



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO. 24 OF 2009
REPUBLIC
VERSUS
GREGORY KIBOI GATHURA
JUDGMENT

The accused person is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The information is that on the 2nd April, 2009 at Muthinga village in Nyeri District within central province, the accused person murdered Simon Karugu Muthee.

In effort to prove the charge against the accused person, the state called ten witnesses the first of whom was **Peter Kiama Wachira (PW1)**; he testified that on 1st April 2009 at about 11 PM he was in his house sleeping when his brother, Simon Karugu, the deceased, called him from outside the house. He responded and went out; he found the deceased and the accused fighting. When he called him, the deceased told him that he had been stabbed. The accused, on the other hand, told him that he had done what he wanted. He then left as the deceased was bleeding and writhing in pain. He noticed that the deceased had been stabbed in the abdomen while the accused had injuries on his right hand. His mother, who also came to the scene, tried to dress the wound apparently in an attempt to stop the bleeding. They took the deceased to Tumutumu mission hospital after reporting the incident to the police. They learned the following morning, that the deceased had passed away. The witness also testified that while he was at the police station recording his statement, the accused person's brother called Mwaniki, informed them that the accused had gone to Nyeri provincial general hospital. Indeed, when he and the police went to the hospital, they found him admitted there nursing bodily injuries.

Margaret Gema Wachiuri (PW2) is the person who attempted to administer first aid to the deceased. She arrived at the scene after **Peter Kiama Wachira (PW1)**. It was her evidence that on 1st April, 2009 at 11 PM, she was in her house when she heard people talking outside. She switched on the lights and saw the deceased and his brother (PW1). They entered her house as the deceased was bleeding profusely from his abdomen. Apparently he could not talk; he attempted to reach his cell phone but he couldn't. He lost consciousness and slumped on the chair. The witness informed his parents who came and took him to hospital.

The deceased's father **Samuel Muthee Wambugu (PW3)** testified that on the material date he was in his house at about 11 PM when he heard the accused person make noise outside. Shortly thereafter **Margaret Wachiuri (PW2)** came knocking at his door and informed him that the accused had stabbed the deceased. He rushed to the scene and took the deceased to Tumutumu hospital where he succumbed to his injuries

and died.

Francis **Wachiuri Muthee (PW8)**, the deceased's brother was also at his home at the material time when he heard screams. He ventured outside and found a crowd of people outside the house. He testified that the accused person had then been arrested.

Patrick Wachira (PW5) who worked with the deceased at his father's pub was in the pub on the material night when **Peter Kiama (PW1)** called and informed him that the deceased had been stabbed. As he rushed to the scene he met a motor vehicle in which the deceased was being carried together with other people who were taking him to hospital. According to him the deceased was bleeding and groaning in pain.

The owner of the vehicle in which the deceased was driven to hospital, **Daniel Muhoro Nganga (PW7)** testified that he was also summoned to the scene by **Peter Kiama (PW1)**. He found the deceased in a pool of blood. He was with his relatives. He took them to Mutinga police station and later to the hospital.

The deceased's wife, **Rahab Moige Muchiri (PW4)** testified that the deceased left the house to visit his cousin on the night of 1st April, 2009 but after about 10 minutes **Margaret (PW2)** called her to go to her home. She found her husband injured; she initially testified that the deceased was conscious and that he even told her that he had been stabbed by the accused person. However, when she was referred to her statement, she agreed that she had told the police that she had found the deceased unconscious. She identified the deceased's body at the mortuary together with one **Anthony Maina Wachira (PW7)**

Dr Dindi Kittu (PW9) a senior medical officer conducted a postmortem on the deceased's body. He established that the deceased had sustained *"an incision scar on the right lumbar region extending from the right at approximately 10 cm below the costal region to the posterior region approximately 15 cm lateral to midline."*

He also had another incisor scar superior to the above measuring approximately 7 cm long. An appendectomy scar had healed. As a result of the examination the doctor formed the opinion that the deceased died as a result of internal haemorrhage due to stab wound.

Police constable George Odhiambo(PW10) testified that he proceeded to Nyeri provincial general hospital where the accused had been admitted in the casualty wing. He had sustained injuries on the head and hand. The officer arrested him because on 1st April, 2009 a report had been received from **Peter Kiama (PW1)** that the accused had stabbed the deceased and that the latter had been taken to Tumutumu hospital where he subsequently succumbed to stab wounds and died. Upon interrogation of the accused person, he told him that an argument had arisen between him and the deceased over payment of work that the accused had done for the deceased. He said that he pushed the deceased down and ran away. He also told him that he had been beaten by the deceased's relatives. The officer admitted, however, that he did not record what the accused told him in his statement.

The accused opted to give sworn evidence when he was put on his defence and stated that on 2nd April, 2009 at about 8 PM, he was on his way from Muthinga shopping center when he passed by the house of one Wambui Wanganga. While there, the deceased came and asked him why he was not going to work at his home. The accused responded that the money he paid him was very little. The deceased, whom he alleges was drunk then started attacking him with a walking stick; the walking stick, according to his evidence, had a knife and a sheath. They both fell down and later the accused found himself at Nyeri provincial general hospital where he was admitted for two days. He had been injured on his right hand and his left hand was also fractured. He informed the police what happened when they came for him at the hospital. He continued his treatment while in prison. On whether he murdered the deceased, he testified that he could not confirm whether he did because both of them fell down. He was only told that he killed him. During cross-examination, he clarified that it was 1st April, 2009 when he fought with the deceased. He confirmed that indeed they fought and the fight was preceded by altercations between them. The fight took place in front of Peter Kiama's (PW1's) house which was not very far from his own house. He also confirmed that he knew the deceased Peter Kiama and his mother very well because they were

neighbours and for this reason he admitted that Peter Kiama could easily have identified him at the material time.

That was all there was to the evidence.

The offence of murder is defined in **section 203** of the **Penal Code**; its punishment is prescribed in **section 204** of the same Code. These two provisions provide as follows:

203. Murder

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

204. Punishment of murder

Any person convicted of murder shall be sentenced to death

The offence of murder is established if the prosecution can prove first, that the unlawful death of the victim was caused by an act or omission of the accused person and, second, that the accused person did that act or omitted to act with malice aforethought; malice aforethought is express or implied. (**See Woolmington v DPP [1935] AC 462**).

Malice aforethought is the *mens rea* or the mental element of the offence of murder; it is express when it is proved that there was an intention to kill unlawfully (**see Beckford v R [1988] AC 130**), but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (**see DPP v Smith [1961] AC 290**). It is apparent that intent is a common element in both forms of malice aforethought.

Section 206 of the **Penal Code** prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

206. Malice aforethought

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, 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 intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

Coming back to the death of the deceased, there is sufficient evidence that it was caused by some unlawful act. The evidence of the **Dr Dindi Kittu** was sufficient proof of this fact; according to the doctor's opinion, the cause of the deceased's death was internal haemorrhage due to a stab wound. In the absence of any contrary evidence, it is not in dispute, and I am satisfied that the deceased not only died but also that he was unlawfully killed. It follows that, the first limb of this offence of murder was proved beyond reasonable doubt.

As far as the second limb is concerned, the primary question is whether the accused person was the perpetrator of this offence and if so whether he had the necessary mental element to commit it.

In answering this question, it must be appreciated at the outset that none of the prosecution witnesses ever saw the accused person assault or kill the deceased. The entire prosecution evidence against the accused person was indirect or circumstantial; it is appropriate at this point to evaluate it and consider whether it is sufficient enough to sustain the accused person's conviction.

The available evidence leaves no doubt that there was some sort of physical confrontation between the accused person and the deceased immediately before the latter died. As noted, **Peter Kiama Wachira (PW1)** found the deceased and the accused in combat when he responded to the deceased's call, apparently for help. He told him that he had been stabbed and the accused, with whom the deceased had been fighting left saying that "he had done what he wanted to do". Several other prosecution witnesses who arrived at the scene a few moments later including **Margaret Gema Wachiuri (PW2)**, **Samuel Muthee Wambugu (PW3)**, **Rahab Moige Muchiri (PW4)** and **Daniel Muhoro Nganga (PW7)** were consistent that the deceased had been stabbed; that he was bleeding profusely and that he had lost consciousness. However, apart from **Peter Kiama Wachira (PW1)** none of these other witnesses testified as having found the accused at the scene.

But the fact that all other witnesses who arrived at the scene of crime soon after the incident did not find the accused does not necessarily mean that the accused was not at the scene or that their evidence is inconsistent with that of **Peter Kiama Wachira (PW1)**. The latter was the first person to arrive at the scene and if the accused left immediately upon the arrival of this witness it is logical that those who came after him could not have found the accused person. Although I did not have the opportunity to see and hear this witness I do not have any reason to doubt his evidence.

The evidence of the accused person himself leaves no doubt that he was at the locus in quo at the material time. According to him, he was not only at the scene but that he also fought with the deceased. He never attempted to controvert **Peter Kiama Wachira's (PW1's)** evidence that he found them fighting; as a matter of fact, he was categorical that this witness is a person who knew him very well since they are neighbours and therefore he could not possibly have been mistaken as to his identity.

It follows that when the evidence on record is considered in its entirety, it places the accused person right at the scene of crime at the time the crime is alleged to have been committed.

The injury to which the deceased person succumbed and died was described by the doctor as a stab wound. **Peter Kiama Wachira (PW1)**, testified that the deceased himself testified that he had been stabbed. The rest of the prosecution witnesses who arrived at the scene after the incident were also consistent that the deceased was bleeding from the stab wound. The question is whether the injury out of which the deceased died was occasioned by the accused person.

The available evidence, or at least the inference that can be drawn from that evidence is that the accused person stabbed the deceased. Both **Peter Kiama Wachira (PW1)** and the accused himself testified that indeed the accused and the deceased fought and the inference that the deceased was stabbed in the course of the fight is not remote; at least it was not displaced by any other exculpatory factor.

The accused person suggested the deceased might have been armed with a walking stick; he described the walking stick as having a knife and a sheath. This weapon was not presented to court for it to appreciate its description as given by the accused probably because it was not recovered but the nature of the deceased's injury goes to show that this was certainly the murder weapon with which he was stabbed.

The accused person alleged that in the course of his fight with the deceased, the latter hit him with the walking stick but all he did in his defence was to hold the deceased. They both fell down and somehow, he could not remember what happened after this because he found himself in hospital where he was admitted for treatment apparently for the injuries he had sustained in the course of the fight. As to the specific question by his own counsel during examination in chief whether he murdered the deceased; the

accused person said:

“I cannot confirm that I killed the deceased since both of us fell down. I was only told that I killed him.”

The accused person might not have been aware that he killed the deceased but the available evidence points to no other conclusion; he inflicted the fatal blow from which the deceased succumbed and died. The inculpatory facts, by and large, constitute circumstantial evidence that points to the guilt rather than the innocence of the accused person. **Section 164** of the **Evidence Act cap 80** makes reference to this kind of evidence; it states: -

164. Circumstantial questions to confirm evidence

When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.

An inference of guilt can be drawn from such evidence and where the court is satisfied with its sufficiency it can safely convict; the parameters within which the court can base its conviction on circumstantial evidence is stated in **“Wills on Circumstantial Evidence”** which was cited with approval in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** where the Court of Appeal of East Africa had this to say;

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

The Privy Council in **Teper versus Republic (1952) AC 480** cautioned that the trial court must be wary of any circumstances that would weaken or destroy the inference of guilt whenever a conviction is based on circumstantial evidence. At page 489 of its decision the court held that:-

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

Even after taking all the necessary precautions into account, my evaluation of the circumstantial evidence against the accused person still leads me to conclusion that the inculpatory facts are incompatible with the innocence of the accused; if I have to recapitulate them, these facts are, in my humble view, the physical confrontation between the accused and the deceased; the fact that the deceased was found to have been stabbed soon after the confrontation; and, the fact that either the deceased or the accused person was armed with a weapon which must have inflicted the injury to the deceased.

As much as the accused inflicted the fatal blow that inevitably caused the deceased’s death, I entertain doubt whether his actions were premeditated. This doubt lingers because both the accused and **Peter Kiama Wachira (PW1)** were consistent that there was a fight between the deceased and the accused person in the course of which the deceased was fatally wounded. According to the accused, the deceased provoked him by hitting him with a walking stick; he was injured in the process and these injuries might have been serious because he was admitted in hospital for at least two days. He produced evidence that even after he was charged and remanded in prison he continued with his treatment. His evidence was not displaced and I see no reason why I should not believe him on this aspect of his defence.

In these circumstances, I am prepared to accept the proposition that the accused may probably have been

acting in self-defence when he injured the deceased. It follows that the accused may not have intended to murder the deceased except that in defending himself he used more force than was necessary in the circumstances; in other words, he employed excessive force. In the absence of intention, there is no proof of malice aforethought which, as noted, is a critical element in establishing the offence of murder.

Where death ensues as a result of use of excessive force in defence of person or property, the English common law doctrine that excessive force in defence of property or person would result in a conviction of manslaughter rather than murder applies. The Court of Appeal for Eastern Africa applied this doctrine in the case of **Ngoilale s/o Lenjaro versus Republic (1951) EACA 164**. In that case, the appellant was convicted of murder by the High Court of Tanganyika. The evidence showed that in the course of a quarrel at a club beer party the deceased pushed the appellant over with some violence causing him to fall backwards. The appellant did not retaliate but got up and walked out of the club. He was followed by the deceased who overtook him. The deceased leapt at him with clenched fists and made as if to strike him. Before he could do so the appellant stabbed the deceased in the chest with a knife. The deceased was unarmed. In allowing his appeal the court noted that the circumstances under which the appellant drew his knife constituted an element of self-defence, and that although he may have gone beyond what in fact was required to defend his person against assault, that fact could not have made his offence murder. In applying the doctrine of self-defence the court held as follows:

If a man acting in good faith exceeds the power given him by law to defend himself and kills his assailant, the resultant homicide whilst not justifiable may yet be excusable, so that his offence can be regarded as manslaughter and not murder. We believe that this aspect of the doctrine of “se et sua defendendo” is sometimes overlooked in these territories, probably because the draftsmen of the penal codes operating in East Africa did not see fit to include in the chapter “Offences against the person” a section similar to the second exception section 300 of the Indian penal code...”(see page 165).

This doctrine has been given a statutory basis in **section 17** of the **Penal Code** which states as follows:

17. Defence of person or property

Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

In view of my findings and considering the foregoing law I find that the prosecution has proved beyond all reasonable doubt that accused person committed the offence of manslaughter; I find the accused person guilty of the offence of manslaughter contrary to **section 202(1)** of the **Penal Code** and, pursuant to **section 215** of the **Criminal Procedure Code**, he is convicted accordingly.

Dated, signed and delivered in open court this 31st March, 2017

Ngaah Jairus

JUDGE