



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 12 OF 2008

REPUBLIC PROSECUTOR

V E R S U S

DOUGLAS RIUNGU ACCUSED

JUDGEMENT

Douglas Riungu is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 27/1/08, at Kathuri village in Upper Kiongone Sub Location, he murdered Josses Kimathi. He denied the offence and the case proceeded to full hearing by the prosecution calling a total of four witnesses. In his defence, the accused testified on oath but did not call any other witness.

PW1 Paul Wambugu produced the post mortem report (PEx1) which had been prepared by Dr. Isaac Wambugu on 11/2/2008 whereby the doctor found the deceased had a penetrating abdominal injury on the left lumbar region about 6 cm long; the cardiovascular region had severed abdominal aorta with haemoperitoneum (collection of blood in the abdomen).

As a result, the Doctor formed the opinion that the cause of death was cardio pulmonary arrest secondary to a penetrating abdominal injury caused by a sharp object.

PW2 Martin Mutegi told the court that on 27/1/2008, there had been a celebration at his father's home of a new born child. At about 8.00 p.m. while with Timothy Mungatia, they started collecting the utensils when Douglas, the accused, entered the house where they were. He was drunk but strong enough to walk. He told them to get out and they pushed him outside. When they reached out, accused hit PW2 with a knife which he drew from his clothes and PW2 managed to ran off as he screamed. It is then that his brother, Josses, (deceased) came out of his house to enquire what was happening. The deceased met the accused and it is just then Josses shouted that he had been stabbed. Douglas then said that he was a Maasai and he left. PW2 said that he ran to the police station to report, who came and went to look for accused and he was arrested. PW2 said that he knew that it was the accused who stabled deceased because when he entered the house there was light from a lamp and accused is their neighbour who lives about 100 metres away and he saw him well.

PW3 Timothy Mungatia reiterated what PW2 told the court that there had been a celebration and when collecting the utensils about 8.00 p.m., Riungu (accused) entered the house where they were; that he was drunk and was making noise and as they pushed him out, he took out a knife, hit PW2 (Martin) with it. They screamed and it is then the deceased came out of the house, met the accused who stabbed

him and ran off saying he was a Maasai; that the deceased said he had been stabbed, fell down and they went near him and found him bleeding from the right side. PW3 went to report at the Chief's Camp and went with Administration Police (Aps) to accused's house and found accused hiding in the ceiling of his house. He had the knife that was recovered and the police took possession of it. Police collected the deceased's body to the mortuary.

PW4, Janet Irima Fredrick is the Chief of Abogeta Location. She received a report of the murder on 28/1/2008 about 1.00 a.m. and on her way to the scene, passed by accused's house who was the suspect. One person called out accused's name, he responded once, but did not respond again; that the door had 2 padlocks and they decided to force the door open and he was not inside. They noticed that some sacks and frames formed a ceiling in the house and upon searching; accused was found sleeping in the said ceiling and had a knife. He was arrested together with the knife and taken to the scene and the locked him up in cells.

PW5, CPL Weldon Koros was the investigating officer in the matter. He was instructed to proceed to the murder scene on 28/1/2008 at about 1.00 a.m. They passed by the Administration Police Camp and found accused already arrested and received the murder weapon i.e. knife. PW5 observed the deceased's body which had a deep injury to the left side of the abdomen and the body was removed from his home about 2.00 a.m.

Accused testified on oath when he told the court that he was at the celebration at the deceased's home which ended at 6.00 p.m. and those who take alcohol were told to remain. He drunk alcohol till 8.00 p.m. and he informed PW2 and 3 that he was leaving; he left to go and sleep. About 2.00 a.m. there was a knock on his door, and the door was kicked open. The door to the bedroom was knocked and he climbed in the ceiling in fear but he heard the Chief talking and he came down. They only took a small panga from his house and said that he had killed somebody. He did not even resist arrest. He denied killing Josses. He had no grudge with the deceased or PW2 and 3. He said there were about 200 people at the celebration and he knew some.

Mr. Wamache, Counsel for the accused in his submission argued that PW2 and 3 did not see accused stab deceased, and accused should be acquitted.

Mr. Musyoka, Counsel for the State argued that the prosecution evidence was consistent, PW2's evidence corroborated PW3's evidence; that the sword used in the murder was recovered in accused's house.

After carefully considering all the evidence on record, there is no doubt that the accused was present at the home of the deceased on the night he was injured. Accused admitted that he had been present at the celebration from about 2.00 p.m. till 8.00 p.m. when he left after taking some alcohol. According to accused, however, there was no confrontation or fight by the time he left. PW2 and 3's evidence was consistent, that about 8.00 p.m. when they were clearing the home after the celebration, the accused followed them in the house, making noise and that is when they removed him and that he removed a knife, hit PW2 with it and when the deceased came out of the house to find out what was happening, he met accused and the deceased then claimed he had been stabbed.

Both PW2 and 3 did not see the accused actually stab the deceased but both of them told the court that at that time, nobody else was near where accused and the deceased were and besides, the accused had just chased PW2 and hit him with a knife. PW2 and 3 were near the accused and deceased. This evidence is circumstantial. Circumstantial evidence was defined in **MOHAMED & OTHERS V REPUBLIC 2005 KLR 722** where the court said:

“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved”.

A court relying on circumstantial evidence must be satisfied that:

1. The incriminating facts are incompatible with the innocence of accused or the guilt of any other person.
2. The incriminating facts are incapable of explanation upon any other reasonable hypothesis than that of guilt;
3. Before drawing the inference of accused's guilt, the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Circumstantial evidence is not of lesser value than direct evidence. In fact it has been said to be the best evidence. In **REPUBLIC V TAYLOR WEAVER DONOVAN (1926) CR 20** where the court said:

“Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified examination, is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

I find the testimonies of PW2 and 3 consistent and the evidence was not in any way dislodged by the defence. The accused had just hit PW2 with a knife and soon thereafter, met the deceased. There was nobody else near accused and deceased when deceased said he had been stabbed and fell down dead and PW2 and 3 noticed the same injury that he had sustained.

The accused denied that he had any grudge with PW2, 3 or the deceased. The prosecution witnesses also confirmed the same. Both PW2 and 3 also observed that the accused was drunk, though he was still strong enough to be able to walk. Accused talked of having drunk alcohol at the celebration. PW2 and 3 did not mention having seen accused drinking but they saw the accused and they formed the opinion that accused was drunk.

As to where he was arrested, the accused seems to admit that he went to hide in the ceiling of his house, when he heard people talking outside his house but when he heard the Chief's voice he came down from the ceiling. Both PW3 and 4 who went in search of the accused said that they found accused hiding in the ceiling of his house and he had the knife that was produced in evidence. Accused's version of what happened at his house cannot be true because if he had already alighted from the ceiling when PW3 and PW4 entered the house, then PW3 and 4 and others would not have known that he ever hid himself in the ceiling. I find that PW3 and 4 found accused hiding in the ceiling of his house after they went to his house and called him out. His conduct speaks volumes. It is evidence of his guilt.

In an offence of murder, the prosecution has to prove the two ingredients:

1. That the accused caused the unlawful act;(actus reus)
2. That he possessed malice aforethought(mens rea).

Section 206 of Penal Code defines malice aforethought 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 person actually killed or not;***

(b) knowledge that the act or omission causing death will probably cause the death 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”.

In this case, both PW2 and 3 believed that accused was drunk. They must have seen his condition and his behaviour and believed that he was drunk. He too said he had drunk alcohol at the celebration. Of course, this court cannot estimate how much alcohol he had consumed. From his conduct, however, accused's judgment may have been impaired due to the alcohol. The court also notes that the deceased sustained only one penetrating injury to the lumbar region which severed the abdominal aorta resulting in massive bleeding. Considering all the evidence in its totality, it seems the accused was drunk and that state deprived him of the ability to form the required malice aforethought to prove a charge of murder and the defence of intoxication under Section 13 of the Penal Code applies.

I find that accused did cause the death of the deceased, when he stabbed him without good cause. However, the offence of murder was not proved, but instead I find the accused guilty of the offence of manslaughter contrary to Section 202 as read with 205 of the Penal Code and convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JUNE, 2015.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mungai for State

Mr. Wamache for Accused

Faith, Court Assistant