



**REPUBLIC OF KENYA**

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

**CRIM. CASE NO. 15 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES KAMAU JANE.....ACCUSED**

**JUDGMENT**

1. John Ndung’u Njau (“Njau”) works as a transporter. He owns a truck which people hire to transport goods to different places. On 01/04/2015, Njau was hired to transport some doors from a hardware shop in Ruiru to Komothai Girls High School. He arrived at Ruiru for the task shortly before 8:00am. The hardware shop whence he was to collect the doors was still not open for the day’s business. Njau, therefore, decided to park his truck at the hardware shop and take a walk hoping to see his friend who lived around the area.

2. As Njau walked towards the Gitambaya area, he came across a huge crowd. He reckoned the crowd was 50-100 people. His curiosity piqued, Njau decided to peek and see what was going on. He pushed his way through the crowd until he was barely three metres away from the “action”. It turned out the “action” was a violent fist fight between two men. Apparently, the crowd watched disinterestedly but curiously as the scuffle unfolded.

3. Uninterested in two grown men duking out violently, Njau decided to leave the scene. However, just as he turned to do so, he heard the crowd gasp almost in unison. Someone in the crowd then shouted that one of them had a knife. That prompted Njau to turn back to the fray. Now he found one of the men lying on the ground clutching his abdomen and screaming in pain. His assailant, the one who had been fighting with him, immediately took to his heels and disappeared from the scene.

4. Njau would later learn that the person who was lying on the ground had been stabbed and that his name was Joseph KirobiWambui. That person died at the scene almost immediately afterwards. Njau would later learn that the name of the assailant who he saw fighting with the Deceased and who he saw running away shortly after someone shouted he had a knife, was James Kamau Jane (“Accused”).

5. This was the testimony of Njau would give at this trial where the Accused is charged with the murder of the Deceased. He was quite categorical that he clearly saw both the Deceased and the Accused as they fought. He was equally categorical that he clearly saw the Accused as he fled the scene immediately after he saw the Deceased writhing and screaming in pain while clutching his abdomen soon after someone had shouted that one of the two men who were fighting had a knife.

6. Njau’s testimony about what he saw remained un-impeached and unshaken after cross-examination. It was his testimony that formed the gist of the case against the Accused Person in this trial. The Accused is charged with murder contrary to section 203 as read together with section 204 of the Penal Code, Cap 63,

Laws of Kenya. The specific allegations against the Accused are that Accused unlawfully, and with malice aforethought, killed Joseph Kirobi Wambui on 01/04/2015 at Matopeni Village in Ruiru within Kiambu County.

7. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

8. To successfully obtain a guilty verdict in a murder charge, the prosecution, therefore, is required to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

9. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or
- 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; or
- c. Intent to commit a felony; or
- d. 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.

10. Njau was the main Prosecution witness. He was the only witness who was present when the alleged homicide was committed. Jane Wambui Chege, Peter Chege Wambui and James Njuguna Chege are, respectively, the mother, brother, and uncle of the Deceased. Someone called them separately to alert them that something untoward had happened to their loved one. However, they both arrived at the scene too late. They found their son lying on the ground bleeding from the abdomen. He was already dead by the time they got there. Someone in the crowd told them that the Deceased had been stabbed by his (Deceased's) friend during a fight. Neither of them saw the fight nor the Accused Person at the scene. They both went to identify the body at the mortuary.

11. PC Samuel Kemboi testified about the arrest of the Accused on 13/04/2015 in Wakariu following information received from an informer. The Accused was arrested at the home of one of his relatives at night as he slept. Inspector Jared Wesonga Seko, a Scenes of Crime expert visited the scene of the homicide on 01/04/2015 and took 13 photographs of both the scene, the location of the body as well as close up photos of the stab wound. He produced these photos and a certificate of authenticity as exhibits and they were so admitted.

12. Finally, PC Josphat Wafula, the Investigating Officer testified about arriving at the scene immediately after the incident and finding the Deceased lying in a pool of blood. After the Insp. Seko took photos, he arranged to take the body to the Kenyatta University Mortuary and was present during the post-mortem. Through a stipulation by the Defence Counsel, Mr. Saenyi, the autopsy report by Dr. Njeru was produced by PC Wafula as evidence confirming the cause of death as excessive bleeding due to the stab wound on the Deceased.

13. PC Wafula testified that his investigations at the scene led him to believe that it was the Accused

Person who had stabbed the Deceased following a fist-fight. He started searching for him and eventually had him arrested and charged with the offence of murder.

14. The Prosecution's case presented through the seven witnesses is a straightforward one: The Accused Person was engaged in a fist-fight with the Deceased; he whipped up a knife and fatally stabbed the Deceased. Although Njau did not see the actual act of stabbing, he saw the Deceased and the Accused in a fist fight immediately before, then, seconds later, he saw the Deceased lying on this ground clutching his abdomen screaming in pain. He also saw the Accused Person fleeing the scene. The Prosecution's theory is that the Accused Person ran away from both the scene and his house because he knew what he had done.

15. When put on his defence, the Accused Person gave an unsworn statement. In it he recalled 01/04/2015 when he said he left his house at 5:00am as was his practice. He went to work where he sells sand. At around 8:20am, some two street boys approached him and told him that they had seen his friend (Deceased) dead near Koroboi area. He then went to the scene where he found the Deceased lying dead. He also found a large crowd but no one could tell what had happened to the Deceased. The Accused testified that he was there when the Deceased's brother and mother came to the scene. Then, he remembered that his mother had asked him to go home and do some chores. So, on 03/04/2015, he got some money from their *chama* and went home as he had promised his mother. It was while there, on 12/04/2015, that the Police came, broke the door and arrested him. He protested his innocence.

16. My task at this juncture is simply to determine, on the basis of the evidence presented, whether the three elements of murder outlined above have been proved. The entire case depends, in my view, on two related aspects:

- a. Whether the crucial testimony of Njau (PW3) is sufficiently credible and whether it is sufficient to link the Accused Person with the murder;
- b. Whether the Accused Person's version of events raises any reasonable doubt.

17. These two aspects of the evidence will go to the two last elements of the offence since the first element (death of the Deceased) is common between the parties. Indeed, even the cause of death is common. The only two issues that require that require analysis and findings are whether the death of the Deceased was caused by the unlawful act of the Accused Person; and whether that unlawful conduct was actuated by malice aforethought.

18. I should begin with the observation that I found the evidence of Njau to be completely reliable and honest. He was able to narrate the events of the day with ease and in a straightforward manner that inspired much confidence that he was being truthful. As I pointed out above, his narrative remained intact even after cross-examination.

19. Mr. Saenyi, however, has narrowed down on an important aspect of the evidence which, he contends, weakens the possibility that the Prosecution could prove that it was the Accused Person who stabbed the Deceased beyond reasonable doubt. He argues that by Njau's own admission, he did not actually see the Accused stabbing the Deceased although he was at the scene. What he saw was the two of them fighting, and then saw the Deceased lying there – and the Accused fleeing. Even if this evidence is accepted as truthful, Mr. Saenyi argues, it is at best circumstantial to prove that it was the Accused Person who actually stabbed the Deceased. At worst, Mr. Saenyi argues that all the Prosecution has is suspicion that it was the Accused Person who did it – and suspicion, however strong, cannot take the place of evidence. He cited *Joan Chebichii Sawe v R (Nairobi Crim. App. No. 3 of 2002)* where the Court of Appeal remarked:

The suspicion may be strong but this is a game with clear and settled rules of engagement. The Prosecution must prove the case against the Accused beyond any reasonable doubt. As this Court made clear....suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.

20. On my part, I am, respectfully, unable to agree that it takes any aversion from available evidence to make a finding that the evidence on record establishes that it was the Accused Person who stabbed the Deceased. While it is true that a Court must be careful to distinguish inferences which are permissible from circumstantial evidence from mere conjecture or speculation, such inferences are permissible and, at times, form the best evidence where there are objective facts from which a Court can reasonably infer other facts.

21. In the instant case, while it is true that Njau had averted his eyes at the specific moment when the stabbing happened, the immediate context leaves no doubt that it was the Accused Person who committed the act. First, Njau was quite categorical that he clearly saw and identified both the Accused Person and the Deceased as the two persons who were engaged in a duel. It was shortly before 8:00am in an open area near a series of residential houses in the background. There is no doubt that there was sufficient lighting for Njau to clearly see and identify them. It is probably important to note that Njau testified that he was barely 3 metres away from the two of them as they engaged in the fist-fight. Hence, he had a clear and un-obstructed view of the Accused Person.

22. Third, while Njau did not see the precise moment when the Accused stabbed the Deceased having averted his eyes for a fleeting moment, this was one of the cases where it can properly be said that the “inculpatory fact is incompatible with the innocence of the Accused, and is incapable of explanation upon any other reasonable hypothesis than that of his guilt.” See ***R v Kipkering Arap Koske & Another 16 EACA 135***. I say so because even with his eyes averted for a fleeting second, Njau heard the crowd gasp before he heard someone shout that one of the people fighting had a knife. When he turned, he found the Deceased lying on the ground screaming – having been stabbed. Importantly, he also now saw the Accused Person fleeing the scene. In other words, Njau saw one of the two people who he had clearly identified as those who had been fighting lying on the ground – and saw the other person who had been fighting with him fleeing the scene. This series of events put together lead an unmistakable inference: it was the Accused Person who stabbed the Deceased and then, on realising the magnitude of the injury, fled the scene.

23. If there was any doubt about the identity of the Accused Person as the assailant, it is resolved by his post-offence conduct: he fled the scene and the area and stayed away. He was only arrested 12 days later at his mother’s home near Kibichoi. His explanation for fleeing the area – that he suddenly remembered that his mother had requested him to go do some chores at home is simply implausible. Its implausibility is accentuated by what would clearly be bizarre conduct from a friend: leaving a friend dead and retreating to your rural home to do “chores” unconcerned about what happened to him; and unconcerned about his burial date and so forth. In other words, the post-incident conduct of the Accused Person makes it very clear that he was the assailant.

24. My reasoning and findings above also puts to rest the Defence theory that the Accused Person was at his place of work selling sand when two street boys told him that his friend had been killed and only then did he go to the scene. While the Defence is not required to demonstrate that its defence theory or narrative is reasonably plausible or probable but it is only required to demonstrate that its version of events or its theory of the case is reasonably possibly true in substance, in this case, the Defence narrative does not meet even this low threshold in order to raise reasonable doubt. The correct test is whether it can be said that the Defence narrative is so improbable that it cannot reasonably possibly be true. (See ***S v Shackell (4) SA 1 (SCA)***). In my view, it is not possible to say that the Accused’s Person’s version of events has *any* reasonable inherent probability that it is true.

25. Finally, I wish to comment on the last element of murder: malice aforethought. Under section 206 of the Penal Code, malice aforethought is established when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or
- 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; or

c. Intent to commit a felony; or

d. 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.

26. In this case, two individuals were engaged in a fist-fight. One of them – the Accused Person – escalated the fight by whipping a knife and using it to stab the Deceased occasioning him the fatal wound that caused his death. Under both prong (a) and (b) above, the Accused Person had malice aforethought to commit murder. It is one thing to engage in a fist-fight; it is quite another to resort to the use of a deadly weapon in the course of that fight. There is no doubt that the Accused Person intended to at least cause grievous harm to the Deceased. And that is sufficient *mens rea* for murder.

**27. In the premises, it is my finding that all the ingredients of the offence of murder have been proved in the instant case. Consequently, I find the Accused Person guilty in the murder of Joseph Kirobi Wambui contrary to section 203 as read together with section 204 of the Penal Code. I hereby convict him accordingly.**

28. Orders accordingly.

**Delivered at Kiambu this 18<sup>th</sup> day of May, 2017.**

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**JOEL NGUGI**

**JUDGE**