



IN THE HIGH COURT AT KIAMBU

CRIMINAL CASE NO. 18 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

SAMWEL KARIUKI KANDE.....ACCUSED

JUDGMENT

1. The Accused Person, Samuel Kariuki Kande (“Accused Person”) is charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of unlawfully killing Moses Macua Kamande on 08/09/2015 at Backyard Bar along Eastern Bypass within Ruiru Sub-County within Kiambu County.

2. The Prosecution presented twelve (12) witnesses. The theory was a simple one: the Accused got into a conflict with the Deceased, a customer at the butchery the Accused was working in, over a disputed bill. The dispute degenerated into a physical one and the Accused whipped out a knife and stabbed the Deceased. At least three witnesses put the Accused at the scene and two testified that they saw and heard the confrontation between the Accused and Deceased but they were not present at the exact moment when the stabbing occurred – one (PW7) having left to get loose change and the other (PW9) having left to get help to separate the two. When both returned, they found the Deceased clutching his chest in pain with blood oozing from a stab wound. PW9 testified that he saw the Accused holding a knife in his hands. The other witnesses complemented and filled on to this narrative.

3. Put on his defence, the Accused Person’s narrative was that the Deceased attacked him in a drunken stupor, hitting him with gratuitous violence until the Accused Person fell on his back. As the Accused Person was holding a knife which he was using to chop meat for another customer, the Deceased fell on the knife and got injured.

4. In the next few paragraphs, I will rehash in more details the Prosecution evidence with a view to determining if it meets the high threshold required in criminal cases: to displace all reasonable doubts that it is the Accused Person who committed the offence charged by proving every element of the offence.

5. The story really begins with Joseph Muchiri (“Muchiri”) who testified as PW7. He was a waiter at the Backyard Butchery. His work entailed serving meat to the customers. The Deceased was a regular customer at the Butchery and the adjoining Backyard Bar. Both the Butchery and the Bar were operated by Mr. Kanyingi Kamau (“Kanyingi”) who testified as PW8. The Deceased was a regular patron in both the Butchery and the Bar. The Accused Person was the attendant and sales person at the Butchery. It is safe to say that the Accused Person and the Deceased were well known to each other.

6. On that fateful day in 2015, the Deceased was a customer at both the Butchery and the Bar. Muchiri saw him as the Deceased was about to leave the premises. He was engaged in a heated dispute with the Accused Person about a Bill. The Deceased was contesting the Bill. Muchiri left the two of them in that heated conversation at the Butchery and he went off to get “loose change” for a Kshs. 500 note.

7. Muchiri was away for what he estimates to be about 5 minutes. When he returned, he found the Deceased clutching his chest screaming that Kamau (Accused Person) had “killed him.” He was repeatedly shouting “Kamau ameniua!” He was only a few metres from where Muchiri had left him arguing with Kamau. Blood was oozing from his chest.

8. Apparently, the Deceased was well enough to ask for keys to Mr. Kanyingi’s car to drive himself to the Hospital. However, Mr. Kanyingi himself came from the Bar when he was informed about the incident and drove him to the Hospital.

9. Patrick Karege (“Karege”) also worked as a waiter in the Butchery. He testified as PW9. He is the one who served the Deceased with meat on that fateful day. He is also the one who took the bill (invoice) to the Deceased. He then walked with the Deceased from the open sitting area of the bar where the Deceased was seated to the Butchery. At the Butchery, Karege testified that the Deceased refused to pay the bill. Indeed, according to Karege, the Deceased, who was patently drunk, turned abusive telling the Accused Person: “I won’t pay. You can go demand for payment from your mother.”

10. Karege testified that the Deceased was trying to leave the Butchery area then reversed course. Instead, he took a few steps back and threw a punch at the Accused Person across the Butchery counter. Accused was on the other side of the counter and he now came outside. A physical scuffle ensued. The Accused and the Deceased were pushing each other and arguing loudly. On seeing that the altercation was getting ugly, Karege says he ran back to the kitchen to get some help from his colleagues to separate the two people.

11. By the time Karege came back with colleagues from the kitchen, the Deceased was clutching his chest and was saying that he had been stabbed by the Accused Person. Blood was oozing from his chest. According to Karege, he had left only two people at the scene: the Accused Person and the Deceased. Karege also testified that he found the Accused Person holding the bloody knife in his hands. He identified the knife in Court as Exhibit 3.

12. Kanyingi, the operator of the butchery and bar, testified as PW8. He largely corroborated the material aspects of Muchiri’s and Karege’s story about the confrontation between the Accused Person and the Deceased. On his part, Kanyingi testified that he had sat on the same table as the Deceased and the Deceased’s two friends. They were having drinks. The Deceased’s two friends got drunk, paid their bills and left. The Deceased was “the last man standing.” But he also got drunk and decided to leave. He left Kanyingi in the Main Bar and left.

13. Shortly after, Kanyingi testified that he heard some commotion outside and people shouting at each other. He went to check out what was happening and found the Accused Person in the midst of a heated verbal confrontation with the Deceased. Kanyingi testified that he vividly remembers the Accused Person angrily retorting: “How dare you bring my mother into it and she doesn’t sell [in] the Butchery?”

14. Kanyingi determined that the best way to calm the situation would be to call the Accused Person aside and warn him against arguing with a drunk customer. So he summoned him to join him (Kanyingi) in the Main Bar. Kanyingi left for the Main Bar hoping that the Accused would follow him there. When the Accused failed to join there after a few minutes, Kanyingi went back outside to the Butchery to find out what had happened. It is there that he found the Deceased clutching at his chest claiming that the Accused Person had stabbed him. While the injury did not seem too serious at that point, Kanyingi says he decided to rush him to the hospital. He even remembers asking the Deceased which hospital he wanted to go to and the Deceased opted for Aga Khan.

15. Kanyingi opted to report the matter to the Police first on his way to the Hospital. This is where he encountered PC Kevin Kimani who testified as PW1. PC Kimani was manning the Report Office at Ruiru Police Station when Kanyingi reported the incident. PC Kimani testified that when Kanyingi reported that he had an injured man in the car and reported what had happened, PC Kimani climbed down the stairs of the Police Precincts and peeped into the vehicle. He saw the Deceased slumped on the vehicle seat his clothes seeping with blood. As a qualified First Aider, PC Kimani concluded that the matter was serious.

He hastily assigned them OB number 52 for that day and asked Kanyingi to rush the injured man to hospital. Unfortunately, however, Kanyingi came back after about 10 minutes with a letter from the Hospital confirming that the Deceased had passed on. At that point, PC Kimani handed over Kanyingi to the Duty Officer, Corporal Grace who accompanied Kanyingi to the Accused Person's house in the hope that they could arrest him there.

16. Jared Seko, an Inspector of Police and in charge of forensic investigations Thika is the Scenes of Crime expert who visited the scene and took photos. He took photos to show the general views of the scene including photos of the general view of the primary scene – the butchery – as well as photos of the general area the Deceased sat as he was having his drinks.

17. Inspector Seko also took 8 extreme close up photos identifying the Deceased physically and showing the clothes and the stab wounds and another 8 extreme close up shots showing the length and width of the wound approximated at 6 cms & 2 cms respectively. He also took 2 close up shots of the deceased without clothing as well as 3 close up shots showing the blood on the left and right hands and the appearance of the eye. He further took 11 shots showing the degree of the injury and the internal hemorrhage. Finally he took 7 extreme close up shots showing internal organs as removed by the pathologist. He produced the certification of the prints and the certificate as evidence.

18. Dr. Johannes Oduor is the pathologist who did the autopsy at the Lee Funeral Home. The body was under escort of PC Duncan Odhiambo from Ruiru CID and it was identified to him by Mary Wangari who is the sister and George Kiarie who is the uncle.

19. Dr. Oduor found a body dressed in a blood-stained multi-coloured shirt, black jacket and blue trousers. It was the body of a male adult, African in good status of nutrition. He had been preserved by refrigeration. He was very pale due to blood loss. There was a stab wound on the left side of the chest. It was between the 2nd and 3rd rib. It measured between 12-15 cms. The stab wound was quite deep reaching the lung cavity.

20. Dr. Oduor's internal findings were that there was bleeding on the left chest cavity. There was about 2.5 litres of blood inside the left chest cavity. There was also laceration on the left lung and fracture on the left rib. Other organs were normal. His conclusion was that the cause of death was hemorrhage due to penetrative trauma to the chest.

21. Dr. Oduor filled out the Post-Mortem Form with his findings and produced it as evidence.

22. Caroline Nduta Ngigi ("Caroline") is the Deceased's aunt and a friend of Kanyingi. She received a call from Kanyingi at around 11:30pm on the fateful night informing her that her nephew had been stabbed and to go to Ruiru Hospital where the Deceased had been taken. She phoned the Deceased's brother (Joseph Waithaka Kamande) to pass on the news and then went to the hospital. Unfortunately, the Deceased had passed on by the time Caroline got there.

23. Mary Wangari Numi ("Mary"), a sister to the Deceased was also called to the Hospital that night but found the Deceased had already breathed his last. They organized to take his body to Lee Funeral Home. Later on, she joined her uncle, George Kiarie Macua to attend the post-mortem and identify the body. Both Mary and George testified that the stab wound was on the left side of the chest.

24. The two wives of the Deceased were only informed of what had happened and made burial arrangements.

25. The last Prosecution witness was the Investigating Officer. PC Duncan Odhiambo was assigned the case on 09/09/2015 by Inspector Chebii. The report he found was that the Deceased had died while being taken to the hospital after being stabbed by a known person. According to the report, the victim was Moses Macua Kamande and the alleged assailant was Samuel Kamau Kande but he later learnt that his actual name is Samuel Kariuki Kande.

26. PC Odhiambo went to the scene on 09/09/2015. On getting to the scene he noted that there was a butchery at the front and a bar at the back. He was accompanied by Corporal Mwangi and Inspector Seko of scenes of crime.

27. At the scene they interviewed the workers. They came to learn that deceased was at the bar but as he was getting home, he apparently tried to leave without paying his bill. The Deceased, then, apparently got into an argument with the Accused and the Accused ended up stabbing him.

28. With the help of one of the employees they were able to get the weapon used. Unfortunately the knife had already been cleaned by the Accused. He produced the knife as Prosecution Exhibit 3. He drew a sketch of the scene which he produced as Exhibit 4.

29. Later, PC Odhiambo accompanied the family to Lee Funeral Home where he witnessed the post mortem done by Dr Johannes Oduor. He testified that he noted an injury on the right side of the chest. The doctor filled a post mortem form and identified excessive bleeding as the course.

30. Afterwards, PC Odhiambo concentrated his efforts on tracing the Accused Person who had disappeared. On 17/09/2016, an informer tipped them that he would help us trace the Accused. They took the information and planned with Cpl James Mwangi and PC Meli and on 18/09/15 they went to Nairobi Tea Room stage where they arrested the Accused as he tried to flee. The Accused told them that he was travelling to Karatina.

31. Put on his defence, the Accused Person chose to give a sworn statement. In many aspects, his narrative mirrors that of Muiruri, Kareng'e and Kanyingi but with two material differences.

32. The Accused Person testified that the Deceased came to the Butchery and ordered for ½ kg dry fry meat. When the meat was ready, he told my colleague, Kareng'e who was a waiter to go and take the meat to him. The Deceased was seated at the back of the pub in the open seating area. After 30 minutes, the Accused wrote a bill for the order. He testified that he wrote two bills because the Deceased had a previous credit of Kshs 650/- from the previous day and that day's bill of Kshs 350/-. He sent Kareng'e to take the Bills to the Deceased.

33. At around 11.00 pm at closing time, another customer came as the Accused Person was closing. He ordered ¾ kgs of meat take away. There were many customers in the bar including Kanyingi. Accused Person says he was alone at the Butchery. According to the Accused Person, Kareng'e Patrick was in the kitchen.

34. As the Accused Person was chopping the meat for the new customer, he says that the Deceased came from behind. He noticed that the Deceased was drunk. As he passed by the Butchery, the Accused Person says he reminded the Deceased that he had not paid his bill. At that reminder, the Deceased exploded: "hiyo utalipwa na mama yako".

35. The Accused Person says he asked him how his mother will pay and she has never sold the Deceased meat. According to the Accused Person, at this point, the Deceased started hitting the Accused on the face with his fists. The other customers took off due to the violence. The Accused says that the Deceased then opened the counter door and came in and continued hitting him. He says that the Deceased hit him so violently that he knocked him (the Accused) off the ground and fell on his back. The Accused Person says he had a knife in his hands as he was chopping meat for the new customer. As he fell down with the knife still in his hands, the Deceased fell on him and on the knife thereby sustaining the injuries.

36. The Accused Person says that he did not realize at first that the Deceased had been stabbed until he heard him crying "umenidunga! umenidunga!" On hearing this, the Accused says that he was shocked and he stood up and immediately went to call his boss, Kanyingi so that he could come and take the Deceased to the hospital. When Kanyingi came, he helped put the Deceased in the car and upon Kanyingi's instructions he remained behind to close the Butchery.

37. 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.

38. 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.

39. 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.

40. In its closing submissions, the Defence focuses on two issues:

- a. First, the Defence argues that from the evidence presented by the Prosecution, it has not been established beyond reasonable doubt that it was the Accused Person who stabbed the Deceased. In particular, the Defence impugns the evidence of PW9 (Kareng'e) and argues that, in totality, the Prosecution evidence does not establish the Accused Person unlawfully caused the death of the Accused Person.
- b. Secondly, the Defence contests that the Accused Person had malice aforethought.

41. It is common between the parties that the Deceased died on 08/09/2015 following an incident at Backyard Bar along Eastern Bypass within Ruiru Sub-County within Kiambu County. It is also common that the incident involved the Accused Person and the Deceased. The only two issues that present themselves for determination when the elements of murder are juxtaposed against the evidence presented, are as presented by the Defence:

- a. Did the Accused Person stab the Deceased as the Prosecution alleges or did the Deceased fall on the knife as alleged by the Accused Person?
- b. Even if the Accused Person stabbed the Deceased, did he have the requisite malice aforethought which is a necessary element for the offence of murder?

42. The Accused Person testified that he did not stab the Deceased. Instead, it was the Deceased who attacked the Accused Person, raining blows on him, causing him to lose his footing and falling. When he fell, the Accused's theory goes, the Deceased fell on him and on the knife and thereby injured himself.

43. If this version of the events is accepted, it is obvious that murder charges cannot be sustained. The

Defence's obligation in this regard is much less than proving that this is in fact what happened. All the Defence has to do is to show that this version of events has reasonable inherent probability that it is true. This is so because the Prosecution bears the burden of proof at all times and, therefore, 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.

44. The Defence here makes two arguments in support of its argument that the Prosecution case has not been proven beyond reasonable doubt. First, the Defence says that PW9 (Karengé) was an unreliable witness. The Defence argues so because, it says that Karengé did not, in his first report tell the police about the knife he allegedly found the Accused holding. Secondly, the Defence says that evidence that the Deceased screamed that it was the Accused Person who had stabbed him is inadmissible hearsay.

45. On whether PW9 was reliable and credible witness, I am persuaded that he was. Defence attacks his demeanour as fidgety and anxious – but I found no such evidence of external evidence of untrustworthiness. As to the first report, I note that even the Accused Person himself does not deny having the knife: all he denies is that he is not the one who stabbed the Deceased but that the Deceased fell on the knife.

46. The Defence also relies on *R v Dismas Isutsa [2016] Eklr* where the Court held that where a witness states that he was told by the Deceased, but he himself did not witness the fact of the killing, and in the absence of satisfactory corroboration, the evidence is regarded as hearsay and cannot be relied upon.

47. In my view the *Dismas Isutsa Case* is distinguishable. In that case, there was no corroboration. Here, at least three witnesses testified to hearing the Deceased saying that it was the Accused who had stabbed him. These same three witnesses had also witnessed a confrontation between the Accused and the Deceased immediately before they found the Deceased with the stab wound. Thirdly, at least one of the witnesses found the Accused Person holding the weapon – a bloody knife – in his hands. The cumulative effect of these surrounding pieces of evidence is to corroborate the evidence of the three witnesses who testified that they heard the Deceased screaming that it was the Accused Person who had stabbed him.

48. In addition, circumstantial evidence is quite compelling here. Evidence firmly established that the Accused Person was engaged in violent confrontation with the Deceased. The same evidence places the Accused Person in that same spot as the Deceased. Evidence also establishes that the Accused had a knife in his hands before the stabbing, and a bloody knife after the stabbing. Finally, evidence establishes that at least three witnesses heard the Deceased say that the Accused Person had stabbed him.

49. In my view, therefore, I can confidently say that 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*. This series of events put together lead to an unmistakable inference: it was the Accused Person who stabbed the Deceased.

50. If additional evidence was needed to push the Prosecution case beyond the edge of reasonable doubt, it is presented by the post-incident conduct of the Accused Person. After the incident, the Accused Person never returned to his place of work. Indeed, evidence shows that he fled his ordinary place of abode. The Police and the family of the Deceased had to do some investigatory work and rely on an informer to finally track down the Accused Person. When he was finally tracked down at Tea Room Stage, he was, ostensibly, on his way to fleeing the country. This is behaviour that is incompatible with the innocence of the Accused Person and, in my view, it corroborates further the Prosecution evidence. I do not accept the Accused Person's narrative that he did not go to work because he did not get a call from his employer (Kanyingi) that the butchery was opened. Kanyingi credibly testified that he was in touch with the Accused Person, and that, indeed, he was active in trying to get him to present himself so that he could be arrested.

51. Finally, I will deal with the question of malice aforethought. The Defence cited for me three Court of

Appeal Cases to make the argument that here malice aforethought was not established: *Joseph Kimani Njau v R*[2014] eKLR; *Nzuki v R (1993) KLR 171*; and *Isaak Kimanthi Kanuachobi v R* [2007] eKLR. 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.

52. In the *Nzuki Case*, the Court of Appeal remarked as follows:

There was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the Appellant had any of the intentions outlined with the fatal consequences. Other than observing that the Appellant viciously stabbed the Deceased and in so doing intended to kill or cause him grievous harm, the Trial Court did not direct itself that the onus of proof of that necessary intent was throughout on the Prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the Appellant beyond reasonable doubt. In the absence of proof of malice aforethought to the required standard, the Appellant's conviction for the offence of murder is unsustainable. His killing of the Deceased amounted only to manslaughter.

53. The remarks by the Court of Appeal in the *Nzuki Case* are apposite here. Clear and uncontroverted evidence in this case shows that it was the Deceased who first attacked the Accused Person. This was after the Deceased had insulted the Accused Person using a derogatory phrase that is considered particularly provocative in our cultural setting (using his mother – our Kenyan version of “Your momma!”).

Evidence shows that it was the Deceased who punched the Accused Person first and then the physical altercation ensued.

54. Additionally, evidence unmistakably shows that the Accused Person already had a knife in his hand as part of his duties. He did not fish out the knife specifically as part of the duel with the Deceased. This would mean that it is likely that he simply used the knife as part of the physical combat he had with the Deceased. To sustain a murder charge, the Prosecution would have had to prove beyond reasonable doubt that at the point at which the Accused Person stabbed the Deceased, the Accused Person had the requisite malice aforethought. In my view, this was not proved.

55. What was proved was that the Accused Person and the Deceased were involved in a violent physical duel provoked by the Deceased. The act of stabbing was committed in the midst of this physical duel and in the absence of premeditation or contemporaneous commission of another felony. It was also committed in the act of self-defence since the Accused Person was under attack by the Deceased. However, it is clear that the Accused Person responded with excessive force. There is no evidence at all that the Accused Person faced imminent death or risk of serious injury and there has been no suggestion or evidence that the Accused Person held an honest even if mistaken belief that it was only by repelling the Deceased using the knife that he would have preserved his life.

56. Consequently, even though the Deceased was the unlawful aggressor, it was unjustifiable for the Accused Person to respond with deadly force. The Defence of self-defence, though suggested by the circumstances, is “imperfect” in this case since the Accused did not hold a reasonable belief that it was

necessary for him to repel the attack with deadly force to avert an imminent infliction of death or serious bodily harm to himself.

57. Consequently, my conclusion is that the Prosecution has not proved the third necessary element to establish the offence of murder against the Accused Person: malice aforethought. Murder cannot be established in the absence of the third element of premeditation. Instead, the Prosecution has established all the elements for the lesser but cognate offence of manslaughter: the unlawful killing of a human being. Consequently, this Court finds the Accused Person guilty of the lesser but cognate offence of manslaughter contrary to section 202 as read together section 205 of the Penal Code and is so convicted.

Dated and delivered at Kiambu this 28th day of June, 2017.

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JOEL NGUGI

JUDGE