



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 15 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

PROSPER MUTUA NZILANI.....ACCUSED

JUDGMENT

Background

Prosper Mutua Nzilani, hereinafter called “the accused” is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on 28th day of January 2013 at Biafra in Eastleigh Section III within Nairobi County murdered Joseph Asumwa Ngigi, hereinafter called “the deceased.”

The law governing the crime of murder is Sections 203, 204 and 206 of the Penal Code. Section 203 of the Penal Code creates the offence of murder in the following terms:

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

Section 204 of the Penal Code provides the penalty for murder and states as follows:

“Any person convicted of murder shall be sentenced to death.”

The onus of proving the crime of murder is born by the prosecution. It is the prosecution who must present evidence to prove that the accused before the court, with malice aforethought caused the death of the deceased by an unlawful act or omission. The standard of proof in a criminal trial is proof beyond reasonable doubt. Malice aforethought is defined under Section 206 of the Penal Code in the following manner:

“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.

Prosecution case

In support of its case, the prosecution called a total of eight (8) witnesses. SGT Ken Mungai (PW1) was at the time of this murder based at Lower Biafra Eastleigh Administration Police Post. On 28th January 2013 he received a report of stabbing and the suspect of that stabbing who had been arrested by members of public. At the time the accused was bleeding from his right thigh. That suspect is the accused before the court. SGT Mungai was also told that the victim of stabbing had been taken to hospital. Shortly thereafter Ibrahim Aswani Prodas (PW4), uncle to the victim, arrived at the Administration Police Camp (AP Camp) and reported that the victim had died. SGT Mungai retained the accused. Earlier that day, 28th January 2013 at around 1.05pm, Ibrahim had sent the deceased to buy him fish (*omena*) in the nearby kiosk. Shortly thereafter, Ibrahim was called and informed that the deceased had been injured.

Kevin Maloba Prodas (PW2) another uncle to the deceased was resting at home on that same day when he received news of the stabbing. He went to the scene and found the deceased lying down with stab wounds on the ribs. The deceased was alive but unable to talk. Kevin took him to Mother and Child Hospital in Eastleigh where he was pronounced dead on arrival. Jamila Indris Wesonga (PW5) and Stella Munyiva Muasya (PW6) were the eye witnesses of the stabbing. According to Jamila, on 28th January 2013 at 12.30pm she was coming from the public toilets at Kinyago when she saw two men on the ground. One man, identified by Jamila as the accused, was on top of the other man, identified as the deceased. Jamila was about 5 metres from where the men were. Jamila did not know the accused but she knew the deceased as her neighbour and friend. She stood at the scene to watch. She saw the accused stand up; pull a knife from the deceased's left side and stab himself on the right leg. The accused threw the knife near the deceased and ran away. Jamila saw Ibrahim and other members of public chasing the accused. They arrested him and took him to the Chief's Camp. The deceased was left lying on the ground not able to talk.

Munyiva's version told the court that she was selling vegetable in a kiosk near the public toilets at Kinyago on 28th January 2013 at 12.30pm when she saw two men fighting. She said that the two fell near her kiosk with one of the men on top of the other. She said the deceased was the one on top of the accused. She knew them as "Jose" Asumwa who was her neighbour and the other was Mutua whom she referred to as "Tundo". Both were known to her as neighbours for six years. She said that the accused ran away and the deceased was left lying on the ground screaming that they should call the police. She said that she approached the deceased and saw that he was bleeding on the left side of the ribs. She said that the deceased's uncle Kevin was informed and he looked for transport to take deceased to hospital and that Ibrahim chased the accused and arrested him to the AP Camp.

Dr. Joseph Maundu (PW3) examined the accused on 30th January 2013 and found him fit to stand trial. The doctor told the court that the accused had no injuries on his body. Dr. Dorothy Njeru (PW8) examined the body of the deceased on 5th February 2013 and found three (3) stab wounds in the left side of the chest all sharp on one edge; perforated left lung and a cut on the left side of the heart and accumulated blood (1 litre) in the chest cavity. She formed the opinion that the deceased died due to chest injuries due to penetrating sharp force trauma (stab).

The matter was investigated by CIP Francis Muthee Gichuhi (PW7) from Shauri Moyo Police Station. He told the court that when he arrived at Biafra AP Camp in Eastleigh in company of PC Kirembei he found a young boy in school uniform with a wound on the right thigh. He said he questioned the boy whom he identified as the accused before the court.

Defense Case

On his part the accused gave unsworn defense that he and the deceased had been attacked by a group of boys who said that the deceased owed them some money and demanded payment from him. He testified that the two held the deceased and searched his pockets and that they stabbed the deceased. He said the boys also stabbed him on the thigh.

Submissions

In his submissions after the conclusion of the trial, the defense counsel Mr. Kariu told the court that there is no dispute that there was a fight between the accused and the deceased and that the deceased attacked the accused first. He submitted that it has not been established that the knife in issue belonged to the accused and that the prosecution case relies on circumstantial evidence. He submitted that the prosecution has not discharged the duty of proving the case beyond reasonable doubt and asked the court to acquit the accused.

On the other hand, the prosecution counsel submitted that the prosecution has proved the death of the deceased due to penetrating sharp trauma which is consistent with the witnesses' testimonies; that the accused was placed at the scene of the murder by PW5 and PW6 and that the evidence of PW5 is corroborated by that of PW6. She submitted that malice aforethought has been established by showing that by stabbing the deceased, the accused must have known that this would cause death or grievous harm. She submitted that the case for the prosecution relies on direct but not circumstantial evidence; that the defense of the accused did not dislodge the prosecution evidence and that the prosecution has discharged the onus of proving this case beyond reasonable doubt. She urged the court to find the charge proved and convict the accused person.

Determination

In determining this matter, I have considered all the evidence tendered. From the outset, I disagree with submissions by defense counsel that this case is based on circumstantial evidence. This is not the case. There are two eye witnesses, Jamila and Munyiva. It is to their evidence this court will turn to in deciding whether the prosecution has proved all the ingredients of murder beyond reasonable doubt.

Firstly, it is my finding that death of the deceased has been proved beyond reasonable doubt. Evidence shows that the deceased was pronounced dead on arrival at Mother and Child Hospital in Eastleigh. Dr. Dorothy Njeru has medically established that the death occurred due to chest wounds caused by a sharp object. These injuries were on the left side of the chest. This is where the witnesses, especially Jamila and Munyiva, described the wounds on the deceased were located when they saw the deceased at the scene. A knife was recovered at the scene. Both Munyiva and Jamila told the court that they saw the accused throw the knife next to the deceased as he ran away.

Secondly, there is the issue of the identity of the person who stabbed the deceased leading to his death. I have considered the evidence in respect of this issue. Jamila did not know the accused. Munyiva had known them for six (6) years as her neighbours. Jamila identified the accused in court as the person she saw pulling the knife from the deceased's left side of the chest and stabbing himself on the right thigh before escaping from the scene. CIP Gichuhi told the court that when he saw the accused in the AP Camp, he was in school uniform and had a stab wound on the right thigh. He identified him in court as that person he had seen at the AP Camp. It did not take long before the accused was chased and arrested by members of public. In his defense, the accused does not deny that he was with the deceased that day. I have considered this evidence and found that it proves the identity of the accused person was at the scene with the deceased. He was identified by Jamila and recognized by Munyiva. He also admits the same.

The only issue I wish to determine is whether the accused stabbed the deceased or not and if so whether he had intended to cause the death of the deceased. According to his defense, the deceased was stabbed by the boys who alleged had followed the accused and the deceased and accosted the deceased, stabbed him and also stabbed the accused. The evidence of Jamila and Munyiva on the issue of sequence of events at the scene differs slightly. Jamila testified that the accused was lying on top of the deceased when she saw them and that the accused stood up, pulled the knife from the deceased's left side of the chest,

stabbed himself on the right thigh, threw the knife beside the deceased and ran away. Munyiva says the deceased was lying on top of the accused and that the accused ran away. She does not mention the accused pulling the knife or stabbing himself. As it has been observed elsewhere, not all the evidence of eye witnesses to a crime are able to describe the events exactly as they happened. People have different methods of processing information and people's concentration cannot be similar in all situations. I do not doubt that the accused was with the deceased at the scene on that day and that he stabbed the deceased. I believe Jamila in her version of evidence because when CIP Gichuhi saw the accused, he had a stab wound on his right thigh. SGT Mungai who received the accused from members of public also confirmed to the court that the accused was bleeding on his right thigh. That wound in my view was inflicted by the accused on himself. I have no reason to doubt the evidence of Jamila on that issue. The law under Section 143 of the Evidence states that "***No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.***" In other words, a fact can be proved by evidence of a single witness care being taken to ensure that the accused is not prejudiced.

I have considered the evidence of Dr. Joseph Maundu. He did not find any injury on the accused. To my mind the doctor concentrated on determining the mental capability of the accused to stand trial and failed, unless this was brought to his attention, to note that the accused had a wound on his right thigh. I have no doubt that the wound existed. The accused was seen stabbing himself by Jamila. SGT Mungai and CIP Gichuhi confirmed seeing that wound. It is worth noting that perhaps due to the fact that the thigh is the part of the body that is normally covered by a pair of trousers unless one is wearing shorts. It is possible not to notice it unless the same is brought to the attention of the doctor. Indeed Part 1 of the P3 Form completed by Dr. Maundu which part is filled by the Police tells the doctor what to look for in examining the accused. In this case the doctor was asked to examine the accused's mental status.

The injuries inflicted on the deceased were critical. They were three and all to the left chest. They were deep enough to perforate the left lung and cut the heart on the left side. Under the provisions of Section 206 of the Penal Code, malice aforethought is established by evidence proving any one of the four circumstances described under that section. It is my considered view that the prosecution has proved that by stabbing the deceased three times on the chest the deceased must have known that this would cause either death or at the very least grievous harm. I find malice aforethought on the part of the deceased proved beyond reasonable doubt.

After due consideration of all the evidence presented to the court both from the prosecution and defense, it is my finding that the prosecution has proved the case beyond all reasonable doubt. It has proved that the death of the deceased occurred due to unlawful act (stabbing) by the accused who acted with malice aforethought. The accused's defense that the deceased was stabbed by some boys who also stabbed him is not true going by the available evidence and it is hereby rejected. I find the offence of murder proved beyond reasonable doubt and convict the accused accordingly.

Dated, signed and delivered this 19th day of June 2017.

S. N. MUTUKU

JUDGE