



IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 102 OF 2010

REPUBLIC.....PROSECUTOR

-VERSUS -

ALBERNUS MICHAEL KAMENDE.....ACCUSED

JUDGEMENT

The accused Albernus Michael Kamende is charged with murder contrary to **Section 203** and **204** of the **Penal Code**. The particulars of the charge are that on the 15th December 2010 at Olekasasi-B village in Kajiado North District, he murdered Samson Musembi Musyoka. The accused pleaded not guilty to the charge.

The prosecution lined up ten (10) witnesses in this case. The facts of the case precisely are that the accused and the deceased met in a chang'aa drinking place in the house of one Florence Achieng (PW1) at Olekasasi village in Ongata Rongai area on the 15th December 2010 in the evening hours. After taking a few drinks, the two disagreed and a confrontation ensued. The accused went outside the house where he grabbed a kitchen knife from PW1. He returned to the house and stabbed the deceased on the right side of the chest. PW1 called for help and her neighbours assisted her to arrest the accused. He was taken to Ongata Rongai police station through Olekasasi Police Post. He was later charged with the offence. The deceased was rushed to a nearby medical clinic for treatment. He was pronounced dead on arrival.

PW1 Florence Achieng was the first witness in this case (PW1). She testified that she used to sell fish and chang'aa in her house at Olekasasi-B estate in Rongai in the year 2010. On the material evening she was outside her house preparing fish for sale. The accused who was her customer came to the drinking place and was served with a glass of chang'aa. The deceased followed soon thereafter and bought himself a drink. The two men continued drinking in the house and the accused suddenly rushed outside and took the knife PW1 was using to prepare fish and went with it to the house. PW1 instructed her daughter PW8 to go after the accused and bring back the knife since she needed it for her work. As PW8 stood at the door demanding the knife, the accused used the knife to stab the deceased in her presence. When PW1 was informed she rushed and took away the knife from the accused and hid it. She was to later hand it over to the police as an exhibit. PW1 hired a taxi and with the assistance of neighbours she took the deceased and the accused to Olekasasi Police Post. The deceased died on arrival at Sinai Medical Clinic as the accused was handed over to the police for investigations.

PW2 the taxi driver testified that he was hired to take the deceased to hospital by one Moses. He was to drop the accused at the police station which job he did as required. Dr. Ndegwa conducted the post

mortem on the body of the deceased. He formed the opinion that the cause of death was excessive bleeding of the chest penetrating injury which had lacerated the right lung and perforated the right heart chamber.

The accused was found mentally fit to plead by Dr. Zephania Kamau who also assessed his age as 27 years. PW5 the Government Chemist conducted analysis on the blood stained knife. The blood matched with the sample of that of the deceased blood group B.

PW6 PC Njuguna of Olekasasi Police Post received the suspect at the police station and booked the report as no. O.B. 51 of 15/12/10. He accompanied PW1 and others to take the deceased to the clinic.

The body was photographed by Chief Inspector Bengi of the Scene of Crime Department. The photographs showed a stab wound on the right side of the chest. PW8 was the daughter of PW1. She testified that she served the accused with a drink and later the deceased in her mother's house. The accused went outside and took the knife her mother was using and after demanding that the deceased returns his phone, stabbed him on the chest with it. The investigating officer PW10 recovered the knife from PW1 and sent it for analysis to the Government Chemist. The officer conducted investigations and charged the offence.

The accused gave a sworn statement of defence. He told the court that he went to PW1's house and bought himself chang'aa. The deceased later joined him and they shared drinks together. As the accused prepared to leave the house to go home, the deceased who was a police officer formerly working at Rongai Police station, grabbed him and searched him. He removed accused's mobile phone from his pocket. The accused demanded that his phone be returned. When the deceased refused, the accused took a knife from PW1 and stabbed him. He then pulled out the knife from the chest of the deceased.

The eye witness in this case was PW8 Lavendar Awuor who was aged 12 years at the time of the incident. When she testified in court, PW8 was aged 14. A *voire dire* test was conducted and the court took sworn evidence from the witness. She told the court that she saw the accused go for the knife from her mother PW1 where she sat outside the house. When he came back, the accused placed the knife behind him on his seat and demanded that the deceased returns his phone. The deceased did not do so and a struggle between the two men ensued. The accused then took the knife and stabbed the deceased on the deceased's chest causing the deceased to fall down. The accused pulled out the knife from the chest as PW8 watched. PW8 called her mother who came to the scene and took the knife from the accused.

The court found PW1 and PW8 credible witnesses. Their corroborated testimonies were in harmony with the defence of the accused on how and why he stabbed the deceased and what weapon he used. Dr. Ndegwa's postmortem report was to the effect that the stab chest injury caused the death of the deceased. The blood-stained knife was recovered with the help of PW1 matched the blood of the deceased. The photographs of the body showed the stab wound on the right side of the chest.

PW1 and PW8 created an impression to the court that they were straight forward witnesses and persons of integrity thereby passing the test of credibility. In the case of **Ndung'u Kamanyi vs. Republic 1979 KLR 282** the court observed:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”

The evidence of PW1, PW5, PW6, PW8 and PW9 is overwhelming against the accused person that he is the one who assaulted the deceased and that the injury inflicted on the deceased caused his death. The murder weapon was recovered and produced in evidence. The two witnesses PW1 and PW8 knew the accused and the deceased well. The question of mistaken identity does not arise in this case. I find that the prosecution has established that the act of the accused caused the death of the deceased.

The next issue for determination is whether the accused had malice aforethought when he killed the deceased. The evidence of the two prosecution witnesses PW1 and PW8 was that at the time the disagreement started and progressed, the accused and the deceased were the only two people in the house. PW8 had served them with drinks and gone outside. PW1 was seated outside the house about 5 metres away preparing fish for sale. The deceased did not live to tell his side of the story on what the quarrel was all about. The accused's version is that the deceased who was a police officer told him that he was on duty and proceeded to search the accused. The accused said that by then, he had stood up to leave the place. His phone was taken away by the deceased and was not returned. This phone was not seen by PW1 and PW8 at any one time. After the stabbing of the deceased, the accused and the deceased were taken straight to the police station. The police did not recover the phone from either the accused or the deceased. The deceased had no opportunity to hide or dispose of the phone in the house of PW1. This casts doubt whether there was any phone taken from the accused by the deceased.

The defence in its submission pleaded provocation in that the deceased invoked his status as a policeman and got hold of the accused and frisked him taking his money and phone. The accused in his defence talked of only his phone being taken by the deceased. There was no mention of money.

The defence relied on the case of **Robert Kinuthia Mungai vs. Republic 1982 – 88 1 KLR** where the Court of Appeal accepted the defence of provocation. The accused in that case went to the house of his girlfriend and found her with another man. The man attempted to leave the home with the woman holding her. The accused who was armed fired three shots at the man injuring him fatally. In this case, the act of the deceased of being found in the house of the woman, who was the girlfriend of the accused and attempting to walk away with the woman holding her hand was indeed provocative.

I find the case before me distinguishable with the **Mungai** case. The deceased in this case did not do anything to provoke the accused in order to justify the use of a knife on him. The holding of the accused's trouser and searching his pockets, if it happened at all, was not sufficient to provoke the accused and to justify his cruel act on the deceased. The accused was of sound mental status and had not been intoxicated. It is important to note that the accused did not raise the defence of intoxication.

Assuming that the accused's phone had been taken away and that he was annoyed as he said, the question as to whether that was reason enough for him to attack the deceased with a knife. The accused said he believed the deceased was armed with a gun and that the deceased threatened to shoot him. The evidence of PW6 and PW10 was that no weapon was recovered from the deceased when they received him at Olekasasi Police Post. PW1 and PW8 who were at the scene did not see the deceased with any weapon. PW8 told the court that when the accused picked the knife and aimed it at the deceased, the deceased stood up and raised his hands in surrender. But the accused proceeded to stab him. He pulled out the knife from deceased's chest and aimed at him with the knife again. This is the moment PW1 came into the house. She demanded the knife from the accused and took it away with her. The accused was preparing to stab the deceased for a second time. The accused admitted he stabbed the deceased because he was annoyed due to the deceased refusal to return his phone. He said:

“I stabbed the deceased because he was harassing, beating me and eventually he wanted to shoot me. I believed Musyoka (deceased) was to shoot me if I did not defend myself”.

The deceased was not armed and put up his arms in surrender when the accused came and aimed the knife at him. In this scenario the accused understood the impact of the stabbing on the deceased. The act of pulling out the knife from the chest and preparing to do a second stab shows the accused intended to bring the life of the deceased to an end and not just to assault him.

I rely on the case of **Daniel Muthee vs. Republic Criminal Appeal no. 218 of 2005 (UR)** Bosire, Okubasu 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 a 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. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

In the case before me, the burden is on the accused to offer a reasonable explanation justifying his behavior. The explanation that the accused has given herein that he was defending himself is not convincing. The accused rushed outside the house, picked the knife and kept it on the chair behind him. He continued to demand his phone in the presence of PW8 who stood at the door. He then picked the knife and stabbed the deceased who was standing up in surrender. There is no evidence that the deceased had taken the phone of the accused or that he was armed with a gun or any other weapon to justify the act of the accused in self-defence. There was no evidence of the slightest provocation by the deceased to the accused. None of the two key witnesses heard the deceased utter any word in provocation. The act of the accused going outside to get the knife, coming back to the house, placing it on the chair behind him, and continuing with the quarrel and subsequently stabbing the unarmed man is evidence of premeditation. The accused was examined by PW4 Dr. Z. Kamau and was found to have no visible injuries. This is evidence that the deceased did not hit the accused during the altercation. The accused in his defence did not say he was assaulted. He said he feared the deceased would shoot him.

I do not find the act of stabbing the deceased justified and I reject the defence that the accused acted in self-defence.

It is my finding that the accused had malice aforethought as has been established by the prosecution. I find the accused person guilty of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and convict him accordingly.

F. N. MUCHEMI

JUDGE

Judgement dated and delivered in open court on **17th** day of **June, 2014** in the presence of:

1. Ms. Ikol for State
2. Mrs. Omung'ala for Tunya for accused
3. Accused present

F. N. MUCHEMI

JUDGE