



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO. 76 OF 2013**

**LESIIT J**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DANIEL MUGABE SISO.....ACCUSED**

**JUDGEMENT**

1. The accused is charged with one count of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on the 27<sup>th</sup> June 2013 at Karen Police Station the accused murdered **SIMON MUREGA**.
2. The prosecution called a total of 11 witnesses. The prosecution case is that on the material day the deceased was on duty at Karen Police Station Canteen where he worked as a cook cum attendant.
3. At about midday the deceased, who was working in the canteen kitchen, went to the back to give his overall to PW2 to wash. PW2 was washing overalls for all the staff near the water tank. It is the prosecution case that the accused found the two there and that he asked THE deceased whether he thought he too was incapable of wooing PW2.
4. It is the prosecution case that the accused held the deceased on the neck by his T-shirt and a fight broke out. PW3 and one Mutwiri separated the two. The deceased is said to have removed his T-shirt and left it with the accused who had declined to release it. The deceased then went away and returned with a change of clothes. He was also carrying meat and cabbage.
5. It is the prosecution case that the deceased went to the kitchen where he settled to cut the cabbage and the meat. Soon thereafter, the accused went to where the deceased was and PW2 heard him ask the deceased whether he, deceased thought he could beat him. At the same time PW2 saw the accused hold the deceased by the collar.
6. The Prosecution case was that the deceased told the accused that he was not interested in fighting. That it is then that the accused held the deceased by the left hand and then lifted his right hand and stabbed the deceased twice in the chest. On seeing that, PW2 started screaming and saying "He has stabbed him." PW2 said that the accused turned against her forcing her to run away from the scene.
7. In the meantime PW6, CPC Thaura was seated outside the Canteen at the time chatting with CPC Bare PW10. He stated that he heard the commotion in the Police Station Canteen and heard people saying that

the accused had stabbed someone with a knife.

8. PW10 was the first to run to the scene. He stated that he found accused and Mutwiri struggling to get a knife which was on the floor. The two of them fell down and accused was able to get the knife first. It is the prosecution case that PW10 ordered accused to give him the knife which he did. That is when PW10 learned that accused had stabbed someone. He then arrested accused and handed him over to PW6 together with the knife. PW6 later booked the accused in the OB and placed him in cells.

9. PW10 walked into the kitchen where he saw the deceased lying on the ground with serious injuries and bleeding from the chest. PW10 was instructed by the OCS to take the deceased to Kenyatta National Hospital which he did with the help of a police driver with a station vehicle. The deceased was pronounced dead on arrival at Kenyatta National Hospital. The Notification of death was P.Exh.8.

10. Earlier, before the accused was arrested and placed in cells, PW5 was holding duty for PC Eunice as station sentry at Karen Police Station when the accused went to the Report Office and made an entry in the OB. The entry was No. 29 of 27<sup>th</sup> June 2013 and the content was that accused had been assaulted by a Police Canteen Attendant.

11. The knife PW10 took from accused when he disarmed him was P.Exh.2. That knife was a bread knife. PW2 and 3 testified that the knife was not one of those used at the Police Canteen Kitchen and that they had never been seen it there before that day.

12. The T-shirt deceased was wearing when the injury was inflicted on him was P.Exh.3. Together with the knife (P.Exhibit 2) and a blood sample from the deceased, they were sent to the Government Chemist for analysis by the Investigating Officer PW11.

13. PW8 who carried out DNA profiling of blood in all the three exhibits found that the DNA from the blood on the knife and T-shirt matched the DNA from deceased blood. The Report with file and photographs of exhibits received and analysed by the Government Chemist Department were P.Exhibits5, 6(a) and 6(b) respectively.

14. The accused was placed on his defence. He gave a sworn defence. His defence was that on the material day he had returned to Karen Police Station where he resided from Kahawa Sukari Police Station where he was based. He stated he had performed night duty and was to report to the same station that evening for night duty.

15. He said he slept in his house until 9 a.m. when he went to the Police Canteen to have a drink. The accused stated that he was joined by a son of the station OCS CIP Muya and one Gitau from the neighbourhood. Later CPL Njeru from the station joined them. He said he bought CPL Njeru some milk whereas for the other two and himself, he bought Blue Moon Vodka which they drunk mixed with water. The accused said that the water was served by a canteen Attendant whom he learnt later was called Simon Murega (deceased herein).

16. The accused said that the accused declined to take water to them as a result of which Gitau hold him to woo the woman slowly if he could not serve water. The accused stated that the deceased mistook who told him that, walked over to him and grabbed him. The accused said that he fell down and that when he stood up a fight broke between him and the deceased. He stated the deceased hit him severally with his fists before the two were separated by PW3.

17. The accused said he entered the assault report at the Report Office, in OB No.29 of 27<sup>th</sup> June 2013. He said that he went home, changed the duty clothes ready to go to work. He then went to use the pit latrine near the station canteen and that on his way back the deceased grabbed him, started punching him in the stomach and face. He said that Mutwiri joined in and that they both pushed him over the counter. He said nearby was a tray with metallic cutlery. That it is then he found that he had hit the deceased and that the deceased walked away into the kitchen.

18. He said that he was left struggling with Mutwiri over a small knife. He said that both of them fell to the ground. He said he picked the knife and gave it to PW10 who ordered him to surrender it to him. He said he was placed in police cells on orders of the OCS. The accused said that it was only later that he learnt that he was facing a murder charge from CPL Kiprono of Langata Police Station.

19. The accused closed his case before calling a Mr. Njeru Police Officer he indicated that he intended to call. The explanation given was that the defence realized his evidence would not be helpful to the defence.

20. The accused person was represented by Mr. Muchiri Advocate. Counsel filed written submissions after the close of the prosecution case. At this stage of the case, Mr. Muchiri urged that the prosecution did not investigate the matter properly because the so-called murder weapon was recovered by PW7 as the accused and a third party fought to gain control over it. Counsel urged that the prosecution witnesses who were availed did not establish an intent by the accused person to cause the death of the deceased and neither did they prove the motive for the attack urging that PW2 did not tender any evidence to the effect that the scuffle/ fight between the accused and the deceased was due to a love triangle.

21. Mr. Muchiri, learned defence counsel gave oral submission in the case after the close of the defence case. In his submissions counsel urged that the accused was apologetic and remorseful for the events of the material day which led to the death of the deceased. Counsel urged the court to note that the accused had been drinking with friends prior to the fracas which ensued between him and the deceased.

22. Mr. Muchiri urged the court to find that there was no clear intention of malice aforethought on the part of the accused to commit murder. Counsel urged court to find accused was intoxicated and that he had no intention or motive to murder the deceased. He urged court to reduce the charge against the accused to manslaughter.

23. Ms Everlyn Onunga, Learned Prosecution Counsel prosecuted this case on behalf of the prosecution. It was the submissions of the learned prosecution counsel that the prosecution had proved that the accused person instigated the confrontation against the deceased person causing a fight between him and the deceased because in his belief the deceased was trying to seduce PW2. Ms. Onunga submitted that even after PW3 and one Mutwiri separated the two as they fought at the tank where PW2 was working, the accused person refused to release the shirt the deceased was wearing, forcing him to remove it and leave it in the hands of the accused.

24. Ms. Onunga submitted that the deceased returned to his work place and started chopping vegetables and cutting meat when the accused walked up to where the deceased was and challenged him to say whether he thought he could fight him. The learned prosecution counsel submitted that even though the deceased made it clear to the accused that he was not interested in fighting him, he still held the deceased with the left hand and stabbed him twice with the right hand in the presence of PW2. Ms. Onunga submitted that PW10 corroborated PW2 evidence because it is PW10 who disarmed the accused at the murder scene after the incident. Counsel submitted that it was noteworthy that the knife produced as P. Exhibit 3, which accused used to stab the deceased had not been seen at the canteen meaning the accused carried it to the murder scene which proved that he pre-mediated the offence and made a conscious decision to murder the deceased.

25. The accused is facing a charge of murder under **section 203** of the **Penal Code**. The burden lies upon the prosecution to prove; one, that the accused committed an unlawful act, in this case by stabbing the deceased; two that the deceased died as a result of the unlawful act, and; three that at the time the accused stabbed the deceased he had formed an intention to either cause the death or grievous harm to the deceased.

26. In this case the defence has admitted that accused stabbed the deceased causing his death following a fight between him and the deceased person. There is therefore no dispute in this case that the accused person is the one that stabbed the deceased and from the injuries that he inflicted, the deceased died. There is also no dispute that at the time that this incident occurred, a fight had broken out between the

accused person and the deceased. There is also no dispute that at the time of the incident, the accused person was already drunk and this was attested to by the key witness who is PW2. PW10 who disarmed the accused also said that the accused was drunk and that before he was aware that the accused had stabbed the deceased, he thought that Mutwiri was trying to push the accused out of the premises because of his drunken state.

27. I have carefully considered the evidence adduced by both the prosecution and the defence together with the submissions by both counsels. I find that the key issue for determination is whether the accused had formed the necessary malice aforethought at the time he stabbed the deceased and whether he was so intoxicated as to be incapable of forming intention to cause death or grievous harm to the deceased.

28. There are other minor issues which are also related to the key issue for determination, which include: whether the prosecution failed to call crucial witnesses in this case, the credibility of prosecution witnesses and whether the accused person carried the murder weapon into the canteen or picked it up from a tray of cutlery from the canteen. Finally whether the prosecution has established any motive for the attack.

29. In regard to malice aforethought, **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought in the following terms:

**“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) .....**

30. In regard to the issue of malice aforethought, the prosecution is relying on the evidence of PW2 and 3 that the accused person is the one who instigated the fight between him and the deceased. Secondly, that even though the deceased made it very clear that he was not interested in fighting the accused still continued pestering him to a duel which culminated in the accused stabbing the deceased.

31. Malice aforethought can be inferred from various circumstances as set out under **Section 206** of the **Penal Code**. The court of appeal in *Rex versus Tuper S/O Ocher [1945] 12EACA63* ruled thus:-

***“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick...”***

32. In this case there is no doubt the accused stabbed the deceased. And there is no doubt that he stabbed him in the chest, an action which according to the pathologist pierced through the heart causing the deceased death. There is however an issue which is controversial in this case, whether the accused person carried the knife into the canteen area where the deceased was working or whether he picked it from the cutlery tray within the canteen.

33. None of the prosecution witnesses claimed that they saw the accused person carrying the knife into the canteen. PW2 and 3 when questioned about the knife, the murder weapon said that it was not part of the kitchen knives used at the canteen. The accused on the other hand stated that he picked that knife from a cutlery tray on a counter on the canteen.

34. From the evidence which has been adduced, there was a lapse between the initial fracas between the accused and the deceased and the second encounter where the accused stabbed the deceased. Both the prosecution and the defence are in agreement that after the initial fracas, the deceased went away and returned with a clean pair of clothing because the accused remained with his t-shirt.

35. It is also the prosecution case that the accused had the time and opportunity to cool down/ arm himself when he went away to the report office and entered in OB no 29 of the same day an incident of an assault against him by one of the canteen kitchen attendants. The accused on his part said that he went to his house to freshen up and change clothing because he was supposed to report on duty at Kahawa Sukari Police Station before that evening.

36. The issue is whether the accused came with the knife or that he found that knife at the canteen. While it is clear that the accused person had the time and opportunity to get the knife and come with it to the canteen, it is a controversial issue. I noted that the murder weapon P.Exhibit 3 was not a kitchen knife. It was in fact a bread knife, the kind used to butter bread. That means that when PW2 and 3 testified that it was not the kind of knife used at the canteen kitchen, they were telling the truth. However that did not necessarily mean that the knife was not part of the other cutlery used by customers at the canteen. The issue is unresolved whether or not the accused may have carried the knife from elsewhere.

37. At the time of the incident, only PW2 was present. According to her testimony after the initial fight the deceased was the first to return to the kitchen and started cutting meat and vegetables for lunch. It was her testimony that the accused walked in after that, went straight to where the deceased was and asked him whether he thought he could fight him. It was also her testimony that when the deceased replied that he was not interested in a fight, the accused held the deceased by the left hand and stabbed him by the right hand.

38. The accused contradicted PW2 testimony in his defence stating that when he returned from making the report at the police station and changing clothes ready to go to work, he went to the pit latrine to relieve himself. He said that on his way back as he walked on a path near the kitchen, the deceased grabbed him and started punching him. He said that one Mutwiri joined in the fight and that he was pushed over the counter where there was a tray of cutlery which is where he picked the knife from which he used to stab the deceased.

39. I noted that when PW2 was cross examined by the defence, no question was put to her to suggest that the deceased and Mutwiri were both fighting the accused. Secondly noteworthy was the fact that it was never suggested to PW2 that she lied that the accused walked directly to the deceased as he was busy doing his work and attacked him without any provocation. Neither was it suggested to her that the accused was walking past the kitchen area minding his own business and that the deceased grabbed him and attacked him.

40. The evidence of PW2 did not receive any corroboration from any other witness. I weighed the demeanour of PW2 as she testified in this case and found that she was impressive as a truthful witness. However I was convinced that she did not lay bare the entire truth in this matter. PW2 was there from the beginning and should have been in a position to say exactly why the accused was talking about seduction to the deceased. That question of seduction holds the key as to why the fight broke out between the accused and the deceased. It also holds the key to the motive for this attack. PW2 withheld that information yet none of all the other witnesses availed by the prosecution was at the scene when the fight broke out. She is the only witness who held the answer to that question.

41. There was Mutwiri who at the time of the initial fight between the accused and the deceased, went to the scene with PW3 and separated the two. He was also later now found by PW10 wrestling with the accused trying to get control of the knife which was on the floor of the canteen after the deceased had already been stabbed. The accused claims that Mutwiri joined the deceased in fighting him. According to PW2, Mutwiri came after the accused had already stabbed the deceased. While PW2 appears to say that Mutwiri played no role in the fight between the accused and the deceased, the accused claimed that he played a central role, as a result of which he (accused) was pushed over the counter where he got the knife

which he used to stab the deceased with.

42. It is very clear that Mutwiri was a crucial witness in this case. He is the only one who could tell the court whether he was involved in the fight between the accused and deceased and came in before the deceased was fatally stabbed or whether he came much later after the fact. Failure to call him was ill advised and creates a lacuna in the prosecution case. It is a lacuna because as the court has noted, PW2 was not fully candid and may have left out certain facts denying the court a clear picture of what happened. It is therefore unresolved whether at the time the accused stabbed the deceased, he was under attack by two people and was therefore fighting back to defend himself or that he attacked the deceased unprovoked.

43. The other issue is about intoxication which I have considered under the backdrop of **Section 13** of the **Penal Code** which stipulates as follows:

**13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**

**(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—**

**(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**

**(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**

**(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) relating to insanity shall apply.**

**(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.**

**(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.**

44. While intoxication is not in itself a defence, under **Section 13(4)** of the **Penal Code** it may be taken into account in determining whether the accused had a specific intent to cause death or grievous harm. In the case of *Manyara v R [1955]22 EACA 502*, the court of appeal expressed itself thus:

**“It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing the defence rests on him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this on the accused.”** (See also *David Munga Maina v R NYR CA Crim App. No. 202 of 2005 [2006]eKLR*).

45. The accused in his defence stated that he had been drinking with one Gitau and one Steve who is the son to the OCS. He said that he bought one blue moon vodka and shared it with Gitau and Steve. He said they were mixing it with water which the deceased was supplying to them but towards the end, he declined to serve them with the water. The accused also claims that at the canteen where the counter was, PW3 was also serving. The accused also said that CPL Njeru joined him at the canteen but since he never took alcohol he bought him a pint of milk which he sat with them and drank.

46. None of the prosecution witnesses talked of seeing the accused in company of any other person. Neither did they say that he took any alcohol that morning whether alone or in company with others. PW2 and 3 who were present around the time of the incident were never cross examined regarding alcohol intake by the accused that morning. I noted that especially PW3 whom the accused claims was serving at the canteen bar that morning was not cross examined regarding the accused alcohol intake.

47. I find that the issue of the accused taking any alcohol at the canteen that morning is a creation by the defence. However I do find the accused was already drunk when he first engaged the deceased. PW2 described him as being drunk and PW10 who came much later also described him as being drunk. The accused has admitted that he stabbed the deceased but as explained it was in the midst of a fight between him, the deceased and one Mutwiri. He said that at the time he stabbed the deceased he was drunk.

48. The issue in this case is whether the prosecution has established that at the time the accused stabbed the deceased, he had formed the necessary malice aforethought to commit murder. I find that it is clear there was a fight between the accused and the deceased during which time the accused stabbed the deceased. It has however not been proved that the accused person had the knife in his possession at the time the fight broke out. I also find that he was under the influence of alcohol which according to PW10 could have made him a nuisance just before this incident. The degree of intoxication has not been attested to. However from his general conduct, he appears to have been irritable and a bully explaining why he made an entry in the OB of an assault against himself.

49. I find that from the circumstances and the facts of this case, the prosecution has not proved that the accused person had formed an intention to cause death or grievous harm to the deceased. I also find that the prosecution did not establish any motive for the offence as to justify a finding that the accused may have harboured an intention to cause the deceased death or may have pre-mediated it.

50. Having come to the conclusion I have of this case, I find that the prosecution has proved that the accused caused the death of the deceased beyond any reasonable doubt. However since malice aforethought was not proved, the charge of murder contrary to **section 203** of the **penal code** was not proved. The offence proved is manslaughter contrary to **Section 202** of the **Penal Code**.

51. Accordingly I substitute the charge against the accused person from murder contrary to **Section 203** of the **Penal Code** to manslaughter contrary to **Section 202** of the **Penal Code**. I convict the accused of the substituted charge of manslaughter contrary to **Section 202** of the **Penal Code** under the provisions of **Section 322** of the **Criminal Procedure Code**.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF DECEMBER, 2017.**

**LESIT, J.**

**JUDGE**