



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 38 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PATRICK MUTUA MADUME Alias PATY.....ACCUSED**

**JUDGMENT**

1. The accused **Patrick Mutua Madume** alias **Paty** is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 25<sup>th</sup> day of March 2011 at Dandora Phase Two estate in Njiru District within Nairobi County murdered **Joseph Gathinji Kagai**.
2. The prosecution called eight witnesses to support its case. It was the prosecution's case that on the material date the accused assaulted and stabbed the deceased for allegedly stealing his (the accused's) DVD. The accused had earlier reported the theft at Dandora Kanyago Police Station at about 7p.m. At about 9.30pm, the deceased's brother one Vincent Njau Kagai found the deceased lying in a pool of blood with the accused standing over him with a knife in his hand. The deceased later succumbed to a stab wound injury leading to the investigations and the present charge against the accused.
3. The accused denied the offence. He testified under oath and called one witness to support his case. He denied stabbing the deceased and being anywhere near the scene on the material night. He alleged that he had been framed by the deceased's family.
4. This being a murder case, the prosecution has the onus of proving three critical elements. These are:-
  - i. The death of the deceased and the cause of such death.
  - ii. That the accused committed the unlawful act which caused the death of the deceased; and
  - iii. That in committing such unlawful act, the accused had malice aforethought.

**Prosecution Case**

5. The death of the deceased was easily proved by the prosecution. The deceased's brother Vincent Njau Kagai testified as PW1. He told the court that on 25<sup>th</sup> April 2011 at about 9p.m, he was on his way to his brother's house. Before reaching the house, he heard some screams in a nearby plot. On checking, he found the brother (deceased) on the ground screaming and bleeding and the accused standing over him with a knife in his hand demanding his DVD. According to PW1 he helped his brother out, and with the assistance of his Uncle John Gitau (PW2) took him to Kenyatta National Hospital where he was declared dead on arrival.
6. No. 76877 PC Peter Omolo Oima testified as PW5. He told the court that he took photographs of the deceased's body at the city mortuary on 29<sup>th</sup> April 2011. He took a photograph showing the

- physical injuries on the head, stomach, chest and upper neck. He produced the bundle of photographs and the certificate as Prosecution Exhibit No. 1 & 2 respectively.
7. An autopsy was carried out on the body of the deceased by Dr. Njau Mungai, pathologist who testified as PW7. The body was identified to him by Elizabeth Muthoni Mukoma, Esther Wanjiru Kagai (PW4) and John Gitau Njau (PW2). He found a penetrating stab wound on the chest below the clavicle and the lower abdomen and lacerations on the head. Internally he saw blood in the abdominal cavity. He found injuries in the lungs and intestines and features of old lung disease. He concluded that the cause of death was internal bleeding due to a stab wound and assault on a person who had ongoing heart and lung disease. Dr. Mungai produced the post-mortem report [Prosecution Exhibit No. 3] detailing his findings.
  8. From the testimony of PW1 and PW7 above, it is clear that the deceased suffered an unlawful death. Following this, the issues for determination by this court are whether the accused caused the unlawful death of the deceased and if he did, whether he had malice aforethought.
  9. The key witness in the case is Vincent Njau Kagai, (the deceased's brother) who testified as PW1. He testified that on 25<sup>th</sup> April 2011 at about 7.00p.m, he met the accused who told him that his DVD had been stolen. They went together to report the theft at Dandora Kanyago Police Station. PW1 does not state in his testimony in court whether the accused suspected the deceased to be the thief.
  10. Later at around 9p.m. PW1 says he went to see his brother (the deceased) but before getting to the house, he heard screams from an incompleated building opposite his brother's house. That on checking he found his brother on the ground lying face upwards with the accused (Paty) standing over him with a knife in his hands. That his brother was lying in a pool of blood. He assisted his brother to get to his house and left him being administered first aid by neighbours while he rushed to inform and seek the assistance of his uncle John Gitau Njau (PW2) to rush the deceased to hospital.
  11. John Gitau testified as PW2. He told the court that the deceased was his brother's son and that he was informed about the stabbing by his other nephew Vincent Njau (PW1). John Gitau testified that he was at his shop in Dandora on the material night when Vincent Njau rushed to tell him that Jose (meaning the deceased) had been stabbed by Paty (the accused). He got someone to mind his shop and immediately drove to the scene.
  12. PW2 said that Paty was around when Vincent reported the incident to him. That he even asked him why he stabbed his friend. John Gitau said that the deceased had to be carried to where he was forced to park his car due to lack of a passage to the house. He lit the vehicle's lights when the deceased was being placed inside the car. They first took him to Mukunga clinic nearby but were advised to rush him to Kenyatta National Hospital (KNH). On arrival at Kenyatta National Hospital however they were advised that he had already passed on. John Gitau also told the court that he was aware that the deceased, the accused and PW1 knew each other well and were friends.
  13. The third witness called by the prosecution was Peter Macharia Mumbi. He testified that on the material date at around 8.30-9.00pm as he was going to his house in Dandora he saw Joseph (the deceased) being carried by Njau (PW1) and that Joseph was already injured then. He said that Patrick (the accused) was also around but he did not see Patrick holding anything. Peter Macharia was stepped down before he completed his testimony for incoherence. The prosecution however closed its case before recalling him.
  14. The deceased's mother Esther Wanjiru Karai testified as PW4. She recalled the night of her son's death on 25<sup>th</sup> April 2011. She was woken up at about 10pm by her sister-in-law Margaret who asked her to rush to Jose's house in Mariguini within Dandora. She was accompanied by her sister-in-law's son. On reaching her son's house she was informed that he had been hurt and had been taken to hospital. Esther Wanjiru further testified that on her way back to her house, she met (Paty) the accused and other young men. They conversed. She said he told her that if his DVD was not returned then he would do to Tete (PW1) what he had done to Jose. PW4 ended her testimony by telling the court that she had forgiven the accused.
  15. Cpl. Stephen Koskei testified as PW6. He told the court that on 25<sup>th</sup> April 2011 while on patrol duties at Dandora Phase II he received a report that a person had been stabbed. Together with PC Ruto, PC Nzioki and PC Ochieng they went to the scene. They were informed by members of the public that three young men had fought over a DVD and that one named Jose had been stabbed by one named Paty. That they saw blood at the scene in the house.

16. Cpl. Koskei also stated that when they returned to the police station he was at the report office when a reportee who introduced himself as Paty came and reported that members of the public wanted to lynch him. The reportee told him that he had fought with people who had stolen his DVD. Cpl. Koskei testified that he connected the report with the incident of the previous night and arrested the reportee (the accused).
17. The investigation officer in the case was No. 67398 PC Jacob Kinyua of Dandora Police Station. He was assigned the case by the OCS after the accused had already been arrested by Cpl. Koskei. He visited the scene at Dandora Phase II. Inside the incomplete building where the deceased was said to have been stabbed he saw blood stains. The deceased's house was about 100 metres away from the scene. In the accused's house which was nearby, he found things scattered all over the house. He collected a bloodstained stone from the scene. He stated that the blood stains were later washed off the stone by the rain at the police station. The investigating officer stated that he preferred charges after the investigation showed that the accused had stabbed the deceased.
18. The accused was put on his defence. He gave sworn testimony and called one witness. Testifying as DW1, the accused denied that he had anything to do with the deceased's death. He denied that he was known as Paty stating that "Paty is a name I heard at the police station. I am called Patrick". He told court that he had spent the evening at his house watching TV. That at some point he dozed off and was woken by his employer. He then discovered that his DVD was missing and went to report at Kanyago Dandora Police station. The accused further testified that he suffered a robbery later the same night and he was forced to hide on the roof till morning when he went back to police station to report the robbery only to be arrested by one Cpl. Koskei. In addition the accused called Peter Macharia Bundi who recanted his statement to the police that he had witnessed the accused stabbing the deceased. He testified that he had been induced to give a false statement to implicate the accused.
19. I considered the testimony of the witnesses as outlined above. I also considered the submission of the prosecution counsel and of the defence counsel. The prosecution admitted that PW1 was the only witness who was at the scene. It however, submitted that the court could convict on the evidence of a single identifying witness. Further that the circumstances of the case showed that the accused had the motive to assault the deceased. He had suspected the deceased of stealing his DVD.
20. The defence submitted that the chronology of events put forward by the prosecution was improbable. That there was material discrepancy in the times indicated by the witnesses and that if the deceased had been stabbed the incident would have attracted crowds and possibly mob justice as Dandora was a densely populated area. The defence further faulted the investigations by PW8 who not only failed to secure the scene of crime but failed to take into account the accused person's explanation when he went to report the theft of his DVD and the robbery at his house.
21. From the testimony of the witnesses and the submissions now on record, I consider the critical issues to be whether or not the prosecution adduced sufficient evidence to link the accused to the offence; whether the identification of the accused was free from error; whether the totality of the circumstantial evidence irresistibly point to the accused as the person who caused the unlawful death of the deceased; and, whether the defence put forward by the accused casts doubt on the prosecution case.

#### single identifying witness

22. Evidence of identification was tendered by Vincent Njau Kagai (PW1). He was the single identifying witness as no other witness saw the deceased being stabbed by the accused. In considering PW1's evidence, I take guidance from the caution stated by the Court of Appeal in **Wamunga Vs. Republic, 1989 KLR 424** where the court stated *inter alia* that:

"where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

23. As stated earlier PW1 told the court that he had met with the accused earlier in the evening when he (the accused) told him of the theft of his DVD. In his testimony, PW1 did not tell the court that

- the accused suspected his brother (the deceased). However, the accused in his defence confirmed that he was with PW1 that evening and that he informed him about the theft and PW1 accompanied him to make the report. The accused stated that he told PW1 that he suspected Jose (the deceased)
24. Neither PW1 nor the accused say when they parted after making the report. PW1 however says that he next encountered the accused at the scene of the incident when he saw his brother Jose on the ground with the accused standing over him with a knife in his hand demanding his DVD. In his statement to the police given on 26<sup>th</sup> April 2011, Vincent Njau stated *‘I entered that plot which is still under construction and found my brother Joseph Gathinji Kagai lying on the ground and being stabbed with a knife by one known to me as ‘Paty.’* In court, he stated in examination in chief *“I found Patrick with a knife. My brother was on the floor bleeding. There was moonlight so I could see. Patrick even recognized me and called my name”* In cross-examination, the witness stated *“I did not see the accused stabbing my brother. The knife and his hands were blood stained. I do remember the clothes the accused was wearing at night.”*
25. I considered PW1 a truthful witness. He had been with the accused earlier in the evening when they went to the police station together. His statement that he saw the accused stabbing the deceased on the one hand and on the other hand that he saw the accused standing over the deceased with a blood-stained knife and blood in his hands presents no material discrepancy. He did not see the knife penetrate his brother. By stating that he saw the accused stabbing, he relayed the conclusion he drew when he saw the accused holding a blood-stained knife with blood in his hands and the deceased lying on the ground bleeding. No other person was present and holding a knife.
26. The incident occurred at night. PW1 estimated the time to be 9.30p.m. This necessarily raises the critical question as to whether or not PW1 properly identified the accused. On this PW1 told the court that the deceased, himself and the accused were friends. They had grown up together in the same neighbourhood. They had also attended the same school. In fact both PW1 and the accused readily acknowledge in their respective testimonies that they (PW1, the deceased and the accused) were friends. Even PW4 the deceased’s mother stated in her testimony that the three were friends. She also stated that at some point the accused lived in her mother’s rental houses.
27. It is therefore right to say that PW1 would recognize the accused as this was somebody very well known to him. The evidence is that of recognition rather than identification. That said however, there is still the question of conditions obtaining at the scene. The incident occurred about 9.30p.m. The scene of the crime was inside an incompletely house which had no roof and no electricity. According to PW1 there was moonlight. He also says there was electricity in a house nearby. Evidence that the building had no roof was supported by PC Jacob Kinyua, the investigating officer. He said that he visited the scene which was inside an incomplete abandoned building.
28. From the above description of the scene and the estimated time of the incident, I consider the circumstances under which PW1 recognized the accused to be unfavourable. I therefore take the added caution set out by the court of appeal in **Abdalla Bin Wendo V. Republic EACA 168** where the court stated;

*“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”*  
(emphasis added)

29. In the present case, there is ample evidence that support the identification of the accused. PW4 the deceased’s mother told the court that she met the accused that evening. He was angry about his missing DVD and told her that if it was not returned, he would do to Tete (meaning PW1) what he had done to the deceased. By that time, PW4 had not been informed of the stabbing of the deceased. Further, according to PW2’s evidence, the accused followed PW1 to his shop when he

- went to call for help. PW2 said that he even conversed with him asking him why he had stabbed his friend.
30. Other than what the prosecution witnesses told the court, there is the conduct of the accused and the circumstances of his arrest to be considered. It is not in dispute that there was a quarrel between the deceased and the accused over the alleged theft of the accused's DVD by the deceased. The accused himself in his statement to the police and in his defence stated that he suspected the deceased to have stolen his DVD. He went to make a report at the police station accompanied by PW1.
31. According to the testimony of Cpl. Koskei who was on police patrol in the area that night he had received a report about a fight in which a person had been stabbed. He had learnt from members of the public that the fight was between two brothers and one Paty who had a complaint about his stolen DVD. Cpl. Koskei together with PC Ruto, PC Nzioki and PC Ochieng went to the scene and found that the deceased had been rushed to hospital and the suspect was at large. After the night patrol the officers returned back to the police station. According to Cpl. Koskei's testimony, a reportee found him in the report office in the morning. He introduced himself as Paty and made a report that members of the public wanted to lynch him and that he had fought with people who had stolen his DVD. Cpl. Koskei connected the report to the incident they had come across in the night patrol and arrested the reportee, that is the accused.
32. I have no reason to doubt the testimony of PW1 and the accused himself respecting the quarrel over the DVD. I also believe the testimony of the arresting officer Cpl. Koskei relating to the circumstances of the arrest of the accused. The accused himself confirmed the same. It is therefore factual. I find that the circumstances of the arrest of the accused goes to strengthen the identification evidence given by PW1. PW1 not only knew the accused, they conversed at the scene. The accused actually went to the police station and had a conversation with Cpl. Koskei before the latter arrested him.
33. From my considered analysis of the totality of the evidence, I am satisfied that the accused was properly identified as the person who stabbed the deceased causing his unlawful death.

#### Defence case

The accused was put on his defence. He gave sworn testimony and called one witness. Testifying as DW1, the accused denied that he had anything to do with the deceased's death. He denied that he was known as Paty stating that "Paty is a name I heard at the police station. I am called Patrick". I doubt that the police would give the accused a new name. PW1 and PW4 who are the brother and mother of the deceased respectively told the court that they knew the accused very well. He was a friend to both the deceased and PW1. He was also at one time a tenant in PW4's plot. Under those circumstances, how would they not know his official as well as popular names? Further, when the accused took plea and denied the charge before Ombija J on 12<sup>th</sup> May 2011, he did not inform the court that he was not 'Paty'. The information clearly named him as Patrick Mutua Madume *alias* Paty. I therefore find the accused's denial of the name Paty as being without merit.

34. In explaining his whereabouts that evening, the accused said that he got home at 7p.m. and dozed off as he was watching TV. He was roused by his employer Charles Jalango who asked him why he had not locked the door. He subsequently realized that his DVD was missing and on inquiring, his neighbour Juma told him that he had seen Joseph at his (the accused's) door. He decided to go and report at the Kanyago Police Station. On the way he met Joseph's brother Tete (PW1). He told Tete about the missing DVD and his suspicion that Jose was the suspected thief. Tete accompanied him to the police station where his report was booked in OB 57/25/4/2011. That was about 9.00p.m. He went back to his room. Thus far, his account tallies with the evidence of PW1 that he accompanied the accused to the police station to make a report about his stolen DVD. The accused however denies having seen the deceased or PW1 after that. He said that he went to sleep at 9pm.
35. The accused further testified that later in the night while asleep, he heard noises and when he went to open the gate he saw a mob armed with weapons. As the mob broke the gate and his door, he escaped onto the mabati roof and stayed there till 5.00a.m. when he returned to his house. He found his TV, radio and Kshs.3,000/- missing. He went to the police station to report the robbery

- and he was given OB 8/26/4/2011 at 6.15a.m. He said that immediately thereafter he was arrested and locked up in the cells. He was told by a police officer (Cpl. Koskei) that he was responsible for the killing of his friend Joseph.
36. Considered against the evidence in general, the accused's account of how he spent his evening after reporting the theft of his DVD is not satisfactory. The alleged robbery is clearly made up. No witness mentioned anything about a robbery; not even his own witness DW2. However, Cpl. Koskei (PW6) testified that the accused had gone to the station early in the morning to report that members of the public wanted to lynch him. The investigating officer (PW8) also told the court that he found the items strewn all over when he went to the accused's house. The evidence then suggests that members of the public may have wanted to lynch the accused after the incident. Further, I observed the demeanour of the accused. He struck me as not being truthful. His whole account was just not credible.
37. The accused called Peter Macharia Bundi (DW2) to support his case. The court learnt in the course of his examination that the same witness had been called by the Prosecution as PW3 and testified half way and was stepped down for incoherence. He was not recalled to complete his testimony and later only surfaced as DW 2. He testified that the accused did not stab the deceased. He stated that he had lied in his statement to the police that Patrick had killed Jose. He said that he had signed the statement upon being promised a benefit. He was a tenant in the deceased mother's plot and he alleged that he would not be required to pay rent if he agreed to testify as a prosecution witness. That he later changed his mind and refused to testify for the prosecution. In cross-examination, DW2 stated that he was not threatened to sign the statement and neither was he forced to come to court to testify the first time. He said the statement he had signed was not true. He admitted that he had previously been jailed for 9 months in a different case which was before Makadara Court.
38. I do not consider DW2 a credible witness. He made an admission that he lied to the police in his statement. In his statement to the police, he had stated that he saw the accused stabbing the deceased. In court testifying as a defence witness, he said that he had made the statement because he was promised a reprieve from paying rent. He admitted in cross-examination that he had been evicted from the deceased mother's plot for failure to pay rent. It appears to the court as suggested by the prosecution counsel that he (DW2) recanted his statement on that account. Further his criminal record, which he admitted brings his credibility to question. I would therefore not rely on his evidence at all. As stated in **Ndungu Kimani v Republic (1979) KLR 282**,

*“the witness upon whose evidence is proposed to rely upon should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his truthfulness or say or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”*

39. In the result, I consider the defence case a mere denial and a fabrication. It has not in any way cast doubt on the prosecution case.

#### Malice aforethought

40. Having found that the accused stabbed the deceased, did he have malice aforethought? Under Section 206 of the Penal Code, 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;*

- c. *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.*

In ***Nzuki v Republic* [1993] KLR 171**, the Court of Appeal stated that malice aforethought can be inferred from the acts of an accused person. The Court elaborated as follows:

*“...”Malice aforethought” is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237.”*

41. In the present case the evidence led by the prosecution shows that the deceased and the accused had a quarrel and a fight over the accused’s DVD. The identification evidence of PW1 which I believed, shows that the accused was at the scene of crime holding a knife over the deceased who was already injured and lying in a pool of blood. While there is proof beyond reasonable doubt that the accused stabbed the deceased, there is no proof at all on what might have transpired before. Cpl. Koskei’s testimony was that when he interviewed the members of the public at the scene, he received information that there was a fight between two brothers and the accused. No other evidence was led by the prosecution to prove that the accused of malice aforethought stabbed the deceased. I find the evidence on record insufficient to prove the *mens rea* necessary to establish a charge of murder. I do find however, that the evidence firmly establishes the lesser charge of manslaughter.

42. In the premises I find the accused guilty of the offence of manslaughter contrary to Section 202 as read with section 205 of the Penal Code. I convict him accordingly.

Judgment, dated and delivered at Nairobi this 18<sup>th</sup> day of June, 2015

**R. LAGAT-KORIR**

**JUDGE**

In the presence of:

.....: Court clerk

.....: Accused

.....: For the accused

.....: For the State