



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 56 OF 2010

LESIIT, J

REPUBLIC

V E R S U S

PETERSON MUTHEE MURAGARESPONDENT

JUDGMENT

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 5th day of September 2010 at Chirigwe village Thigaa Sub Location, Maara District, within Eastern Province murdered Denis Mutegi Kea.
2. The Prosecution called nine witnesses. The brief facts of the prosecution case were that the deceased was the husband of PW1, while the accused sold in a shop belonging to his mother. On the material day at 7 pm PW1 borrowed money from her husband for purposes of buying sugar. The deceased gave the wife PW1 500/-. PW1 went to the shop and bought ¼ kilogram of sugar from the accused, she gave him shs.500/- expecting 475/- change. The accused refused to give back the change.
3. PW1 went back home and informed the deceased that accused had refused with change. The deceased decided that he had to go and demand the change from the accused that same night. PW1 heard some voices after deceased left and when she went to find out what was happening, she saw accused holding a knife sharpened on both sides (dagger) saying he would kill someone. That is when he stabbed the deceased once. He stabbed him several times after the deceased attempt to run away failed. The deceased died same night at Chogoria Hospital where he had been taken for treatment.
4. The accused gave a sworn defence in which he denied the charge. He stated that he spent the whole day at home and at 6 pm left for Kiarugu Market to relax. He went to Kacembes pub where he drank alcohol and chewed miraa. He then went home at 7 pm and after having supper he went to bed. He said that at 1 am he was woken up by his wife and told a person was knocking at his door. On opening he saw Police Officers who arrested him. He denied the offence and said he had no problems with the deceased or his wife. He denied selling at his mother's shop that day and denied refusing with PW1's change.
5. The accused is facing a charge of murder. The burden lies with the prosecution to prove the case against the accused person beyond reasonable doubt. The prosecution has to adduced evidence to prove that the accused caused the death of the deceased by unlawful act and that at the time he executed that act he was motivated by malice aforethought.
6. Malice aforethought is an important ingredient to the offence of murder. The circumstances which constitute this ingredient have been set out under 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**
 - b. **death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
 - c. **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;**
 - d. **an intent to commit a felony;**
 - e. **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.**
7. The eye witness of the incident is PW1 the wife of the deceased. After buying a quarter kilo of sugar from the accused the accused declined to give her change of 475/-. That money belonged to the deceased; PW1’s husband and she therefore went home and told her husband about it. According to PW1 the deceased decided to go back for the change the same night because schools were opening the following and he needed the money in order to pay fees for his children. PW1’s testimony was that after a few minutes after the deceased left, she heard voices of people talking and decided to go to check.
 8. She found the accused and the deceased exchanging words in front of the kiosk. The deceased was telling the deceased “bring the change” and the accused would reply “no I won’t”. After that exchange PW1 who had already arrived at the scene saw the accused who was by then armed with a knife stab the deceased once on the left chest. She saw the deceased trying to run away but he fell down on his stomach. In the meantime the accused chased PW1 and tried to stab her but she took off. She turned back in time to see the accused return to where the deceased was lying and saw him stab the deceased several times on the back.
 9. PW1 was screaming and as a result a brother of the deceased PW3 Benson Kirimi went to intervene and he too was stabbed on the leg.
 10. Another brother of the deceased PW7 had gone to buy a matchbox and he said that the mother of the accused person sold the matchbox to him and then he heard her warning him “you will be cut”. On turning to go he said that he was cut by the accused on the right hand. PW2 who is a nephew of the deceased and a cousin to the accused went to investigate the commotion and the screams he heard while in his home only to find the deceased lying on the stomach, and his cousin the accused person passing up and down near the kiosk. It is PW2 who got a vehicle in which he carried his injured uncles i.e. Kirimi PW3, Njeru PW7 and Mutegi the deceased.
 11. The evidence against the accused was the eye witness account by PW1 who was present at the scene at the time the attack took place. The incident was between 7 and 7.30 pm. It was dark but there was a lamp hanging on the outside opening of the kiosk where the incident took place. The issue of identification is an important one since the incident was at night. I have considered the eye witness account of PW1 of what transpired. According to PW1 she was aware that the deceased went back to the accused to demand change which the accused had refused with. She heard the exchanges between the two before the deceased was stabbed.
 12. The evidence of PW1 was supported by the evidence of PW2 and 3. PW3 came to the same after being attracted by noises and screams. By the time PW3 arrived the deceased was lying on the ground facing down with several stab wounds. The accused person was also present. According to PW3 he pulled the accused person aside after learning from PW1 what the accused had done. He too was stabbed so was PW7 who came to the scene later. PW2 arrived at the scene after PW1, 3 and 7. He said that he saw the accused person with a knife pacing up and down near his kiosk. The deceased was lying down on the ground.
 13. The evidence of PW1 received material corroboration from PW2, 3 and 7. All these witnesses saw the accused person with a knife which was also identified as exhibit 1. The accused was still

- at the scene with the murder weapon at the time PW2, 3 and 7 arrived at the same scene. PW2 was a cousin of the accused while PW3 and 7 were uncles to the accused because they were brothers to the accused father. They all knew the accused person very well.
14. The accused put forward an alibi as his defence. He said that he was not home that day until 7 pm when he returned home chewing miraa. He denied committing the offence.
 15. In the case of **UGANDA v. SEBYALA & OTHERS [1969] EA 204**, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

16. The accused person does not bear any burden of proving that his alibi is true. All that is required is for the alibi defence of the accused to create a doubt in the court’s mind as to the strength of the prosecution case against him. In this case I find that the Prosecution case against the accused person is strong. There is eye witness account by PW1 who saw the deceased exchanging words with the accused before the accused set upon him with a knife. PW3 and 7 even though they came a little later were equally attacked by the accused person with the same knife he stabbed the deceased with. There is no possibility of mistaken identity. The accused was placed at the scene of crime. I find that the alibi defence of the accused person has been displaced by the strong evidence of the prosecution.
17. I carefully considered the evidence by the prosecution and the defence. It is clear that even though the accused, the deceased and most of the witnesses were very close relatives there was no grudge between any of them. The motive of the attack could not be deciphered and the attack puzzled the deceased wife (PW1) the cousin (PW2) the brothers (PW3 and PW7) and the mother of the mother of the deceased (PW4). Lack of a motive does not affect the prosecution case against the accused person. The evidence against him is overwhelming that he attacked the deceased just because the deceased demanded his change from purchase of sugar.
18. Regarding malice aforethought the court must also consider whether in the case of injury caused whether the accused inflicted a single or multiple blows. I am guided by the case of **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, where BOSIRE, O’KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

19. The Accused stabbed the deceased first on the chest and then on his back in the full view of PW1. Those injuries were confirmed by the Doctor in the Post Mortem report produced by Dr. Kiende on behalf of Dr. Mwaniki who performed it. The doctor found a stab wound on the right thumb three stab wounds on the back one stab wound on the neck, one stab wound on the upper left lung and one stab wound on the lower right side. The cause of death was hemorrhagic shock. The accused stabbed the deceased several times and must have known that the stabs could cause death or grievous harm.
20. Ms Nelima for the accused raised an issue with the nature of the weapon used to stab the deceased. The learned counsel for the accused urged that according to PW9 the stabs on the body of the deceased were created by a single edged stab.
21. PW9 who produced the post mortem report was not the doctor who carried out the post mortem. The statement that the stab wounds were caused by a weapon with a single edge is nowhere mentioned in the post mortem report. The evidence by PW9 that it was a single edged weapon

- which caused the stabbed wounds on the deceased was speculative and was also inadmissible as being a statement without any evidential or cogent basis.
22. The weapon that was recovered from the accused by the Assistant Chief PW5 and the Investigating Officer PW6 one Inspector Njoka was a dagger. It was identified as exhibit 1 by PW5 and 6 who recovered it the same night at around 11 pm, four hours after the incident. It was also identified by PW1 who witnessed the attack. It was a dagger which appeared sharpened on both sides. PW9's evidence that the murder weapon was a single edged is not a contradiction to the prosecution case since that evidence by PW9 was without basis.
 23. I find that the prosecution has proved beyond any reasonable doubt that the accused attacked the deceased by stabbing him several times with a knife. That knife was recovered from him the same night of the incident. There is no doubt that it was the accused person who executed the attack on the deceased single handedly. I also find that malice aforethought was proved in the evidence which shows that the accused set upon the deceased with a knife and stabbed him several times on the chest and the back which injuries caused excessive bleeding. The bleeding was the cause of death. By setting upon the deceased with a knife and stabbing him several times, the accused person should have known that doing so would cause the deceased death or grievous harm. Malice aforethought was proved under section 206 (b) of the Penal Code.
 24. Having considered the evidence adduced in this case I find that the prosecution proved the charge of murder contrary to section 203 of the Penal Code against the accused beyond any reasonable doubt. I reject the accused defence find him guilty as charged and convict him accordingly.

DATED SIGNED AND DELIVERED THIS 29TH DAY OF MAY 2014

LESIIT J

JUDGE