



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL Case no. 33OF 2010**

***LESIT, J***

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**PATRICK KIMATHI.....ACCUSED**

**JUDGEMENT**

1. The Accused **PATRICK KIMATHI** was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 7<sup>th</sup> day of June, 2010 at Atheru Village, Amwathi Sub-location, Kabachi Location, Mutuati Division, Meru North District, within Eastern Province, murdered Stanley Meme.
2. The prosecution called 4 witnesses. The facts of the prosecution case were that James Mwenda, who is PW1 in this case, had been employed by the deceased and his wife PW2, to guard their miraa shamba. At about 11 pm, the accused person and his brother, one Mungathia went to the shamba of the deceased and asked PW1 to give them a torch. When PW1 said that he did not have any torch the accused and his brother started beating him.
3. At around the same time the deceased was walking home with his wife, PW2 and a friend, PW3 when they heard PW1 screaming. They went to the shamba of the deceased where PW1 was being beaten and they separated PW1 from his attackers. According to PW3, the two attackers turned against the deceased, and PW2 and 3 managed to separate them. All of them reconciled and PW2, 3 and the deceased started walking away. That is when Mungathia requested the deceased to help him drive his car so as to move it from from where he had parked it to Muriuki's place.
4. The deceased is said to have taken the car key from Mungathia. He then walked to the vehicle. At that point in time PW1, 2 and 3 said that they did not know where Patrick was. The deceased walked over to the driver's door which he opened. His wife, PW2, and PW3 were a short distance behind him. All they heard was the deceased make a sound and then he said "Come! Patrick has stabbed me at the car!" The deceased then fell down and Patrick ran away from the scene with the weapon.
5. The deceased was eventually taken to the hospital where he died while undergoing treatment. The postmortem form was produced by the Investigating Officer PW4, as P. Exhibit 2. It shows that the deceased died due to cardio-respiratory arrest secondary to lung collapse and hemo-pericardium following stab wound.
6. The investigating officer testified that he arrested the accused person one day after the incident at his sister's home in Laare. PW4 took the accused to a doctor for Mental Assessment. He produced the P3 form as P. Exhibit 1. That report shows that the accused was fit to plead. The P3 form also shows that the accused person had some injuries which were bruises on the head and hands,

- and which were caused by blunt objects. The injuries were assessed as harm.
7. The accused person was placed on his defence. In his statement which was under oath, he stated that he and his brother Mungathia went on a drinking spree and that they took 8 glasses of changaa each from 8 pm to 11 pm. That they took this changaa at the deceased bar where PW1 was also working. The accused stated that about 11pm his brother Mungathia said that he had lost his car keys and he stood up to look for the keys around the same area.
  8. The accused stated that when the deceased saw that Mungathia had gone he and PW1 went to him and demanded that he, the accused, pay 700/- for their drinks. The accused stated that his plea that the two should wait until Mungathia returned to pay for the drinks fell on deaf ears. He said that PW1, the deceased and another set upon him. They started beating him before the deceased produced a panga with which he cut him on the left knee. The accused stated that the deceased dropped the panga and that he picked it, and that in the cause of their struggle the deceased was stabbed in the chest. The accused stated that he admits that he stabbed the deceased as a result of which he died. He said that he had not planned to kill him, and that there was no grudge between the two of them.
  9. The accused faces a charge of murder contrary to section 203 of the Penal Code. Under that section murder is defined as follows.

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

Section 206 of the CPC gives the circumstances which constitute malice aforethought in the following terms:

**“206. 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) ...**

**(d) ...”**

6. The prosecution must prove that the accused person not only stabbed the deceased, but that at the time he did so he had formed the necessary malice aforethought to cause either death or grievous harm to the deceased.

7. In the accused statement in defence he admits that he stabbed the deceased in the chest. There is therefore no dispute that the accused stabbed the deceased in the chest, and that it was out of those injuries that the deceased died. What is in dispute however, is the circumstances leading to stabbing. According to the prosecution case the accused and his brother had gone to the shamba of the deceased where they assaulted his worker PW1. According to the prosecution witnesses, it is the deceased, PW2 and 3 who rescued PW1 from the accused and his brother Mungathia; and that soon thereafter Mungathia requested the deceased to drive his vehicle from where he had parked it, not far from the deceased shamba, to park it at Muriuki's place. It is when he opened the vehicle in order to enter the driver's seat that the deceased was stabbed.

8. The defence has put in a new angle to the case in which the accused contends that he stabbed the deceased at a drinking place which was ran by PW1 and owned by the deceased. The accused claims that after he and his brother drank 16 glasses of changaa, his brother left him behind. That

it is then that the deceased together with PW1 and another assaulted him as they demanded payment for the changaa he and his brother had taken. The accused claims that it was the deceased who had a panga with which he cut him, the accused, on the left knee. He even showed the court a healed scar on the left knee measuring two inches. The accused said that he took the panga from the deceased when it fell down. Although the accused started by saying the deceased was stabbed in the chest as they fought, he later changed and stated that he admits that he stabbed the deceased in the chest and that the deceased died as a result of that injury.

9. Having considered the evidence adduced by both sides I find that there is no dispute that it is the accused that stabbed the deceased, as a result of which the deceased sustained serious injuries, to which he succumbed and died during the same night. There is no dispute that PW1 was a central part of the incident that led to the attack on the deceased. What is disputed are the actual circumstances leading to the incident.

10. The prosecution case has inconsistencies between the evidence of PW1 on one hand and that of PW2 and 3 on the other. This is regarding the place where the alleged fight between the accused, his brother Mungathia and James PW1 took place. According to PW1 the fight took place inside his house which was in the shamba belonging to the deceased who had employed him. However PW2 and 3 testified that the scene of the fight was in the shamba of the deceased outside in the open.

10. The other inconsistency regarded the lighting at the scene. According to PW1 and 2 there was moonlight during the incident which enabled them to see clearly and enabled them to make identification of persons at the scene. PW3 on the other hand said he had a 3 battery torch which could light up a distance of 80 meters. This witness swore that on the material night there was total darkness and there is no way anybody could see anything without the aid of light.

11. The other inconsistency regarded the people who were present at the scene when the accused stabbed the deceased. While all the prosecution eye witnesses agree that the scene of the incident was at the driver's door of the car belonging to Mungathia, PW2 and 3 were very clear in their evidence that PW1 was left at the shamba and therefore did not witness the incident.

12. The reason why all these inconsistencies are material is because the accused person has contested both the circumstances leading to the incident and the place of that incident. It is the duty of a trial court to try and resolve inconsistencies, especially those in the evidence of the prosecution case. I have analyzed the entire evidence before me in this case and find that I am unable to resolve the inconsistencies in the prosecution case. The prosecution witnesses contradicted each other regarding the place of the fight between the accused, PW1 and Mungathia; the conditions of lighting of alleged scene of stabbing; and the people that were present at the time of stabbing.

13. These inconsistencies in the evidence are of material importance. They go to the very substance of the case. The only conclusion one can make is that the prosecution witnesses were not telling the whole truth regarding the circumstances leading to the incident and the place where the incident took place.

14. Turning to the defence case, the accused has explained that incident arose out of a fight. He has explained how the fight started and has said that he was not the one who started the fight and that rather, he was the victim of an attack by the deceased and PW1 as they demanded payment for alcohol he and his brother had taken.

15. The injury the accused alleges the deceased inflicted on him on his knee was proved to be a lie because the PW3 form filled by Dr. Kariuki about a week after the incident did not capture that injury. That notwithstanding, I tend to believe the accused statement that the scene of the attack was in the deceased bar where he sold changaa and not at the scene described by the prosecution witnesses. I tend to believe the accused version because the prosecution witnesses

admitted that the accused and the deceased had no grudge against each other, and that there was therefore no logical explanation for the attack on the deceased in the circumstances described by the prosecution witnesses. Furthermore after the deceased was stabbed, the prosecution witnesses are on record admitting that the brother of the accused, one Mungathia, carried the deceased, his wife and PW3 in his car and took him first to Mutuate Hospital and thereafter to Maua Methodist Hospital. However they did not make it to Maua Hospital because the vehicle overturned and they had to get another one. There is no reasonable explanation why Mungathia could have agreed to carry the deceased to hospital if he had been stabbed by his brother in the circumstances described by the prosecution witnesses, as from those circumstances Mungathia would be regarded to have been involved in a set up to murder the deceased. He would have been regarded a key suspect of the death of the deceased. I doubt he would have carried the deceased to hospital had he been a key suspect of the death of the deceased.

14. I find that the prosecution has been unable to establish malice aforethought against the accused. The evidence by the prosecution failed to establish at the time the accused stabbed the deceased he had formed the necessary intention to cause death or grievous harm to the deceased. I noted that the defence did not put the scenario of the attack in accordance to the statement of the accused when cross examining the prosecution witnesses. However, due to all the inconsistencies in the prosecution case which I could not resolve I find that the circumstances of the attack as described by the accused were more plausible and also reasonable. I find that the accused stabbed the deceased and that at the time he did so he was under the influence of alcohol and was incapable of forming the necessary malice aforethought to commit the offence of murder.

15. The other issue to determine is that of malice aforethought. Has the prosecution established that the accused had formed the necessary intention to commit the offence of murder? In Nzuki V Rep 1993 KLR 171, the learned judges of Appeal set out the principles of determining whether intention to commit murder is proved as follows:

**“ 1. Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.**

- 2. Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions**
  - a. To cause death;**
  - b. Cause grievous bodily harm; and**
  - c. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits these acts deliberately.**
- 3. Without an intention of one of these three types, the mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.**
- 4. ...**
- 5. The offence with which the appellant was charged and convicted was committed in an environment of beer drinking and dancing, and except for the appellants bare statement in his unsworn testimony, there was absolutely nothing on the record of the superior court from which it could be implied that the appellant had any of the intentions when the unlawfully assaulted the deceased.”**

16. The prosecution did not prove that at the time the accused committed this offence he had formed the necessary intention to cause either death or grievous harm to the deceased. The accused was in a place of drinking alcohol and had consumed a lot of it before the circumstances leading to the stabbing of the deceased occurred. There is no evidence whatsoever that he had formed an intention to cause death or grievous harm to the deceased. The prosecution has

therefore not proved the offence of murder under section 203 of the Penal Code.

17. Having come to the conclusion I have of this case I find that the accused person caused the accused death and that he did not have the malice aforethought to commit murder. I therefore substitute the charge against him from murder contrary to section 203 of the Penal Code to that of manslaughter contrary to section 202 of the Penal Code under the powers given to this court under section 179 of the Criminal Procedure Code. I find the accused person guilty of the substituted charge of manslaughter and convict him accordingly.

**DATED AND DELIVERED AT MERU THIS 27<sup>th</sup> DAY OF MARCH, 2014.**

**LESIT, J.**

**JUDGE**