



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL (MURDER) CASE NO.27 OF 2012

REPUBLICPROSECUTOR

VERSUS

DAN CLAUS MURUNGAACCUSED

J U D G M E N T

Introduction

1. The accused herein DAN CLAUS MURUNGA is 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 DAN CLAUS MURUNGA on the 22nd day of July 2012 at Shirere sub location, Bukhungu location, Kakamega Township in Kakamega Central District within Western Province murdered CHARLES KUBAI.

2. On 18th September 2012, the accused person took plea and denied the charge. The case proceeded to hearing during which the Prosecution called 6 witnesses. For the defence, it was only the accused person who testified under oath.

The Prosecution Case

3. On 22nd July 2012 at about 3.00p.m, Evans Obiero Shivega who testified as PW1 was at the home of the deceased person at Shirere sub location when the accused whom PW1 know went to the deceased's home and assaulted the deceased using fists. As PW1 was to later establish the accused had taken away the deceased's two cows. The accused then went away but returned soon thereafter armed with a panga hidden in his clothes. The accused removed the panga and without a word cut the deceased on the hand and then ran away. As the accused fled, he was arrested by some touts who also informed Kakamega Police Station of the arrest. The Police from Kakamega Police Station went to the scene and re-arrested the accused as they also took the deceased to Kakamega Provincial General Hospital for treatment. PW1 accompanied the Police to the hospital when they took the deceased to the hospital. On the next morning PW1 went back to the hospital to check on the condition of the deceased only to find that the deceased had died. PW1 identified the murder weapon in Court – PMFI – 1.

4. The body of the deceased was identified by Edga Imonje Kubai PW2, to doctor Dickson Mchana who performed the post mortem examination on 25th July 2012. Dr. Mchana testified as PW4. The doctor stated that the cause of death was severe blood loss secondary to cut wound following an assault. The post mortem report bearing burial permit number 227270 was produced as PExhibit 2. Morris Luteshi, PW3 a brother to the deceased was only informed of the deceased's death but he stated that the deceased and the accused used to live together in Kakamega.

5. Mohammed Mzee Juma who testified as PW5 stated that on 22nd July 2012 he was outside the mosque at Sigalagala area when he heard people quarrelling. He said he heard the voice of Dan, the accused herein whom he knew well. Dan was asking for cows from the deceased. According to PW5, the two were in the homestead where they both lived. He (PW5) then saw the accused remove a panga and cut the deceased on the hand before fleeing. The deceased bled. The accused's attempt to escape was thwarted by members of the public who chased and arrested him and later handed him over to the Police. PW5 stated that he was at a distance of about 50 metres away from the scene. He also testified that he knew that the cows the cause of the quarrel belonged to the deceased.

6. Number 86381 Cpl Phoebe Oluoch of Kakamega Police Station PW6, in the company of Police Constables John Mutemi and Njomo Mukulieli rushed to the scene of crime upon receiving instructions from their OCS to do so. At the scene, they found both deceased and accused who were both nursing injuries. The deceased had a deep cut wound on the left arm while the accused had multiple injuries on the face, feet as well as some scratches on the lower leg. Both accused and deceased were rushed to Kakamega Provincial General Hospital for treatment. While accused was treated and discharged the deceased was admitted but succumbed to the injuries later that night.

7. PW6 recovered the alleged murder weapon, a slasher, which was produced as PExhibit 1. PW5 could not say who had inflicted the injuries on the deceased and the accused.

The Defence Case

8. At the close of the Prosecution case, the accused person was put on his defence after due compliance with Section 306 (2) of the Criminal Procedure Code. The accused person gave sworn evidence. He did not call any witnesses. In brief he denied committing the offence and stated that he was hit on the head with fists when he (accused) was trying to be a good Samaritan to the deceased who had allegedly been attacked by his son. He further stated that he knew the deceased well because they used to work together. The accused stated that he did not know the person who killed the deceased. He also maintained during cross examination that he did not know PW1 and PW2. When shown a statement he is alleged to have recorded with the Police, the accused denied knowledge of the same and especially the signature thereon which the Prosecution said was his.

Analysis of the Evidence

9. From the evidence on record the incident herein happened during the day between 3p.m and 4p.m. It is not in dispute that there was a commotion on the 22/07/2012 around Sigalagala Technical Institute area in the home of the deceased PW1 explained in his testimony that he had visited the deceased on the material day after attending church and he saw the accused assault the deceased and even saw him cutting him with a panga. His evidence is corroborated by that of PW5 who was fifty (50) meters away from the scene and who also said he saw the accused cut the deceased with a panga. The panga which was also referred to as a slasher was produced as evidence and both the PW1 and PW5 identified the same in Court. The Police were also at the scene and as PW6 testified she saw the deceased and the accused at the scene and they were both injured. The Police took the two to Kakamega General Hospital where the accused was treated and discharged but the deceased was admitted. PW6 stated that when she interrogated the accused, the accused told her that he picked a quarrel with his father the deceased herein. The accused has not rebutted what PW6 told the Court regarding the quarrel between himself and the deceased herein. What the accused said is that he is not related to PW2 and he does not know both PW1 and PW2. He has not denied being at the scene on the material day and at the material time. He only gives a different version of what happened at the scene.

10. Many questions arise in my mind. Why was it only the accused who was injured and taken to hospital together with the deceased and not the others? Is it not true that he had a quarrel with the deceased, which quarrel attracted the wrath of the crowd who had stones and sticks and who were ready to give him a test of his own medicine? As explained by PW6 the incident occurred behind Sigalagala Technical Institute along Mumias Road. This is corroborated by the evidence of PW5 and the accused himself. PW1 has also said in his testimony that he did not know the accused before the incident. The issue of the quarrel is

confirmed by PW1, PW5 and PW6. Though none of the witnesses tried to describe the scene, I find it hard to believe DW1's story especially when he says that a young man emerged from a window of a church and descended on him with fists on the head.

Issues for Determination

11. "From the analysis of the evidence as above, the issues that arise for determination are whether:
 - a. The Prosecution has proved the death of the deceased and the cause thereof.
 - b. The Prosecution has proved that the deceased's death was caused by an unlawful act and omission on the part of the accused person.
 - c. The Prosecution has proved that in committing the offence, the accused had the necessary malice aforethought.

12. Section 203 of the Penal Code defines murder in the following terms "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder." Thus the central ingredients of the offence of murder are:
 - a. an unlawful act or omission on the part of the accused.
 - b. malice aforethought

14. On the other hand, Section 206 of the Penal Code provides 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 of or to do grievous harm to any person whether that person is the one 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

15. The Prosecution must thus prove that the accused person herein had the intention to cause the death of or to do grievous harm to any person; that he had the knowledge that his act or omission causing death would probably cause death either to the person intended or to some other person; that he had the intent to commit a felony or that he had an intention by the act or omission to facilitate the escape from custody of any person who had committed or attempted to commit a felony.

16. In the instant case the accused was seen cutting the hand of the deceased after a started up by the accused himself. It happened during the day and therefore he was properly identified. His intentions were clear because he went to the scene twice. There was the issue of the cows that led to the quarrel. The Prosecution proved the death of the deceased as PW4 is the one who did the autopsy on the body of the deceased. He produced the post mortem report that showed the cause of death. The post mortem was witnessed by two persons namely PW2 and one Pius Khayati.

17. The accused had an intention to kill the accused. He first quarrelled with the deceased and went away only to return shortly carrying a panga which he was hiding in his long sleeved shirt. He must have known that his act of cutting the deceased so badly on the hand would cause death of or grievous harm to the deceased.

Conclusion

18. In conclusion I am satisfied beyond any reasonable doubt that the accused killed the deceased by cutting him on the left hand, some 3cm below the shoulder joint. As a result of the cut wound, the deceased bled profusely and by the time he got to the hospital, his condition could not be salvaged. There is no doubt in my mind that the accused must have known that his unlawful act was likely to result in the death of the deceased or do some greivous harm to him. I am also satisfied that the accused person was clearly identified by the witnesses who testified especially PW2 and PW4. There is no suggestion by the accused that he had any grudge with any of the said witnesses.

19. I have also carefully considered the defence put forth by the accused, but I find that the said defence does not offer any challenge to the Prosecution case against him. I reject the defence as being unbelievable and an afterthought which the accused person manufactured in his mind as he awaited trial.

20. Consequently, I find the accused person Dan Claus Murunga guilty of the murder of Charles Kubai and convict him accordingly under Section 322 (1 of the Criminal Procedure Code.

21. It is so ordered.

Judgment delivered, dated and signed in open Court at Kakamega this 25th day of February 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Omwenga (present) for State

Mr. Lagat - Court Assistant