



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE NO. 25 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

S.KACCUSED

JUDGMENT

1. **S. K. (the subject)** now is 17 years old. When he was 16 years old he was charged before this court with the **offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code**. He pleaded not guilty.

2. The prosecution witnesses and even the subject himself confirmed that the subject and the deceased, James Mwangi were friends. The events that led to the death of the deceased occurred on the night of 18th August, 2016 in Timau town.

3. Even though the subject was at a tender age of 16 years old he was employed at the butchery called 'Pewa' which was next to 'Pewa Bar'. He used to peel potatoes in the kitchen of that butchery. On 18th August, 2016 the subject had been sacked from Pewa butchery about two weeks previously but it seems that he continued to go to that butchery even after his sacking. On 18th of August, 2016 Peter Kagunda Kariuki (**P W 6**) remembers seeing the subject seated outside the butchery during the day.

4. Joseph Gaturu Nyawira (**P W 3**) an employee of Pewa Butchery was on duty at about 7p.m of 18th August 2016. He saw the subject who entered and was sitting down at the Pewa Bar. The subject did not consume anything at the bar. P W 3 saw, in a short while, the subject being joined by another person, the deceased herein. P W 3 heard the two speaking in Kimeru and they were talking about money. P W 3 said:

“They were talking about money. Both of them were asking each other money. I could hear them mention Ksh. 100/=. K (the subject) was the one asking for money and the deceased was asking K (the subject) money”.

5. P W 3 saw the two leave the bar at about 10p.m but they returned later. He saw them leave again and within 15 minutes someone entered the bar saying that someone had been stabbed outside. When P W 3 and others went outside they met the subject and the deceased who was bleeding. P W 3 noted that the person bleeding was the one whom he had been in the company of the subject.

6. P W 3 recalled that at about 7p.m. earlier that evening he had notice the subject wearing a yellow jacket but later after the incident and when the subject was arrested by police he noted he was wearing a black jacket.

7. Charles BachaNjoroge (P W 1) is the owner of Pewa Bar and Restaurant. He confirmed that the subject was employed in the Pewa butchery which is in the same place as the Pewa bar. On 18th August 2016 at 10p.m. P W 1 was at the said bar drinking beer with friends. The subject came to him and spoke to him. P W 1 narrated what the subject said:

“[The] subject said that he had given [the] deceased Ksh. 100/=and deceased had given [the] subject a cell phone that was faulty.”

The subject continued to tell P W 1:

“... that he was on the way to collect the faulty phone from his (the subject's) home. That they quarrelled and both began to return to the bar”.

8. The subject informed P W 1 that the deceased owed him Ksh. 100 and that a fight ensued between him and the deceased but the subject was able to overpower the deceased. That was when the deceased removed a knife and he stabbed himself which the subject said was a small stab. Further that the deceased had stabbed himself because he wanted to blame it on the subject.

9. P W 1 said that he advised the subject to go and report the matter to the police whereupon the subject said that he would wear his jacket to go to report the matter to the police. P W 1 did not take the report by the subject as serious. P W 1 noted at that time the subject spoke to him, he was wearing a yellow jacket but did not scrutinise the jacket carefully.

10. On the subject leaving the security guard of the Bar and Restaurant David Kiprotich Langat P W 2 went into the bar and told P W 1 to go outside and see what had occurred. It was then P W 1 realised something out of the ordinary had occurred and he went out.

11. On going out he found the deceased, whom he assumed was the subject's friend whom the subject had spoken of. He found the deceased lying down outside the bar facing upwards and he was bloody from the stomach upto the chest. That there was sufficient light outside. That the deceased looked like he wanted to speak but no voice was coming out. Before the police arrived P W 1 noted that the subject look shocked. People who had gathered were blaming the subject for the death of the deceased. P W 1 noted the subject went into the bar and came out again wearing a black coat on top of the yellow one. Since people were accusing the subject P W 1 apprehended him. P W 1 however said that the subject did not resist. P W 1 note that the subject's yellow jacket had blood stains.

12. P W 1 said that when the police took the deceased's body and re-arrested the subject they were unable to find the murder weapon. The police requested those that were there to look for that weapon but if they found it they were advised not to handle it.

13. The following day P W 1 and others were able to find the murder weapon a knife which P W 1 said was used in the kitchen of the butchery. P W 1 was therefore familiar with it. The police took possession of the knife after photographing it.

14. On being cross examined P W 1 confirmed that it was him who had purchased the knife that was used at the kitchen of the butchery. He confirmed that it was the same knife recovered at the scene where the deceased died. P W 1 did confirm that the subject, when he first went to him at the bar, told him that it was the deceased who had the knife and he reiterated what the subject told him that the deceased said he would stab himself and then blame it on the subject. P W 1 in cross examination confirmed that the subject did not attempt to run away from the scene that he stayed there until the police arrived.

15. David Kiprotich Langat(P W 2) worked as a security guard at the bar owned by P W 1. He confirmed that the subject worked at the butchery. On the night of 18th August, 2016 at about 10 to 11p.m. the subject and the deceased went to Pewa Bar. The deceased seemed drunk. He noticed they looked happy but later disagreed. On inquiring what was wrong the subject said that he had loaned deceased Ksh. 100. P W 2 told both of them to go awayfrom the vicinity.

16. They left and P W 2 heard the deceased say that they were going to the place the subject resided, at Mia moja, to get a phone. They however returned within a short while and P W 2 saw them go to another bar. He saw them approaching the deceased was in front and the subject following him. P W 2 then said:

“Deceased run towards where I was as though he was running for safety. He (deceased) said, K (the subject) has stabbed me. He (deceased) was crying”.

P W 2 saw the deceased fall down and he noted he had blood on his front. It was then P W 2 entered the bar and called P W 1. P W 2 also confirmed that the subject did not run away from the scene and when police arrived they arrested him.

17. Jackson Kiburi Mutai operates a garage in Timau. On 18th August 2016 at 10p.m. he was locking his garage. He saw about three people who were quarrelling. He was able to identify one of those as the subject because of the yellow jacket he was wearing. P W 7 said that he knew the subject since the subject worked at a place he used to go to eat. P W 7 had also seen the subject earlier on that day and he was wearing the yellow jacket. Later he found one of those that were quarrelling was lying down. He said he did not know that person who was lying down.

18. On being cross examined P W 7 said that it was dark at that place he saw people quarrelling and that he saw two, three or four people quarrelling. Of those quarrelling he only recognised the subject. That although there was no light at his garage there was a light on the opposite side of his garage.

19. The post-mortem carried out by Dr. Abdiaziz Ibrahim P W 5 revealed the deceased had three wounds. There was one deep wound on the left/middle of the lung and in there was a pool of blood. There was a penetrating deep wound on the right coronary artery and a deep cut on the left supraorbital area, which in layman's language is the area immediately above the eye socket.

20. The subject in his defence stated that as they were walking with the deceased to their place of residence at 10p.m on that night they were attacked by people who demanded money from them. He heard the deceased say ***“I have been stabbed”***. That he held the deceased to assist him walk and that was how blood of deceased was smeared on his jacket. He denied stabbing the deceased.

21. The prosecution is required in law to prove beyond reasonable doubt the charge of murder against the subject. There are three elements that the prosecution has to prove beyond reasonable doubt. Those elements are:

(a) The death and cause of death of the deceased,

**(b) That the subject committed the unlawful act which resulted in the death of the deceased ,
and**

(c) That the subject had malice afore thought.

22. The persons who were at the scene on 18th August 2016 more particularly P W 1 to P W 4 and P W 6 to P W 7 all confirmed that the deceased died at the scene. Similarly the deputy officer in charge of police station at Timau Inspector Toroitich (P W 9) when he attended the scene found the deceased dead. The doctor who carried out the post-mortem confirmed death of the deceased whose cause was severe haemorrhage due to penetrating stab wound on the left lung and cardiac.

23. The next element prosecution needed to meet is proof that the subject committed the unlawful act which resulted in the death of deceased.

24. P W 2, the security guard at Pawa Bar testified how on the night in question the subject and the deceased quarrelled. They were quarrelling near where he was and he sent them away because they looked like they wanted to fight. He further stated that the deceased ran toward him as though looking for safety and the deceased said that it was the subject who had stabbed him.

25. The subject, after the stabbing of the deceased, informed the owner of the Bar and Restaurant P W 1, that he heard the deceased quarrelled where upon the deceased threatened to stab himself and then blame it on the subject.

26. The garage owner P W 7 saw people quarrelling who he said were either two, three or four people near his garage. Amongst those people he distinctively recognised the subject whom he well knew and had seen him earlier in the day wearing a yellow jacket.

27. In my view prosecution did prove that the subject did the unlawful act which resulted in the death of the deceased. P W 2 and P W 7 clearly saw the subject and deceased quarrel. After the quarrel P W 2 and P W 7 saw the person who had been quarrelling with the subject, the deceased lying down and dead. More importantly P W 2 heard the deceased make a dying declaration blaming the subject for his stabbing.

28. In the case REPUBLIC - V- NKURUGWATIARUKARIA [2014] eKLR court of appeal discussed dying declaration as follows: What qualifies to be a dying declaration is now well settled in the case of CHOGE V. REPUBLIC 1985 KLR 1, the Court of Appeal held:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person”.

The court of appeal also in the case PHILIP NZAKAWATU – V REPUBLIC [2016]eKLR stated:

“Decisions of this Court abound on admission and reliance on a dying declaration. Suffice to mention only two, CHOGE V. REPUBLIC [1985] KLR1, KIHARA V. REPUBLIC [1986] KLR 473 and NELSON JULIUS KARANJA IRUNGU V. REPUBLIC, CR. APP. NO. 24 OF 2008. Under Section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, or oral or written, made by a person who is dead are admissible where the cause of his death, or as to any of the circumstance of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of Section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence”.

29. Bearing in mind those decisions, above, it is clear that the deceased, in making his declaration, was contemplating his imminent death. Although the court of appeal in the above decisions stated that such dying declaration should be considered with caution, it is important to note in this case that dying declaration is not the only evidence pointing to the subject's involvement in the death of the deceased. Evidence was also tendered by the government analyst Kinyua Lawrence Muthuri (**P W 8**). He examined the yellow jacket, worn by the subject, and the knife found at the scene. His findings were that the blood on the yellow jacket and on knife belonged to the deceased. It ought to be remembered that the knife was identified by P W 2 and P W 6 as belonging to the butchery of Pewa Bar where the subject worked in the kitchen. It was also in evidence that although the subject was no longer working in that kitchen he had freedom of movement in and out of that kitchen. The subject had an obligation on a balance of probability to explain how the blood of the deceased was found on his jacket. **See Section III of the Evidence Act** which provides:

III. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him”.

30. The subject did offer evidence, in his defence, explaining that the blood was smeared on his jacket

after the deceased was stabbed by robber and as he assisted the deceased to walk. It is important to note that although P W 2 saw the deceased fall no question was put to him in cross examination suggesting the subject was assisting the deceased walk. It is for that reason that evidence of the subject shall be rejected.

31. It is pertinent to note that the doctor who carried out the post mortem noted three cuts on deceased's body. One was a deep wound in the left lung, the other was a penetrating deep wound on the right coronary artery and finally there was a deep cut on the forehead. The three deep cut wounds could not have been self-inflicted, by the deceased as stated by the subject, as he narrated the happenings of the evening to P W 1. It will be recalled that the subject informed P W 1 that the deceased had threatened and then had stabbed himself wishing to blame it on the subject. If indeed that was so how could the deceased inflict such deep and life threatening cuts on himself. The presumption, if one was to accept the evidence of the subject, was that the deceased if he wanted to blame the subject for his stabbing would only have superficially stabled himself. But rather what happened was that the deceased was stabbed with three deep wounds. In my view the evidence is clear that someone else stabbed deceased and that someone was the subject in this case. It is the subject whocommitted the unlawful act of stabbing which resulted in the death of the deceased.

32. The third element required theprosecution toprove that the subject caused the death of the deceased with malice aforethought so as to constitute the offence of murder under Section 203 of the Penal Code. In the case **BONAYA TUTU IPU&ANOTHER- V - REPUBLIC [2015] eKLR**. The Court of appeal had this to say on what constitutes malice aforethought:

“Malice aforethought is the mensrea for the offence of murder and it is the presence or absence of malice aforethought, which is decisive in determining whether an unlawful killing amount to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. (See MORRIS ALOUCH – V- REPUBLIC CR APP. No. 47 of 1996)..... It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently that intention is established by or inferred from the surrounding circumstance”.

33. Malice aforethought as provided under **Section 206** is in the following terms:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:

(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.

34. The surrounding facts of the death of the deceased needs to be examined to determine indeed whether the subject intended to cause death as per **Section 206 (a) of the Penal Code**.

35. The subject and the deceased were friends. They were both very young. The subject was then 16 years old while the deceased was 22 years old. From the evidence it is clear that although the subject was only 16 years old boy he was fending for himself. In the pre bail probation report it is stated that the subject is an orphan. It follows that since he had to provide for himself, meaning hehad to take on employment, the loss to him of even one shilling could be devastating. On the nightin question witnesses of the prosecution

heard the subject quarrelling with the deceased over Ksh. 100/= that the deceased owed the subject. From the quarrel it does indeed seem that the deceased was reluctant to repay that money to the subject. Hence the quarrelling. It is possible that the lack of Ksh. 100 by the subject who is as stated self-reliant could very well have meant the difference between hunger and a few meals. That I believe was the state of mind of the subject. When he committed the unlawful act which resulted in death of the deceased. In my view he did not intend to cause death or to do grievous harm. What he seemed to be interested in was the return of his Ksh. 100,00. In my view there was no evidence that the subject had knowledge that the act of injuring the deceased would cause death. The fact that the subject did not have intent to cause death is deduced from firstly the report he made to

P W 1. Although he told P W 1 that the deceased had stabbed himself intending to blame it on the subject, the subject further informed P W 1 that the deceased was not very hurt. That was the reason why P W 1 did not take the issue very seriously. Secondly when the crowd gathered at the scene the subject was said by P W 1 to be in shock but more important did not attempt to run away. He did not run away even when the crowd blamed him for the death of the deceased. I believe that is a clear indication of one who is not having a guilty mind.

36. It is because of the above that I make a finding that the prosecution failed to prove malice aforethought, an essential ingredient of a murder charge. The offence that was proved by the prosecution was manslaughter. I therefore hereby make a finding of guilt against the subject of the offence of manslaughter **Contrary to Section 202 as read with Section 205 of the Penal Code.**

Dated and Delivered at Nanyuki this 31st October 2017

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Accused: S. K.

For state:

For accused:

Language

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE

206.\ **111. (1)**