



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 2 OF 2014

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

SHUKURI AHMED DAE.....ACCUSED

JUDGMENT

1. The accused **SHUKURI AHMED DAE** is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

“On the 5th day of January, 2014 at about 4.30 p.m. at Kiamaiko in Huruma Area within Nairobi County murdered DIDA WARIO JILLO.”

2. The prosecution called a total of 8 witnesses. In brief it was the prosecution case that the accused and the deceased were working at a hotel in Kiamaiko. It was owned by PW1 and 2 who were brothers. It is the prosecution case that as the accused was busy cutting meat on a table, the deceased who was drunk started a quarrel demanding food and accusing the accused of making false allegations against him to the effect that he does not work. The deceased threatened the accused that once paid his salary, he would burn him inside the hotel as he slept at night and that he would leave never to return again.

3. PW2 saw the accused run after the deceased who at that point decided to run out of the hotel. He stated that the accused caught up and fought with the deceased at the main door to their hotel. He thereafter saw the accused stab the deceased on the neck with the knife he was using.

4. The accused gave a sworn defence. He stated that the deceased and him and one Kasei were workers at the hotel owned by PW1. On the material day the accused said that he woke up at 4 a.m. as usual and did all the preparations of food to be cooked at the hotel as well as lighting charcoal burners. At midday PW1 left the hotel leaving the deceased and him behind. He stated that as soon as PW1 left, the deceased took advantage and also left the hotel only to come back later while drunk.

5. The accused stated that the deceased started abusing, harassing and disturbing everybody at the hotel. By that time PW2 had returned. The accused said that at first PW2 paid the deceased his dues and sacked him. After the deceased pleaded with him, PW2 re-instated the deceased to work and took back half his salary as the deceased had requested. PW2 then asked two customers at the hotel to escort the deceased home to rest as he was drunk.

6. The accused stated that the deceased was escorted away but shortly later returned. This time round the deceased went for him (accused) insulting him and pulling him towards the main door of the hotel. It was as the deceased pulled him that the knife he, accused was holding accidentally cut the deceased. The accused said that he did not realize that the deceased had been cut until he saw him bleeding from the neck.

7. The accused faces a charge of murder, an offence created under **section 203** of the **Penal Code** which stipulates as follows:

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

8. The offence of murder is proved where the prosecution adduces evidence to show that the accused committed an unlawful act or omission; which act or omission caused the death of the deceased and that at the time the act or omission was committed, the accused was motivated by malice aforethought.

9. Malice aforethought is an important component of the offence of murder. The circumstances which constitute malice aforethought are set out under **section 206** of the **Penal Code** as follows:

“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.”

10) I have considered the evidence adduced by the prosecution and the accused defence in this case. I have considered the submissions by counsels.

11) In brief Ms. Njuguna Learned Prosecution Counsel submitted that the prosecution proved that the accused stabbed the deceased on the neck causing his death. Counsel urged that malice aforethought under **section 206 (b)** of the **Penal Code** was proved for reason the accused stabbed the deceased on the neck which action was prove he intended to cause the deceased death.

12) Counsel urged further that the Government Analyst had established that the blood on the knife, the murder weapon was from the deceased. Ms Njuguna, Learned Prosecution Counsel urged that the accused tried to escape after stabbing the deceased, an act she urged established malice aforethought.

13) Mrs. Omungala was the defence counsel in this case. Her submissions were that there were material inconsistencies in the prosecution case. Counsel urged that the deceased provoked the accused leading to the unfortunate attack. Counsel urged the court to consider that the deceased was stabbed only once, that the knife itself was very sharp and pointed and could cause serious injuries. Counsel relied on **VMK vs. Republic [2015] eKLR** in which the English case of **Duffy [1949] 1 ALLER 932** was cited. In the latter case the court held:

“Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-

control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind....”

14. In **VMK**, supra, the Court of Appeal reduced the charge from murder contrary to **section 203** to manslaughter contrary to **section 202** of the **Penal Code** on the grounds that the facts adduced by the prosecution pointed to provocation of the accused and the prosecution had failed to rebut that provocation.

15. The issues for determination in this case are pretty simple and clear. They are:

(1) Whether the evidence adduced by the prosecution points to provocation of the accused.

(2) Whether the prosecution has rebutted accused defence of provocation.

16. The prosecution evidence points to two undisputed facts. One that at the time of the incident the deceased was quite drunk. Two that the deceased was abrasive and abusive and that he harassed the accused as the latter calmly carried on with his work, and that out of that harassment the accused stabbed the deceased.

17. The course of events leading to the stabbing of the deceased was not quite consistent in the prosecution case. There were 3 eye witnesses, PW2, 3 & 4. It is not clear from their evidence exactly what the deceased was quarreling the accused about. PW2's testimony was that the deceased was quarrelling the accused because of false accusations the accused had allegedly made to his employer, that he (deceased) was not working and that he had heard the deceased threaten the accused that he would burn him alive at night as he slept in the hotel. PW2 said that the deceased quarrels were characterized with loud shouts while the accused worked quietly and remained calm.

18. PW3 on the other hand testified that he heard the deceased quarrelling the accused loudly and at the same time demanding food, which the accused declined to give him.

19. PW4 corroborated the evidence of PW3 stating that the deceased loudly demanded food from the accused. He testified that the accused declined to give the deceased food saying that he had come late to work that day and would not eat.

20. There was however corroboration in the evidence of these 3 witnesses to the extent that after the deceased's outbursts at the accused, the deceased walked near the table where the accused was working, said some harsh words as he made for the main door to the hotel. This was followed immediately by the accused jumping at the deceased and stabbing him once on the neck.

21. There is however no proof that the accused tried to escape after stabbing the deceased. In fact PW2's testimony was that the accused accompanied him to take the deceased to hospital.

22. As noted by the Uganda Court of Appeal in **TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA, 6** it is not very contradiction that warrants rejection of evidence. As the court put it:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

23. There was inconsistency between the evidence of PW2 on the one hand and PW3 and 4 on the other. The question that begs is whether these inconsistencies are material to negatively affect the prosecution case.

24. The evidence of PW2, 3 and 4 who were the eye witnesses in this case do corroborate one another as to what led to the accused stabbing the deceased. They all agree that the deceased was drunk and abusive to the accused when the incident happened. The inconsistency as to what led to an argument between the accused and deceased I find was not material. That inconsistency was minor and did not go to the substance of the case.

25. The accused defence was that the deceased, after abusing him and generally disturbing everyone at the hotel, pulled him towards the hotel entrance. The accused defence was that he was still holding a knife with which he was cutting meat and that in the process of being pulled the knife accidentally cut the deceased.

26. The burden of proof lies with the prosecution to prove the charge against the accused beyond reasonable doubt. The prosecution case has shown that it was the deceased who with harsh and abusive words first attacked the accused who was quietly minding his business and cutting meat. PW3 and 4 are clear in their evidence that it was when the deceased said some very harsh words to the accused that the accused jumped at him and stabbed him once on the neck.

27. Ms. Njuguna for the State urged that there were three witnesses who saw the accused stab the deceased, that there was no fight before the deceased was stabbed and that on that basis malice aforethought was proved.

28. Mrs. Omung'ala on her part for accused urged that no intention to cause death or grievous harm was proved, and that the evidence pointed to the deceased having provoked the accused.

29. Provocation has been set out as a defence under **section 207** of the **Penal Code**. **Section 207** provides as follows:

“207. When a person who unlawfully kills another under circumstance which, but for the provisions of this Section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

30. **Section 208** defines provocation as follows -

“208(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self- control and to induce him to commit the assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

(2) when such an act or insult is done or offered by one person to another, or in the presence of another person who is under the immediate care of that other or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.”

31. Provocation was defined in the case of **Duffy [1949] I ALL ER 932** as:-

“Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...”

32. In the case of **Benson Mbugua Kariuki v. Republic [1979] eKLR** the court held thus:

“The correct direction which a judge should give himself and the assessors in a criminal case

is that it is for the prosecution to prove that the accused is guilty, such proof being beyond reasonable doubt. There is no onus whatsoever on the accused of establishing his innocence; and if in respect of any matter; the evidence raises a reasonable doubt, then the benefit of that doubt must go to the accused. This applies also to matters of defence such as alibi, provocation, self defence or accident. It is for the prosecution to establish that an accused was present when the crime was committed, or that he was not provoked, or that he was not acting in self defence, or that whatever happened was not accidental; and the prosecution must discharge this burden beyond all reasonable doubt. An accused, whether challenging the case put forward by the prosecution or raising matters in his own defence, assumes no onus in these respects; and if any reasonable doubt arises in respect of any matter, the prosecution has failed to discharge the burden which it must discharge.”

33. I find that the prosecution evidence points to the deceased having been abusive, harsh and verbally abrasive towards the deceased just before this incident. The deceased was drunk at the time and his actions on that day were unreasonable may be due to the influence of alcohol. The accused on the other hand was calm throughout the time until a final outburst of harsh words from the deceased caused him to jump and stab the deceased.

34. The onus lay upon the prosecution to rebut the defence of provocation. The accused’s defence was that apart from provocation, the deceased was stabbed accidentally. It was the onus of the prosecution to prove that what happened and in particular the stabbing of the deceased by the accused was not accidental. (see **VMK vs. Republic**, supra).

35. I have carefully analysed the evidence on record and have evaluated it. I find that the eye witness account by PW1, 3 and 4 establishes beyond any reasonable doubt that the accused jumped and stabbed the deceased on the neck. This evidence therefore rebuts the accused theory in his defence that the deceased was ‘cut accidentally’ by the knife he, accused was holding.

36. The prosecution evidence did not however rebut the defence of provocation. The evidence establishes clearly that the deceased provoked the accused with abusive words; that he was loud and was generally a nuisance to everyone in that hotel at the time.

37. I find that the accused was provoked as a result of harsh and abusive words hurled at him by the deceased leading the accused to temporarily lose self-control. I find that from the particular circumstances of this case, the defence of provocation attaches.

38. The consequence of this is that the charge of murder contrary to **section 203** of the **Penal Code** was not proved. Instead the prosecution has proved it is the accused’s unlawful act of stabbing the deceased which caused the deceased death. The charge proved is therefore manslaughter contrary to **section 202** of the **Penal Code**.

39. Accordingly, I substitute the information against accused from murder contrary to section 203 of Penal Code to manslaughter contrary section 202 of Penal Code, find him guilty of substituted charge and convict him accordingly.

DATED AT NAIROBI THIS 31ST DAY OF JULY, 2017.

LESIIT, J

JUDGE