



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM : R.E. OUGO J**

**CRIMINAL CASE NO 11 OF 2016 (MURDER)**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**MATUNDURA NYAMWEYA.....ACCUSED**

**JUDGMENT**

1. The accused, **Matundura Nyamweya**, is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the information are that on 13<sup>th</sup> April 2016 at Igare in Sameta Sub-county within Kisii County, he murdered **Kashmir Onsari Mariera** (“*the deceased*”).

2. The prosecution case was that on the material night, the accused was found struggling with the deceased. The deceased had a stab wound and a knife stained with blood was found besides the body. The prosecution called 8 witnesses to prove their case. The accused gave sworn testimony in his defence.

3. **Kennedy Dagr Atina** (Pw1) testified that the deceased was known to him. The accused was an employee at his hotel. He recalled that on 13<sup>th</sup> April 2016 at around 10:00 pm he heard footsteps outside his premises. Immediately the accused started calling Pw2, his wife and asking that she gives him 200/= to take his wife to hospital. He opened the door, proceeded to the gate but before he could open the gate the accused asked him to give him the Kshs 200/- through the spaces in the gate. He did not have money, he opened the gate and felt some force push him backward. He saw the accused holding the deceased by the collar though the deceased’s black coat was unbuttoned. He testified that he asked the accused who he was fighting with, and when he got no response he pulled the accused backwards asked him to stop fighting the deceased. Immediately he pulled the accused to his compound, the deceased fell down. He held the head of the deceased and immediately recognized that the deceased was a watchman from the area. He noted that the deceased had an injury on his chest causing a bleeding. When he realized the deceased was dead he began screaming calling his wife and children. He immediately left to report the incident at Igare and came back to the scene with 2 police officers. He testified further that the accused had a white T-shirt that had blood and also identified a knife that was at the scene. He testified the incident occurred between 9.30 p.m. to 10.00p.m. the electric lights were on and the place was well lit.

4. **Verona Moraa Kennedy** (Pw2) testified that on the material night at around 9.00 p.m. to 10.00 p.m. she heard that accused calling for her and asking her to him with money as his wife was sick. She had already paid the accused his dues and found no reason to open the door to respond to his cries. Then she heard the gate open, she decided to go out and she saw Pw1 pulling the accused. She observed that the deceased was not talking or moving. She testified that when the accused heard that the deceased was dead he wanted to escape and they decided to detain him.

5. **Kennedy Bahati Fortune** (Pw7) recalled that on the material night at around 9:00 p.m. he heard voices. He heard the accused calling Pw2, the accused wanted the Kshs.200/= to take his wife to hospital. The accused was drunk and was shouting. He went outside and he saw Pw1 pulling the accused. Pw1 instructed them to hold the accused down and they tied the accused with a rope. He testified that the gate area was dark and that he identified the deceased after the police came.

6. **Alfred Cheriot Chewen AP No.215075511** (Pw3) recalled that on 13<sup>th</sup> April 2016 while at work he got a report from Pw1 at 9.00 p.m. that the deceased had been murdered. They went to the scene and found the deceased lying on the ground bleeding from the left side of the ribs and the accused tied with a rope. There was blood on the accused person’s white T-shirt and there was all a kitchen knife at the scene with blood on it.

7. **Simon Waithaka No.231123** (Pw5) testified that on 13<sup>th</sup> April 2016 at around 11.30 p.m, he was informed by the OCS CIP Wangombe that a watchman had been stabbed to death at Igare market. He proceeded to scene accompanied by the OCS and other officers from Itumbe Police Station. Upon arriving at the scene, in a corridor that separates the hotel and a residential house, they found the body of the deceased facing upwards with blood around the chest and besides the body was a knife that had blood. The deceased had a coat, scarf and gumboots.

The scarf was cream in colour and it had blood stains. The body was lifeless and there was a group of people that had gathered because of the incident. He established that the deceased had been stabbed by the accused who was arrested at the scene and had been escorted to Igare AP Camp. He found the accused at the station handcuffed but did not have a t-shirt on. He asked why he was not wearing his t-shirt and upon looking at the room he was locked up in, they discovered he had dug a hole to the adjacent latrine and threw the t-shirt in the latrine. Pw5 told court that the t-shirt was retrieved from the latrine. On the 15<sup>th</sup> April 2016 he prepared the post-mortem form and post mortem was done after the body was identified.

8. **Dr Dennis Oeri Ongere** (Pw4), a Senior Medical officer at Moi University, testified that on 15<sup>th</sup> April 2016 he conducted postmortem of the deceased. From the external appearance there was a stab wound on the right lower side of the chest between the 6<sup>th</sup> and 7<sup>th</sup> rib measuring about 3cms by 1 cm inflicted by a sharp object. The internal examination revealed that in the respiratory system there was a right haemothrox, that is, blood on the right side of the lung weighing about 1liter. On the cardio –vascular system there was a deep cut on the right atrium with blood in the pericardium of about 500mls formed the opinion that the cause of death was cardiopulmonary failure due to sharp wound in the heart with a sharp object.

9. **George Musila** (Pw8) No.237086 testified that on the material night they proceeded to the scene with the DCIO and P.C. Kitur. There were blood stains at the scene and a bathroom at the AP camp where they recovered a white T-shirt belonging to the accused. He told court that they proceeded to Christamariane Hospital and observed the body of the deceased had an open wound on the right of the chest his clothes were also full of blood. He collected a white –cream scarf from the body of the deceased which was blood stained and retained it as an exhibit. He recorded statements of witnesses and forwarded exhibits to the government analyst and a post mortem too was carried out. He found out that there was sufficient evidence to charge the accused person with murder.

10. **Richard Kimutai Langat** (Pw6) testified that he was a government analyst holding a Bachelor of Science Degree in Chemistry from the University of Nairobi and working with government chemist in Kisumu. He has worked in department for 26 years and is a gazetted officer under Gazette notice no.1873 of 18<sup>th</sup> March 2005. He testified that he received a police exhibit memo form marked CID Sameta. He marked the memo form as A 96 of 2016. He testified that the memo form forwarded the following items for purposes of determining the DNA.

**1. A blood stained T-shirt from the accused. Marked ‘A’**

**2. A blood stained cream neck scarf from the deceased marked ‘B’**

**3. A blood stained kitchen knife with blue and red handle marked ‘C’**

**4. Blood sample from the accused marked ‘D’**

11. He testified that from analysis the T-shirt was moderately stained with human blood while the knife was heavily stained with human blood. He testified that the T-shirt, scarf, kitchen knife and blood sample of the accused were subjected to a DNA analyzer which generated DNA profiles in each of them. The DNA profile generated from the blood stained T-shirt matched that of the accused, but the DNA profiles generated from the kitchen knife and scarf matched the DNA profile of the deceased.

12. At the close of the prosecution case, the accused was put on his defence. He told the court on the material day he was at work at the hotel and left at 7.00p.m. Mary his employer paid him 100/-. She requested him to return to work later as the work was not finished. His pay per day was Kshs.150/-. He returned to the hotel at 9.00p.m. and entered through the hotel door as he was staying behind the hotel. When Mary saw him she started screaming and accusing him of killing someone. He asked her whom he had killed. They tied him with a rope, took him behind the hotel and started beating him up. He did not see what happened thereafter and found himself at Itumbe station Police station the next day.

13. The offence of murder is defined in **section 203** of the **Penal Code** as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution is therefore required to prove first, the fact of death of the deceased and the cause of that death; second, that the accused committed the unlawful act or omission that led to that death; and third, that the accused committed the unlawful act or omission with malice aforethought.

14. The fact and cause of death the deceased is not in dispute. Dr Dennis Oeri Ongere, testified that the deceased had a stab wound on the right lower side of the chest between the 6<sup>th</sup> and 7<sup>th</sup> rib measuring about 3cms by 1 cm inflicted by a sharp object. He reached the conclusion that the cause of death was cardiopulmonary failure due to sharp wound in the heart with a sharp object. PW1& PW2 too saw body of the deceased .

15. The critical question for determination is whether the accused caused the unlawful death of the deceased. The prosecution case is hinged on the evidence of Pw1 who saw the accused struggling with the deceased. It is of great importance for the court to consider whether under the circumstances the accused was positively identified. It is no doubt that the incident took place at night. In the case of case of **Abdallah Bin Wendoh & Another v Regina [1953] EACA 166** the Court held that:

***Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence circumstantial or direct pointing to guilt is needed.***

16. Pw1 and Pw2 both testified that there was adequate lighting from the light bulbs at the gate. However the evidence given by Pw7 in regard to the source of light is contradictory to that given by Pw1 and Pw2. Pw7 testified that it was dark when he got outside and in fact he saw the deceased when the police came and shone their torch on him. However Pw1, Pw2 and Pw7 testified that they recognized the voice of

the accused as he was shouting asking for Kshs 200/-.The witnesses testified that they recognized the voice of the accused who was working in their hotel and therefore this was not a case of identification of a stranger. In fact the witnesses tied the accused with rope at the scene after the deceased had collapsed at the scene.

17. Pw1 testified that he saw the accused struggling with the deceased and had in fact held the deceased by the collar. Pw1 testified that he pulled the accused away from the deceased and when the accused person let go of the deceased, the deceased fell down. Beside the deceased was a knife stained in blood. Pw1 did not see the accused person stab the deceased with the knife. The prosecution case therefore largely relies on circumstantial evidence. In order to justify circumstantial evidence leading to the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt (see the case of **Sawe vs Republic [2003] KLR 364**).

18. The prosecution tabled evidence that the weapon used to commit the offence was a knife consistent with the findings of Pw4 on the cause of death, being stab wound on the chest with a sharp object. Further evidence was adduced by Pw6 that the knife was heavily stained and had the DNA profile which matched that of the deceased. The accused was found struggling with the deceased and holding him by his collar and when separated from the deceased, the deceased fell down. The deceased had a stab wound and Pw1 testified that he was dead.

19. Pw5 also testified that when he went to Igare AP Camp where the accused person was being held the accused was handcuffed but did not have a t-shirt on. Pw5 testified that though the accused had been held in a bathroom and the next room being a toilet dug a hole and the accused threw the t-shirt in the toilet which was found by the police officers upon shining their torch in the toilet. The actions of the accused disposing of the blood stained T-shirt is not consistent with an act of innocence. There was further evidence by Pw2 that the accused was ready to escape when he was told that the deceased had died. The totality of the evidence by the prosecution is that the accused person used a knife to inflict injuries on the deceased which led to his death. His actions thereafter are also not consistent with innocence.

20. I now turn to whether the prosecution proved whether the accused had malice aforethought. The Court of Appeal in **Bonaya Tutu Ipu & Another v Republic MLD CA Criminal Appeal No. 43 & 50 of 2014 [2015] eKLR** accepted that determination of whether there was malice aforethought was a matter of evidence. It stated as follows:

*It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT -Vs- UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in REX -Vs- TUBERE S/O OCHEN (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:*

*It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick... (Emphasis mine).*

21. From the evidence by the prosecution, the accused person's action of stabbing the deceased on his right chest through to his heart was intended to cause grievous harm or indeed death. I therefore find and hold the prosecution proved malice aforethought under **section 206** of the **Penal Code**. The defence by the accused is a mere denial and does not displace the evidence of the prosecution. I find the consistent and satisfactory. The accused didn't deny being at the scene on the material night. Based on the evidence adduced I find that the prosecution has proved their case beyond reasonable doubt.

22. The prosecution has proved the case of murder against the accused, I therefore find the accused, **Matundura Nyamweya**, guilty of the murder of **Kashmir Onsari Mariera** and I convict him accordingly as charged.

**Dated, signed and delivered at Kisii this 25<sup>th</sup> day of October, 2019.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**Accused Person Present**

**Mr.Nyangacha For the Accused Person**

**Mr. Otieno Senior State Counsel Office of the DPP**

**Ms Rael Court clerk**