



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 6 OF 2011

REPUBLICPROSECUTOR

VERSUS

DANIEL MUTHAMA KASYIMA..... ACCUSED

JUDGMENT

On 10th January 2011, the Accused person, Daniel Muthama, and John Makuthi (PW1) were having a drink at a bar in Nunguni on the evening, when they were joined by Jackson Wambua Kakui the deceased, who appeared to have started quarreling with the Accused person and PW1, before he was told to leave the bar. The quarrel was witnessed by Florence Nduku Wambua (PW2) who was working at the bar, and James Kimunyi Kakui (PW7), who was a watchman at the bar and led the deceased out. PW7 also stated that he saw the deceased leave the bar with the accused person, PW1 and another man he did not know.

When the Accused and PW1 left the bar, PW1 reported seeing the deceased entering a corridor next to a shop. He then saw the accused and another man they had been drinking with running along the road and he followed them. PW1 testified that that when he asked them why they were running, the accused person showed him the handle of a knife without a blade. They then went to the other man's home and threw the handle of the knife in a pit latrine.

In the meantime, Regina Muteti (PW8), was at the shops at Nunguni at 7.00pm on 10th January 2011 when she saw a group of people at a staircase leading to some shops. She went there and found the deceased, who was her neighbor, lying down at the bottom of the stairs sweating and he could not talk. She then telephoned the deceased's brother who came to the scene. Martin Mutham (PW5) who had been drinking with the deceased at the bar and had also witnessed him quarrel with the accused, also testified that he later found the deceased at the staircase with a cut on the side of his stomach

John Sila Kakui (PW3) who was the deceased's brother, went to the scene after receiving the call, and found that the deceased had been stabbed on the left side of the stomach with a knife. He then rushed his brother to Kilungu hospital on his motorbike, and they were referred to Machakos General Hospital. However the deceased died before they reached the Machakos General hospital. The deceased's other brother Joseph Muthenya Kakui (PW4), and father, William Kakui Mwanja (PW6) also came to the hospital. PW6 then reported the matter to the police station, and PW4 and Patrick Muthenya Muteti (PW9) who was their neighbor, later identified the deceased's body during the postmortem that was conducted on 17th January 2011.

The post-mortem was also witnessed by Cpl Rimba Kitsao (PW10) who was then stationed at Kilome Police Station, and who received the report of the deceased's death from PW6. The said post-mortem was

conducted by Peter Muriuki Ndegwa (PW11), a pathologist with the Ministry of Health, who established that the body of the deceased had penetrating stab wound through the left abdominal wall, and that the cause of death was haemorrhage due to abdominal injuries due to a stab wound.

Daniel Muthama Kasyima, the Accused Person, was subsequently arrested by PW10 and charged with murder contrary to section 203 as read with Section 204 of the Penal Code. According to the information filed in Court on 12th January 2011 by the Director of Public Prosecutions, it was alleged that on 10th January 2011 at unguni Market, Kauti Sub-location, Kithembe Location, within Kilungu District within Makeni County, the Accused person murdered Jackson Wambua Kakui “alias” Masu.

The prosecution called eleven witnesses, whose evidence has been summarized in the foregoing. The Accused was found to have a case to answer, and put on his defence. He gave sworn testimony, and stated that PW1 was his cousin and that PW1’s family had a grudge against the Accused’s family over land, and had threatened to remove the Accused family from the land they were staying in after the Accused’s father died. He denied that he had a knife or that he stabbed the deceased on the material day, and testified that he came to learn of the details of the deceased’s death during the trial.

The learned counsel for the Accused, R.M. Matata & Company Advocates, filed final written submissions dated 16th August 2016, while Ms. Mogoi Lillian, the learned Prosecution Counsel, submitted that the prosecution would rely on the evidence on record. The learned counsel for the Accused submitted that no independent witness linked the Accused to the commission of the crime, save for PW1 with whom they had a family dispute, and despite there having been many people present at the scene of the crime.

I have read the original record of the trial as well as the typed proceedings of the same, and submissions made by the Accused person that are on record. I am mindful that section 203 of the Penal Code defines the offence of murder as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

Therefore in order to establish and to secure a conviction for the offence of murder, the prosecution must prove beyond reasonable doubt the following ingredients;

- a) Evidence of the fact and cause of the death of the deceased.
- b) Evidence that the deceased met his death as the result of an unlawful act or omission on the part of the accused.
- c) Evidence that the said unlawful act or omission was committed with malice aforethought.

Malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- i. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not.
- ii. 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.
- iii. Intent to commit a felony.
- iv. 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.

In the present case, as to the first ingredient of required to prove murder, PW3, PW4, PW6, PW9 and PW10 testified that after receiving the news of the deceased’s stabbing, they went to the scene, and also saw the deceased’s dead body at Machakos General hospital on 10th January 2011 and during the post-

mortem on 17th January 2011. PW11 established that the cause of the Deceased's death was haemorrhage due to abdominal injuries arising from a penetrating stab wound in the stomach. The fact and cause of death of the deceased are therefore not disputed and was proved by the prosecution.

As to the second ingredient whether the Accused is the one who caused the deceased's death by an unlawful act, no witness testified to being present when the deceased was stabbed, and the murder weapon was not recovered nor produced in evidence. The evidence of PW1 is the one which placed the Accused person at the scene of the murder, when he testified that he saw the accused person and another man running from the corridor where he had seen the deceased enter, and that the accused showed him the handle of a knife which had no blade. The testimony of PW1, PW2, PW5 and PW7 also pointed at a possible motive for the murder, being that the Accused person was among a group of three men including PW1, who were quarrelling with the deceased shortly before his death earlier on the evening of 10th January 2011.

The evidence linking the Accused person to the death of the deceased is therefore circumstantial evidence, and this court is in this respect guided by the dictum laid down in **Kipkering Arap Koske & Another v R, [1949] EACA 135**, the Court of Appeal for Eastern Africa as follows:-

“That in order to justify, on the circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt and the burden of proving facts which justify the drawing of the inference from the facts to the conclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused”

It was also held in **R vs Chelestino Kago Nguku, (2013) e KLR** and **Sawe vs Republic (2003) KLR 364** that suspicion however strong, cannot infer guilt which must be proved beyond reasonable doubt.

In the present case I find that the question to be answered is whether the evidence by PW1 is credible and reliable evidence, and secondly whether the evidence on record can give rise to watertight inference of guilt on the part of the Accused person.

In this regard I note that the credibility and reliability of PW1 evidence is suspect for various reasons. Firstly, PW1 was one of the persons seen quarrelling with the deceased, and therefore had as much of a motive as the accused to harm the deceased. In addition he was also at the scene of the murder, and in fact his evidence is that he went to a shop and later joined the Accused and another man who had run ahead of him. He therefore also had the opportunity to attack the deceased.

The blade PW1 stated was missing from the knife that he stated he saw the Accused with was not recovered from the deceased body, or at the scene of the crime. In addition, PW6 who was the deceased's father testified that he had been told it was PW1 who was suspected of the crime, and PW10 testified that after testifying, PW1 disappeared and had not been located since. Lastly, the prosecution did not discount the evidence by the Accused that there existed a grudge between his and PW1's family.

The prosecution did not bring any evidence as to the other man who was with the Accused and PW1 during the time of the commission of the offence, or of the murder weapon. To this extent there was doubt created as to whether it is the Accused who caused the deceased's death, and the evidence adduced is in my view insufficient to raise a conclusive inference of guilt on the part of the Accused, as there are other persons who were at the scene of the murder and had motive to harm the deceased, including PW1.

Arising from the foregoing findings, I enter a verdict of not guilty and acquit the 1st Accused under section 306(2) of the Criminal Procedure Code.

It is so ordered.

DATED AT MACHAKOS THIS 30TH NOVEMBER 2016.

P. NYAMWEYA

JUDGE