



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO 64 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL OTIENO FRANCIS.....ACCUSED

JUDGEMENT

1. The accused **SAMUEL OTIENO FRANCIS** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on 23rd day of April, 2014 at Kayaba slums in Industrial Area within Nairobi County murdered **BONIFACE OMWAWA MUTULA**. On 31/7/2014 he took his plea before Muchemi J. when a plea of not guilty was entered.

2. After several adjournments on 31/5/2016 his trial commenced before me and to prove its case, the prosecution called a total of seven (7) witnesses and when put on his defence, the accused gave unsworn statement in defence without calling any witnesses.

3. The prosecution case was stated by **PW6 CAROLINE ATIENO ODHIAMBO** who testified that on 23rd April 2014 she was at her door steps within Mukuru Kayaba at about 5.00 p.m. next to where the deceased had a hair cut (barber shop) business which he used to operate after his formal work. The deceased on the material day opened his shop and shortly thereafter she saw the accused who she knew as "Sammy" whose brother had died. It was her evidence that the deceased used to collect funeral collections in the area. She heard the accused ask the deceased why he had not organized funeral collections for his dead brother to which the deceased replied that he would organize for the same later on which did not please the accused and he took a stone which he threw at the deceased through the window.

4. It was her further evidence that the deceased got out of his shop and asked the accused what the dispute was. **PW6** then advised the accused not to fight with the deceased. She shortly thereafter saw him pass by and removed a knife from his trouser pocket and stabbed the deceased on the stomach which the deceased removed out before running after the accused. As she was still at the scene the accused came back and took away the knife. They followed the blood stains to the deceased house which passed the house upto a neighbour's house where they found the deceased had entered into and fell down.

5. In cross-examination the witness confirmed having known the accused since childhood. She confirmed that they had made contributions towards the accused brother's funeral and therefore when he asked the deceased about the same that drew her attention. She stated that she saw the accused stab the deceased and that there was no grudge between her and the accused mother.

6. **PW7 JACKSON ORWA ABINDI** *alias* "JAKISUMU" stated that he was in his house on 23rd April 2014 at 6.00 p.m. when the deceased went to his house through the main gate and raised alarm saying that he had been stabbed with a knife, and fell down while bleeding from the stomach. Whereas the deceased did not tell him who had stabbed him he heard the neighbours calling the name "Sammy". Three of the neighbours came to his house and they took the deceased to Busia Road for a taxi which took him to Kenyatta National Hospital from where he died.

7. **PW1 RAPHAEL RACHIEDO MUTULA** and **PW2 JOHN KENNEDY ASUNA** identified the body of the deceased to **PW5 DR. BENARD MIDIA** who performed postmortem examination on the body which had a supra pubic penetrating wound in the abdomen, penetrating bladder injury, massive pen-vescical/hematoma and massive pelvic hematoma. As a result of the said examination he formed an opinion that the cause of death was pelvic hematoma, bladder injury rectal injury due to penetrating abdominal injury.

8. **PW4 CORP. STEPHEN KIOGORA** received a report that the accused had stabbed the deceased on the stomach and that the accused had run away and was at large. He proceeded to the scene where he saw blood stains. On the 24th of April 2014 he witnessed the postmortem examination. He stated that at the scene he made an inquiry from members of the public who told him that there was an argument between the accused and the deceased. **PW7 PC FREDRICK ORAMISI** was assigned the duty of investigating the matter after the accused had been arrested by AP officers from Lungalunga. He took the accused for a mental assessment where he was found fit to stand trial.

9. When put on his defence the accused denied the offence and stated that on the material day 23/4/2014 he was at his rural home in Asembo in Homabay County upto 28/4/2014 when he came back to Nairobi. He stated further that on 11th July 2014, while coming from work he was arrested by two AP officers and locked up for twenty one (21) days before being charged in court. He stated further that PW6 had a grudge against his mother as both of them were selling chang'aa in the area and anytime she was arrested she alleged that it was the accused mother who had sent the police for her.

SUBMISSIONS

10. At the close of the defence case the prosecution opted not to make any final submissions. On behalf of the accused written submissions were filed in which it was submitted that the accused had tendered in an alibi that between 10th April 2014 to 28th April 2014 he had travelled to his rural home in Asembo supported by two bus tickets. It was submitted that **PW6** gave false evidence incriminating the accused and that the fact that **PW6** gave her evidence after being put in witness protection programme gave a possibility of her evidence being tainted by fear and under duress. It was submitted that **PW7 JACKSON ORWA ABIDI JAKISUMO's** evidence was that the deceased did not give the name of the accused as the one who had stabbed him when he sought refuge in his house.

11. In support of the submissions, the following cases we submitted:-

a) **REPUBLIC v GEORGE ONYANGO ANYANGO & ANOTHER [2016] eKLR** - That the prosecution did not prove the case beyond reasonable doubt.

b) **REPUBLIC v GEOFFREY CHERUIYOT alias ERIK KIPROTICH KIRUI [2015] eKLR** - On the basis that suspicion however strong cannot be a basis for conviction.

c) **REPUBLIC v SALIM KALINGA MWATELA [2012] eKLR.**

ANALYSIS AND DETERMINATION

12. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code**, the prosecution is required to prove beyond any reasonable doubt the following three ingredients:-

a) *The fact and the cause of death of the deceased.*

b) *The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - "actus reus".*

c) *That the said unlawful act of omission or commission was committed with malice aforethought - "mens rea".*

13. The fact and the cause of death of the deceased is not disputed. From the evidence tendered **PW1 RAPHAEL RACHIENDO MUTULA, PW2 JOHN KENNETH ASUNA OPENDO, PW4 CORP. STEPHEN KIOGORA, PW6** and **PW7** all confirmed the death of the deceased. The cause thereof was confirmed beyond any reasonable doubt through the evidence of **PW5 DR. BENARD MIDIA** which corroborated the evidence of **PW6** and **PW7** that the cause of death was hemorrhage due to penetrating abdominal injury. I therefore find and hold that the fact and cause of death of the deceased was proved beyond any reasonable doubt.

14. On whether the said death was caused by unlawful act on the part of the accused person, the only eye witness produced by the prosecution was **PW6 CAROLINE ATIENO ODHIAMBO**. She knew both the accused and the deceased who were her neighbors. In her testimony before the court I found her a truthful witness who confirmed that the accused and her first born son were age mates and that she had known the accused since childhood. She placed the accused at the scene of the murder and her evidence was not shaken by cross-examination.

15. It was **PW6's** evidence that the accused had picked a quarrel with the deceased before going to their house for a knife which he used to stab the deceased in the stomach. She gave credible explanation on why she had earlier declined to testify since the accused had a gang at the area and therefore she had to act in self preservation. Her evidence was corroborated in material particulars by that of **PW7** in whose house the deceased sought refuge. He had earlier on met the deceased before the incidence on the way.

16. I have weighed the account of **PW6** against the defence of the accused and take note that his alibi though was for a period between 10th April to 28th April 2014 the accused was not very truthful when he testified before court as he initially stated that his home was in Homabay County which turned out not to be true. Whereas the deceased did not mention the name of the accused to **PW7** in whose house he ran to, **PW7** heard neighbours shout the name of the accused as the one who had stabbed the deceased immediately he rushed into his house and closed the door behind thereby positively placing the accused at the scene and corroborated the evidence of **PW6**.

17. It is clear to the court and I find and hold that the accused defence herein was an afterthought the same having ran away from the scene upto the time he was arrested. I have further taken into account the evidence of **PW4 CORP STEPHEN KIOGORA** who received the first report on the incidence on 23rd April 2014 while on duty at Industrial Area Police Station in which the name of the accused was given as the one who had stabbed the deceased and would dismiss the accused allegation that there was a grudge between his mother and **PW6** as the initial report to the police was made by an independent witness.

18. From the evidence tendered before the court I find and hold that the prosecution proved beyond any reasonable doubt that it is the accused who stabbed the deceased on the stomach. I have looked at the authorities submitted and find that they are distinguishable from the

fact herein as in **REPUBLIC v GEORGE ONYANGO ANYANGO & ANOTHER (supra)** the cause of death was not established whereas in this case the same has been established, **REPUBLIC v GEOFFREY CHERUIYOT** the case was based on circumstantial evidence and in **REPUBLIC v SALIM KALINGA MWATELA** the accused had not been positively identified. I therefore find and hold that the prosecution proved beyond any reasonable doubt that the death of the deceased was caused by unlawful act on the part of the accused.

19. On whether the said death was caused with 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 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 intention to commit a felony.”

20. From the above definition specifically **Section 206 (b)** and **206 (c)** malice aforethought comprises not only intentional act but also reckless acts likely to cause death and or grievous bodily harm with indifference of the consequences of such acts. See **CRIMINAL CASE (MURDER) NO. 21 OF 2010 MOMBASA, REPUBLIC V MOHAMMED DADI KOKANE & 7 OTHERS [2014] eKLR**. According to **PW6** the accused first confronted the deceased on the issue of the funeral collection in respect of the death of his brother before throwing a stone at the deceased barber shop. When the deceased confronted the accused **PW6** advised them not to fight. The accused then went to their house from where he came with a knife which he used to Stab the deceased on the stomach with the intention to cause and indeed caused grievous harm to the same. The accused thereafter chased the deceased upto the house of **PW7** clearly showing that he had the intention to cause and indeed succeeded in causing the death of the deceased. I am therefore satisfied and hold that the accused caused the unlawful death of the deceased with malice aforethought.

21. Having taken into account the evidence tendered by the prosecution and the defence of the accused which I dismiss as not believable I find and hold that the prosecution proved beyond any reasonable doubt all the ingredients of the offence of murder and hereby find the accused guilty and convict the same of the offence of murder of **BONIFACE OMWAWA MUTULA** on 23rd April 2014 contrary to **Section 203** of the **Penal Code** and it is accordingly ordered.

DATED, SIGNED and DELIVERED at Nairobi this 30th day of May, 2018.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Miss Wegulu for the State

Mr. Ongaya for Wachira for the accused

Accused present

Court assistant - Karwitha