



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 97 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ERIC MUYA MWANIKI.....1ST ACCUSED

DALMAS OTIENO JUMA.....2ND ACCUSED

JUDGMENT

1. The accused persons **ERICK MUYA MWANIKI** and **DALMAS OTIENO JUMA** were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on 27th August, 2013 at Mlango Kubwa in Starehe District within Nairobi County jointly murdered **THOMAS JAGONGO AMESO**.

2. They both pleaded not guilty to the charges and to prove its case against them the prosecution called a total of nine (9) witnesses and when put on their defence each of the accused persons gave unsworn statement in defence.

PROSECUTION CASE

3. It was the prosecution case that on the material day while the deceased was walking along the road he was attacked by the two accused persons. This was confirmed by **PW1 PC SOLOMON LAIKERA** who stated that he was on patrol together with PC Makori PW5 and PC Kinyua PW4 when they spotted the accused persons struggling with the deceased and when the accused persons noticed them, they ran away leaving the deceased lying at the spot bleeding. They gave chase and managed to arrest the accused persons and upon conducting a search on them they recovered a blood stained knife on one of the accused persons.

4. It was PW1's evidence that he was able to identify the accused persons positively using the lights from moving motor vehicles and the security light next to Mamba petrol station. The accused persons were arrested about twenty meters away from the scene. It was his evidence that the knife was recovered from the 1st accused and that upon interviewing the deceased he stated that the accused persons were trying to steal from him and when he resisted they stabbed him.

5. This evidence was corroborated by **PW4 PC LAWRENCE KINYA** who stated that together with PW1 he arrested the 1st accused person whom they recovered a knife from. **PW5 KENNEDY MAKORI** confirmed having arrested the 2nd accused person as he ran away from the scene and upon returning back

with him to the scene they found the deceased lying down bleeding. It was his evidence that the 2nd accused had a torn trouser with blood stains.

6. PW2 JAMES AKELO OMANJE a brother of the deceased received a report that he was missing. He proceeded to Pangani Police Station to make a report and was told that there was a report of a person who had been stabbed and died on the way to the hospital. He proceeded to the city mortuary and identified the body of the deceased together with **PW3 JOSEPH ODHIAMBO MITO** and confirmed that the same had stabbed wounds on the right chest and right leg. **PW9 DR. J. ODUOR** performed post mortem examination on the body of the deceased and confirmed the cause of death as chest injuries caused by penetrating force trauma.

7. PW6 DR MUCHERU WANGOMBE carried a mental assessment examination on the accused persons and confirmed that they were fit to stand trial while **PW8 ELIZABETH WAITHIRA OYIENGO** carried out an analysis on the blood samples for the deceased and the accused person and the jacket, sweater and long trousers which the accused persons were wearing and came to the conclusion that the blood on the knife matched the DNA profile of the deceased while the DNA generated from the blood samples on the sweater and jacket matched the 1st accused and those from the trouser of the 2nd accused matched the blood sample of the 1st accused.

8. PW8 Corp. JOHN NGALA the investigating officer visited the scene and found the accused persons already arrested and took them together with the deceased to Kenyatta National Hospital where he was pronounced dead on arrival whom he later took to the police station. It was his evidence that he knew the 1st accused person as the same had earlier been arrested for some offence. At the time of their arrest the second accused had torn long trousers.

DEFENCE CASE

9. When put on their defence the 1st accused stated that he was arrested while on his way from work by the police officers who requested him to assist in putting the deceased to the police motor vehicle and that when he refused he was assaulted by the police. He denied having any knife on him and that the blood stains on him came as a result of beating by the police.

10. The 2nd accused also stated that he was arrested while on his way from work and taken to where the deceased was lying on the ground and ordered to assist in loading him onto the police motor vehicle.

SUBMISSIONS

11. At the close of the defence case the prosecution relied upon its submissions at no case to answer stage noting that the defence gave unsworn statement in their defence.

12. On behalf of the 1st accused it was submitted that there was contradiction in the prosecution case and that PW1 admitted that there was no proper lighting but went ahead and identified the accused persons. It was submitted that no member of the public who allegedly wanted to lynch the accused persons were called to testify. It was submitted that if the knife found on the 1st accused was hidden in the trouser then there was no way the same could still be blood stained. It was submitted that the said knife was never subjected to finger print analysis. It was therefore submitted that the prosecution had failed to prove who killed the deceased and the intention thereof.

13. On behalf of the 2nd accused, it was submitted that the prosecution failed to prove its case against the same beyond any reasonable doubt since the case was full of contradictions. It was submitted that all the prosecution witnesses were police officers and that the prosecution failed to produce even one civilian witness who was at the scene. It was submitted that PW1's allegation that the deceased told him that the accused persons wanted to rob him was not corroborated by PW4 and PW5 and did not amount to dying declaration. It was submitted that the 2nd accused was mistakenly identified and that it was not possible

to make an accurate identification for which the case of **JOHN MWANGI KAMAU v REPUBLIC [2014] eKLR** was submitted.

14. It was further submitted that the prosecution failed to establish beyond any reasonable doubt that the accused persons had common intention to murder or cause grievous harm to the deceased in support of which the case of **DICKSON MWANGI MUNENE & ANOTHER v REPUBLIC [2014] eKLR** was submitted. It was submitted further that there was no direct or circumstantial evidence to prove that the 2nd accused committed the offence of murder.

ANALYSIS AND DETERMINATION

15. To sustain a conviction on a charge of murder the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:-

a) The fact and cause of death

b) That the said death was as a result of unlawful act or omission on the part of the accused persons.

c) That the said unlawful act or omission was committed with malice aforethought.

16. The fact and the cause of death of the deceased is not in dispute. The fact of death was proved beyond reasonable doubt through the evidence of PW1, PW4 and PW6 all who were at the scene of the offence. PW2 a brother of the deceased confirmed the information of his death at Pangani police station and attended the post mortem examination. The accused persons stated in their defence that they helped load the body of the deceased onto the police motor vehicle and stated that the same died on arrival at Kenyatta National Hospital. The cause of the said death was proved by the evidence of **PW9 Dr. J. Oduor** to be chest injuries due to penetrating force trauma.

17. On whether the said death was caused by unlawful act or omission on the part of the accused persons; the evidence of PW1 and PW4 and PW5 is very clear on how the accused persons were arrested. The witnesses who were all police officers were on foot patrol when they noticed a struggle between the accused persons and the deceased and when they move to check what was happening the accused persons ran away leaving the deceased bleeding. I have contrasted this evidence with the accused persons defence wherein they alleged that they were arrested by the police officers on patrol and forced to help in loading the deceased into the police motor vehicle. DW2 in his defence confirmed that there were many people at the scene but did not say why it was only him and the first accused who were ordered by the police to assist in loading the deceased into the police motor vehicle. I therefore find their defence unbelievable.

18. Whereas the murder weapon was only recovered from the 1st accused and according to PW7 the DNA profile generated therefore matched that of the deceased, both accused persons were put at the scene by PW1 PW4 and PW6 and according to the evidence of PW1, the deceased informed him that the two accused person had tried to rob him and when he resisted he was stabbed. It is therefore clear that the accused persons had a common intention which is defined in **Section 20(1) of the Penal Code** as follows:-

20(1) When an offence is committed each of the following person is decided to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it that is to say:-

a) Every person who actually does the act or makes the omission which constituted the offence

b) Every person who does omit to do any act for the purposes of enabling or aiding another person to commit the offence

c) Every person who counsels or procures any other person to commit the offence

And in the last cause he may be charged either with committing the offence or with counseling or procuring its commission.”

19. The evidence tendered shows that both the accused persons were put at the scene together struggling with the deceased and upon noticing the police officers they ran into different directions but were immediately arrested by PW1 and PW4 and PW6 respectively. Whereas there was no independent eye witness who saw the deceased being stabbed I find the evidence of PW1 to the effect that the deceased told him that the accused persons wanted to rob him and when he resisted stabbed him very credible. The accused persons had a common intention to rob the deceased and in advancing their common intention the deceased was stabbed and subsequently died from the said injuries. I therefore find and hold that common intention on the part of the accused persons has been proved beyond any reasonable doubt. In this holding I find support in the Court of Appeal decision in **DICKSON MWANGI MUNENE & ANOTHER v REPUBLIC [2014] eKLR.**

20. It must be stated that what is required to prove common intention is that any of the four instances mentioned in **Section 20** of the Penal Code is present. I have looked at the evidence of PW1 PW4 and PW6 whose evidence I find credible as there was no evidence tendered by the defence to show why they would have framed the same with the occurrence of the offence herein and find that though the murder weapon was not found in the person of the 2nd accused person the same was together with the 1st accused when they were struggling with the deceased and the death of the deceased was as a direct consequence of their attempt to rob the same.

21. The final issue for determination is whether the accused persons had malice aforethought which is defined in **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 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) Intention to commit a felony.”

22. From the evidence of the prosecution witnesses and in particular the evidence of PW1 it is clear that the accused person had the intention to rob the accused person and in the process thereof caused grievous bodily harm to the same from which he died. It is therefore my finding that malice aforethought has been proved by the prosecution beyond any reasonable doubt and therefore dismiss the 2nd accused submission that the prosecution failed to prove beyond any reasonable doubt that he had formed the necessary motive or malice aforethought to cause the death of the deceased.

23. I further dismiss the accused persons contention that the prosecution case was full of contradiction and hold that failure to call the civilian witnesses to corroborate the evidence of the police officers who arrested the accused persons and witnesses the commission of the offence herein was not fatal to the prosecution case having taken judicial notice of the fact that securing civilian witnesses to a commission of offence of this nature which was committed boldly by the accused person in the presence of many people is not always easy the fact that the accused person did not have guns to scare people off notwithstanding.

24. I am satisfied beyond any reasonable doubt that both accused persons were properly identified and put at the scene of the crime and were immediately arrest by the prosecution witnesses PW1, PW4 and PW6 and their evidence was corroborated in material particulars by PW8 the investigating officer and

therefore find and hold that the prosecution has proved its case against the accused persons beyond any reasonable doubt and find both accused persons guilty of the murder of the deceased and I hereby convict the same accordingly and it is hereby so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 13th day of December, 2017

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Mr. Shimaka for the 1st Accused

Mr. Mutitu for the 2nd accused

Accused present

Tabitha - court clerk