



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO.20 OF 2011

REPUBLICPROSECUTOR

VERSUS

WILLIAM KOOME MIKAOACCUSED

J U D G M E N T

1. It is said Kilonzo Mahuzi Kombe (Deceased) met his death on 29th May 2011 at Mtwapa Township in Kilifi County. The accused was said to be responsible for that death and faces a charge of Murder contrary to Section 203 as read with Section 204 of The Penal Code.
2. Eight (8) witnesses testified in prosecution of the charge, while the accused gave sworn testimony in his Defence.
3. On 29th May 2011 P.C. Bernard Ngeno (PW 3) was on patrol at Mtwapa township together with P.C. Kioko and P.C. Momanyi. At about 4.00a.m. they were informed that a person had been beaten and was lying on the side of the road. Indeed they found that person. He was bleeding heavily. The officers got a lift from a good Samaritan and rushed him to Mtwapa Medical clinic. Whilst there, they were joined by Inspector Jason Odhiambo (PW5).
4. A Clinical officer at the Clinic advised that the patient be transferred to Coast General Hospital for more advanced treatment. Unfortunately the person was pronounced dead on reaching the doorsteps of the hospital. That person who died is the Deceased herein.
5. Inspector Christine Ramadhan (PW 8) was on duty at the crimes office at Mtwapa Police Station on 29th May 2011. A person by the name John Barui visited the Police Station and informed her that he had witnessed the incident leading to the death of the Deceased. John informed her that she knew where the suspect resided because he (the suspect) was his friend. Later on that day John led a group of Police officers who included PW5, P.C. Harun Chebii (PW4) and PW8 to the house of the suspect whom they found fast asleep. On knocking, the suspect opened the house and was arrested. He did not resist his arrest. It was the testimony of PW5 that he led a search of the suspects house but was unable to recover the murder weapon.
6. At about 7.15a.m on 29th May 2011 Joseph Mwandui Nguu (PW2) received information from one Daudi that his cousin Kilonzo had been stabbed to death in the night. PW2 visited the scene near Blue Cafe. He saw a pool of blood on the ground near there. He later visited Mtwapa Police Station where he was directed to Coast General Hospital (popularly called Makadara Hospital) mortuary where the Deceased body lay. PW2 saw the body, he saw a wound under the left armpit. Lilian Mwendu (PW1), a sister to the Deceased also saw the body at the mortuary. She saw a wound under the left armpit.
7. A postmortem was conducted on the body of the Deceased on 10th June 2011 by Dr Lucy Ann Wahome (PW 7) a Doctor at Coast Provincial Hospital. She holds a Bachelor of Medicine and Surgery from the University of Nairobi. The body of the Deceased was identified to her by PW1 and PW2. In the postmortem report produced in Court (P Exhibit 1), the Deceased was referred to

as John Kilonzo Malusi. Presumably, John was his Christian name. The external appearance of the body was severely pale and had a stab wound in the right axilla (armpit) measuring 3cm. Internally, there Lungs had partially collapsed and both were adherent to the Rib Cage. In the cardi-vascular system the Doctor observed,

“several right axillary vessels collection of altered, clotted blood in axilla.”

In the end the Doctor formed the opinion that the cause of death was Hemorrhage due to severed axillary vessels. In Court she explained that the Deceased may have bled to death and the suspects weapon would be a sharp object.

8. The investigation of the suspected murder of the deceased fell to PW5. In his testimony he explained that there were two witnesses who saw how the Deceased sustained the stab blows. This was one John Mbarui (Barui) and another whose name he could not recall. He thought that both had recorded statements. But his colleague PW8 was certain that Mbarui had not recorded any statement.
9. A person who says that he saw the accused stab the Deceased was Amos Kimani (PW6). This witness recorded his statement with the Police after charges had been preferred against the accused. He infact referred to the suspect as “the accused” in his statement. He told Court that he volunteered to be a witness after other witnesses were reluctant.
10. It was the testimony of PW6 that he knew both the Deceased and the accused. They grew up with the former while the accused used to sell miraa to them. PW6 acted as a security person at Santiago Video Hall on the night of 29th May 2011. The star attraction on that night was a big football match between Manchester United and Barcelona. The Deceased was one of the patrons who watched the match and left at 1.30 a.m.
11. After his duties PW6 passed by Burn Off Bar. There he met the Deceased who was with his girlfriend. PW6 danced with them. PW6 then left for California Bar. This was at 2.30 a.m. He stood outside the Bar with a group of friends. Then the Deceased joined them. A short while later the accused who looked very upset came and called out the Deceased but shortly thereafter said, “sorry it is not you.” This upset the Deceased and the two started to fight.
12. PW6 and his friends tried to separate them and it was while doing so that PW6 says that he noticed that the accused was armed with a Maasai sword. That sword was tacked into his trouser. The accused, fearing the PW6’s group run away. The Deceased hot in pursuit. The Deceased tried to kick the accused but the accused turned and stabbed the Deceased, twice with the sword. That the stabs were on the left side of the Deceased’s chest. The Deceased continued to run after the Deceased but was overcome by his injuries.
13. PW6 then testified how the Police came to the rescue of the Deceased only to find him dead. But on cross-examination the witness said that the Police took the Deceased to Hospital where he succumbed to his injuries just on arrival.
14. In his sworn testimony the accused explained that he trades in miraa and cigarettes at Mtwapa. On 29/05/2011 at 12.30 am he decided to leave his work early as he was to make an early morning trip. He asked his helper Steve Gitonga to escort him towards the Kilifi Bus Stop but after walking a short distance he turned back only to find that Steve was not there. When he got near California Bar he met a group of 6 people. One of them approached him and tried to snatch his mobile phone. Later the group attacked him and started to beat him. He screamed in distress, released himself and run. But not too far. They caught up with him near the Mosque where they robbed him of ksh.12,600/= and the phone he was carrying.
15. That the person who took his money started to run back towards California and the other five gave him a chase. He got himself together, very tired now, he said, and went home. He told a neighbour about the incident and asked him to accompany him to Mtwapa Police Station so as to lodge a complaint but the neighbour declined because it was late into the night. So the Deceased slept until 8.30 a.m. when he was woken up and arrested by the Police. He denied committing the offence and says that he was not armed at all on that night.
16. That is the evidence that calls for my analysis. There is no doubt that the Deceased died on 29th July 2011. A postmortem examination carried on his body revealed that he bled to death and had a stab wound on his right axilla. Of all the eight witnesses called by the Prosecution only PW6

- implicated the Deceased.
17. As I turn my attention to his critical evidence, I must make an observation that has caused this Court some anxiety. The Investigating officer (PW 5) recalled that two people gave him eye witness accounts of how the Deceased sustained the fatal wounds. One was John Mbarui (Barui) but he could not remember the name of the other. PW 5 says that both had recorded statements with the Police. Although PW8 only made mention of Barui, she was certain that he had not recorded a statement.
 18. What the Court was not told was whether the other witness was in fact PW6. Anyhow something notable about PW6 was that his statement was recorded after the accused person had been arraigned and charged in Court. He in fact refers to the accused person in his statement as an "accused". He neither calls him by name nor describes him. PW6 in fact conceded that at the time of making the statement he was well aware that the accused had been charged. The witness explains why he was a late comer,

"I recorded the statement after I volunteered because others were reluctant."

One of those reluctant persons would be Mbarui (Barui). Mr. Atanacha appearing for the accused asked me to disregard the evidence of the witness because it was created evidence.

19. The explanation given by PW6 as to why he came late into the Prosecution case may create a suspicion that his evidence was fabricated so as to fill in for those who were reluctant to come forward. For that reason this Court will approach his evidence with the necessary circumspection.
20. To his credit, PW6 was steady in his evidence as to how the accused allegedly called out the Deceased as they stood outside the California Bar. How this irked the Deceased who then attacked the accused. A fight broke out. Thereafter the accused ran, pursued by the Deceased who attempted to kick him. At that point the accused, it is said, turned back and stabbed the deceased twice using a Maasai sword.
21. That firmness, notwithstanding, the evidence runs into trouble because the postmortem examination does not support the evidence of the witness that the stab was on the left side of the Deceased's abdomen and that the Deceased was bleeding on the left side of his chest. Although PW1 and PW2 said that the wound they saw on the Deceased was under the left armpit, the Doctor who conducted the Postmortem found that it was on the right side. PW3 who saw the Deceased before he died also stated that the Deceased was bleeding from the right side of his chest.
22. Besides, the categorical evidence of PW6 was that the accused stabbed the Deceased twice, yet in the Postmortem report, on examination of the external appearance of the Deceased's body revealed one stab wound of 3cm. If PW6 was true in his evidence then it will have to be assumed that the second blow landed on the same spot as the first.
23. Taken up by the Defence and with some merit is the quality of light that enabled the witness see and recognize the accused. The incident happened, according to the witness at about 2.30a.m. It was dark. On the source of light, the witness says he saw the sword carried by the accused because of electricity light from Blue Café Hotel. But there was no evidence of the intensity of that light nor is there evidence that the light made him see and recognize the face of the accused.
24. So there are aspects of the evidence of the only eye witness that weakened his account. But there is yet another troubling aspect of the Prosecution case. The impression given by PW8 was that John Mbarui (Barui) was the only reluctant witness. Yet, if PW6 is to be believed, he was with a group of friends outside California Club when the Deceased joined them and the disagreement between him and the accused arose. Under further cross-examination he would put this as a group of six. These are the people who tried to separate the two fighting adults. The other five, just like PW5, may or may not have seen the deadly attack on the Deceased. But it would seem that they saw the initial confrontation between the Deceased and the accused and the physical struggle between the two. It must be incredible that none of them were called to aid the evidence of PW6. And no explanation was given by the prosecution for this.
25. Given my take of the evidence adduced by the only "eye" witness, I reach a conclusion that the Prosecution has failed to prove its case beyond reasonable doubt. This Court acquits the accused of the charges he faces. He is hereby set at liberty unless held for some other lawful reason.

F. TUIYOTT

J U D G E

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

IN THE PRESENCE OF:

J U D G E