



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL CASE NO. 112 OF 2014**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**G O O ..... ACCUSED**

**JUDGEMENT**

1. The Accused **G O O** 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 the 6<sup>th</sup> day of November, 2014 at in Majengo, Kamukunji Area within Nairobi County murdered **J O H**.

2. He pleaded not guilty and to prove its case against him the prosecution called a total of nine (9) witnesses and when put on his defence the accused gave sworn statement of defence without calling any witness.

**PROSECUTION CASE**

3. The accused and the deceased were both students of [*particulars withheld*] with the deceased being in Form two (2) while the accused was in Form four (4). The school was headed by **PW3 QUINTER ABOK** as the principal of a school sponsored by the Anglican Church of Kenya (ACK).

4. According to the evidence of **PW5 K Y** who was a class mate of the accused. On 6/11/2014 after the Form four (4) students had completed their last paper and as some students were eating lunch some were in the field when there arose a fight between the accused and one P M the cause of which he did not know. The deceased entered into the fight and attempted to stop it when the accused removed a knife from his side pocket and stabbed the deceased on the right waist from which he fell down. The accused then followed P M outside the school compound. He was then chased by fellow students but managed to enter into a neighbouring house from where he was arrested by the police.

5. It was his evidence that there was a grudge between the accused and the deceased which arose from an incidence in the first term when he had reported the accused as a noise maker and when the accused wanted to beat him up the Form two (2) student who included the deceased stopped the accused from doing so. The accused was according to his evidence eventually suspended and only came back to sit for exams.

6. **PW6 H O N** evidence was that he was in the field when there arose a fight between two Form four (4) students, when the deceased who was the games prefect attempted to stop the fight, the accused removed a knife and stabbed him on the left ribs, the accused then proceeded to chase P M whom he was fighting with in an attempt to stab him too leaving the deceased behind bleeding. The accused then entered into a public toilet within the area from where he was flashed out before escaping into somebody's house within the area. In cross-examination he stated that there was an unresolved issue between the accused, the deceased and **PW5 K** which led to the accused being suspended from school. He confirmed that the deceased was his friend.

7. **PW3 QUINTER ABOK's evidence** was that at about 1.00 p.m. while in her office attending to a parent who wanted admission for his child, saw students running which made her get out to check on what was happening only to see the deceased lying down on the ground and on inquiry was told that he had been stabbed with a knife. She took him to the nearby health clinic for first aid before being taken to hospital by one of the teachers. She then called a police officer who came to the compound and started to search for the accused. She inquired from the students what had happened and was told that the Form two (2) students wanted to pick up a quarrel with the accused who had come to school armed with a knife and the deceased who considered himself stronger confronted the accused who stabbed him with a knife. It was her evidence that the accused was a humble boy without any major case of indiscipline.

8. **PW2 AP. CORP. KIPKEMOI TANUI** received a telephone call from the school and responded to the call. Upon arrival he got a tip off that the accused had disappeared into Majengo slums where he was arrested in a house hiding under a bed covered with clothes. He had injuries on the forehead and had blood stained vest. **PW1 MWANAUMA JUMA YUSSUF** the mother of the deceased testified that three

(3) girls from the school went to her house and notified her of the incidence. She then went to the school before following the deceased to Kenyatta National Hospital where he informed her that he had been stabbed by "O". In cross-examination she confirmed having not mentioned the name of the accused in her statement to the police.

9. **PW7 DR. DOROTHY NJERU** conducted postmortem examination on the body of the deceased and confirmed the cause of death to be chest injuries due to penetrating force trauma from two stab wounds. **PW8 LAWRENCE KINYUA MUTHURI** a government analyst carried out an analysis on the exhibit and confirmed that the blood stains found on the vest matched those of the accused and the blood stains on the shirt and trouser of the deceased matched those of his mother. There was no DNA profile of the deceased found on the accused clothes.

10. **PW9 PC RICHARD OSOI** investigated the case where the accused was initially booked for assault and charged at Makadara Law Courts. It was his evidence that the accused complained of having been assaulted. It was his evidence that the accused was fighting with another student when the deceased who was a game prefect intervened and was stabbed with a knife. He confirmed that according to the medical report on the accused, the same had suffered chest pain, abdominal pain and stabbed wounds.

#### **DEFENCE CASE**

11. When put on his defence the accused stated on oath that on 6/11/2014 after his exams he went to the field to play football where one P M a fellow four (4) student emerged into the field directly towards him and started to kick him on the stomach on a revenge mission. The accused had been made Chemistry student leader and when the said P M failed to hand over his paper to him he reported him to the teacher who then branded him a betrayer. In the month of September on his way home he met the said P M, K, the deceased and another student who bullied him damaging his trouser. He later reported to school and the group were punished and since that time the group kept on mocking him on his inability to pay school fees.

12. On the material day the said P M kicked the accused and the deceased who was then acting game captain ran after him holding a knife threatening to stab him. While he was struggling with P M, sensing danger he held the knife which cut him on the fingers, the deceased then stabbed him on the left side of the head before throwing the knife to P M and as he was struggling with P M, the deceased came to separate them and he heard him saying that he had been stabbed. He stated that at that stage it is P M who was holding the knife. P M then ran away and escaped. At that stage the accused got a chance to free himself and walked out of the school to seek for help.

13. Since his nose was bleeding he entered into the public toilet to clean himself. He then met a fellow student whose home was nearby and went there for first aid. He was subsequently arrested from the said house. In cross-examination he confirmed that the initial fight was between him and P M before the deceased joined. He stated further that the deceased stabbed him and threw the knife to P M.

#### **SUBMISSIONS**

14. On behalf of the prosecution it was submitted that they had established through evidence that the accused was at the scene of the incidence and that it is him who stabbed the deceased. It was submitted further that immediately thereafter the accused ran into a public toilet and cleaned the murder weapon. It was submitted that the deceased blood was found on the clothings of the accused and that the theory of existing grudge between him and the deceased was an afterthought. The case of **PETER KIAMBI MURIUKI v REPUBLIC CR. APPEAL NO. 321/2011 Nyeri**, reported in [2013] eKLR was submitted without any comments or reference thereon.

15. On behalf of the defence it was submitted that the prosecution case rested on the evidence of **PW5** and **PW6** which evidence was contradicting in nature. It was submitted that the story of the murder weapon being recovered from the accused was a fabrication to implicate him. It was further submitted that the prosecution failed to call very crucial witnesses and in particular one **P M** who was at the centre of the case thereby creating a gap in the prosecution case. The court was therefore invited to make an adverse inference that if called to make an adverse conclusion against the prosecution case in support of which the case of **SAID AWADHI MUBARAK v REPUBLIC [2014] eKLR** was submitted.

16. It was contended that there were no independent eye witnesses save for those who were friends of the deceased and the said **P M** who had vested interest in the matter whose evidence should be weighed against the accused defence and his account of what happened and find that the prosecution case was not proved beyond reasonable doubt as stated in the case of **CAROLINE WANJIKU NGUGI v REPUBLIC [2015] eKLR**.

#### **ANALYSIS AND DETERMINATION**

17. For the prosecution to sustain a conviction on a charge of murder it is required to prove by evidence direct or circumstantial the following ingredients of the offence:-

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

*b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.*

*c) That the said act of omission or commission was with malice aforethought as defined in Section 206 of the Penal Code.*

18. Proof beyond reasonable doubt has now obtained constitutional status in Kenya as Article 50 (2) (a) states that every accused person has a right to a fair trial which includes right to be presumed innocent until the contrary is proved. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favorite other than truth and to constitute reasonable doubt, it must be free from an overemotional response. Doubt must be actual and substantial doubt as to the guilt of the accused person arising from the evidence

or from lack of it as opposed to mere vague apprehension. See **KRISHNAN AND ANOTHER v THE STATE REPRESENTED BY INSPECTOR OF POLICE [2003] 7 SCC 56.**

19. In **COMMONWEALTH v JOHN W. WEBSTER 5 CRUSH 295.320 (1850), MASSACHUSETTS COURTS** as early as in 1850 explained the expression “*reasonable doubt*” as follows:-

**“Reasonable doubt . . . is not mere possible doubt; because everything relating to human affairs and depending on moral evidence, is open to some imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction.”**

29. It is not necessary that the prosecution should prove the case with absolute or mathematical certainty but only beyond reasonable doubt. While examining whether any doubt is beyond reasonable doubt, the court may carry in mind some “*residual doubt*” even though the courts are convinced of the accused person guilt beyond reasonable doubt with “*residual doubt*” being mitigating circumstances.

21. The fact and cause of death of the deceased is not in dispute. Evidence tendered before the court confirmed that the same died at Kenyatta National Hospital where he was rushed after the incidence on 6/11/2014 with **PW6 DR. DOROTHY NJERU** who conducted postmortem examination on his body stating that the cause of death was chest injuries due to penetrating sharp force trauma (stab).

22. The only issue in dispute is whether the said death was caused by unlawful act on the part of the accused person:- At the close of the defence case herein the following facts stood undisputed, that there was a fight between the accused and one **P M** which according to the accused person was as a result of a grudge that had been in existence throughout their school life with the said **P M** together with the deceased and a group of other boys who had formed the habit of bullying the accused on account of his poverty and inability to afford school fees. Being the student in charge of Chemistry the accused had at some stage reported **P M** to the teacher having failed to hand over his assignment from which he was punished and that being the last day of school the said **M** decided to teach the accused a lesson of his life.

23. During the said fight the deceased who was the acting games prefect joined but it is disputed whether he joined to separate the duo or to aid **P M**. It is also in dispute as to whether it was **P M** or the accused who had the knife - the murder weapon. From the P3 form and treatment notes on the accused issued from **MORNINGSIDE MEDICAL CLINIC** dated 15/11/2014, the accused had a stab wound on the left side of the head, thereby corroborating his account that it is **P M** who had the knife raising a possibility of the deceased having been stabbed by **P M** and not the accused. This possibility was not displaced by the prosecution either during the prosecution case or in cross-examination of the accused.

24. As submitted by the defence there is material contradiction in the evidence of the prosecution witnesses as to what happened on the material day. According to **PW5**, the accused stabbed the deceased on his right waist while according to **PW6** he stabbed him on the left rib. Both witnesses stated that the accused stabbed the deceased only once while according to the evidence of **DR. DOROTHY NJERU** the deceased had two stabbed wounds thereby raising doubt as to whether **PW5** and **PW6** actually witnessed what had happened or made up the story to cover up for their friend **P M** who was placed at the scene by both the prosecution and the defence.

25. Whereas **PW5** and **PW6** stated that **P M** ran away because the accused was running after him, the accused in his evidence stated that when **P M** heard **J O** the deceased scream that he had stabbed him he ran away with other students running after him while the accused got an opportunity to get away from school to seek medical attention. At the close of the prosecution case the said **P M** was never called as a witness and neither was any statement recorded from him. If **P M** was not involved in the stabbing of the deceased herein who was his friend nothing would have been easier than for him to come forward and record a statement with the police so as to assist in establishing the truth. He took off on the said date and has not been traced as at the conclusion of this case thereby pointing to a guilty mind on his part.

26. There still remains a doubt as to how the knife the murder weapon was recovered the accused having denied that the same was recovered from him and who handed it over to the police. Further the prosecution failed to call other vital witnesses in addition to the said **P M** being the two ladies who gave information to the mother of the deceased and who were present at the time of the incidence, the man at the public toilet who directed the accused where to wash his bleeding face and the members of the public who gave **PW1** tip on where the accused was. The prosecution also failed to call the teacher who had allegedly suspended the accused taking into account the fact that it was the evidence of **PW3** the Principal that the accused had never been suspended thereby contradicting the evidence of **PW4** and **PW5**.

27. Having taken into account the accused account of what happened, the prosecution evidence and the missing link created by the absence of one **P M** I am satisfied that the accused has succeeded in his lower burden of proving his defence by a preponderance of probability that the death of the deceased was caused by an act on the part of **P M** thereby creating a doubt about his guilt for which he is entitled to an acquittal. I take the view that based on the evidence tendered the version of the accused is more probable than that of the prosecution.

28. Whereas it is sad that the deceased lost his life at the hands of his fellow students, in the absence of the evidence of **P M** and having taken into consideration the accused account and the fact that he had stabbed wounds on his head which were not self inflicted and further the fact that the DNA profile found on his vest confirmed that it was his blood and not that of the deceased and since **P M** has not been accounted for, I find that the prosecution has failed to prove its case against the accused beyond reasonable doubt bringing home the guilt of the accused and to prove that the accused alone committed the crime in doubt for which he is entitled to the benefit of doubt.

29. Whereas no criminal case is free from short comings where the contradictions in the prosecution case and the gaps therein goes to the root of the case, the accused person will always be entitled to the advantage of those gaps, doubt and inconsistency.

30. I must point out that this being an offence involving youngsters, the investigators were under a higher duty to do proper investigations taking into account the developmental stage of the accused, the deceased and the witnesses and where there is evidence as in this case that the accused was considered “an outsider” in the school and subjected to bullying being a weaker person there was greater caution and higher responsibility on the part of the investigator which required an honest, sincere and dispassionate investigator with an account being made for

the absence of **P M** in the mix taking into account further the contradiction between the Principal and the two students witness evidence which should have raised a red flag both to the investigators and the prosecution, so as to make our schools safe for the students we send there for purposes of gaining knowledge and not to kill each other.

31. Having come to the irresistible conclusion that the prosecution did not prove its case against the accused beyond reasonable doubt the only logical conclusion is that the accused is entitled to an acquittal and accordingly acquit the same of the charges herein and discharge the same of the charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

32. The accused shall remain at liberty unless otherwise lawfully held.

**DATED, DELIVERED and SIGNED at Nairobi this 27<sup>th</sup> day of September, 2018.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Miss Wegulu for the State*

*Mr. Oloo for Mr. Ogada for the accused person*

*Accused person present*

*Court assistant Karwitha*