



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL CASE NO. 18 OF 2013
REPUBLIC.....APPELLANT
VERSUS
ALEXANDER MBEVO MUTEMI.....ACCUSED
JUDGMENT

The accused ALEXANDER MBEVO MUTEMI stands charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 14th November, 2013 at Kavilolo village Nzauni Location in Mwingi West District within Kitui County murdered Stella Makaa Makuthu.

He was first brought to court on 3rd December, 2013, and the trial was conducted by two Judges. The first 8 witnesses were heard by Honourable Justice Mutuku and the rest of the witnesses testified before me.

In proving their case the prosecution called 16 witnesses. PW1 was Daniel Mbithi Mutinda a supervisor at Target supermarket in Mwingi town who was a senior employee of the accused person.

It was his evidence that on 14th November, 2013 at about 3.00 pm Alex Mbevo the accused informed him that he was feeling unwell and wanted time off to go to hospital. Since the day was a busy with customers purchasing items for school children, he advised him to continue working until the work reduced before leaving to go to hospital. However, the accused left the place of work without alerting him. According to him, at that time, the accused was wearing a red t-shirt. The accused did not come for duty thereafter and after three days the police came and inquired about him and asked for witness statements.

In cross examination, he clarified that the accused asked for permission at around noon but then he learned at 3.00 pm that he had already left.

PW2, was Ruth Katembo Makuthu an electrician at Migwani and a sister of the deceased. It was her evidence that on the 14th November 2013 at 4.00 pm, she saw Alex the accused whom she knew as a friend of her sister the deceased. He appeared where she was at Migwani and asked her to find a motor cycle to take him to Kavililo a journey that would take about 30 minutes. She called the motor cyclist and the accused boarded the motor cycle, rode away , and later the motor cycle rider Mumbo Itumo came back and gave her Kshs.50/= which he said was from Alex the accused, who had instructed him to give her the amount.

It was her evidence that she later called her sister on phone Stella Makaa three or four times but she did not respond. While on her way home, as she went to buy vegetables for supper at around 5.00 pm, she met a cousin Kitembu Mutua who informed her that something had happened to her sister. She later saw her sister with injuries on the shoulder and the neck. She also saw a mobile phone and a knife near her. According to her, the scene was about 250 metres from their home. They called the police who came and took photographs and carried the body as well as a t-shirt written "Manchester United" which was brought by members of the public. She had seen the accused wearing the said T-shirt. She stated that she had known the accused before for about 2 months.

PW3, Julius Muumbo Itimo a bodaboda operator at Migwani. Stated his evidence that on the 14th November 2013 at about 4.00 pm while at Migwani, a customer talked to Katembo Makuthu PW2 asking for a bodaboda. Katembo then told him to take the customer to the AIC church Kavililo. He did so and the customer paid him Kshs. 100 for the ride and also gave him Ksh.50 to take to Katembo. He came back and at round 6.00 pm, as he took another customer home, he was informed that a girl had been killed in the bush. He proceeded to the scene and saw Stella Makaa lying beside a mobile phone and a knife with injuries in the hand, and stomach with blood stained clothes. He knew the deceased from childhood. He later recorded a witness statement with the police. He identified the accused in court as the person he carried on the motor bike that day and stated that he wore jeans and a red t-shirt.

PW4, Judy Mbet Katembo also a sister of the deceased, stated in her evidence that on 14th November 2013 while at home at Kavililo, the deceased came home and her phone rung and the deceased stated that the caller was a boy friend with whom they had disagreed and that she did not want to answer the phone. The deceased however finally picked the phone and told the caller who was Alex not to come home. Shortly thereafter, the deceased Stella left to meet the boy at Kavililo, but did not come back. At around 5.00 pm two children Jane and Maurine told her that Stella had been killed. She ran to the scene but did not see the body clearly as she did not go near. She however noted injuries. The police came and took the body to the mortuary. She stated that she had earlier seen Alex about 3 times at home when he came to visit the deceased. She identified the phone of the deceased.

PW5, was Makuthu Katembo a primary school teacher and father of the deceased. It was his evidence that on 16th November 2013 he witnesses post mortem examination of the deceased at the mortuary.

PW6 was Sera Copion Nyawa. It was her evidence that on 14th November 2013 at around 4.00 pm she attended a meeting of women and girls at AIC Kavilolo Church and while outside the church, she saw the deceased walking with a young man whom she did not know. She talked to the deceased who said that she had come home same day from school. According to her, the young man wore a red t-shirt. She then continued with church affairs but later Mrs. Kariku called and informed her that something had happened and when she proceeded there she found the deceased lying on the ground with a mobile phone ringing near her. She observed that the deceased was bleeding from injuries suffered. Later police came and took the deceased to the mortuary

PW7 was Nguyo Mwangangi, whose evidence was that on the 14th November 2013, he met the deceased and another man and he greeted them. The two said they were going towards bazaar. She observed that the man was wearing a t-shirt. She entered the church but at around 5.00 pm a woman was called on the phone and fainted. That woman who fainted later said that she had been told that Stella Makaa had been stabbed near a forest. They rushed to the scene and found her lying on the ground with a kitchen knife and a mobile phone near her. According to her, the deceased had stab wounds the elbow and the stomach. Police later took the body to the mortuary.

PW8, who was Mwikali Muli John testified that on 14th November 2013 at around 5.00 pm went to fetch water from the stream. On the way she found someone lying on the road already dead and soaked in blood. She recognized that person as Stella Makaa. She noticed a mobile phone nearby and screamed and people came to the scene. The police later came and collected the body.

PW9 was Doctor Gerald Mutisya of Migwani Sub-district hospital. It was his evidence that on 16th

November 2013, he conducted post mortem examination on the body of the deceased at Migwani district hospital mortuary. The body was identified by the father and uncle and was naked. His findings were that it was the body of an African female 23 years of age. It had several stab wounds on the right side of neck, with 2 major vessels injured. Also a stab on the right fore arm which injured the main artery. Two stab wounds on the right side of the breast. A stab wound in the center of the abdomen. Lastly, a superficial stab wound on the left thigh. He formed the opinion that death was caused by organ failure due to shock, due to excessive bleeding from the stab wounds. The probable weapon was a knife. He filled and signed the post mortem form which he produced as exhibit No.3. He stated also that no samples were taken for further examination.

PW10 was Police Constable Gregory Maingi of Migwani Police Station. It was his evidence that on 16th November 2013 he was sent by the OCS of Migwani Police Station Chief Inspector James Kariuki to witness the post mortem examination of Stella Makaa. He did so and witnessed the examination conducted by the doctor on the deceased who was identified by Paul Katembo and James Katembo.

PW11 was Chief Inspector James Kariuki. It was his evidence that on 14th November 2013 at about 5.30 pm while in the office, he received a telephone call from the chief Migwani Location informing him that a dead body had been found on a footpath. He boarded the station motor vehicle and proceeded to the village, in the company of Police Constable Leting and Police driver Kireli. At the scene, he met a crowd and relatives gave him the name of the deceased. He noted multiple injuries on both hands, on the chest, stomach and left thigh. He searched the scene and collected a red t-shirt, a kitchen knife and a mobile phone. He stated that photographs of the scene were taken by Cpl Tunoi of Mwingi CID. He collected the body to Migwani District Hospital mortuary. It was his evidence that investigations were done by corporal Tunoi of Mwingi CID.

PW12 was Elizabeth Waithera Oyiengo a Government Analyst of 21 years holding a Bachelor of Science Degree in Chemistry from the University of Nairobi.

It was her evidence that she prepared a report for the purpose of Section 77 of the Evidence Act (Cap. 80) in the Government Laboratory at Nairobi on items received from police constable John Choge of CID Mwingi. Item 1 was a t-shirt in a khaki envelop. Item 2 was a kitchen knife. Item 3 was a blood sample in a bottle for Stella Makaa. Item 4 blood sample in a bottle from the accused Alexander Mutemi.

The examination report was that the knife was likely stained with blood of human origin. The t-shirt was not blood stained. According to her the blood on the knife matched the DNA profile from blood sample item 3 which was from Stella Makaa. She produced the report as exhibit 5.

PW13 was Chief Inspector Charles Marangu Deputy DCIO Mwingi. It was his evidence that on 16th November 2013 at 11.00 am he received the accused brought by the father Joseph Mukui Kasi and another person known as Muthoka. These people informed him that the accused had committed a crime and then moved to Mombasa and had now surrendered.

When he inquired he noticed that the accused wanted to confess. Not being the investigating officer he took the statement. He asked the accused whether he wanted somebody present and the accused brought Moses Mukui Kasi. According to him, the accused voluntarily recorded the statement and he read it back to him. The accused and his witness Mukui Kasi then signed the statement, and he then countersigned the same. He also prepared a certificate which the accused and Mukui Kasi also signed. He produced both statement of the accused and the certificate as exhibits 7 and 8.

PW14 was Corporal Livingston Katui of CID Kitui crime scene support section a Gazetted scene of crime photographer. He stated that he processed photographs herein on the request of Corporal Tunai. He produced the photographs from films which were not altered or interfered with. He prepared a certificate on the same. He produced the photographs and certificate as exhibits.

PW15 was Inspector Joseph Leruk of Police Headquarter data production analysis. It was his evidence that he was qualified and registered to analyze data from Safaricom Limited to detect fraud.

He testified subscriber details on phone No. 07142007251 related to Alex Mbevu identity Card 28709530 which was purchase d on 19th July 2011. He also extracted subscriber details for Stella Id No. 27467127 – phone no. 0703841398 the line was valid from 13th April 2011.

He gave the information on IMEI Numbers of the two mobile phones. He stated that each of the two mobile phones had two sim cards but he could not access information from Airtel mobile communication.

It was his evidence that he was requested by the DCIO Mwingi to extract data from the two numbers and he did so and put it in documentary form. According to him, the information showed the communication as well as location and time. He prepared a certificate to show the truth of the information, and produced the report and the certificate as exhibit. According to him the data in the reports contained all call records on the two mobile phone numbers relating to Safaricom.

PW16 was Tanui Gilbert a Police Officer from Migwani Police . It was his evidence that as a Criminal Intelligence Unit Officer, he carried investigations on intelligence information as well as ordinary investigations through recording statements.

He stated that on 15th November 2013 at 9.00 am while in the office, the Deputy DCIO Chief Inspector Charles Maranga called him to this office and informed him about the incident. They conducted investigations together with other police officers. In the course of investigations, he visited Target supermarket in Mwingi Township where they found Daniel Mbiti Mutinda who gave them information about the accused, but they did not find the accused then. They were given his mobile phone number but on trying to call, it could not get through. They were however, informed by the said Daniel Mutinda that on the material day the accused had sought permission at around 1.00 pm saying that he was not feeling well. They were given the name of his father whom they later found and he said that the accused had not gone home that day and had not answered phone calls.

On 16th November 2013 at 9.00 am while at the office, Alexander Mutemi the accused was brought to the police station by the father, a brother and other people and the Deputy DCIO interrogated him. The DCIO then recorded a statement from him which was a confession. The DCIO gave him statement to keep in his custody.

It was his further evidence that on 17th November 2013 at 10.45 am he proceeded to Kavililo village with the Deputy DCIO and Corporal Leting led them to the scene which was on a footpath. They noted blood stains at the scene.

He was then handed over the police file to take over investigations. Among the items handed over to him was a red t-shirt written “Manchester United” which he was informed belonged to the accused. He produced it as an exhibit. He was also handed over a blood stained kitchen knife with a light blue handle which he produced as an exhibit. He was also handed over one mobile phone make Techno which had two sim cards, which he produced as an exhibit. He was also given a blood sample.

Additionally, when the accused was brought he also came with his mobile phone which had two sim cards which he took possession of. He took the two mobile phones to Nairobi for extracting of data which was done and a report on the same made.

He stated further that he interrogated the accused who stated that the t-shirt and knife belonged to him. According to him the accused stated also that the deceased was his girlfriend but that they had disagreed because she fell in love with a college mate called Nino Lengubai. He carried out his investigations and charged the accused with the offence, because Nino Lengubai stated that he was in Nanyuki that day and produced a bus ticket and hotel lodging receipt and thus he did not pursue him further. He produced the two mobile phones as exhibits.

That was the end of the prosecution case.

When the accused was put on his defence, he elected to give a sworn defence and to call one witness.

The accused testified on oath as DW1. The accused stated on oath that he worked in a shop factory in Mombasa. He knew the deceased as his girlfriend. He stated that on 13th November 2013 he worked at Target supermarket near Equity bank branch in Mwingi. He stated that the deceased was training at Mwingi Technical College and that on 13th November 2013 they closed college, and as usual she passed at the supermarket but she was with Nino who threatened to kill him, if he did not stop loving the deceased. He stated that at that time he had already brought a present for Stella the deceased. However the two came together and bought fair and lovely oil and left at 10.00 am

It was his testimony that thereafter he called Stella on the phone after work and asked that they meet on the 14th at 2.00 pm. On the 14th November he called her again and she said she was at home near Migwani. He thus took a vehicle and met her on the road. He then suggested that they go to a stream and as they walked Nino appeared coming fast holding something that looked like a knife in his hand.

Because Nino had warned him, he ran away and his girlfriend was slower so he left her behind and did not know what happened to her thereafter. He learnt later what had happened and heard that he was sought by the police and he volunteered to the police. He was cross examined. He stated that he did not know why Nino was not charged in court. He stated that there were additions in his police statement which were not from him. According to him, he did not tell the police that he ran away. He also denied telling the police that he bought a knife. He stated that he told Inspector Marangu that he phoned his girlfriend but the inspector did not record that. He also stated that he did not explain to the police that Nino and the deceased passed by the supermarket. According to him, he did not admit that he stabbed the deceased.

His witness was DW2, Festus Muisyo a welder at Migwani market. It was his evidence that he knew both the accused and the deceased. That on 14th November 2013 at 4.00 pm while at Migwani stage, the accused came and said that he wanted to see Stella and then went away. After about 30 minutes, another person came and asked if he knew Stella. That person claimed to have been training with Stella. That person also left without any explanation. Later he heard that Stella had died.

That was the close of the defence case.

After the closure of the case, counsel for the defence filed written submissions which they relied upon. The prosecuting counsel made oral submissions in court.

This is a murder case. The prosecution is required to prove all the elements of the offence beyond any reasonable doubt. The prosecution has to prove first of all that the deceased died. Secondly, the prosecution has to prove that the accused caused the death of the deceased. Thirdly, the prosecution has to prove that the death was unlawful. Fourthly, the prosecution has to prove that the death was caused with malice aforethought.

The burden is always on the prosecution in a criminal case to prove each of the elements beyond any reasonable doubt. The defence does not have any burden to prove the accused person's innocence. The defence may only raise doubts on the prosecution case. That burden squarely rests on the prosecution even if the defence a defence of alibi. See the case of Leonard Aniseth –Vs- R (1963) EA 206, and the old English case of Woolmington –Vs- DPP (1935) AC.

Did the deceased die? The evidence on record in my view is clear. The deceased was alive at Kavililo area in Migwani on 14th of November 2013. It was in the evening at around 4.00 pm that she left her home never to come back again alive. Her body was seen at about 5.00 pm by a woman PW8 Mwikali Muli who was going to fetch water. It was lying on a foot path with stab wounds. That woman screamed, members of the public came to the scene and the police were called and they came, and took the body to Migwani mortuary. Postmortem examination was conducted on 16th November 2013 by PW9, doctor Gerald Mutisya and the body was identified by the father and an uncle.

The cause of death was established by the post mortem doctor as organ failure due to excessive bleeding from injuries which were visible externally.

In my view, the prosecution proved beyond any reasonable doubt that the deceased died. She died due to organ failure arising from excessive bleeding due to stab wounds caused by a sharp object such as a knife.

Who caused the death of the deceased? The prosecution case is that the accused caused the death of the deceased. The defence position is that the death of the deceased was caused by one called Nino Lengubai a boyfriend and a college mate of the deceased. Nino was neither charged with the offence nor was he called as witness, though a statement was recorded from him.

The evidence of the prosecution is that the accused was a boyfriend of the deceased. The accused admits this. The evidence of both the prosecution and the defence is that the accused wanted to have a serious relationship with the deceased leading to marriage. However, the deceased had lately fallen in love with Nino a class mate at college, which the accused was not happy with. The accused admits this and stated that on 13th November 2013 the deceased and Nino came to Target Supermarket at Mwingi where he worked, which did not make the accused happy as he had already bought a present for her. The accused said that he was threatened by Nino on that day with death if he did not stop loving the deceased. He also said that he had brought a present for the deceased, and had saved about Kshs. 300,000/= for marriage expenses and was paying college fees for the deceased.

It is the accused's story that he later called the deceased and insisted that they meet next day on the 14th November and went ahead to meet her. From the evidence of the sister of the deceased PW4 Judy Mbeti even on 14th of November 2013 the accused called the deceased several times and the deceased came out reluctantly to go and meet the accused. The accused met another sister of the deceased PW2 Ruth Katembo at Migwani who assisted him get a motor bike cyclist to take him to Kavililo to meet the deceased.

Shortly thereafter, the deceased was found dead on a footpath and the accused disappeared from 14th until 16th November 2013 when he showed up to his relatives and was taken to the police by his father and other relatives. Attempts by witnesses, including his father, to trace him on the phone were not successful initially.

This is a case based on circumstantial evidence. The prosecution is required to prove the inference that the circumstances are inconsistent with the innocence of the accused and that there are no co-existing circumstances that would weaken or destroy that inference. See the case of Muchene –Vs- Republic (2002) eKLR 307.

It is only the accused who connects Nino to the offence of murder. In my view, this story is unconvincing. Though this is a case based on circumstantial evidence, and the legal position is that all the factors should point to the guilt of an accused person, in my view, all the facts and circumstances in this case point to the accused person as the culprit. He was at the scene with deceased. His t-shirt was found around there and he does not explain how the t-shirt remained there. What he has stated in evidence about Nino threatening him is not in his statement to the police. He himself made an admission to the police that he was involved in the killing. Even if that statement is discounted, the evidence on record and the surrounding circumstances in my view, are such that the irresistible conclusion is that the accused was the killer of the deceased, as a jilted lover who had invested so much in the deceased by paying college fees, buying her presents, and saving money Kshs.300,000/= for wedding expenses.

Was the death unlawful? There is no suggestion either from prosecution or the defence that the death herein was legally justified in any way. There was no legal excuse for the death of the deceased. I thus find that the death of the deceased was caused by an unlawful act.

I now turn to malice and forethought. Malice aforethought is defined under Section 206 of the Penal Code. It is generally an intention to cause death or do grievous bodily harm. Everybody is taken to intend the natural consequences of his acts.

From the evidence on record, the accused in my view properly and meticulously planned the incident because he was not happy that his lover or intended wife who had now changed and decided to love somebody else. He expressed his disappointments in his own defence. He planned the incident by calling the deceased and insisting against her wish that they meet on 14th November, 2013. He told his supervisor a lie that he was unwell while in fact he was trying to get an off to go and meet the deceased. He even left his place of work before being formally released from there. He was seen near Kavililo AIC church in the company of the deceased. The stab wounds were several, vicious and actually intended to kill. The accused, though he said that it was Nino who attacked him and the deceased did not report the alleged attack to anybody including his relatives or relatives of the deceased whom he knew well. In my view, if the story about the attack by Nino was true, the accused would have certainly mentioned the incident to someone, even if it was his father before the police started looking for him. He also disappeared from his place of work hoping that he would not be traced.

In my view, all the above confirm that the accused intended to kill the deceased and then afterwards tried to create a situation where he could pass blame to somebody else. All of this proves that the accused had malice aforethought in killing the deceased, and in his attempt to defend himself, tried to divert attention by bringing in Nino as the killer. The prosecution proved malice forethought beyond any reasonable doubt.

I find that the prosecution has, proved beyond any reasonable doubt all the elements of murder against the accused person. I thus find the accused guilty of the offence of murder as charged contrary to Section 203 as read with Section 204 of the Penal Code and convict him of murder accordingly.

As this is a capital offence, the bail/bond granted to the accused is hereby vacated, and security provided by sureties is hereby discharged. The accused will remain in custody to await sentence.

Dated and delivered at Garissa on 23rd November, 2017.

George Dulu

JUDGE