



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 49 OF 2013
REPUBLICPROSECUTOR
VERSUS
JOHN HENRY ALUBALE OMULIEBIACCUSED
JUDGMENT

1. The accused **JOHN HENRY ALUBALE OMULIEBI** was 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 the 7th day of April, 2013 at Huruma Madoga within Nairobi County murdered **ALLAN EZIANO MUGAZIA**.
2. He pleaded not guilty to the said charge and to prove its case against the same the prosecution called a total of nine (9) witnesses whose testimony was as follows:- PW1 ROSE NJOKI NJOROGI testified on oath that she was a neighbour of both the accused and the deceased. On 7/4/2013 she was at her door when the accused who was in his house called the deceased by his nickname "Maragoli" while holding a knife behind his hand and upon the deceased entering the house of the accused she heard the deceased cry and upon going to check what had happened she saw the accused running away from his house while the deceased was lying down on his stomach inside the house.
3. It was her evidence that the accused was stopped by the woman at the gate she immediately called PW2 who came to the scene. Under cross examination PW1 stated that the deceased was a little drunk on the material day and that she did not know whether there was a dispute between the accused and the deceased. She further stated that she could see the accused holding a knife. It was her further evidence that the accused was amongst those who assisted in taking the deceased to the hospital.
4. This evidence was corroborated by that of PW2 DAVID KEYA NYANGWESO who stated on oath that he was with the deceased on the material day since they did not go to work when they returned to their respective plots after Busaa drinking. He left the deceased at the gate to his plot and proceeded to his home when he was shortly called and informed that the accused had killed his father, the deceased. When he rushed to the scene he met the accused at the gate and saw the deceased lying down on his stomach. He requested the accused to help carry the deceased to the hospital which he agreed and when he asked him why he had stabbed the deceased, he stated that he did not know what had happened.
5. They took the deceased to Mundika clinic where they were referred to Kenyatta National Hospital only for the deceased to die on the way thereto. It was his further testimony that the accused was arrested by the policemen who had responded to the commotion created at the said clinic where they had followed them with the murder weapon and a stick. It was his further evidence that three weeks before the material day, there had been a quarrel between the deceased and the accused

- over some debt. He confirmed under cross examination that both the accused and the deceased were his friends.
6. **PW6 FREDRICK OTIENO JUMA** testified that he responded to the cry of the women in a plot next to his and found the deceased injured. Together with the accused and PW2 David Keya, they carried the deceased from the house of the accused to Mundika clinic before being referred to Kenyatta National Hospital. On the way they took the deceased to Marura clinic where he was pronounced dead. They called the mother of the deceased before proceeding with the body to the City mortuary through Huruma police station. It was his evidence that when he responded to the alarm raised, he found the deceased lying down in the house of the accused. He confirmed under cross examination that they did not know of any grudge between the deceased and the accused both who were his friends. He further stated that when he asked the accused why he had acted in that manner the same said that he did not know what caused him to so act.
 7. **PW7 STEVEN KIBET** stated that he had received a call from members of the public who gave him the information as regards the stabbing of the deceased and rushed to the scene where they rearrested the accused who had been arrested by the AP officers. They found the deceased who had a stab wound behind the shoulder in a critical condition. They later handed over the accused to the duty officer Cpl. Munila. Under cross examination he confirmed having been given the murder weapon by the AP officers who had arrived at the scene before them.
 8. **PW3 LENA H JAMOZA MUNGAZI** and **PW4 NICHOLAS ISADIA NYANZIRA** confirmed the death of the deceased and identified the body to **PW8 DR. ODUOR J.** for purposes of post-mortem examination on 16/4/2013 in which he confirmed that the cause of death of the deceased was penetrating injuries to the chest. **PW 5 LAWRENCE KINYUA MUTHURI** a Government Analyst confirmed that the blood stains on the knife matched that of the deceased while **PW9 PC WYCLIFF OGUK** the investigating officer testified that he interviewed the accused who alleged that he had called the deceased to the house and it is the deceased who attacked him which account contradicted that of the prosecution witnesses.
 9. He further confirmed that the accused was examined and found medically fit to stand trial. Under cross examination he stated that an assault report had earlier been made at the police station by one Kevin Odungo to the effect that the deceased had been stabbed by the accused on the right side of the shoulder and that the accused was not found to take the deceased to the hospital.
 10. When put on his defence the accused testified on oath and stated that on the material day he went to look at the construction site and when he returned to his house while preparing food the deceased went to his house and knocked down his sufuria from the stone with a stick and that a fight ensued in the process of which he took a knife and stabbed the deceased. Once he realized what had happened he called for help and the deceased was taken to hospital where he died on arrival. It was his evidence that the deceased attacked him since he did not go with him to the construction site. Under cross examination he denied having called the deceased.

ANALYSIS OF EVIDENCE AND DETERMINATION

11. There are three ingredients that must be established before an accused person is convicted of the offence of murder being:-
 - a. Proof of the facts and the cause of death.
 - b. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitute the “*Actus reus*” of the offence as proof that the said unlawful act or omission was committed with malice aforethought –the *mens rea* of the offence.
12. The fact and the cause of the death of the deceased is not in dispute. PW3 LENA H JAMOZA MUNGAZI and PW4 NICHOLAS ISADIA NYANZIRA and PW8 DR. JOHANSEN ODUOR all confirmed the fact of the death of the deceased with Dr. Oduor testifying that the cause of death was chest injury due to penetrating force trauma. PW5 LAWRENCE KINYUA MUTHURI confirmed that the murder weapon a knife collected all the scene had blood stains which matched the blood type of the deceased.
13. On the issue as to whether the said death was as a result of an unlawful act on the part of the accused, PW1’s evidence was that the accused called the deceased to his house and when the same

responded, the accused who had a knife on his hand stabbed the deceased. This evidence was corroborated in material particulars by the evidence of PW2 DAVID KEYA NYANGWESO who was with the deceased for the better part of the day and who had left him with PW1, who called him later and informed him that the accused had killed the deceased. It was his evidence that when he responded to the call, he found the deceased lying down at the front of the house of the accused. This account was confirmed by the evidence of PW6 FREDRICK OTIENO JUMA who responded to the cry of the women and assisted in carrying the deceased to the hospital.

14. It is therefore clear that the death of the deceased was caused by unlawful act on the part of the accused who in his defence admitted having stabbed the deceased but in self defence the same having attacked him in his house and therefore the question for the court to determine is whether the accused caused the death of the deceased with malice aforethought.
15. Malice afore thought which is the intention to kill another person has been defined under Section 206 of the Penal Code in the following terms:-

“Section 206. 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 to 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 the person is the reason 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 intention to commit a felony.”***

16. When you apply the above definition of the malice aforethought against the evidence on record I make the following findings:- That as per the evidence of PW2, the accused and the deceased had an early dispute as regards some outstanding debt which he thought had been resolved. That it is the accused person who according to the evidence of PW1 called the deceased to his house and stabbed him with a knife and that the deceased died as a result of the said injuries inflicted upon him by the accused. The sum total of the prosecution evidence dislodged that accused defence that the deceased attacked him and he stabbed him in response thereto and that the accused had no lawful reason to stab the deceased.

17. Based on the evidence tendered by the prosecution I am satisfied and find that the prosecution has proved beyond reasonable doubt that the accused caused the death of the deceased with malice aforethought and therefore find the same **guilty of murder of ALLAN ESIANO MUGAZIA** contrary to **Section 203** as read with **Section 204** of the **Penal Code** and accordingly convict the same of murder as charged.

DATED, DELIVERED and SIGNED at Nairobi this 15th day of June, 2016.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Magoma for the state

Miss Odembo for the accused

Accused present

Tabitha court clerk