



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 70 OF 2011

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

ALLAN ASEKA AMBONGO.....ACCUSED

JUDGEMENT

The accused person is charged with Murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that:

“On the 28th day of August 2011 at Kariobangi North within Nairobi County, murdered Francis Karoli Mulimu.”

The prosecution called a total of 8 witnesses. The summary of the prosecution case was that the deceased was attacked by the accused person who stabbed him during a scuffle that ensued between the accused person on one hand and PW1 (Isaac Luteya) and his cousins PW4 (Ferdinand Anduku) and Juma Robert Isichi on the other. PW1 had gone to collect a memory card he had lent DW1 which he had refused to return. On reaching the accused’s place, they differed with the accused person who told them that the card was with someone else. They proceeded to look for that other person but did not find him. In the process, an argument ensued that eventually led to the stabbing and eventual death of the deceased person.

PW1 and the deceased person were cousins. At the time the offence was taking place, PW1 was together with his two other cousins George (PW3) and Ibrahim (PW2) at George’s house when George received a call from PW4 that his brother had been stabbed with a knife. They responded immediately and went to the scenewhere they found the deceased had been taken to Huruma Nursing Home for treatment. They proceeded to the Nursing home where they found the deceased screaming in so much pain. They then decided to move him from the nursing home to Kenyatta National hospital where they left him receiving treatment.

PW4 later called PW3 and informed him that the person they suspected to have stabbed the deceased was also threatening to stab him near his house. PW3 and his two cousins PW2 (Ibrahim) and PW1 (Isaac) proceeded there but did not find the suspect as he had already left. George later received a call informing him that the deceased had passed on.

It was his evidence that they went to the police station and found the accused surrounded by people outside the station and holding a knife in his hand. The accused threw the knife under a parked car, and tried to escape but the crowd managed to arrest him and put him inside the police station. The knife was later collected by George who handed it over to the police.

PW2 Ibrahim Chebukosya was the deceased's brother. He was at his house in Kariobangi on 28th August 2011 at around 8.30 pm together with his brother George Milimo (PW3) and cousin Isaac Luteya (PW1) when his cousin Ferdinand (PW4) called George. He suddenly left the house running without informing them what the problem was or where he was going. PW2 later learnt that his brother had been stabbed and George had rushed to help him out. PW4 told PW2 that Francis had been stabbed with a knife and had been taken to receive medical attention. He rushed where Francis had been taken at Huruma nursing home and found him screaming and in great pain. He had been stabbed in the stomach and his intestines were protruding outwards. He tried to establish who had stabbed him but the deceased did not tell him who had done that. They rushed Francis to Kenyatta National hospital where they left him receiving medical attention. PW2 was later called by the doctor who informed him that Francis had passed on.

PW 3 George Mulimo was at his house on the 28th August 2008 at 8:30 am together with his mother and brother Ibrahim (PW2) and Cousin Isaac (PW 1) when Ferdinand (PW4) who was also his cousin called him and informed him that his brother Francis had been stabbed with a knife. He rushed to the scene that was near Kariobangi Catholic Church and on arrival found the deceased had since been taken to Huruma Nursing Home. He immediately went and reported the matter to the police.

On reaching outside the police station, he met the suspected person whom he said he knew before the incident as he used to cook and sell chapatti in the area. He was holding a knife in his hand. At the police station he met PW1 and PW4. He entered the police station with PW1, PW4 and Robert. The police asked them to bring the suspect in which they duly did. However, he threw the knife away as they arrested him. The police asked PW3 to go find the knife which had been thrown outside the bar under a vehicle. PW3 found the vehicle had been driven away. He picked the knife using a polythene bag and handed it over to the police. (However, in his statement to the police he said that "we also handed over the knife to police which he threw away when he heard that we were taking him to police station and it was blood stained.")

PW4 Ferdinand Angawa Andugu was an eye witness. He testified that on 28th August 2011 at around 8.00am accompanied by the deceased (Francis), Cetric Ngosi and cousin Robert they saw the accused "Vickie" at a distance enter his house and remembered that that he had his memory card that he had refused to return. PW4 followed him to inquire about the memory card. They met the accused's wife who informed them that the accused was not in the house. However as PW4 had seen him enter, he insisted on meeting him as he knew he was inside the house. He went to the back and saw him sitting at the door. The accused asked why PW4 had brought so many people with him to his house. PW4 explained that he had come to collect his memory card that the accused had overstayed with. The accused told him he didn't have the card with him and asked PW4 to come for it the following week. PW4 refused. The accused offered to give him another one at an extra cost but PW4 declined the offer. The accused told PW4 that the said memory card of 2GB was with his friend Ben. He offered to take them to his house, a plot that was about 100 meters from the accused's plot. They went there but did not find him as his house was locked. The accused then picked up a quarrel with the deceased and assaulted him in the process. He removed a knife and stabbed him on the side of the stomach causing the deceased shouted that he had been stabbed. PW4 had tried to rescue the deceased from the assault by the accused in vain. The deceased held the stab wound with his hand and pleaded with his colleagues to arrest the accused. At the time PW4 was together with his colleagues Robert and Cetric Ngosi. They took the deceased to hospital in a motorbike while PW4 who was left behind called the deceased brother PW3 to inform him of the incident. Cetric Ngosi rode with the deceased on a motorbike while Robert followed on foot. PW4 and PW3 went to report the incident to the police. However, the deceased did not make it and died shortly thereafter.

On his way back from the police station, PW4 met with the accused friends Ben who the accused had alleged was in possession of the memory card and Edgar who was the owner of the memory card. He met them where the accused used to do business. The accused showed up shortly after, holding a knife in his hand and threatened to harm PW4. PW4 however calmed him down and the accused let him go. PW4

then called PW3 and alerted him that he had seen the accused person in the vicinity.

PW 5 Zacharia Akula Amwayi was the deceased's uncle and brother to his dad. He identified his body at Kenyatta Hospital Mortuary on 30th August 2011. He observed that the intestines were sticking out of the body.

PW 6 Charles Muthoka booked the death report by PW3 and effected the arrest of the accused person on 28th August 2011 at 9 pm. Members of the public arrested and brought the accused to the police station. PW6 also received the knife that was said to have been used in the offence. The accused had no visible injuries. He also received the alleged knife that was used in the crime.

PW 7 Lawrence Kinyua Muthumuri was the Government analyst. He received the following items from PC Ngugi of Kariobangi Police Station On 5th September 2009

- 1) An exhibit memo (MF3)
- 2) A knife wrapped in khaki paper
- 3) A blood sample indicated as that of Francis Milimo Kavori (deceased)

He examined the knife which was blood stained and the deceased blood group too. Having conducted the analysis, he formed the opinion that the DNA profile generated from the knife was of an unknown male origin.

PW 8 P.C Stephen Ngugi attached to Kariobangi Police Station carried out the investigations of this case. He testified that they found the suspect "**Allan Aseko Abongo**" the first accused in this case at the police station accompanied by relatives. He interrogated the relatives of the deceased and recorded their statements. From this investigation, he established that the deceased was in the company of his cousins Robert Isichi and Ferdinand Angaiya when they went to the accused person's home.

He testified that he learnt that the accused was the first one to make a report at the police station. He visited the scene of crime where he found a pair of slippers which he says belonged to the accused. The murder weapon was brought to the station by the deceased's relatives. He sent the knife for analysis to the Government analyst. PW8 attributed the killing of the deceased to a quarrel between the accused and the deceased over a memory card. He also alluded to the possibility of a fight between the accused and his cousins. The accused he said, had been brought to the police station by the deceased cousins. They all said they knew the accused physically but not by name. PW8 was recalled to produce the post mortem report as exhibit 4.

DW1 Allan Aseka Ambongo made a sworn statement in his defence. On the said date when the offence took place, he was sleeping in his house when he heard a knock on his door a few minutes to 9 pm. His friend Isaac (PW1) had come to pick his memory card that he had given DW1 two weeks earlier. DW1 however told him that he had lost it together with his mobile phone. DW1's wife even volunteered to pay him to purchase another one but DW1 wanted to settle it by himself. PW1 refused to leave without the card as he raised the pitch of his voice in the ensuing argument. Shortly after, some people who had accompanied PW1 entered his house and an argument ensued that prompted the caretaker to come and find out the cause. DW1 asked that they go to Ben who had the said memory card and they all proceeded to his place. It was his evidence that no sooner had they reached Ben's place when PW1 stopped DW1 and told him that they wouldn't go a step further than they had reached. DW1 tried to reach his wife's phone to call Ben, however PW1 prevented him from doing so. PW1 took pliers and hit DW1 on the mouth injuring two of his teeth and causing him to bleed in the process. PW1 was joined by his colleagues who included the deceased in continuing the attack against DW1. DW1 defended himself by boxing PW1 who fell down as the others continued beating him.

DW1 said that PW1 cut him on the left wrist and thighs using a knife. DW1 tried to get the knife from PW1, but was unable to. PW1's colleagues managed to pull PW1 away from DW1. However, they fell

down with his friends and it is then that he heard the deceased scream and say that he had been stabbed with the knife. DW1 took the opportunity to run away from them. DW1 said that he ran to his house where he found his wife and sister who escorted him to the police station where he reported his ordeal to the police. He made a report twice. The first time, he reported assault against him by PW1 and his friends as well as theft of his money. After this report, it was his evidence that he went back to his house and found that his house had been burglarized and things stolen from it. He went back and reported a second time when they met with an officer who told him to hide as there were people looking for him to kill him.

Together with his wife, they left the police station, and met PW1 and his colleagues who began screaming at him that he had murdered someone. DW1 and his wife decided to go back and seek refuge at the police post. The officer at the station intervened and urged all of them to sit on a bench outside the station as he consulted with his seniors. A senior officer came and listened to both parties before he decided to arrest and place DW1 in the cells.

DW1 complained that in spite of the injuries he suffered; the IO denied him an opportunity to see a doctor for treatment. He instead gave him pain killers. He denied being in possession of the said knife and urged that it was PW1 who brought the knife to the police station. He denied that he was arrested by members of the public. He also denied quarrelling with the deceased and urged that he had no reason to quarrel with him. DW1 said that the said "Vicki" was also known as "Isaac" the PW1.

Finally, it was his evidence that those who attacked him were not called to testify with the exception of PW1. He made two reports to the police, the first one being assault and theft and the second one being house breaking and stealing.

I have carefully considered the entire evidence adduced by the prosecution and the defence and submissions made by both sides.

The burden to prove a charge of murder against an accused person lies with the prosecution to prove beyond any reasonable doubt that the accused person attacked and inflicted injuries on the deceased resulting in his death. They must prove that the accused formed the necessary mens rea to commit the offence that is that at the time the accused inflicted the injuries on the deceased he had formed an intention to either cause death or grievous harm to the deceased. They must also prove that the accused possessed malice and aforethought as defined under section 206 of the Penal Code. The said provision reads:-

"206. Malice aforethought 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;***
- 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."***

From the entire set of evidence adduced by the prosecution in this case, I note that there were indeed eye witness accounts of the events that transpired on the material night when the deceased was fatally wounded leading to his death. However, not all the eye witnesses were called to testify, with the Defendant arguing that only one eyewitness that is PW1 was called to testify.

Counsel for the accused relied on his earlier oral submissions made in court at the prima facie case stage as well as those he had filed after he closed his defence case. It was his case that the prosecution had not proved its case beyond reasonable. He urged that the accused in his defence testified that he was involved

in a confrontation with the deceased as well as PW3, PW4 and PW5 and it was not clear who among them had the knife that was used to stab the deceased. He cited the Government Chemist report that concluded that the blood was from an unknown person.

He urged that the accused was acting in self-defence as a result of provocation and cited a few authorities in support of the same. The evidence on record he noted did not attribute any criminal liability on the accused person and therefore urged the court to acquit him.

Ms Onunga for the state also relied on her earlier submissions. She urged that the accused's argument that he had struggled with the deceased before the deceased was stabbed in the process and that they were separated by PW3, PW4 and PW5 was untrue. She urged that at the time of the offence, the accused was wearing an apron from where he removed the knife that he used to commit the offence.

Ms. Onunga Counsel for the State in her submissions observed that the evidence by PW3 was candid. PW3 testified that after the accused fled the scene of crime, they ran in pursuit of him and caught up with him. The accused threatened PW3 with the same knife he had used against the deceased. It was her case that PW1, PW2, PW4 and PW5 went to the police to file the report. They cornered the accused as he fled and found him holding the said knife which he threw under a parked vehicle. PW2 recovered the knife and handed it over to the police.

Ms Onunga urged that although the knife had been analysed and returned negative results, the same could be attributed to the fact that the accused had enormous time with the knife at his disposal which allowed him to interfere with the evidence. She noted that the extent of attack showed that the accused person had malice and aforethought that led him to assault the deceased person by stabbing him on the abdomen where vital organs were housed.

The main issue that arises is whether the Prosecution proved its case beyond reasonable doubt?

Were PW3, PW4 and PW5 there during the scuffle?

DW1 argued that only PW1 testified as a witness among those that attacked him or were present at the time of attack. Looking at PW1's testimony however, I note that he was not there during the scuffle, and only arrived to find the deceased had been rushed to the nursing home. During cross examination he was emphatic when he said ***"I did not witness the assault"*** However, according to DW1's defense, PW1 was at the scene when the arguments and assault occurred and actually was the one who triggered the ensuing argument and scuffle. Who between DW1 and PW1 then was telling the truth?

DW1's Counsel argued that the accused was involved in a confrontation with the deceased as well as PW3, PW4 and PW5. This argument contradicts the accused defense that none of his attackers with the exception of PW1 testified. During cross examination by the State Counsel, he categorically stated at page 157 that; ***"Those who testified were not the ones who were with Isaac at the scene of incident"*** If the accused was indeed involved in a confrontation with PW3, PW4 and PW5, then he should have identified them in court as they were prosecution witnesses.

PW4 Ferdinand Angawa Andugu gave evidence that he was accompanied by the deceased (Francis), Cetric Ngosi and his cousin Robert when they spotted the accused at a distance entering his house. From this record, he must have been present during the scuffle that ensued shortly thereafter and directly witnessed the same. DW1 however does not mention PW4 in his defense as a witness present when the offence took place. He is only mentioned by his Advocate during his closing submissions.

Of serious concern is the fact that from the record, neither Cetric Ngosi, who I note rode with the deceased to hospital on a motorbike according to PW4, nor PW4's cousin Robert who followed them on foot, both who in my view were crucial eye witnesses present at the scene were called to testify in this case.

PW3 met the suspect outside the police station holding a knife in his hand and in my view was not there

during the scuffle and only linked up with the rest at the police station.

PW5 Zacharia Akula Amwayi was not at the scene when the offence took place. From the record, he identified his body at Kenyatta Hospital Mortuary on 30th August 2011.

The arguments by the Defense Counsel in my view are not only contradictory but also do not hold water

Who witnessed the stabbing incident?

PW1 did not witness the stabbing, but was informed by PW4 who called him, same as PW2 and PW3. Only PW4 said he witnessed the stabbing. The other two gentlemen that were with PW4 i.e Robert and Cetric did not testify, though I note that Robert in his statement to the police said that the deceased was stabbed outside the accused house whereas PW4 in his statement says that the deceased was stabbed on the way to Ben's house. Cetric did not record a statement. PW4 said during his cross examination; ***"I..... just saw him stabbing the deceased with it"*** According to DW1 testimony, it is only PW1 who witnessed the stabbing incident that testified.

I do note however that though he was at the scene when the deceased was being stabbed, PW4 does not disclose what the quarrel between the deceased and accused was all about. Is it that he knew something or simply chose to remain quiet?

Who was entitled to the memory card?

PW4 in his testimony says that the accused had his memory card that he had lent him 2 months earlier which he had gone to take. DW1 however in his defense said that it was his friend Isaac (PW1) who had come to pick the memory card that he had given him two weeks earlier which belonged to PW1's friend. I have looked at the record and note that PW1 on his part does not mention anything to do with a memory card in his evidence. The question then is who was entitled to the memory card that was at the heart of this dispute? Was it PW1 or PW4? I find that this card belonged to PW4. He testifies of this card in court contrary to PW1 who does not say anything about it. DW1 in my view cites PW1 as a diversionary tactic.

What is the implication of the medical report?

PW7 examined the knife which was blood stained and the deceased blood group and formed the opinion that the DNA profile generated from the knife was of an unknown male origin.

Whose house were the witnesses in when they received the report?

PW1 on one hand in examination in chief says they were at Ibrahim's house and in the same breath says they were at George's house. PW2(Ibrahim) on his part says they were at his house when the call came in. Who between them was saying the truth? PW1's assertion was corroborated by that of PW3 that they were at PW3's and not PW1's house.

Having come to the conclusions I have of this case. I substitute the charge against the accused under section 179 of the Criminal Procedure Code, from murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 of the same Act. I find the accused guilty of the substituted offence of manslaughter and convict her accordingly.

DATED AT NAIROBI THIS 29TH DAY OF OCTOBER, 2015.

LESIIT, J.

JUDGE.