**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CRIMINAL CASE NO. 10 OF 2015**

**REPUBLIC.....................................................................PROSECUTOR**

**Versus**

**STEPHEN SILA WAMBUA MATHEKA.........................................ACCUSED**

**JUDGEMENT**

**STEPHEN SILA WAMBUA MATHEKA** hereinafter referred as the accused was charged with the offence of murder contrary to section 203 punishable under section 204 of the Penal Code. In addition the accused faced a charge of attempted murder contrary to section 220 (a) of the criminal Procedure Code.

The brief facts on both counts were that prior to the 11/6/2012 the accused worked as an employee at Shila Hostel owned by one Juliana Wacucu. On the 11/6/2016 while at the hotel located at Mashuru township the accused murdered Mutuku Muhia and at the same place within proximity as to time unlawfully attempted to caused the death of one Christine Ndinda by cutting her on the left elbow and left side of the ribs using a panga.

The accused pleaded not guilty to both counts. He was represented by Mr. Onchiri advocate while the prosecution was conducted by Mr. Akula, the senior prosecution counsel.

In support of the prosecution case a total of eleven (11) witnesses were called and examined. I shall refer to the summary of the evidence before proceeding any further. PW1 CHRISTINE NDINDA testified as an employee of Shiru Hotel where she worked also with the accused. On 11/6/2012 PW1 stated that together with the deceased they all were within the premises. In the morning after morning tea the accused left and came later about 12.00 noon. While inside the house PW1 told this court the accused started to ask for his pay from the employer PW5 Juliana Wacucu. That demand got into some kind of misunderstanding between the accused and PW5 as to the exact amount he is entitled since he was off duty on that day. Faced with such a situation PW1 further testified that accused picked a quarrel with her arguing that he had referred to him as a devil worshiper. That is when suddenly accused took out a panga aiming at her head but on a way of self defence by PW1 accused struck her left side of the body. This incident saw PW1 rushed to the hospital where she was treated and a P3 filled. The P3 form was produced in evidence as exhibit 9 by PW11 Jonah Kipkosgei. According to PW11 on examination of injuries he assessed the degree of injury as harm.

PW5 testified that while at her place of work in company of other workers like PW1 and the deceased, she had a dispute over pay with the accused. In her evidence PW1 stated that the dispute escalated until she made a decision to inform the accused that his services will no longer be needed at the hotel. Thereafter PW5 stated that the accused armed himself with a panga from the butchery which he used

against PW1 and later on he stabbed to death the deceased with the same panga. The incident was reported to Mashuru Police Station where PW6 – APC Benson Musomba took action of visiting the scene. On arrival PW6 found members of the public already gathered at the scene with the accused in possession of the murder weapon, under arrest. The accused person was re-arrested by PW6 and the panga weapon used to inflict injuries to PW1 and occasioning the fatal harm to the deceased was taken in as exhibit.

The testimony of PW6 was maternally corroborated by that of PW7 APC Manjali who had accompanied PW6 to the scene of the offence. Both PW6 and PW7 in their testimony were able to identify the blood stained panga allegedly used to commit the assault against PW1 and fatal injuries upon the deceased. According to PW6 and PW7 the body of the deceased was taken to Kajiado District Hospital Mortuary. It was further the evidence of PW6 and PW7 that the matter was handed over to the police to proceed with investigations. This took placed immediately when PW6 and PW7 were joined by PW11 Cpl Jackson Kariuki. The dead body of the deceased was positively identified to the pathologist by PW2 Festus Makau and PW3 Miriam Nthenya a brother and sister to the deceased respectively.

According to PW8 Dr. A. Mureithi he conducted a postmortem on the body of the deceased on 13/6/2012 where the following positive findings were noted: large lacerations with a skull fracture measuring 30 cm extending from the right temporal region to the right pancial and occipital region, deep laceration through right cervical neck region 5 cm x 6cm deep, right hand laceration through the radial aspect with a depth of 5 cm, perforated trachea 2cm. On the same day PW8 opined that the cause of death was cardio pulmonary failure secondary to massive haemorrhage from multiple cuts from a sharp object. The investigating officer PW11 made a request for the processing of a film containing the photographs taken in respect of the deceased. The photographs processed and developed by PW10 were produced in evidence as exhibit 5 (a) together with the certificate as exhibit 5 (b).

The accused was put on his defence after the close of the prosecution case. The accused in his sworn statement denied the two counts of murder and attempted murder as per the information on the charge sheet. The accused denied that he was on duty at Shiru Hotel where the incident is alleged to have taken placed. What the accused was able to recall was a visit to his house by the deceased. According to the accused the deceased came with a message from PW1 that he was needed at the hotel. In addition the accused deposed that he agreed to accompany the deceased to the hotel to see his employer PW5. It was while with PW5 he learnt that his services had been terminated and was requested to vacate the house. The accused further told this court that while at the same location he was beaten together with the deceased. The accused exonerated himself with anything to do with the fatal injuries sustained by the deceased on 11/6/2013.

Mr. Onchiri learned counsel for the accused submitted that the prosecution miserably failed to establish both counts against the accused contrary to section 203 and 220 (a) of the Penal Code. Mr. Onchiri argued that the nature of the evidence did not meet the threshold of a case proved beyond reasonable doubt. In Mr. Onchiri contention the prosecution witnesses presented a case with a glaring inconsistence which by itself weaken their case against the accused.

Mr. Akula the learned prosecution counsel submitted that prosecution has proved beyond reasonable doubt the ingredients of the offence under section 203 and section 220 (a) of the Penal Code. Mr. Akula further contended that the prosecution case is based on direct and circumstantial evidence on the occurrence of the offence and positively placing the accused at the scene. Learned counsel in support of his submissions cited the following authorities; ***Libambula v Republic 2003 KLR 683, Republic v Jared Otieno Osumba [2015] eKLR, Peter King'ori & 2 Others v Republic [2014] eKLR*** Mr. Akula further submitted that all the features of the offence of murder revolving around the death of the deceased, the unlawful nature of his death and the presence of malice aforethought does exist in reference to the charge of murder against the accused. He also contended that the accused used the same murder weapon to inflict serious injuries to PW1 as supported by the medical examination P3 report.

I have gone through the charge, the evidence, the rival submissions made by both counsels to the case. First of all i shall consider whether the prosecution has established beyond reasonable doubt the charge of

murder contrary to section 203 of the Penal Code. The essential ingredients of the offence of murder required to be proved by the prosecution against the accused stands as follows:

a. **The death of the deceased.**

b. **That the death of the deceased was unlawful.**

c. **That in causing death the accused had malice aforethought.**

d. **That it was the accused who caused the death of the deceased.**

I shall endeavour therefore to deal with each ingredient vis viz the evidence.

a. **The death of the deceased:**

It is a general principle of law that homicide death may either be proved by direct or circumstantial evidence to be adduced by the prosecution. As laid down in the case of ***Republic v Cleya & Another [1973] EA*** 500 proof of death is usually through medical evidence, although other credible and cogent evidence is admissible to establish the matter of death in homicide cases.

In the present case the prosecution placed before court the testimony of PW5 Wacucu who was at the scene of the murder. PW2 Makau Peter and PW3 Miriam Nthenya brother and sister to the deceased deposed that they went to the mortuary and saw the dead body of Mutuku Muhia. PW8 Dr. Gituma deposed that during the postmortem the deceased was found to have suffered multiple skeletal injuries inflicted with a sharp object. The death of the deceased was traceable to the injuries to the neck, head and massive haemorrhage. The scenes of crime officer PW10 Gitau also processed photographs documenting the death of the deceased.

The prosecution has therefore established the death of the deceased beyond reasonable doubt.

b. **The unlawful death of the deceased.**

It is trite every homicide is unlawful unless it is authorized or excusable by law or committed in execution of reasonable defence of property or self-defence. See ***Sharmpal Singh [1962] EA 13***. Under this ingredient from the oral and documentary evidence the deceased was alive and on duty at Shiru Hotel. That is confirmed by the testimony of PW1 and PW5 who were with the deceased at about 12.00 pm on 11/6/2012. The accused also does not dispute that he was in company of the deceased almost at the same period and time at their place of work. PW5 stated the circumstances upon which the deceased was stabbed severally with the panga by the accused. PW5 saw the dead body lying on the ground in a pool of blood as she screamed for help from the neighbours and members of the public. PW5 deposed as to the injuries to the body of the deceased when the postmortem was conducted on the aforesaid body by PW8 Dr. Gituma. The autopsy report confirmed large lacerations with a skull fracture measuring 30 cm from the right temporal region to the occipital lacerations which were assessed as deep through right cervical neck region, the upper right and left limb lacerations with multiple cuts, intracranial haemorrhage. Thus the postmortem revealed that the deceased suffered grievious injuries to most sensitive and vulnerable parts of the body. This nature of injuries according to Dr. Gituma led to cardio respiratory failure secondary to massive haemorrhage.

The prosecution has therefore proved that the death of the deceased was homicidal in nature. I am satisfied that the acts of unlawful as provided for under section 213 of the Penal Code do exist in this case and as proved by the prosecution beyond reasonable doubt. The defence has not dislodged the evidence on facts proven by the prosecution as provided for under section 107(1) of the Evidence Act Cap 80 of the Laws of Kenya.

c. **The next issue to establish is whether the perpetrator had malice aforethought:**

Malice aforethought is defined under section 206 of the Penal Code. Under section 206 it 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 grievious 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 death or grievious harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievious injury occurs or not or by a wish that it may not be caused.**

c. **An intention to commit a felony.**

The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a-e) malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case at the trial.

The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In the ***Ogelo v Republic [2004] 2KLR 14*** the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held interalia that by dint of section 206 (1) an intention to cause death or grievious harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of ***Ernest Bwire Abanga Onyango v Republic [1990] Cr. Appeal No. 32 of 1990.*** The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.

While giving directions on the matter the Court of Appeal in the case of ***Nebart Ekaita v Republic [1994] eKLR*** stated as follows:

**"It remained a matter of questioning whether or not the appellant know that there was a serious risk that death or grievious bodily harm would ensue from his sustained assault on the deceased. The possibility therefore that the appellant killed the deceased by a sustained unlawful assault but without the intent necessary to constitute legal malice requisite to the proof of the offence of murder contrary to section 204 of the Penal Code cannot be excused. In the circumstances we are unable to uphold the appellant's conviction for murder."**

This was also anchored in the case of ***Nzuki v Republic [1993] KLR 191*** where the court stated as follows:

**"Malice aforethought is a term of art and emphasized that:**

**Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:**

i. **The intention to cause death.**

ii. **The intention to case grievious bodily harm.**

iii. **Where the accused knows that there is a serious risk that death or grievious bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does not matter**

**in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused conduct is done in the knowledge that grievious harm is likely or highly likely to ensue from his conduct is not by itself enough to convert homicide into a crime of murder. (See also Hyman v DPP [1975] EA 55)."**

Applying the above principles to the present case I am of the following conceded view:

As regards this case evidence of PW1 and PW5 paint a picture of a misunderstanding between the accused and PW5. This was centered on the employment terms of the accused with PW5 as his employer. This discussion culminated into the decision made by PW5 to terminate the employment of the accused on her hotel. There is no evidence tendered by the prosecution to demonstrate at what stage of the conversation accused was provoked and went for the panga. There was no suggestion from any of the prosecution witnesses more specifically PW1 and PW5 that the accused pre-planned the fight and attack against the accused. The evidence demonstrates the difference was between PW5 and the accused regarding his employment terms. It was not reasonably foreseeable the outcome was to advance to an assault against the deceased.

I am alive to the fact that murder and manslaughter both have a component of an element of unlawful killing. The distinguishing factor of the two is the existence of malice aforethought. It is trite that in murder case the prosecution must prove that the accused had the requisite *mensrea* (read state of mind of a criminal nature to carry out the murder). What is clear from the testimony of PW1 and PW5 is that the act of an attack against the deceased from which he succumbed to death.

It is the finding of this court that malice aforethought was not proved beyond reasonable doubt.

**(d) The last ingredient of identification of the accused:**

In the present case the incident of murder occurred during the day. It is not in dispute that the accused was an employee of PW5 working at Shiru Hotel. Although the accused was off duty PW1 and PW5 confirmed that he appeared in the morning hours took some breakfast leaving of a chose period. PW1 and PW5 further confirmed that the accused came back later at about 12.00 pm. This is the time hell broke loose particularly when accused received a pay of Sh.50 from PW5 for the very reason that he was not entitled to any benefit for missing from work. There was no discrepancy or mistaken identity from the evidence of PW1 and PW5 as to the accused presence at the scene of the crime. It is also clear that PW5 sought the assistance of the police from Mashuru AP Camp. PW6 APC Lucas and PW7 APC Manjali arrived at the scene following a distress case regarding a murder incident. PW6 and PW7 confirmed that on arrival accused was under arrest and a murder weapon a panga in possession of the accused. The murder weapon and the accused was handed over to PW11 Cpl Kariuki and PW4 PC Otieno. I am satisfied that there is no question as to the identity of the accused being at the scene on 11/6/2012 as a perpetrator.

The second count the accused is facing a charge of attempted murder contrary to section 220 (a) of the Penal Code. Section 220 (a) defines the offence as follows:

**"Any person who –**

a. **Attempts unlawfully to cause the death of another or**

b. **With intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life is guilty of a felony and is liable to imprisonment for life."**

The phrase attempt is defined in section 388 of the Penal Code which states as follows:

**“Attempt defined**

1. **When a person, intending to commit an offence begins to put his intention into executions by means adapted to its fulfilment, and manifests his intention by some overt act but does not fulfil his intention to such an extent as to commit the offence he is deemed to attempt to commit the offence.**

2. **It is immaterial except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will or whether he desists of his own motion from the further prosecution of his intention.**

3. **It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”**

In the present count the prosecution led evidence of PW1 who gave a chronology of events on the material day of 11/6/2012 at Shiru Hotel. According to PW1 this day started normally and in the course of her duty she came into contact with the accused at a place of her work. The other piece of evidence from PW1 was to the effect that accused had a dispute on his employment with PW5. PW1 presuming that all was well in a few exchange of words with the accused the unexpected happened where he whipped a panga and aimed it at PW1. As lady luck will have it the panga hit the upper limbs of PW1 inflicting serious physical injuries. These injuries saw PW1 rushed to Kajiado District Hospital for treatment. On examination the P3 was filled which confirmed injuries to the left chest wall, left elbow with a deep cut wound. According to PW1 testimony which was corroborated by PW6 the employer points the accused as the assailant.

In evaluating the evidence of PW1, the following features emerge:

First, the accused person as he sat in the hotel taking tea he was armed with a panga which is a dangerous weapon when used to inflict injuries to a human being. Secondly, the accused was employed at Shiru Hotel and therefore a co-worker to the complainant PW1. Thirdly, this is not a place where pangas can be said to be easily procured or obtained. The accused therefore must have sought and made arrangements to secure the panga with the sole purpose to commit a crime. Fourth, in a spur of the moment and without provocation or attack the accused aimed on target to cut the complainant PW1 with the said panga. This attempt on the complainant PW1 was however not complete to occasion death.

In relation to the principles on attempted offence the court in Tanzania in the case of ***Mussa S/O Saidi v Republic*** stated as follows:

**“The principles of law involved are sample but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention he is guilty of attempted larceny.**

**The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence. The intention will, in the majority of cases, only capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation.**

**Secondly, if the intention is established, the act itself must not be too remorse from the alleged intended offence.”**

In ***Zakari Murewa Mwendwa v Republic [2016] eKLR*** the court faced with a similar situation observed that:

**“An attempt to commit a crime must go beyond merely the preparatory stage to the intended commission of the crime.”**

In the circumstances of this case the accused armed himself with the panga and at a very close range he targeted the complainant. What can be deduced from his action is the intent to kill or merely to cause grievious bodily harm. This was not an accidental attack but one which the accused conceptualized and designed on how to execute it.

In support of the accused state of mind at the time i refer to the case of ***Pembe v Republic [1971] 124 CLR 107*** the Australian court pointed out what will be inferred on the accused state of mind in the following passage:

> **"The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. Its reckless quality if that quality relevantly exists must almost invariable be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning as to the accused's actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decision of the accused's state of mind. That conclusion (as to the accused state of mind) could only be founded on inference, including a consideration of what a reasonable man might or ought to have foreseen."**

The same court in the case of ***Republic v Millmot [1985] 2 QDR 413*** it was held that:

> **"The ordinary and natural meaning of the word "intends" is to have in mind, which involves the directing of the mind, having a purpose or design."**

As for this case applying the above principles the prosecution proven facts are that the accused in an aggressive manner got himself armed with a panga. This panga was first used against PW1 at the same murder scene. The P3 confirmed that PW1 suffered serious harm what then followed immediately was a fatal attack using the same weapon in respect of the deceased Mutuku Muhia.

It appeared to this court that the accused had formed the necessary intention to cause death or grievious harm. The immediate consequences of the accused action was bodily injury to the first victim who escaped by a whisker but for the second victim who was not so lucky the resultant consequence was death.

The accused on his defence provided no answer on any of these issues of being armed and in the same vein using the weapon duly positively identified in his possession to cause harm and also death at the same venue and time. The prosecution has discharged the burden of proof of beyond reasonable doubt for the offence of attempted murder contrary to section 220 (a) of the Penal Code.

I do hereby find the accused guilty of the charge contrary to section 220 (a) of the Penal Code and do convict him accordingly.

**Dated, delivered and signed in open court at Kajiado on 24th day of April, 2017.**

**......................**

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

Mr. Onchiri for the accused

Mr. Akula for Director of Public Prosecutions

Accused

Mr. Mateli Court Assistant