



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 29 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

MUSYA MULYUNGI.....ACCUSED

JUDGEMENT

1. The accused person Musya Mulyungi stands charged of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 23rd August 2012 at Ndiani village, Kivou Location in Mwingi District within Kitui County murdered Kioko Mwinzi.
2. He has denied the charge and the prosecution has brought a number of witnesses to prove their case.
3. PW1 is Muthina Mwinzi the mother of the deceased. It was her evidence that the deceased was her first born child and was also called Musyoki. She also knew the accused who was a son of her brother in-law.
4. According to her, on 23rd August 2012 at 7 pm while at home his brother Charles Ndulu came and informed her that the deceased had been stabbed with a knife. She ran there only to find that the deceased had died. She saw nobody at the scene but people came back later. When she turned round the deceased, she found that he had been stabbed with a knife on the upper right side of the abdomen. The deceased also had a cut left arm and blood was spread all over the place. Someone called PW1's mother in Nairobi who informed the police who came and took the body to the mortuary. She learnt later that the deceased had been killed by his cousin the accused but did not know the reason.
5. In cross-examination, she stated that her brother Ndulu tried to explain to her what had happened but was emotional and that a young man called Kimanzi was the first to explain to her. Thereafter, Ndulu explained to her properly. She stated that Ndulu, Musya and Musyoki were together but at the time of incident Ndulu had gone away shortly. She confirmed that the incident occurred at the home of Ndekwa Munyoki. She said that she met Ndekwa near the river running. Ndekwa informed her that her son had been killed by Musya.
6. She agreed that the father of the accused was a brother to her husband and that she knew of no problem in the family. She agreed that the deceased and the accused took alcohol and that Ndekwa sold alcohol at her home. She also agreed that Ndulu also took alcohol. She said she saw the knife after turning the body. She said that the chief came to the scene later. She did not go for the postmortem examination.
7. She said that on the same day 23rd August 2012 she met the accused at Mwingi and that on 24th August 2012 she met him at Mwingi Law Courts. She said that the accused voluntarily went to the chief. She insisted that Ndulu witnessed the stabbing. She got the full story after the police arrived.
8. In re-examination, she said that during the stabbing there were many people around but they left the scene. She was sure that the deceased was stabbed by the accused. She agreed that the accused did not escape but went to the chief.
9. PW2 was Kathini Musyoki the wife of the deceased of 13 years with 4 children. She also knew the accused as a cousin of the deceased and a neighbour at home.
10. On the 23rd August 2012 at 7pm while at home, Charles Ndulu Mbaluka told her to go to Ndekwa's home and save Musyoki Mwinzi who had been stabbed with a knife by Musya Mulyungi. She ran there and found that Musyoka had actually died. She saw blood and her deceased husband lay on the side. According to her the knife was removed from the body by the OCS. She identified the knife she saw that night in the moonlight. According to her the police took the knife. She was told about the person who stabbed the deceased by Charles Ndulu. They discovered that Musya Mulyungi had gone to the chief Kasyoka and volunteered and was arrested. She was not aware of any issue between the deceased and the accused. She identified the accused in court.
11. In cross-examination, she maintained that Ndulu came and informed them and she proceeded to the scene with her mother in-law. She

said however that Ndulu explained to her mother in-law separately from her about the incident. She agreed she was not at the scene and maintained that Musya volunteered to the chief. She said that she knew that people consumed alcohol at Ndekwa's home. Her husband and the accused and Ndulu took alcohol. According to her, the accused and deceased used to accompany each other. She was shocked by the news of the stabbing. When she arrived at the scene she did not find the accused there but met Ndekwa and her mother in-law. She said she saw the body of the deceased from a distance. According to her chief Kasyoka arrived at the scene before she left. The chief arrived with the police and the assistant chief and headman. The mother of the accused was also present. She saw the accused later in court.

12. She said there was electricity light. That other than Ndulu nobody claimed to have witnessed the stabbing. When shown the knife she said that she had not seen a knife with such a handle before but the knife was embedded in the body. She did not witness postmortem examination of her husband. She said Ndulu did not say there was a quarrel or fight before the stabbing. She said that the alcohol that was sold in the homestead was Karubu traditional liquor. She did not see any visible signs of a fight. She maintained that she was convinced that the accused was the culprit.

13. In re-examination she maintained that Ndulu said the deceased was stabbed by Musya Mulyungi, which she believed. She stated that she did not go very closely to the body as she was shocked. She stated that Musya Mulyungi volunteered personally to the chief.

14. PW3 was Dr. Kiema Mwangi a Medical Officer at Mwingi Hospital.

15. He identified postmortem form dated 3rd September 2012 prepared by Dr. Mutua who had left for further studies. He was familiar with his handwriting.

16. He read the postmortem form. The postmortem examination was done on 3rd September 2012 at midday. It was a body of a male African aged about 36. There was a deep cut left side of the chest and a superficial cut wound on the chest. There was also internally a small laceration on the left side of the lung and the aorta heart vessel was torn. Cause of death was hemorrhage due to the tear of aorta. He produced the postmortem examination form as an exhibit.

17. In cross-examination, he stated that alcohol ordinarily took six hours to be cleared from the body. Due to the way the body was preserved, it would be difficult for the doctor to smell alcohol. It could be established however through taking urine or serum samples. He stated that people had different tolerance to alcohol. One could not say that somebody who regularly took alcohol had more tolerance.

18. PW4 was Alice Kasyoka Mutahi the area chief of Kivou Location in Kitui County. She knew Kioko Musyoki Mwinzi the deceased as a young man from her location. In addition, the accused Musya Mulyungi was a resident of the same area.

19. On 23rd August 2012 at 9 pm she was at home when called on the phone by the mother of Musyoki Mwinzi who explained that her son had been killed by Musya Mulyungi at the home of Ndekwa Mulyoki. She proceeded there and about 1 ½ km away from her home she met two young men one of them being Musya Mulyungi and the other Wambua Salehe. Musya Mulyungi informed her that he had killed and decided that instead of committing suicide he should surrender to the government. She then called on the phone the OCS Mwingi police station who told her to wait for him on the road side to take him to the scene. The police found her on the road side with the culprit and they proceeded to the scene. She entered the compound with the OCS, Musya Mulyungi and other police officers and she saw the body on the ground in a pool of blood with a knife in the left side of the chest. The body faced upwards and they used a lamp and a torch to see the knife which the police pulled out. It was a double edged Masaai knife which she identified in court.

20. The police then took the body in the vehicle, took her home and then they took the body to the mortuary together with Musya Mulyungi. After three or four days she was called by the police and recorded witness statement.

21. She said she inquired from Mulyungi what had caused the killing but he said he did not understand what happened because the deceased was his cousin. She did not notice any drunkardness in the accused. She identified the accused in the dock.

22. In cross-examination, she said that chiefs had a duty to control excessive drunkardness. She said that she met two young men and she thought the accused was coming to her and that was a good sign. She confirmed that Ann Ndekwa Mulyoki was the owner of the home where the incident occurred. She denied that the accused had strong smell of alcohol. She said that even at the scene the accused did not say that he was drunk. She maintained that the accused told her that he did not know what drew him to stab the deceased. She maintained that it was not true that they were drunk.

23. PW5 was PC Stephen Irungu Wanjenga from Molo police station. He had been in Mwingi police station for six years and was among the arresting officers with PC Akungu and C.I Wafula. According to him the investigating officer was PC Tom Akungu.

24. On 23rd August 2012 while at Mwingi police station at 10 pm, he was called by the OCS with PC Akungu. The OCS instructed them to accompany him to Kivou where a crime had been committed as somebody had stabbed another. They used the station vehicle and met the chief on the road with the suspect and other people. They accompanied the chief to the scene in the police vehicle where they met the body at the home of Ann Ndekwa. They had been told by the chief that accused had volunteered to her after stabbing the deceased. They found the body lying with a sharp Somali sword embedded. The knife was recovered by PC Tom Akungu. He identified the knife in court which he said was embedded on the left side of the deceased.

25. They took the body to Mwingi Hospital after leaving the accused at Mwingi police station. He however did not talk to the accused person.

26. In cross-examination, he stated that though he got close to the accused he did not sense the smell of alcohol from him. He also said he did not sense smell of alcohol from deceased's body.

27. PW6 was William Kangola Nzengu a village elder at Kianundu village. He knew Musyoki Mwinzi from birth. He also knew the accused Musya Mulyungi who came from the neighbouring village.

28. On 23rd August 2012 at 8 pm he was phoned by Ndekwa Munyoki who said two people chased each other and on arrival at her house one was stabbed and fell down. The said Ndekwa Munyoki said that Musya had stabbed Mwinzi. He then called the assistant chief Justus Kiteme on the phone and explained to him the incident. The assistant chief came and they proceeded to the place and outside the house they saw someone lying down with a knife on the left side and oozing blood. The assistant chief made calls on the phone. He stated that the owner of the home and the mother of the deceased and others were present. The body lay facing upwards. He did not see Mulyungi that night.

29. At this point PW5 PC Irungu Wanjenga was recalled and he produced the knife recovered from the scene as an exhibit.

30. PW7 was Ann Ndekwa Munyoki from Kisamba Location, Kivou Location. Musyoki Mwinzi was her uncle while Musya Mulyungi was also her uncle.

31. On 23rd August 2012 at 6 pm she was at home cooking for the children when Musya, Musyoki and Ndulu arrived. Shortly Musya held the hand of Musyoki and said "is it not true that you know?" Musyoki did not respond but they followed each other to the gate and Musyoki fell on the ground. According to her the two held each other as if wrestling. When Musyoki fell, Ndulu asked whether the accused had stabbed him, then Musya said he did not stab but hit him with a hand. Then Musya told Ndulu that they should leave and they left.

32. When she noticed that Musyoki was not raising up, she went and called his mother, found her on the road and on checking Musyoki she explained that Musya had killed her son. The witness then called the village elder on the phone who called the assistant chief and the chief who came in the vehicle and took the body to the mortuary. She stated that she did not know if the visitors who visited in her house were drunk that night before the incident. She said that they did not discuss with her as she was attending to her own things. She did not see them disagreeing unless they had disagreed on the road. She stated that the two held each other and the deceased fell facing downwards but his mother turned him. She saw the knife after his mother recovered it. She identified the knife in court though she said she did not make the observation on the knife as it was at night. She said she did not know where Ndulu was currently. She identified the accused in court.

33. In cross-examination she said that the accused and deceased and Ndulu were friends. She said that on arrival Musyoki and Ndulu sat down and then Musya held Musyoki but they did not quarrel or insult one another. She said that the mother of the deceased came at about 8 pm. She said she did not know why the deceased and the accused held each other. She stated that she recorded a witness statement on the next day. She stated also that the deceased and the accused were all drunk when they came. She denied brewing alcohol though the police inspected her house for local brew which they did not get. She said that the accused was a good person and she had not heard adverse report on him from village elders. She said that the accused and deceased moved away and held each other about 8 meters away but she did not see the accused stab the deceased. She stated that she was aware that the accused went to the chief's home.

34. In re-examination she maintained that she did not see the stabbing but that Ndulu asked Musya whether he had stabbed the deceased and he replied that he had merely hit him with a feast. She said that if the accused and deceased were drunk, then they were not very drunk.

35. That was the end of the prosecution evidence.

36. In his defence the accused gave sworn testimony. He said that he was a businessman who sold fruits and that Musya Ndulu was an uncle. Kioko Mwinzi was his brother. Both assisted him and they used to relax together.

37. On 23rd August 2012 he saw Kioko and Ndulu at the house of Ndekwa Munyoki who testified in court. The house of Ndekwa Munyoki was about 2 kilometers from his house.

38. He said that they took alcohol at Ndekwa Munyoki's house from 4.30 pm. It was a traditional liquor called "Karubu" which was sold by Ndekwa Munyoki.

39. Kioko Mwinzi found him there and he said he wanted to see him but he would explain the reasons later. They continued drinking until 7.30 pm when Kioko called him aside and told him the reason why he wanted him. According to him Kioko was not happy because he had disagreed with his wife because his wife was pregnant from another man. He said that his wife had run away that day and then started crying as the children were young; one 7 years, two of 5 years old and another one of 12 years old. He told the deceased that such issues could be resolved at home and even suggested that Wambua Ngusu a neighbour be called to try and resolve the issue and walked away. He then heard the deceased screamed and when he turned he saw he had fallen down. He went there and found that he had stabbed himself. Then Wambua Ngusu, Ndekwa Musyoki and Charles Mbaluka came and when they saw what happened they ran away. He then proceeded to make a report to the chief with Wambua whom they met on the way.

40. He denied killing Kioko Mwinzi and also denied knowledge of the knife. According to him the wife of the deceased was called Kathini and he saw her in court this year. She came to the cells also with a child aged about 5 years. He said that he was arrested in 2012.

41. In cross-examination he said that he was together with Kioko his cousin and took alcohol. Ndekwa and Mbaluka were also present. With regard to PW7's evidence he agreed that they went aside and stated that when Kioko fell and died he had already left him alone. He did not see anybody approach the deceased. He stated that they were at that house from 4.30 pm to 7.30 pm and Kioko arrived at 5 pm and was drunk. On the pregnancy Kioko did not implicate him but implicated Musyoka of Kianundu whom he did not see that day. He denied exchanging insults with the deceased. He denied that they wrestled as was stated by PW7 Ndekwa. He denied that he admitted the offence to the chief.

42. In re-examination he maintained that there was no issue or insults between the two on that day.

43. After the close of the prosecution and the defence evidence, counsel on both sides made oral submissions which I have considered.

44. This is a murder case and the prosecution is required to prove the elements of the offence beyond any reasonable doubt. The accused is not required to prove his innocence but may raise doubts in the prosecution case. See the case of Leonard Aniseth vs Republic [1963] EA 206.

45. The prosecution is required to prove beyond reasonable doubt firstly that the deceased died. Secondly, the prosecution is required to prove that the death was unlawful. Thirdly, the prosecution is required to prove that the accused caused the death of the deceased. Fourthly, if the death of the deceased is proved to have been caused by the accused, then the prosecution is required to prove that the death was caused with malice aforethought.

46. Did the deceased die? The evidence both for the prosecution and the defence was that the deceased fell down on 23rd August 2012 in the early of the night and died at the home of Ndekwa Munyoki (PW7). He had a knife in the left hand side of the chest. The prosecution and the defence did not dispute. The body was taken to the mortuary and the postmortem examination was conducted. I find that the prosecution proved beyond any reasonable doubt that the deceased died of a knife wound.

47. Was the death unlawful? From the circumstances of the case, if the death was caused by someone other than the accused, then it was unlawful because there is no legal justification for the deceased dying in the way he died.

48. Was the death of the deceased caused by the accused? The evidence of all prosecution witnesses and the accused himself put both the accused and the deceased at the scene when the incident occurred. They were all at the home of Ndekwa Munyoki with others. The prosecution version is that the accused asked the deceased to go aside and then suddenly they wrestled and the deceased fell down unconscious. One of their companion asked the accused whether he had stabbed the deceased and the accused brushed it aside by saying that he had merely hit him with a feast. The accused also went and informed the chief about the death of the deceased, which the prosecution said was an admission of the offence and a voluntary surrender of the accused to the authorities.

49. On the other hand, the accused states that though they moved aside at the house of Ndekwa it was the deceased who pulled him aside. He denied wrestling or stabbing the deceased. Instead he said that the deceased expressed anger that his wife was made pregnant by another man and though the accused told him that the matter should be resolved amicably, the deceased stabbed himself.

50. In my view, the prosecution proved beyond any reasonable doubt that the accused stabbed the deceased and killed him. There was no reason why Ndulu the person with whom they were drinking or sitting at the house of Ndekwa could implicate the accused as the person who called the deceased aside. There was also no reason why Ndekwa could have said that the two wrestled before one of them fell unconscious and died. There was also no reason why Ndulu could have asked the accused whether he had stabbed the deceased and then the accused just said that he had hit the deceased with a feast while in fact the deceased had been stabbed. There was also no reason why the accused could have gone to report the incident to the chief if indeed he did not kill the deceased, as no one told him to do so. In my view, if indeed the accused did not do it, he would have discussed with Ndekwa and maybe called the mother of the deceased before going to the chief.

51. In my view, the defence of the accused was an afterthought. He did not shake the prosecution evidence on who killed the deceased. I find that the accused killed the deceased. The death was unlawful.

52. Was the death caused with malice aforethought? In my view, from the circumstances of the case, it cannot be said that the death was not with malice aforethought. The attack on the deceased was so vicious and meant to cause the death. The deceased appeared to have been completely defenseless. In my view, though the accused said that somebody else had impregnated the wife of the deceased, he was the suspect and decided to kill the deceased to silence him forever. That cannot be anything but a malice aforethought, even if that intention to kill was formed just at Ndekwa residence. From the evidence, the accused was shocked that the deceased was aware of his relationship with his wife and this is confirmed by his own defence that Kathini visited him in prison with a child of about 5 years. In my view, malice aforethought was proved beyond any reasonable doubt against the accused person. The death was thus caused with malice aforethought.

53. Consequently I find that the prosecution has proved the offence of murder against the accused person and I convict him for murder contrary to section 203 as read with section 204 of the Penal Code.

Dated and delivered at Garissa this 18th day of December, 2018.

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George Dulu

JUDGE