



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 44 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

PAUL NGANGA KAMUNGE.....ACCUSED

JUDGMENT

The accused person **Paul Nganga Kamunge** faces a charge of **Murder contrary to Section 203 as read with Section 204 of the Penal code**. The particulars of the charge were given as follows:-

“On the 26th day of April 2013 at Ponda Mali Estate in Nakuru Municipality within Nakuru County, murdered James Kiarie Kamanu.”

The accused entered a plea of ‘**Not Guilty**’ to the charge. His trial commenced before **Hon. Lady Justice Mshila** on 17/2/2014. The prosecution led by the learned state counsel called a total of five (5) witness in support of their case.

PW1, Joel Njoroge Mwangi, told the court that he knew both the accused and the deceased as matatu touts in the ‘**Ponda Mali**’ area of Nakuru. On 26/4/2013 at about 10.00 a.m. **PW1** stepped out of his kiosk in order to go and purchase water. He heard shouts of ‘**Shika Huyo.**’ **PW1** checked what the commotion was about. He saw the accused holding a knife in his hand and chasing after the deceased. The crowd were running after the accused. **PW1** decided to hop on a motor bike in order to join in the chase. He chased accused person for some distance towards Langa Langa. The accused ran into a plot and dived into a barrel drum full of water. **PW1** followed and pulled accused out of the water. He then prevailed upon the mob not to lynch the accused and took him to Bondeni Police Station.

PW5, PC Albert Juma, told the court that on the material day he was on duty at Bondeni Police Station. At about 11.30 a.m. members of public brought to the police station the deceased who had a cut on his neck and the accused. **PW5** re-arrested accused and directed that the deceased be rushed to hospital for treatment. The deceased unfortunately died whilst undergoing treatment. After conclusion of police investigations the accused was charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer. At this point **Hon. Justice Mshila** was transferred to the Nyeri High Court. I took over the matter and placed the accused upon his defence. He opted to make an unsworn defence in which he denied any and all involvement in the death of the deceased. This court must now analyze the evidence on record with a view to determining whether the charge has been proved to the legally required standard.

The offence of murder is defined in Section 203 of the Penal Code as follows:-

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

This definition gives rise to four (4) ingredients of the offence of murder all of which must be proved beyond reasonable doubt. The 4 ingredients requiring proof are:-

1. **The fact of the death of the deceased;**
2. **The cause of that death;**
3. **Proof that the death of the deceased resulted from an unlawful act or omission on the part of the accused;**
4. **Proof that the said unlawful act or omission was committed with malice aforethought.**

On the fact of death there is no dispute. **PW1** and **PW2** both of whom knew the deceased well and identify him as **‘Kiarie’** confirm that the deceased died whilst undergoing treatment at Nakuru Provincial General Hospital. **PW5** the Investigating Officer also confirms that he went to the mortuary where he arranged for an autopsy to be conducted on the body of the deceased.

Similarly regarding the deceased’s cause of death there exists no controversy. **PW3, Dr. Titus Ngulunga** is the pathologist who conducted the autopsy on the body of the deceased. He confirms that he noted a single stab wound on the neck. He opined that the cause of death was **“asphyxia following hemorrhage to the airway with attendant clogging of the bronchiola due to a single stab wound to the trachea.”** This was expert medical evidence which was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased met his untimely death as the result of being stabbed in the neck.

The next key question is whether it was the accused who unlawfully stabbed the deceased and caused his death. There was no witness who actually **saw** the accused stab the deceased. **PW2, Samuel Ndungu** told the court that he only heard some unnamed persons say that it was accused who had stabbed the deceased. **PW2** did not himself witness that stabbing. His evidence is of little assistance to the court.

PW1 told the court that he too did not actually witness the stabbing. What he did see was the accused chasing the deceased whilst wielding a penknife. The prosecution therefore relies upon circumstantial evidence to prove the guilt of the accused. Circumstantial evidence is that evidence which though not direct points at the guilt of the accused. Therefore in order for circumstantial evidence to suffice as proof of guilt it must exclude all other possible scenarios.

In this case **PW1** has said that he saw the accused chasing the deceased. The incident occurred at about 10.00 a.m. It was broad day light and visibility was good. **PW1** stated that he knew both accused and the deceased as matatu touts in the area. He knew the accused by his nickname of **‘Ngangalito.’** Thus this was not a mere visual identification. **PW1** knew and was able to recognize the accused. Recognition has been held by the Court of Appeal to be **“more satisfactory, more assuring and more reliable than identification of a stranger.”**

PW1 told the court that he joined in the chase to apprehend the accused. He hopped on a motor cycle and rode after the accused. **PW1** describes the chase thus:-

“I gave chase to Nganga who was headed to Langa Langa about 5 metres from Eliza House. I gave chase, jumped over 3 plots fences – accused disappeared. Found accused hidden inside a big drum with water about 200 litres. The water was for construction saw bubbles arising from the drum....”

It is clear from this narration that at no time did the witness ever lose sight of the accused. He chased and eventually fished the accused out of a drum full of water. This indeed raises the question of why accused would seek to hide by submerging himself inside a drum full of water at risk of drowning if he had done nothing wrong. **PW1** said he had seen accused wielding a knife as he chased the deceased. It cannot be a mere coincidence that the deceased was found to have been stabbed in the neck. The knife was also recovered inside the drum of water together with a cap the accused had on. Both items were produced in

court as exhibits **PExh.1** and **PExh.2**.

From the above there can be no doubt at all that it was the accused who stabbed the deceased. No other possible scenario can be envisaged. The accused stabbed the deceased and then ran away to avoid apprehension. However, **PW1** put up a spirited chase and managed to catch up with accused. At no time did he ever lose sight of the accused. On the basis of the circumstantial evidence available accused – seen chasing the deceased while wielding a knife I find that it can only have been the accused who stabbed the deceased. I therefore find that the *actus reus* for the offence of murder has been sufficiently proved.

The final ingredient requiring proof in a murder charge is that of '*mens rea*.' This is the mental element and in law is defined as '**malice aforethought**'. Malice aforethought is defined by Section 206 of the Penal Code 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 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.”**

In this case the act of stabbing another in the neck can only have been intended to kill or at the very least causing grievous bodily harm to the victim. Accused could have had no other intention. I find that malice aforethought as defined by Section 206 has been proven to exist.

In his defence the accused denied having stabbed the deceased. This defence amounts to a blanket denial. Accused offers no explanation for his apprehension by members of public and his delivery to the police station. I find no merit in his defence and the same is hereby dismissed. Based therefore upon the foregoing I am indeed satisfied that the charge of murder has been proved beyond reasonable doubt. I therefore convict the accused under Section 203 of the Penal Code.

Dated in Nakuru this 17th day of December 2015.

MAUREEN A. ODERO

JUDGE

PRESENT:

Ms. Ngovi for state

Ms Kerubo for accused