



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO.11 OF 2010

REPUBLICPROSECUTOR

VERSUS

BAKARI MAGANGA JUMAACCUSED

J U D G M E N T

1. The accused faces a charge of Murder contrary to Section 203 as read with Section 204 of The Penal Code. It is alleged that on 4th May 2010 at Kariokor Majengo in Voi Township, Voi District he murdered Beatrice Mwadima (the Deceased).
2. The Prosecution case comprised of 7 witnesses. After hearing their evidence, the Court formed the view that the Accused needed to answer the charge. He chose to do so by giving a sworn statement.
3. In the evening of 4th May 2010, Joseph Mbogho Mwadima (PW 1) sat at the verandah of his house, in the company of his friends, to enjoy traditional brew. They had started to drink at about 7.00 p.m. He was first with Zainab (PW 4) and one Bernard but was later joined by the accused. The accused appeared drunk when he joined them and carried a jerrican of “Mbangala” – a traditional brew.
4. As the night wore the accused became more drunk, rowdy and abusive. The noise woke up the Deceased who was sleeping in a house close by. This would be at about 10.00p.m. The Deceased came out and asked the accused to stop making noise. The accused would not hear of it and continued with his rowdy behaviour. The two exchanged abusive words and then the accused suddenly left and returned after about 3 minutes. He insisted on continuing to drink and again became abusive towards the Deceased who decided to return into her room.
5. The accused followed her and abusing her. The witness heard some commotion and a loud bang. The accused came running out. This shocked the revellers who ran towards the source of the sound. There they found the Deceased badly wounded and bleeding profusely. She shortly succumbed to injuries she had sustained. PW 1 saw a stab wound to her right side of her neck and left thigh.
6. Zainab Maemba (PW4) who was present at the home of PW1 recalled the events of the fateful night in a similar way as PW1. Only that she thought that the accused had after the first confrontation with the Deceased left for about 5 minutes before returning with his mother Kibibi in toe. It was also her further testimony that at the time he saw the wounded Deceased she uttered the words “Bakari has stabbed me.” She also testified that she saw the accused well. He wore an orange “T” shirt and a black track bottom.
7. On the same night Nicholas Ouma Ndaga (PW 2) met the accused outside the house of PW 2. That the accused asked him for water to wash his hand. He never said why needed to wash his hands. But PW2 noticed that he had blood on his hands. The Accused wore slippers, an orange T-shirt and Black Track Bottom. All were stained with blood. PW3 needed to fetch the water. As he did so, he heard screams from the direction of the Deceased’s house. He went there only to

- find that the Deceased had been killed. PW2 was told by the village Elder Holiness Wakesho (PW3) that the accused had killed the Deceased.
8. Without disclosing to PW3 that the accused was in his house, PW2 returned and confronted the accused about the incident with the Deceased. The accused told him that they had a small fight. PW2 locked the accused in his house and returned to tell PW 3 about this.
 9. PW3 was told by Kibibi Juma and Hadija Bakari that the accused had killed the Deceased. He left for the house of the accused where he found a crowd. There he found the body of the Deceased at the doorstep of her house. She was bleeding profusely. He saw a stab wound on her breast and thigh. Later he was to go to the house of PW2 with some Police officers who included PC William Chepo (PW6). There they found the accused lying on the floor inside the house. He was asleep. That on searching the Deceased PW6 recovered a knife from the right hand pocket of his trouser. However PW2 told Court that it was he (PW 2) who removed the knife from the accused's trouser.
 10. Dr. Charo Wilson (PW 9) is a Senior Medical officer, Voi and holds a Bachelors Degree in Medicine and Surgery. He conducted a post-mortem on the body of the Deceased on 6th May 2010 and in his report (Exhibit 5) observed as follows on the external appearance of the body:-
 - a. A deep cut wound on the right carotid region.
 - b. A deep cut wound on the left Dutoid region (shoulder)

He formed the opinion that the cause of death was cardio-pulmonary arrest due to shock caused by ruptured carotid artery. He explained this to mean that there was a drop of blood pressure due to extensive bleeding. It was his further view that the probable weapon used was sharp.

11) It fell to Sgt Gabriel Rotich (PW7) to investigate the death. He formed the view that the accused had committed the offence and preferred the charge against him. The officer produced the following exhibits.

- i) A pair of slippers Exhibit 1
- ii) Suspects trouser – Exhibit 2
- iii) Suspects yellow “T” shirt – Exhibit 3
- iv) Knife – Exhibit 4

12. In his sworn Defence, the accused remembers that on 4th May 2010 he and some friends went for a Mnazi drink at 9.00a.m at his neighbours. One of them was Musa. He drunk up to 1.00p.m. He left shortly with Musa and returned at 2.00p.m. They stayed there up to about 6.30p.m when he carried some “take away” alcohol and headed for the home of PW1. He joined PW1 and his friends. He got very drunk.

13. At one point he left for a nearby shop to buy cigarettes. On his way someone pulled him violently and a struggle ensued. He fell on a wood fence. Later he noticed that he was bleeding from his left hand. He tried to prevent further bleeding using his shirt but in vain. That is when he met PW2 and explained what had happened. PW2 took him to his house, offered him water to clean his hands and a towel. He wiped himself and then lay back to rest. As he rested Ouma and the Police came into the house and arrested him. The accused did not recognize or identify the person who attacked him as he made his way to the shop as it was dark.

14. The accused denied injuring or killing the Deceased who he claimed was a friend. He would have no reason to kill her. He maintained that he was not armed with a knife on that day. He however accepted that the orange shirt (Exhibit 3) belonged to him but that the blood on it was his.

15. In her closing submissions Ms Odhiang appearing for the accused made two pronged arguments. On the one hand it was argued that the prosecution case fell short of proving that the accused committed the offence. On the other this Court was urged to find that the accused person was drunk and did not intend to kill the Deceased who was his friend. That there could be no malice aforethought and the probable offence was manslaughter.

16. Something, right away, needs to be said about the latter Defence. The Defence of Intoxication is a Statutory Defence (Section 13 of The Penal Code). The onus is on the accused person to prove its existence and the burden of prove is on a balance of probability. In his sworn Defence, the accused denied committing the offence and stated that he was a victim of an assault committed by an unknown person. He explained the blood on his clothes as coming from an injury to his hand sustained in the attack. Not for a moment did he say that he was under such heavy influence of alcohol that he killed the Deceased unintentionally or unknowingly. My view is the accused did not even attempt to set up a Defence of intoxication. The Defence cannot therefore be available to him. So did the Prosecution prove its case beyond reasonable doubt?
17. The witnesses who were close to the scene of the incident were PW1 and PW4. They, together with the accused, were at the house of the PW1 drinking traditional liquor. They sat at the verandah to the house. The accused had joined them at about 7.00p.m. PW1 and PW4 testified how the accused was drunk and noisy. They also testified how the Deceased who was sleeping in a room close by came out and urged them not to continue with the noise.
18. At that point the accused became abusive and exchanged some unkind words with the Deceased. The accused left them shortly. PW1 says for 3 minutes while PW4 put it at 5 minutes. The difference is insignificant. On returning, the Accused continued with his abusive onslaught. This time round the Deceased decided to return back to her room.
19. PW4 gave some detail about the access into the Deceased's house. That house is fenced with iron sheets. A gate accesses the outside into the verandah of the house. From the verandah one accesses the Deceased room with a single door. The accused followed the Deceased into the gate of the fence. Shortly PW1 and PW4 heard a loud bang against the iron sheet and the accused then emerged running. The two found the Deceased bleeding profusely from her neck. She also had injuries to her left arm and left thigh. PW4 testified that the Deceased spoke out the following words "Bakari has stabbed me." She succumbed to her injuries shortly thereafter.
20. Up to this point there was consistent and firm evidence by the two witnesses that the accused joined them for a drink as they sat together from 7.00p.m up to around 10.00p.m when the incident is said to have happened. This was a considerable long period of time. The three were all friends and known to each. There would have been no mistake that the accused was at the house of PW1 on that day. Indeed the accused said as much in his Defence.
21. There is firm evidence as to how the accused and the Deceased exchanged some harsh words and how the accused followed the Deceased as she made her way back to her room. Shortly thereafter the accused came out running and the Deceased was found with severe injuries. But neither of the witnesses saw how she had sustained the injuries.
22. It was the evidence of PW4 alone that the Deceased said that she had been injured by Bakari (the accused). If spoken, the words may amount to a dying Declaration as contemplated by Section 33 (a) of The Evidence Act which provides:-

“33. Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases -

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

The words were spoken by the Deceased at a moment when she was bleeding profusely from an injury to her neck. There is no knowing whether she believed that she would survive the injury. Sadly she died moments later. She may have spoken what she truly believed. That it was Bakari (the accused) who stabbed her. It is possible that her believe was mistaken?

23. Perhaps not because the evidence of PW2 incriminated the accused further. Shortly after the

- incident, PW2 met the accused outside his house. He had blood in his hands. The accused asked for water to wash his hands. The witness saw that the clothes of the accused were stained with blood. The slippers, trouser and track bottom worn by the Deceased on that night were produced in Court. PW6 who arrested the accused also saw those clothes.
24. PW2 locked the accused inside his house until the point of his arrest. PW2 also said that he recovered a penknife from the house of the accused. But this contradicted what PW6 told Court, that he was the one who made the recovery. That penknife was produced as Exhibit 4. That contradiction notwithstanding the other Prosecution evidence severely implicates the Accused.
25. In his Defence, the accused admits that he went to the house of PW2 on that night while bleeding but that it was PW2 who offered him some water to clean up his wounds. He admitted that there was blood on his shirt but says that it was his own blood from his left hand. Forensic examination of the clothes could have provided an unequivocal resolution as to whose blood was on the clothes. Unfortunately this was not done because as explained by PW7 the Exhibits were badly stored and contaminated and the Government Chemist found them unfit for examination.
26. That said who between the accused and the prosecution witness is to be believed? This Court has weighed on this matter. It has found the Prosecution witnesses to be consistent and credible. Throughout the testimony of the Prosecution witnesses this Defence theory did not pop up. None of the witnesses was asked about it. It would have been expected that at least PW2 would be challenged on this aspect. The accused in his testimony said that he explained to this witness how he had sustained his injury. But on his cross-examination PW2 was not asked a single question on this. I have to come to a conclusion that the theory was an afterthought and this Court rejects it. Although the evidence incriminating the accused is circumstantial in nature, this Court finds it to be so overwhelming that there is no other reasonable conclusion that can be drawn other than that it was the Accused who stabbed the Deceased.
27. The postmortem conducted by PW9 found that the Deceased had two cut wounds, one to the neck and another to the shoulder. The Doctors opinion was that the probable weapon used was sharp. Anyone who stabs another on the neck intends to cause grievous harm to the victim and must take responsibility for the likely consequences of his action. The blows inflicted by the Accused proved fatal. I have to find that malice aforethought in the circumstances contemplated by Section 206 (b) of the Penal Code has been established. That provides,

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

a)

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.”

I find him guilty of murdering Beatrice Mwadima and convict him of the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

F. TUIYOTT

J U D G E

COUNTERSIGNED, DATED AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2014.

J U D G E

IN THE PRESENCE OF: