



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 24 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**THAMBURA M'THIRUA ALIAS KINJILA.....ACCUSED**

**J U D G M E N T**

1. **THAMBURA M'THIRUA** alias **KINJILA** (“the accused”) has been charged with the offence of 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 night of 22<sup>nd</sup> February, 2013, at Kandabene market, Rwanda Location in Tigania West District within Meru County, jointly with another not before court, the accused murdered **SAMWEL KINOTI** (“the deceased”). The prosecution called five witnesses to establish its case.

2. **PW1 Michael Ochieng' Okello** told the court that on the material day, he was in a bar called ‘Spider Chain’ at Kandabene. He was in the company of the accused, the accused’s wife Joyce, the deceased and the deceased’s brother (**PW3**). **PW1** testified that the deceased went to the accused’s wife and told him to pay him his debt of Kshs. 4,000/=. The accused told the deceased to go away as they did not have any debt. The deceased then told the accused that he had known his wife before she got married. The accused removed a knife and wanted to stab the deceased. The waiter chased all of them outside.

3. **PW1** left the bar and walked to his house which was about 100m away. Upon reaching his house, he saw the accused chasing the deceased up to his, **PW1**’s house. An electric post tripped the deceased and he fell down. The accused hit the deceased with a stick while calling him ‘wamukundu’, He then drew a knife and stabbed the deceased in the thigh and left. **PW3** then came and realized his brother was dead. Soon after, **PW1** and **PW3** went to the Police Post in Tigania East and reported the incident.

4. **PW2 AYUB MANYARA**, an uncle of the deceased, told the court how he went to the mortuary on 25<sup>th</sup> February, 2013 and identified the body of the deceased for post mortem. He noticed that the deceased had an open cut wound injury on the head and the body was swollen.

5. **PW3, BERNARD MWITI**, a brother to the accused, stated that he and the deceased spent the better part of the material day in their grandmother’s farm harvesting maize. Thereafter, they went into an unnamed bar where a scuffle between the deceased and accused occurred. The two fought and were separated. He and the deceased left and proceeded to Spider Club II at about 6.30pm. That 30 minutes later, the accused joined them, ordered for a coke and started to quarrel the deceased. They started kicking and boxing each other but the people in the bar intervened. The accused and deceased left for home as he closely followed behind. The two started to fight once again but the accused stabbed the deceased on the chest near **PW1**’s house. He and **PW1** went to report the incident at the police post when he realized that his brother was dead.

6. **PW4, Doctor James Kisilu** produced a report dated 28<sup>th</sup> February, 2013 on the post mortem carried out by Dr. Njuguna. He identified the injuries as a stab wound on the left 2<sup>nd</sup> intercostals space that is, between the 1<sup>st</sup> and 2<sup>nd</sup> rib and a laceration on the frontal and back region of the head. Internally, there was massive haemothorax (blood in the chest) affecting the left lung. It was established that the cause of death was massive haemothorax due to a penetrating chest injury.

7. **PW5 No. 88236 PC Moses Omondi** stated that on 22<sup>nd</sup> February, 2013 the OCS informed him to proceed to Kandabene where a murder had been reported. On arrival, he and his colleagues found that the deceased’s body had been removed from the scene. From his investigations, he established that the deceased and the accused had received some campaign money from a certain politician and the deceased was supposed to give some of it to the accused which he failed to. This angered the accused which led him to viciously attack the deceased.

8. When put on his defence, the accused gave sworn testimony as **DW1** and called two witnesses. He testified that on 22<sup>nd</sup> February, 2013, he was in Mikinduri at the funeral of his uncle’s wife. After the funeral, he and his children slept over with other mourners. They left the following morning after taking tea.

9. That while going home, customers called him and he carried them to Kianjai using his bodaboda and at Kianjai market, he heard that someone had been murdered. When he went home, he heard that **PW1** had implicated him with 3 others in the murder of the deceased. He knew **PW1** as he had once hired him to build a pit latrine for him but ran away with his equipment. He had reported **PW1** to the police who promised to return the said equipment which he never did.

10. The accused further testified that the following Monday, he met the Chief of Bumoi who asked him to accompany him to the police station which he did. On arriving at the station, they did not find his name listed but that of one Kinjila which he denied to be his nickname. The Chief asked the police to add his name onto the list of suspects.

11. He denied killing the deceased as he was in Mikinduri which is far away from where the deceased was murdered. That he and the deceased's father were in good terms but he knew the deceased had been severally arrested for stock theft.

12. In cross-examination, the accused denied that his nickname was Kinjila. He stated that he was attending a funeral at Mikinduri and that he found **DW2** there. To him, **DW2** was his neighbour from Kilothu in Rwanda Location and she was the cashier at the funeral. He admitted that during the prosecution case, he did not put the alibi to the prosecution witnesses because he did not think that it was necessary.

13. **DW2, Florence Kamangu** testified that she knew the accused since one of his relatives is married to her aunt. That on the 22<sup>nd</sup> of February, 2013, she and the accused were at a funeral in Mikinduri. The funeral ended at about 6.30pm and she too spent the night there. The following day, she and the accused left at around 11 am and he took her home. There were people calling him to take them to Kianjai. She later heard that the accused had killed the deceased while she knew he was at the funeral.

14. **DW3, Henry Kinoti** testified that he was the son of the lady whose funeral was on the 22<sup>nd</sup> February, 2013 at Mikinduri. He stated that he was with the accused that day, having arrived at Mikinduri at about 8 am and they waited for the body until 5pm. That since there was mourning, he did not allow the deceased to go home until the following day at about 11am. The following Monday, he received information that the accused had been arrested on the allegation that he was with group of people who had killed someone on the 22<sup>nd</sup> February, 2013.

15. I have carefully considered the evidence on record. The accused is facing a charge of murder. **Section 203 of the Penal Code** defines that offence as follows:-

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

The four ingredients of the offence that arise from the definition and that need to be proved by the prosecution beyond reasonable doubt 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, and**
- d) proof that the said unlawful act or omission was committed with malice aforethought.**

16. On the fact and cause of death, **PW1** testified that on the material day at about 6.30pm, he was in the company of the deceased, the accused and other persons at Spider Club. That differences arose between the deceased and the accused. The two fought and were thrown out of the Club. The fight however continued up to the doorstep of **PW1**'s house where the deceased was stabbed and died. **PW3 and PW5** corroborated **PW1**'s testimony while **PW2** identified the body in the mortuary on 25<sup>th</sup> February, 2013.

17. The post mortem report produced by **PW4** as **PExh.1** revealed that the body had a stab wound on the left 2<sup>nd</sup> intercostals space that is, between the 1<sup>st</sup> and 2<sup>nd</sup> rib, a laceration on the frontal region of the head and at the back of the head. Internally, there was massive haemothorax affecting the left lung. The doctor concluded that massive haemothorax due to a penetrating chest injury was the cause of death.

18. In this regard, I am satisfied that the prosecution has established the first and second issue of fact and cause of death.

19. On the 3<sup>rd</sup> issue, **PW1** told the court that on the material day, he was with the deceased in Spider Club where the deceased and the accused had an argument over a debt that the accused's wife allegedly owed the deceased. Later, he saw the accused beat and stab the deceased with a knife outside his, **PW1**'s, house whereby the deceased died.

20. **PW3** also testified to the fact that there was a scuffle between the accused and the deceased. He witnessed the accused stabbing the deceased and soon after, he and **PW1** reported the incident to the police. In **PW5**'s investigations, he established that the deceased and the accused had received some money from a certain politician and the deceased was supposed to give some of it to the accused but failed to do so which angered the accused. That this is what led him to viciously attack the deceased. The cause of death was established to be massive bleeding due to a penetrating chest injury.

21. The accused raised the defence of alibi and called two witnesses to collaborate his story. The accused and his witnesses told the court that he was in Mikinduri, a place very far away from where the deceased was killed.

22. The testimony of the accused and his witnesses had contradictions in material particular. The accused stated that **DW2** was a neighbor

from Kilotho area and that she was a cashier at the funeral. On her part, **DW2** told the court that she was a relative of the accused as his uncle is married to her auntie. She also denied that she had any other role at the funeral other than helping in the kitchen.

23. If **DW1** and **DW2** were together at the funeral, why the discrepancy in the roles **DW2** played at the function? Why was their relationship to each other not clear? The accused testified that **DW1** was a neighbor from Kilothu while **DW2** stated that **DW1** was related to her by marriage.

24. In *Wang'ombe v. Republic [1976-80) 1 KLR 1683*, the Court held that it is the prosecution who always bears the burden of disproving the alibi and proving the appellant's guilt. However, the prosecution can only do so if the particulars of the alibi is disclosed to it in good time. In the present case, the alibi was only set up at the defence stage. During the testimonies of the prosecution case, the alibi was neither raised nor suggested.

25. The accused alleged that there was a grudge between him and **PW1** arising out of their previous dealings. This was never put to **PW1** when he testified for him either to confirm or deny. Being raised belatedly in defence, I find it to be an afterthought.

26. In *R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145*, the former Court of Appeal for Eastern Africa stated:-

*"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".*

27. In light of the foregoing, I am convinced that the defence was an afterthought. When asked by the prosecution why he did not declare his alibi earlier, the accused stated that he did not think that it was necessary. The court holds that it was absolutely necessary to raise it at the earliest. It was being raised late because it was an afterthought.

28. The evidence of the prosecution in my view remained firm and consistent. The accused is said to have run away with the weapon that dealt the deceased fatal injuries. The testimonies of **PW1** and **PW2** placed the accused at the scene. I am satisfied that the death of the deceased was as a result of the unlawful act on the part of the accused.

29. Was there malice aforethought? *Section 206 of the Penal Code* provides, inter alia, that:-

*"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,*  
.....

30. **PW1** stated that the scuffle between the deceased and the accused was because of the deceased's allegation that the accused's wife owed him money. **PW5** however established that the deceased and the accused had received some money from a certain politician and the deceased was supposed to give some of it to the accused which he failed to. This angered the accused which led him to attack the deceased. In any event, from the nature of the injuries inflicted on the deceased, there was clearly an intention to cause grievous harm on and even death of the deceased. The accused had the necessary malice aforethought.

31. Accordingly, I am satisfied that the prosecution has proved its case beyond any reasonable doubt. I find the accused guilty of the offence of the murder of **Samwel Kinoti** and convict him of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya.**

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

**A. MABEYA**

**JUDGE**