



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT MERU

HCRA 43 OF 2011

REPUBLIC PROSECUTOR

VRS

ISAACK KOBIA ACCUSED

JUDGEMENT

Isaack Kobia is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He is alleged to have murdered Charles Kiriamburi on 26/11/2011 at Kawiru Location, Igembe South. The Prosecution called a total of three witnesses namely: Moses Michubu (PW1), Patrick Gitonga Ncee (PW2) and PC Joseph Kiminda (PW3). When called upon to defend himself, the accused testified on oath and called one witness, Janet Makena (DW2).

PW1 Moses Michubu recalled that on 26/7/2011, he was with his brother, Charles Kiriamburi (deceased) while they were coming from Kawiru Market at about 8.00 p.m. They found a person standing by the road side. The person started beating Charles using a club. He did not know why the attack and tried to ask why but the person did not answer. PW1 said it was dark but he had a torch which he flashed and saw that it was Isaack Kobia (Accused) whom he knew as a neighbor who was assaulting Charles. PW1 said that Isaack also threatened him and it is then he started to scream and people who included Patrick Gitonga (PW2) came and Isaack ran away. PW1 said that Charles fell and Isaack continued to hit him while on the ground. PW1 said he saw Charles complained of pain in the chest and head. PW1 then walked Charles home slowly and next morning they reported at Maua Police Station and proceeded to Nyambene General Hospital where Charles was treated and discharged with an appointment for 1/8/2011. Charles got worse and PW1 took him to Muthara Hospital where he was admitted. With the help of the Chief, they found Isaack and took him to the Maua Police Station but learnt that Charles had died on same day. PW1 further told the court that for some time, the deceased and Isaack had disagreed over their late brother's wife, DW1 Janet Makena. Their brother had died in 2005 and Isaack had taken over the wife and Charles did not like the fact that Isaack had moved into the late brother's home with the wife; that as a family they were not happy about it. He admitted that the clan had deliberated the issue of Isaack and Janet.

By the time PW1 testified, he said that Isaack and Janet had demolished the late brother's house and moved away with the children. PW1 said that Gitonga was one of the first people to arrive at the scene of attack. Patrick Gitonga Ncee (PW2) told the court that on 26/7/2011 at about 8.00 p.m. he heard somebody crying on the road. He flashed his torch and saw Charles lying on the ground and Isaack was beating him. He knew both of them well. He said he also started screaming for help. He found PW1 (Michubu) at the scene. Other people came and Isaack ran away. PW2 said that he saw Isaack hitting Charles on the chest and head. They lifted Charles from the scene as he held his chest in pain. He learnt of Charles's death about 1/8/2011.

PW3 PC Joseph Kiminda is the Investigation Officer in this case. He recalled that Charles Kiriamburi made a report to Maua Police Station on 27/7/2011 about 10.30 a.m. that he had been attacked and assaulted by Isaack Kobia which report was booked. PW3 was assigned the case after a report was made that Charles had died. PW3 visited the scene and recorded statements from witnesses and attended the post mortem. PW3 produced the post mortem report because Dr. Kangethe who performed the post mortem was unavailable to testify, having gone for further studies. The Doctor found a depression on right parietal area and formed the opinion that the cause of death was a blunt force trauma to the head resulting in bleeding within the cranial vault.

When called upon to defend himself, the accused said that on 26/7/2011 about 8.00 p.m., he was at home when Moses (PW1) went there with Charles (the deceased) and they started abusing him asking him to leave Janet Makena's who was a wife to their deceased brother; that deceased got hold of Janet's hand and pulled her outside. She was then pregnant; that he feared for Janet, he got a stick and hit deceased twice on the left side of the ribs and both PW1 and deceased left, alleging that he had beaten them. DW1 said that the deceased and PW1 used to harass them; that they threatened to come back and they did return at 4.00 a.m. but he did not get out. He said Janet gave birth on 7/10/2011. He denied ever hitting the deceased on the head; that deceased used to drink a lot and would fight with people and had been cut on the hand and leg.

DW2 Janet Makena told the court that her husband was a younger brother of the deceased and PW1. She started living with Accused after the death of her husband and the family of her late husband were offended by it and kept telling accused to leave their home and she should not give birth there. She said that on 26/7/2011, PW1 and deceased went to her home and wanted to start a fight; that accused picked a stick, and hit Charles twice on the stomach; They entered the house and locked it and that PW1 and deceased continued to make noise outside, went away and then returned at 4.00 a.m.

At the close of the defence case, Mr. Mbogo, Counsel for the Accused, adopted the submissions made earlier at close of prosecution case, to the effect that in a murder charge, the prosecution had to prove that the unlawful action caused the death; that in the instant case, the most crucial witness PW1, said that the deceased was only hit on the chest; that the post mortem revealed that the injury to the head caused the death and therefore the accused cannot be blamed for the death of the deceased.

Having carefully considered the evidence on record, there is no doubt that the accused was a person well known to the deceased and PW1. They were neighbours at the time of this incident and the accused had moved into the home of their late brother and was cohabiting with DW2, Janet Makena, their sister-in-law. The evidence adduced by both the prosecution and defence is that PW1 and deceased family was not happy with Isaack's action of moving into their late brother's house and that the matter had even been adjudicated by the local administration. PW1 told the court that there had been fights between the deceased and accused over the same issue. It was not denied that the standing dispute was the source of what happened on the night of 26/7/2011.

Both prosecution and defence are in agreement that there was indeed a confrontation between accused on one hand and PW1 and deceased on the other. The point of departure is, where did it occur? PW1 narrated in detail how he took deceased home and next day, reported at the police station before proceeding to Hospital. PW3 PC Kiminda, the Investigating Officer, confirmed that report was made at the Police Station on the morning of 27/7/2011. PW3 referred to it as OB 91 of 27/7/2011, which totally tallies with what PW1 told the court as to how the incident occurred – that it occurred on the road and not at DW2's home. During cross examination of PW1, the court's attention was drawn to the statement written by PW1 to the police and the court noted that it was exactly what he had told the court as to where the attack took place. By the time the first report was made, the deceased was still alive with no possibility that the deceased was going to die and there was no possibility of the report being manipulated. PW2 did corroborate PW1's evidence as to where the incident that resulted in deceased's injuries occurred. The importance of the first report cannot be underscored. The Court of Appeal considered its importance in **CRA 82-85/2011 KIOKO KILONZO & OTHERS V REPUBLIC** when it relied on the decision of **TEREKALI & ANOTHER VS REPUBLIC [1952] EACA** where the court said:

“... Evidence of first report by; the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”

I believe the prosecution evidence that it is the accused who waylaid the deceased on the road on the material date and assaulted him.

The other issue that arose is whether the accused inflicted the fatal injuries. The confrontation between the accused and deceased occurred on the night of 26/7/2007 and the deceased died on 1/8/2007, 4 days later. In his testimony, PW1 told the court that at time of attack it was dark and the accused started assaulting the deceased by hitting the him on the ribs and that when he fell, he continued to hit him on the head. During cross-examination, it transpired that, in his statement to police, he never mentioned that the deceased was hit on the head. He admitted that he only mentioned that deceased was hit on the chest because that is what he saw and the deceased complained of chest pains the next day. Similarly, PW2 said that he found the deceased lying on the ground holding his chest in pain and that he saw accused hit deceased on chest and head. In cross-examination, he also admitted that he did not tell the police that the deceased was assaulted on the head. I have taken into account all the circumstances of the case; the assault occurred along the road, at 8.00 p.m. It was dark, save for the torches that PW1 and 2 said they had. There was also evidence from PW1 and 2 and specifically PW3 who observed the body at the time of post mortem that there were no visible injuries on the deceased’s body. The post mortem report also indicates that there were no open injuries on the body save for a depression on the right parietal region that may have been caused by a blunt object. Taking into account the scene of crime, it is very possible that the witnesses could not have seen every place that the accused hit the deceased. PW1 readily admitted that the deceased had an old fracture, on the leg (10 years old) which the Doctor confirmed. In his defence, the accused and DW2 introduced allegations that the deceased was a drunkard and used to fight with people and he may have been injured elsewhere. I find these allegations to be unfounded and an afterthought. The accused’s counsel had an opportunity to cross-examine PW1 and 2 and at no time were such allegations of the deceased’s character and the possibility of him having been injured elsewhere alluded to. Accused said he hit the deceased twice on the ribs but no injuries were noted on the deceased’s body. It is no wonder that PW1 and 2 saw deceased complain of chest pains but no visible injuries were seen. After the confrontation between accused and deceased, the deceased reported to the police station next day, was referred to hospital where he was treated and discharged on 27/7/2007. After that, his condition deteriorated and PW1 took him to Muthara Hospital where he was admitted on 1/8/2007 and he died on same day. There is no evidence that there was any other intervening factor in deceased’s life that could have caused his death other than the injuries inflicted by accused on 26/7/2007. He died within 6 days of the assault. I believe and find that the deceased died from injuries inflicted by accused.

In a charge of murder the prosecution has to prove that:

1. An unlawful act was committed;
2. Malice aforethought or intention to cause death. Section 206 of Penal Code defines malice aforethought as:

“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 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;

(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 there is no doubt that the deceased's life was cut short by the unlawful act committed by the accused. The accused had waylaid the deceased and attacked the deceased while armed with a blunt weapon with which he assaulted the deceased. The attack was as a result of their disagreement over the relationship of accused and their late brother's wife, DW2. The accused planned the attack on the deceased and put it into action when he went to waylay him on the road. His intention was to harm the deceased, which he did.

Consequently, I find that the prosecution has proved the charge of murder against accused to the required standard that is beyond any doubt. I find accused guilty of murder as charged and convict him accordingly, under section 322 of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF JUNE, 2015.

R. P. V. WENDOH

JUDGE

PRESENT

Mr. Mulochi for State

Faith, Court Assistant

Mr. Mbogo for Accused

Accused, Present