



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 35 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

D I M.....ACCUSED

J U D G M E N T

1. **D I M**, hereinafter “the accused” is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence being that on **20th** day of **April, 2012** at **Yatta District** within **Kitui County**, murdered **P K K** (deceased).
2. Facts of the case are that the deceased and the accused were married. Following irreconcilable differences they separated. On the **20th** day of **April, 2012** the deceased and PW1, **L K K**, her sister were walking home when the accused appeared and followed them. Subsequently, the deceased was stabbed severally on her body. She succumbed to injuries sustained hence this case.
3. Evidence adduced by the Prosecution was that PW1, **L K K** was at a shop at **Kwa Vonza** when she heard voices of people that she identified as the accused and deceased quarreling. She confronted them with a view of establishing why they were quarreling. The deceased alleged that the accused had threatened to kill her an allegation that was vehemently refuted. Thereafter, the deceased in company of PW4 **Rebecca Kamene Mutunga** who had all along been with her entered a shop at **Husenya**. The deceased wanted to buy some airtime to call her relatives to report the accused’s alleged threat of killing her if she wasn’t willing to reconcile with him.
4. After the deceased purchased airtime they continued with their journey, only to find the accused sitting on a rock alongside the road. The accused took issue with the deceased’s allegation. He assaulted her with a knife severally on the body. Screams by PW1 and PW4 did not deter him from acting further. The deceased managed to free herself by removing the blouse that the accused was holding. At this point in time the accused turned and ran towards PW1 then stopped. He then ran towards the general **Mataka area**.
5. The deceased sought refuge at one **Alice’s** home. The area Assistant Chief, **Peter Kieme** was notified. He managed to get means of transport which they used to take the deceased to hospital where she was admitted. The following day, the **21st April, 2012**, the accused was spotted within the hospital vicinity and arrested. On **22nd April, 2012** the deceased succumbed to injuries sustained.
6. When put on his defence the accused stated that on the material date he worked until **5.00 p.m.** and left with his brother-in-law, the deceased’s brother. On his way home he encountered the deceased who was with PW1 and PW4. He went to collect his cellphone hence losing sight of his brother-in-law. He ran after him and caught up with the deceased who was in company of PW4 and another who were walking towards their home. He stated that he expressed his delight to see the deceased and notified her of his intention to visit them with a view of finding out why she

- deserted his home in his absence. The deceased vowed to disrupt the meeting and alleged that she could even kill him. She had carried a handbag and paper bag.
7. Further, he stated that they walked on and reached **Husenya** where they found PW1. They continued with their journey. **Kalonde** entered a shop nearby leaving the two (2) of them. The deceased went off the road then returned. She had a knife that he had not seen. She lifted it up, an act that prompted him to dodge and subsequently hold her hand. They struggled and in the process she could have been injured. PW1 and PW4 returned to the scene and assisted the deceased. He went home and informed his relatives. The following day he was arrested. He denied having murdered the deceased.
 8. Submissions filed by the defence at the close of their case have been considered.
 9. According to **Section 203** of the **Penal Code** any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.

Therefore, issues to be determined are:

- i. Whether death occurred.
- ii. Whether the death was caused by an unlawful act committed by the accused.
- iii. Whether it was actuated by malice aforethought.

10. It is not in dispute that the deceased was injured and subsequently taken to hospital. She succumbed to injuries sustained a day later. PW9, **Dr. Patrick Mutuku** who performed the postmortem on the body of the deceased found it having sustained multiple stab wounds – on top of the scalp, left arm on both the forearm and upper arm. The right arm had two (2) stab wounds; the right breast had one stab wound, the left flank had one deep wound, the lower back had one wound. The digestive system had punctured small intestines with faecal matter in the abdominal cavity and signs of peritonitis. He opined that the cause of death was peritonitis secondary to punctured intestines. This was evidence of death having occurred.
11. The Prosecution adduced evidence to establish that the death that resulted was caused by the accused. It is however submitted that the Prosecution failed to prove that the unlawful act that caused the death of the deceased was done by the accused and that he acted with malice aforethought.
12. The deceased sustained injuries on the **20th April, 2012**. Evidence adduced by PW1 was that the accused lifted up his hand to hit the deceased who dodged an act that prompted the accused to chase after her. Ultimately he removed a knife that he used to stab her severally on various parts of her body as she tried as much as possible to shield herself. PW4 who was present confirmed in material particular the fact of stabbing of the deceased by the accused as stated by PW1. In his defence the accused denied having stabbed the deceased. Acknowledging that the deceased sustained stab wounds, he claimed that it was the deceased who had a knife which she intended to use and he acted by holding her hand that she had lifted up. A struggle ensued that resulted into injuries sustained by the deceased. He denied having inflicted the injury on the person of the deceased but claimed that she could have sustained the injuries in the course of the struggle. We must therefore interrogate if the accused acted in self defence?
13. **Section 17** of the **Penal Code** provides thus:

“Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”

14. The Court of Appeal has now and again cited the case of **Palmer v. Republic (1971) A. C. 814** in an endeavour to express conviction principles relating to self defence **Lord Morris** citing the aforementioned case in the case of **R. vs. McInnes 55 Cr. App. R. 551** had this to say:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances..... some attacks may be serious and dangerous. Others may not be. If there is some

relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction.... If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression.....”

15. Looking at the nature of injuries sustained by the deceased, they were multiple stabs and all over the body. Injuries sustained as a result of a struggle over a weapon would probably result into both parties involved in the struggle sustaining injuries. This was not the case in the instant case. If indeed he grabbed the weapon it could have resulted into his hands or at least fingers suffering wounds. The wounds sustained were not self-inflicting. They were consistent with an assailant using a knife (weapon) to inflict them on the person of the victim. In the premises I find that what PW1 and PW4 stated as to what transpired was true hence find that it was the accused who stabbed the deceased severally. This unlawful act committed by the accused is what resulted into the deceased's death. Therefore the accused caused her death.
16. To be culpable he must have acted with malice aforethought. **Section 206** of the **Penal Code** defines malice aforethought as:

“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) 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.”

17. In his testimony the accused stated how he met the deceased coincidentally and how he went about his duties since morning. He was in company of PW2 **C M K** on the fateful evening. They parted ways when he went to collect his cellphone as confirmed by PW2. After the accused collected his cellphone he rang PW2 with a view of accompanying him on their journey back home but it turned out that PW2 had already reached home.
18. From the evidence adduced by PW1 and PW4 their encounter swiftly degenerated into a quarrel with the accused threatening to kill the deceased which prompted the deceased to purchase airtime to call her relatives to notify them of the threat. When the quarrel subsequently degenerated into use of a knife to inflict injuries on the person of the deceased – it was so violent that it resulted into the deceased sustaining stab wounds on the scalp, both arms, breast, flank, lower back and abdomen. The intestines were punctured. These were serious stab wounds. The stabbing was as a result of intentional violence. The intention to kill was formed at the point of threatening to kill the deceased. This means that the accused acted with malice aforethought.
19. In the result, I find the Prosecution having proved the case against the accused beyond any reasonable doubt, he is guilty. Accordingly, I convict him of the offence of murder.

Dated, Signed and Delivered at Kitui this 19th day of January, 2016.

L. N. MUTENDE

JUDGE