



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 46 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

WILSON MURIITHI.....ACCUSED

JUDGMENT

1. WILSON MURITHI ('the accused') herein has been charged with 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 the 5th day of February 2014 at Nkabune Location in Imenti North District within Meru County murdered HENRY MURERWA ("the deceased"). The prosecution called six (6) witnesses to establish its case.

2. PW1 Gerald Mwenda Inoti testified that on 11th October 2014 at around 9.00PM he was at his home when his neighbor informed him that his brother had been found behind the shops at Kathurene Market. He went there and found his brother fallen facing down along the footpath. When he lifted him he saw that he was bleeding from the ribs on the left side. He was with his brother Mwiti together with other members of the public. He and Franklin Mwirigi Mwiti identified the body of the deceased. He affirmed that the accused is known to him but does not know how he and his brother related to each other, whether friends or enemies.

3. PW2 Josephine Kamba Munyua told the court that on 5th February 2014 she went to the home of Jennifer where he met the deceased who was drinking *changaa*. He bought her a glass. After that they left together and were heading home at about 7.00 PM. When they reached a banana plantation which is a short distance from the den the accused emerged and asked her '*ujaacha umalaya yako*'.

4. The accused started slapping the deceased and saw him with a shining object that looked like a knife. She immediately ran away to her home. She does not know what happened thereafter neither does she know who killed the deceased. At about 1.00AM the police woke her up informed her of the death of the deceased and took her to Nkabune Camp since she was the last one seen with him. She was placed in the cells and the next day she came to Meru Police Station where she recorded her statement.

5. PW3 Jennifer Ntiringa stated that on the material day the deceased and **PW2** came to her home to drink *changaa* and thereafter left together at around 8.30PM. When they left she did not have any other customers. Later he accompanied Muthomi to where someone was lying along the road. When they got there they found that it was deceased.

6. PW4 George Muthomi stated that on the material day at about 8.40PM on his way home he saw someone lying on the road bleeding. He rushed to **PW3's** home which was nearby and informed her. They went to the scene where she identified him as the deceased. He called the administration police and reported the incident.

7. PW5 No. 65563 Daniel Muriithi stated that on 6th February 2014 at 8.00 AM when he reported to work he found that a murder report had been booked. He went to the scene and found a body in a pool of blood near a banana plantation. He made arrangements for the body to be moved to Meru Level 5 Hospital mortuary. Upon carrying out investigations he found out that on the material day the deceased was taking alcohol with **PW3** who was a girlfriend to the accused. After they decided to return to their homes through a banana plantation. On the way they met the accused who was armed with a knife that he used to stab the deceased on the left side of the chest. The lady ran away. Later he went to the homestead of the accused but did not find him but on 26th June 2014 he was brought to station. From his investigations he established that the deceased had gone drinking with accused's person's girlfriend.

8. PW6 Dr. Stephen Kibengo Chege produced the post mortem report which indicated that externally the body had a stab wound on the left anterior chest wall at mid clavicular line on 5th intercostal space approximately 5 cm wide extending to thoracic cavity. Internally there was blood in chest cavity, laceration on left lung lower lobe. There was also a laceration on the left ventricular wall with massive haemothorax. It was concluded that the cause of death was massive internal haemorrhage due to stab wound to the chest.

9. When put on his defence the accused gave a sworn testimony. **DW1 Wilson Muriithi** testified that on 5th February 2014 he met his landlord from whom he had rented out a club at Kathurune Market. After that he went to the video room watched a movie and left at 6.30PM. When he got out **PW2**, Kibobori and the deceased came. The latter was carrying an iron rod used to shape stones. **PW2** started insulting him since he had sacked her and that she would do something to him that he will never forget. The deceased held **PW2** pulled her away and reprimand her for insulting him. The three then left together and the he boarded a motorbike and went home. His home is in Gachauka 2 KM from Kathurune Market about 10 minutes ride with a motorbike.

10. The next day he went to Gitimbine market where he was informed that the deceased had been killed and **PW2** was arrested since he was last seen with her. When he heard this he went to make a report on the same day but did not make a statement. That it is not true that they stayed with **PW2** for 7 years or that they having an affair. He has a wife called Florence Kiende. It is also not true that he emerged from the banana plantation and slapped the deceased. The deceased was good customer and they had not differed.

11. As for **PW2** he knew her in 2011 as she worked for him in the club. Three months later he terminated her for the business was not doing well. That there was a time she broke into his house and stole from him a mobile phone, *sufurias* and his wife's two trousers. She knew his home as she used to bring money to his house in the morning. He reported the matter on 21st January 2014 which was booked under OB No. 38.

12. At close of accused persons evidence written submissions were filed. The accused submitted that from the evidence this is a witch hunt taking place and the accused being the most vulnerable at the time put him on the fix. There are no eye witnesses who witnessed the accused committing the act neither was he seen caring any weapon. The prosecution failed to establish the motive of the murder. He relied on the following authorities **Republic v Daniel Musyoka Muasaya & 2 others [2014] eKLR**, **Milton Kabulit & 4 others v Republic [2014] eKLR** and **Joseph Kimani Njau v Republic [2014] eKLR** to support his defence that the evidence presented was purely circumstantial.

13. The offence of murder is defined under **Section 203 of the Penal Code** as:-

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

Thus, the four ingredients that need to be proved by the prosecution beyond reasonable doubt in as was settled in the case of Republic versus Mohammed Dadi Kokane & 7 others [2014] eKLR are :-

a. The fact of the death of the deceased

b. The cause of such death

c. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

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

14. Regarding the first and second issue, that is, the fact and cause of death of the deceased, from the evidence adduced the deceased was found lying on the ground bleeding from the chest. According to **PW6** who produced the post mortem report, the cause of death was massive internal haemorrhage (haemothorax) due to stab wound to the chest. Before post mortem was conducted the deceased's body was identified by **PW1** and **Frankline Mwirigi Mwitii**. Accordingly, I am satisfied that the fact and cause of death of the deceased has been proved.

15. The third element that the prosecution needed to prove is that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, that is *actus reus*, that resulted in his death.

16. From the evidence adduced is that **PW2** who was last seen with the deceased stated that when they left **PW3's** home where they were drinking *changaa* and not too far away the accused emerged from the banana plantation. She testified that the accused who was carrying a sharp object and whom she identified as the accused had a torch which he flashed and she recognized his voice when he shouted at her saying “*haujawacha umalaya yako*”. When the accused started slapping the deceased she ran away to her home. According to **PW3** and also **DW1** is that each last saw the deceased with the **PW2**. But according to **PW2** she was with the deceased when the accused who was known to her emerged from banana plantation and started slapping deceased. The accused and **PW2** were known to each and **PW2** said she was a girl friend to the accused for 7 years before the severed the relationship. **PW2** said that accused had a torch which light made her to identify him and she also recognized the voice of the accused person when he shouted at her saying “*haujawacha umalaya wako*” The accused person in his defence confirms he came across **PW2** and the deceased as well as one Kibobori on the material evening that the deceased was murdered. His version of the happenings of that evening were however, not raised with the Investigating Officer **PW5** or even with **PW2** during her testimony in chief and cross-examination. Contrary to the accused persons assertion that he presented himself to the police and made a report **PW5** said that he visited accused persons home but did not find him and he made arrangements with Administration police at Nkabune AP post to effect his arrest. He was not arrested until on 26th June 2014 having committed the offence on 5th February 2014. This court finds that the defence by the accused was an afterthought. It is the accused who inflicted the injuries that led to the death of the deceased.

17. Did the accused have the necessary malice aforethought? **Section 206 of the Penal Code** defines malice aforethought as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) 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;

(c) an intent to commit a felony;

(d)

18. From the injuries sustained by the deceased it shows that he was stabbed right into his chest which is one of the most sensitive parts of the body. The fact that the weapon was not found does not mean that inference of guilt may not be ascertained. This was so stated in the case of Karani v Republic [2010] 1 KLR 73 the court expressed itself as follows:

“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit”.

As to whether there was motive for the offence and whether it has been established, it is trite law that motive need not be proved as it is immaterial so far as regards criminal responsibility. This was expounded upon by the court of appeal in the case of Choge v Republic [1985] eKLR where they held:

“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1stappellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”

The fact that the accused laid ambush in a banana plantation and emerged suddenly when PW2 and the deceased were passing by and inflicting the fatal stab is sufficient evidence that he intended to cause grievous harm or even death to the deceased. This court therefore finds that the ingredient of malice aforethought on the part of the accused has been proved beyond reasonable doubt. This court finds the accused person guilty as charged and is convicted under section 322 (1) of Criminal Procedure code.

HON A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 26TH DAY OF SEPTEMBER 2019

IN THE PRESENCE OF:

CA: KINOTI

STATE: Ms Mbithe for state

ACCUSED:- Present in person

Mr Abubakar Advocate for accused

HON A. ONG'INJO

JUDGE

MS MBITHE

I pray for a mention date for records and mitigation.

Order: Mention 3.10.2019 for records, mitigation and victim Impact Statement. Copy of judgment to be supplied to state and defence Counsel. Accused remanded in custody.

HON A. ONG'INJO

JUDGE

