



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 1 OF 2012

LESIIT, J

REPUBLIC.....PROSECUTOR

-VERSUS -

ANGELO KARANJA MUIRURI.....ACCUSED

JUDGMENT

1. The accused **ANGELO KARANJA MUIRURI** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are:

On 25th December 2011 at Ruiru Mills Estate in Ruiru District within Kiambu County, the accused murdered PETER MURAGURI.

2. The prosecution case was heard by Hon. Muchemi, J who also made the ruling placing the accused to his defence. I heard the defence case and submissions by counsel thereafter.

3. The prosecution called 9 witnesses. PW1 was an eye witness of the incident. His testimony was that the deceased left the house they shared at Ruiru saying that he was going to see a friend. PW1 stated that the deceased took rather long and therefore he decided to check on him.

4. PW1 told the court that when he went outside their house he saw the accused and deceased in a heated argument. When he asked them what they were quarrelling about, the accused warned him not to ask any questions. PW1 stated that he beckoned on the deceased to leave the accused which the deceased heeded.

5. PW1 testified that the deceased joined him and they walked away with the deceased behind him. PW1 stated that he saw the accused, who lived 10 meters from their house, coming after them with a knife in his hand. PW1 said that on seeing that he immediately ran into the rear side of accused house. The deceased did not run and therefore the accused caught up with him.

6. By the time he returned, PW1 said he found the deceased screaming in pain with a stab wound on his back. PW1 shouted for help and neighbours came and assisted to take the deceased to hospital. The neighbours included PW2, a brother of the deceased.

7. PW2 the brother of the deceased said that he heard screams for help and then went outside his house and saw his brother lying down in a pool of blood. He said that he spoke to the deceased who told him that it was the accused who stabbed him. PW2 stated that he entered the house of the accused and asked him why he stabbed the deceased. The accused told him not to ask that question again. When PW2 asked the accused for the weapon he had used, the accused entered the house and removed a knife from

the gunny bags ceiling and gave it to him. PW2 testified that the knife still had blood stains in it and he later handed it over to the police. PW2 identified the knife as P. exh.1.

8. PW3 confirmed the evidence of PW2. PW3 said that he heard screams for help when he was about 70 metres away from the scene and when he went to the scene he found a large crowd of about 50 people who included the accused who was surrounded and the deceased who was lying down with an injury. PW3 accompanied PW2, the accused, the deceased, and the mother of the accused to the police station.

9. PW4 was another brother of PW2. He confirmed receiving the report of the attack on the deceased and later of his death, from PW2.

10. PW5 was the police officer who received the accused, the deceased, PW2 and others at the police station. After recording the report of serious assault on the deceased, he issued him with a P3 form to be escorted to the hospital and also placed the accused in the police cells. PW5 also took the assault weapon which he identified it as P. exh. 1.

11. PW6 was the Government Chemist. He told the court that he received the knife, P. exh.1 together with blood samples of the accused and the deceased. After analyzing the 3 items through DNA profiling, he came to the conclusion that the knife P. exh.1 was stained with the deceased blood. His report was P. exh. 2.

12. PW7 was the Doctor who performed post mortem on the body of the deceased. After his examination he formed the opinion that the cause of death was bleeding into the chest cavity which he described as acute internal haemorrhage. PW7 found that the deceased had two stab wounds, one in the chest which penetrated into the chest cavity and another in the scapular.

13. PW8 was the investigating officer in this case. He took over the investigations one day after the incident. This witness took statements from witnesses. He also took blood samples for analysis and the murder weapon.

14. The accused person gave a sworn defence. In his defence, he said that he left his parents home after eating supper and proceeded to his house where he used to stay. He said he found two youths one standing at the first stair and another one standing at the door of his house (accused's house). He said he found the one at the door, the deceased in this case, was hitting his brother who had just been circumcised, and were demanding for a fee which new initiates usually paid to circumcised men according to kikuyu traditions.

15. The accused stated that when he tried to intervene for his brother who was lying in his bed nursing his injuries, the two youths attacked him with sticks. The deceased then sat on him and held him on the throat very tightly. The accused stated that he felt around with his hands when he realized that he could not breathe and felt a knife. He said that he took that knife and stabbed the deceased who was still holding onto his throat. The accused person said that he scratched the deceased with the knife first on the back and when he did not release him, he scratched him again. That is when the deceased and PW1 ran out of the his house and shortly later he heard someone screaming saying he will die.

16. The accused stated that after a short while PW2 entered his house and started beating him and demanded to be given the knife that the accused had used to stab the deceased. He said that he switched on the light of the house and gave him the knife he had used. PW2 then took him to the police station. He said that two days later he was informed that the deceased had died.

17. I have considered the entire evidence adduced by the prosecution and the defence, and also the submissions by Ms. Wafula for the State and Mr. Jumba for the accused person.

18. The accused person is charged with murder contrary to section 203 as read with 204 of the Penal Code. The prosecution has the burden to prove the case against the accused person beyond any reasonable doubt. Section 203 of the Penal Code which creates the offence of murder stipulates as follows:

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

19. The prosecution must adduce evidence to prove that the accused person by some unlawful act or omission caused injury to the deceased as a result of which he died. The prosecution must prove that at the time the accused caused the said injury he had formed the necessary malice aforethought to cause either death or grievous harm to the deceased. Section 206 of the Penal Code gives the circumstances which constitute malice aforethought as follows:

“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 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) ...

(d)”

20. There is no dispute that the accused person stabbed the deceased twice on the back and as a result the deceased succumbed to the injuries and died. The only dispute is whether there was premeditation on the part of the accused before the attack or whether the accused person was acting in self-defence. The accused is relying on both provocation and self defence.

21. Dealing with the prosecution case, I am very clear in my mind that the accused and the deceased engaged in an intense quarrel just before the incident. According to PW1, he was waiting for the deceased to return to the house which they share and when he delayed, he went out to find the accused and the deceased in a heated argument. Neither of them told PW1 what the cause of the quarrel was. According to PW1 he persuaded the deceased to leave the accused alone but no sooner had PW1 and the deceased walked away than the accused followed them with a knife. PW1 said he did not witness the accused stabbing the deceased because he first ran away. He however stated that when he returned he found the deceased bleeding from a stab wound on the back.

22. The accused version of the story was different. The accused alleged that PW1 and the deceased were busy attacking his brother demanding for payment of a certain fee when he found them in his house. The accused stated that his brother was in bed nursing injuries of a recent circumcision and so could not defend himself. That aspect of attacking the accused close kin raises the defence of provocation.

23. It is the accused defence that PW1 and the deceased set upon him with long sticks before the deceased tried to strangle him as a result of which, to save himself he grabbed a knife which was nearby and scratched him twice on the back. The attack on the accused by the deceased and PW1 raises the issue of self defence.

24. The issue is whether the accused was attacked or whether he was the one who attacked the deceased. From the evidence of PW1, the accused and the deceased quarreled and immediately after that quarrel is when the accused followed the deceased and stabbed him.

25. I noted some discrepancies in the prosecution evidence. While PW1 said that he was the first to arrive at the scene immediately the deceased was stabbed, and that he was the one who screamed for help after which PW2 and 3 went to the scene, PW2 said he was the one who arrived at the scene first and he found the deceased alone lying injured on the ground.

26. The other discrepancy was the fact that PW1 said that when he asked the deceased who stabbed him, the deceased was so severely injured that he could not answer the question. PW2 on the other hand said that the deceased was able to talk and that he told him that it was the accused that stabbed him on the back.

27. PW1 and PW2 clearly contradicted each other's evidence. Given the accused defence that both PW1 and the deceased were the ones who attacked him, and that PW1 ran away with the deceased soon thereafter, that seems to be in tandem with PW2's evidence that he found the deceased alone outside the house. That could explain the evidence of PW2 where he claimed that he was the first at the scene where the deceased was lying down. That also means that PW1 was not wholly truthful of the events of the day in question. It is possible that what the accused said in his defence that he was attacked and that he was trying to defend himself may as well be true.

28. Regarding malice aforethought, in **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

29. In **MORRIS ALOUCH VS REP CR. APPEALS NO 47 of1996 (UR)** the court of appeal stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later.”

30. In this case the prosecution case is not quite clear what exactly happened. However it is clear, and the accused has not disputed that there was an exchange of words between the deceased and the accused after which the deceased was stabbed. The accused stated that he merely scratched the deceased on the back two times in self defence. However the doctor found that one of those stabs penetrated to the chest cavity of the deceased causing severe bleeding which led to death.

31. The fact that one stab was not deep seems to lend credence to accused defence that he first scratched the deceased so that he could release his throat.

32. Mr. Jumba for the accused referred the court to the case of **Rep Vs Joseph Kamamda Mau & 3 others[2005] eKLR** where Ombija, J. observed:

“In this regard, I was referred to the case of Palmer – vs- Region [1971] Vol. 1 All. E. R. 1077 an authority for the proposition that where the evidence is sufficient to raise the issue of self-defence that defence will only fail if the prosecution show beyond reasonable doubt that what the accused did was not by way of self-defence. If the prosecution succeed in this then the issue is eliminated from the cases. Other possible issues will remain; in particular the circumstances may be such as to raise an issue whether there was provocation which would justify a verdict of manslaughter or whether the intent necessary to constitute the crime of murder was lacking. That going by the actions of the accused even if the court is not persuaded by the defence of self-defence then the court should entertain the defences of provocation which now reduces the offences to manslaughter...”

That the issue of provocation and self-defence merged and it matters little if the circumstances are regarded as acts done in excess of the right of self-defence or done under the stress of provocation.

That the essence of the offence of murder is malice-afore thought and if the circumstances show that the fatal blow was given in the heat of a passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control then the inference of malice is rebutted and the offence will be manslaughter.”

33. I agree with the cited persuasive authority. In this case the evidence of the prosecution shows that there was an argument between the accused and the deceased after which the accused entered his house and came out with a knife with which he stabbed the deceased. Even if I have to go by that evidence alone, there is clear evidence from the circumstances given by the prosecution that accused acted out of provocation arising out of the discussion he had just had with the deceased.

34. The court cannot ignore the accused defence which seems to be equally plausible that the accused was both provoked when he found his sick brother under attack by PW1 and the deceased; and soon thereafter the two attacked him with sticks and strangled him as a result of which he stabbed the deceased in self defence.

35. Having considered this case I find that the accused acted out of provocation and in self defence. The prosecution has not proved malice aforethought. There is no evidence that the accused act to stab the deceased was pre-meditated.

36. I find that the prosecution has proved manslaughter against the accused contrary to section 202 of the Penal Code. Consequently, I substitute the charge against the accused from murder contrary to section 203 of the PC to manslaughter contrary to section 202 of the PC. I find the accused guilty of the substituted charge of manslaughter beyond any reasonable doubt, and convict him accordingly.

DATED AT NAIROBI THIS 28TH DAY OF MAY, 2015

LESIIT, J

JUDGE