the accused was arrested. He told the court that the witnesses lied to the court by stating that he was found sitting on the deceased stabbing him. He stated that the man hit him and he lost one tooth.

Determination

10. Section 203 of the Penal Code provides that:

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

11. It behoves the prosecution, and so the law requires, to prove that there was death of a human being; that the death was caused by an unlawful act or omission perpetrated by the accused before the court and that the accused is so acting or omitting to act had malice aforethought.

12. Dr. Dorothy Njeru examined the body of the deceased at the City Mortuary on 5th April 2016 after the body had been identified to her as the body of the deceased by Nathan Bosire Moti and Daniel Nyanchwani, cousins of the deceased. The doctor found the following injuries:

(i) 2 stab wounds on the superior right shoulder about one 4cm long and the other 6cm long.

(ii) 3 stab wounds left posterior trunk scapular 3cm long.

(iii) Stab wound on the lumbar region 5cm.

(iv) Stab wound on the pelvic 7cm.

(v) Incision on the lungs with 600ml of haemothorax on both sides.

(vi) Incision in the heart.

13. The opinion of the doctor after examining the body was that the deceased died as a result of chest injuries due to penetrating sharp force trauma (stab). The doctor's findings are contained in the post mortem report produced in court as Ex. 2.

14. The evidence of the doctor confirms that the deceased was stabbed to death. The act of stabbing another to death is an unlawful act. This evidence therefore satisfies me that the prosecution has proved beyond reasonable doubt that the deceased died as a result of an unlawful act.

15. Further evidence by Elizabeth Oyiego (PW4) shows that she examined the knife recovered at the scene; a brown jacket and a checked shirt belong to the accused and found them stained with human blood. She generated DNA profiles from the stains and compared with the DNA profiles generated from a blood sample from the deceased. Her conclusion was that the blood on the knife, jacket and shirt belonged to the deceased. These findings are contained in her report marked Ex. 1.

16. I have considered the evidence of Francis, Tonny and Alex. It is clear to me that Francis and Tonny, who were attracted to the scene by screams, ran to the scene and found the accused sitting on the deceased who was on the ground. The accused was seen holding a knife and stabbing the deceased repeatedly as testified by Francis. Alex seems to have found the accused having been overpowered by Francis and Tonny. His evidence is that when he arrived at the scene after hearing the screams, he found a man he identified as the accused, being held by his friends Francis and Tonny while there was another injured man on the ground.

17. I have compared this evidence with that of the accused in his defence in which he admitted having a scuffle with the deceased after the deceased grabbed his (accused's) wife. He stated that it was his wife Fatuma Yusuf who took the knife and stabbed the deceased. He also testified that the deceased had a knife and that he (accused) knocked it off deceased's hand and it fell on the ground. He said that this is when his wife picked it and stabbed the deceased.

18. From my careful reading of the evidence, it is clear to me that the accused did not cross-examine Francis, Tonny or Alex about his wife stabbing the deceased. It is also strange that the accused did not mention to the police that it was not him but his wife who stabbed the

deceased to enable police trace and arrest the woman. After careful consideration of the evidence of the three eye witnesses and the defence of the accused, I hold the view that the accused is not telling the truth on who stabbed the deceased. His evidence on that issue can only be an afterthought and untruthful.

19. I find the evidence of Francis, Tonny and Alex strong and unchallenged. They did not lose sight of the accused after witnessing him stabbing the deceased. They held him, tied him with shoe laces and handed him over to IP Noor. Their evidence that the accused was stabbing the deceased at the back repeatedly is confirmed by the evidence of Dr. Njeru who found multiple injuries on the right shoulder, scapular, lumbar region and pelvic area. It is my finding that the accused was caught in the very act of stabbing the deceased. In addition he was not a stranger to Tonny. Tonny knew him before this incident. After careful consideration of all the evidence it is my conclusion that the accused has been properly identified. I reject his defence, especially the part where he states that it was not him who stabbed the deceased but his wife, as untruthful. I find that the prosecution has proved the identity of the accused as the person who stabbed the deceased beyond reasonable doubt.

20. I need to mention some slight differences in the description of the knife found with the accused. Francis described it as a Somali sword while Tonny called it a Maasai sword. I find these differences negligible given that it is confirmed that there was a knife. This court finds that these differences in describing the knife do not prejudice the case for the prosecution or the accused.

21. On the element of malice aforethought, I have considered the evidence on record and the submissions by both counsel. I have noted that all through the trial, witnesses have mentioned that the accused said the fight between him and the deceased was over a woman. The accused on his part said the deceased grabbed Fatuma Yusuf, his wife, leading to the fight. In his submissions Mr. Wamwayi told the court that it is not known who started the fight or who had the knife. He also submitted that the accused acted in the heat of the moment in the defence of his wife. Mr. Wamwayi asked the court to accept the defence of the accused on the events of that day.

22. The woman in question was not called as a witness by the prosecution or even the defence. However, it is clear to this court that Francis, Tonny and Alex were attracted to the scene by screams of a woman who called for help because two men were fighting. There is no evidence from the prosecution to confirm who started the fight or who had the knife in the first instance other than what the accused told the court. With this kind of evidence I am not able to establish the truth. For this reason I will give the accused the benefit of doubt as far as the proof of the element of malice aforethought is concerned.

23. I have considered the evidence that the accused acted in the heat of passion in defence of his wife. The viciousness with which the accused attacked the deceased shows how enraged he was. The defence of provocation is provided under section 208 (1) of the Penal Code. That section states as follows:

The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

24. In David Mugambi M’Mauta [2013] eKLR, the Court of Appeal stated as follows in reference to the defence of provocation:

“Provocation can vitiate a criminal offence. See Chivasi & another –vs- Republic (1990) KLR 5298. In this case there was evidence that there was a dispute over payment of Kshs. 50/=. As per Lord Goddard CJ in R –vs- Whitfield (1976) 63, provocation means some act or series of acts done or words spoken which could cause any reasonable person a sudden and temporary loss of self-control rendering him so subject to passion as to make him for a moment not a master of his mind. Lord Goddard further held that provocation is not an absolute defence, it is only available to an accused to reduce an otherwise clear case of murder to manslaughter. The law is clear that an accused person does not assume the responsibility of proving the defence he puts forward to a charge. It is upon the prosecution to call evidence and disprove the defence.

25. The Court in the above cited authority the case of Kenga –vs- Republic (1999) 1 E.A 141, where it was held that:

“The accused does not have to prove provocation but only to raise a reasonable doubt as to its existence.”

26. My conclusion is that the prosecution has proved beyond reasonable doubt that the accused caused the death of the deceased by an unlawful act of stabbing. However, the prosecution has failed to prove malice aforethought on the part of the accused. I will give him the benefit of doubt and find that he acted in the heat of the moment following provocation by the deceased. Without the evidence as to who between the accused and the deceased started the fight, the doubts in this case become real.

27. Consequent to this finding, it is the view of this court that the offence of murder has not been proved beyond reasonable doubt. I hereby acquit the accused of the offence of murder. I however find the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code proved beyond reasonable doubt. I convict the accused for manslaughter. Orders shall issue accordingly.

Dated, signed and delivered this 27th June 2019.

S. N. Mutuku

Judge