



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 90 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL KIHARA MWANGI.....ACCUSED

JUDGMENT

1. **Michael Kihara Mwangi** “the accused” herein stands charged with the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars are that the accused on 20th November, 2011 at Kamande slums within Buruburu Estate in Nairobi County murdered **Aaron Mbindyo Wimba**.

2. The accused denied the charge and the matter proceeded to hearing with the prosecution calling six (6) witnesses. A summary of the case is as follows:

PW1 Caroline Nzombi is a daughter to the deceased. She was informed of the death of her father on 22nd November 2011. She went to the scene and saw the body which had a stab wound.

3. **PW2 Dr. Dorothy Njeru** performed the post mortem on the deceased’s body after being identified by PW1 and her cousin. She found a stab wound on the chest extending from the midline towards the left hemathorax and the left lung was injured. She found the cause of death to be chest injury due to the penetrating trauma and she produced her report as Exhibit 1.

4. **PW3 David Ochieng Munyiere** was a neighbour to the deceased. He testified that his house and that of the deceased were on the same plot and were 10 metres apart. He stated that on 20th November 2011 at about 10p.m. he was in his house when he heard the deceased screaming saying “*Help me, help me I am dying*”. PW3 opened his door and flashed his spot light and saw the deceased outside his door and he was bleeding. He told PW3 that he had been attacked by two young men who were demanding for money from him. He fell down as they were still talking.

5. PW3 called the neighbours on the next plot who responded. Another old man on their plot who had come to shop at the deceased’s shop told them he had seen 2 young men run away towards Nairobi river and one of them was bleeding on the left hand. The witness tried to call the police through a number he knew but he did not go through. They took the deceased to his house. The next day at 7.00a.m. A report was made to the area chief who called the police who arrived immediately, and did their work.

6. **PW4 No. 232704 C.I. Evans Mwangi** was the deputy OCS Buruburu in November 2011. On 21st November 2011 8a.m. he was directed by his boss to visit a scene of murder in Kamande village. He was accompanied by **Sgt. Kyalo** and **P.C. Obuya** to the said scene. They found the deceased’s body on his

door way. They were informed that the suspect Michael Kihara (accused) was nearby hiding. They were even shown the exact place where he was. They broke into the house of his hiding and found him lying on the bed. He had an injury on his left hand (stab on the elbow). He had tied a piece of bed sheet to stop the bleeding.

7. He was interrogated and the officers found a blood stained kitchen knife (Exb.1) on a table inside the room where the accused was. The beddings where the accused was lying and his clothes were all soaked with blood. The officers collected the blood stained trouser, coat, piece of bed sheet and knife and arrested the accused. These items were later on handed over to the Government Analyst for analysis. This witness confirmed that the accused was arrested on 22nd November 2011 at 10 a.m.

8. **PW5 Elizabeth Waithera Oyiengo** is a Government Analyst who had practiced for 22 years. She produced with leave of the court, the analyst's report by a Mr. Kang'ethe who had since retired. The items indicated in the exhibit memo including blood samples of the accused and deceased were examined to determine the source of the blood stains. The DNA analysis showed that;

(i) The blood stains on the knife matched the DNA of the deceased.

(ii) The blood stains on the pillow case matched that of Joseph Maina.

(iii) The blood stains on the accused's trousers matched that of the deceased. The report and exhibit memo were produced as Exhibit 6.

9. **PW6 No. 37885 PC Simon Mokaya** was the investigating officer in this matter. He testified that on 21st November 2011 at 11.18a.m. He accompanied C. I. Evans Mwangi (PW4), Sgt. Kioko and others to a murder scene at Kamande Station. At the scene they found a crowd of people near a house made of iron sheets. There was a dead man's body with stab wounds on the chest and left hand at the door. He left other officers at the scene as he rushed back to the station to prepare signals to their seniors. Later while at the station PW4 arrived with the accused whose left hand was bleeding and tied with a torn bed sheet. He also received a blood stained knife and some blood stained clothes from PW4.

10. He organized for the accused to be treated at Mama Lucy Kibaki Hospital. With the permission of the court the accused was arraigned for plea on 30th November 2011. Post mortem and age assessment were conducted on 25th November 2011 (Exb.1 and 9 respectively). Exhibit 9 confirmed that the accused had injuries on his left hand, and he was mentally fit to stand trial.

11. This witness confirmed that the deceased operated the front part of the house as a shop while the back had a bed. Items would be sold through the window of the kiosk. There was blood at the kiosk. That the accused had refused to disclose how he had been injured.

12. The accused elected to make an unsworn statement for his defence and did not call any witness. He stated that on 20th November 2011 he went with his friend to Eastleigh to attend a birthday party. He returned home at 5 p.m. and slept. On 21st November 2011 he did cleaning and prepared for work at noon when he climbed up a stool to pick his shoes but the stool gave way and he fell. An iron sheet injured him in the process. He tied his hand with a piece of bed sheet, and left for hospital. On the way he was arrested by a policeman who took him to Buruburu Police Station.

13. He was asked about the injury by an officer and he explained. The bandage was removed and he bled a lot. He remained in the cells for two weeks. His blood sample was taken on 25th November 2011. He denied committing this offence with which he is charged.

14. **Mrs. Nyamongo** for the accused submitted that there was no eye witness to this incident. Further that the investigating officer used informers as the accused was a suspect in earlier matters. She argued that there was no evidence showing that the accused was the only person who could have committed this offence since it was five robbers who had attacked the accused. That the accused was arrested while

sleeping in his house, and nothing connected him to the offence.

15. She pointed out that there were officers who visited the scene but did not testify; some items sent for analysis were not examined and that there was an issue with where the knife was recovered from. She added that no knife was found at the kiosk. It was her submission that the DNA was not properly conducted and should not be relied on.

16. Mr. Oroni for the State submitted that the prosecution had proved its case to the required standard and relied on the evidence of PW3 a neighbour to the deceased. That the accused had been arrested within the neighbourhood with injuries on his hand. This explanation on the cause of the injury was not satisfactory he said. He did not go for treatment and was found hiding. He submitted that the motive for the murder was robbery as the deceased was just closing his shop.

This is now the case before court for determination.

17. The accused stands charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. For a charge of Murder to be proved the following must be proved.

(i) The fact of death.

(ii) The act of killing by the accused i.e. *actus reus*

(iii) The intention to kill i.e. *mens rea*/malice aforethought.

18. On the fact of death PW1, PW3, PW4 and PW6 saw the deceased's body lying at his kiosk and he was dead. The said body was identified for post mortem by PW1 and her cousin. PW2 conducted the post mortem and confirmed the death and its cause. A post mortem report (EXB 1) was produced by PW2 to that effect. There is therefore no dispute on the fact of death.

19. It is true that there was no eye witness to the attack on the deceased. The evidence before this court is purely circumstantial evidence. What then is circumstantial evidence? It is evidence that relies on an inference to connect it to a conclusion of fact. It is the opposite of direct evidence. The kind of evidence to prove circumstantial evidence is enunciated in the case of ***Republic –vs- Kipkering Arap Koske (1949) 16 EACA 135 at 136*** where it was held:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence, is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.”

20. I would now wish to examine the evidence on record to determine whether it falls within that category of evidence. PW3 who was a neighbour to the deceased heard the deceased's desperate calls for help. He came out and found the deceased who told him what had happened. ***That he had been attacked by two young men who were demanding for money.*** He did not go beyond that as he immediately fell down unconscious. He was assisted into the kiosk/house, and could not be taken to hospital because it was raining and there were no means. Police were notified early the next morning of his death.

21. PW4 and PW6 are among the officers who visited the scene on 22nd November 2011. PW6 was not present when the accused was arrested. PW4 a Chief Inspector of Police led the operation. Acting on information gathered, he led other officers to a house not far from the scene. They found the door locked from outside and broke it. Inside it they found the accused lying in bed with a bandaged hand. The sheets and his clothes had blood stains. On the table in the room was a blood stained knife. All these items were recovered; blood samples of the accused and deceased taken at the mortuary and all these were forwarded to the Government Chemist for analysis.

22. The report by the Government Analyst was produced here as exhibit 6. The results are clear that the blood on the knife was of the same DNA as that of the deceased. Secondly the blood on the accused's trouser was of the same DNA as that of the deceased.

23. **Mrs. Nyamongo** for the accused has submitted that the analyst's report is unacceptable because some items were not examined. The record shows that PW5 who produced the report testified that the only sample not analysed was that from the polo-shirt as no DNA could be generated. It is therefore not correct that several items were not examined. Secondly, Mrs. Nyamongo never challenged the post mortem report before production and so cannot be heard to say the DNA was not properly done.

24. She also submitted that it was not clear as to who committed the offence because the robbers were five (5). PW3 said he was told by the deceased that two (2) young people had accosted him. It is nowhere mentioned in the record that it was five (5) people who accosted the deceased. Counsel's submission on this is not therefore borne by the record with all due respect.

25. It is not disputed that the accused had a stab wound on his hand. He did not explain to those who arrested him the origin of these injuries. However in his defence he said he had been injured by an iron sheet as he tried to get his shoes, on 21st November 2011 at noon.

26. From his evidence in defence he went to attend the birthday party on 20th November 2011 and slept home that night after the party. That he was injured the next day on 21st November 2011 and was arrested the same day as he was going to the hospital and not on duty. The case of the prosecution is that the accused was arrested from the house where he was hiding on 21st November 2011 at around 10.30 a.m. and not on his way to hospital. He was taken to the police station where he was received by PW6 at 12.59 p.m.

27. The evidence that links the accused person to this offence is the finding of the blood stained knife (Exhibit 2) on a table in the room where he was lying in bed. The analyst's report (Exhibit 6) confirmed that the blood stains on this knife (Exhibit 2) were found to match the deceased person's DNA. Secondly, the blood on the accused's trouser matched the DNA profile of the deceased. How did he get the deceased's blood on his trouser? The house in which the accused was found was not his house and the same was locked from outside. The door had to be broken for the police to gain entry. It is not clear what he was doing in a locked house which had the blood stained knife at that time. Finally he was found to have an injury on his upper limb. It was tied with an old sheet and it was still bleeding which meant it was a fresh injury.

28. The accused failed to explain the origin of this injury to the police and even to the doctor who examined him for purposes of filling the P3 Form. This is stated by the Doctor at Page 2 of the P3 (Exhibit 9). The story of the accused in his defence about falling from a stool and going to hospital is not true. It is an afterthought.

29. PW4 in his evidence explained how he had arrested the accused from a house where he was found lying in bed bleeding. He also explained how he recovered from therein a knife with blood stains. The accused in his defence says he was arrested by a police officer as he went to hospital. Nothing stopped the defence from raising up these issues in cross-examination of PW4 so that he could respond to them. The answer for such failure is obvious and confirms that the defence is an afterthought.

30. Upon analyzing the evidence, I am convinced beyond doubt that the knife stained with the deceased's blood was the murder weapon. It was found in the accused's possession. Secondly, the Analyst's report (Exhibit 6) shows that the blood stains on the accused's trouser matched the DNA profile of the deceased's blood. How did he get this blood if he was never in contact with him? The accused was found with an injury he could give no satisfactory explanation for. The logical conclusion is that he sustained this injury while struggling with the deceased. I have no doubt in my mind that the accused used this knife (Exhibit 2) to stab the deceased and the injuries suffered led to his death.

31. I now move to the 3rd ingredient as to whether *mens rea* has been proved: Malice aforethought is defined under Section 206 of the Penal Code to be as follows:-

“a. An intent to cause the death 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 intent 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.”

32. It has been stated that the deceased was running a kiosk where he lived. It was raining and this incident occurred at around 10p.m. when the deceased was closing his business. He told PW3 that he had been attacked by two young people who were demanding for money from him. Since the deceased never lived to tell his story it is not clear whether he was robbed of anything or not.

33. Can it therefore be said that there was a premeditation by the accused to kill or cause grievous harm as defined under Section 206 (a) and (b) of the Penal Code? The accused came to the deceased’s kiosk while armed with a kitchen knife. The whole purpose was to cause grievous harm in case of resistance. In this instance, the grievous injury turned fatal.

34. In the case of *Isaak Kimathi Kamuachobi –vs- Republic (Nyeri) Criminal Appeal No. 96 of 2007 (UR)* the Court of Appeal expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal Code by stating as follows;

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill, while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See Republic –vs- Stephen Kiprotich Leting and 3 Other (2009) eKLR HCCC No. 34 of 2008)”.

35. In the circumstances of this case, the accused person and another came to the deceased’s kiosk to rob him of money. As a result of their demands they injured the deceased who succumbed to the injuries. I am therefore satisfied that there was intention to kill by causing grievous harm as can be deduced from the above authority and Section 206 of the Penal Code.

36. I find that the prosecution has proved its case beyond reasonable doubt. I find the accused guilty and convict him of the offence of murder as charged.

Dated, signed and delivered this 16th day of November 2017 in open court at Nairobi.

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HEDWIG I. ONG’UDI

HIGH COURT JUDGE