



IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 27 OF 2009

LESIT, J.

REPUBLIC.....PROSECUTOR

V E R S U S

STANLEY MWITHALIE MUCHUI.....RESPONDENT

JUDGEMENT

1. The Accused **STANLEY MWITHALIE MUCHUI** is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are as follows: that on the 9th day of March, 2009 at Kiguru location, in Igembe District within Eastern Province, murdered Peter Gitau.
2. The prosecution called 5 witnesses. The facts of the prosecution case were that on 9th March, 2009 at 12.20 pm the deceased went running and calling out the name of PW5 Thirindi. When PW5 went out of his house he saw deceased covered with blood on his face and head. She was shocked and without saying a word she decided to run to Maurice, PW1 a son in law of the deceased to tell him. As she did, she saw the accused going round accused house carrying a panga. Eventually the accused was arrested and charged. The deceased died at the scene of the incident but before he did he told PW1 that Mwithalie was the one who cut him.
3. The accused denied the offence. He said he spent the whole day at his shamba working until 3 pm when he returned to his home. The accused stated that he heard nothing the whole day. He admitted he was the immediate neighbor of the deceased.
4. The Accused is charged with murder contrary to section 203 of the Penal Code. that section provides as follows:

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

5. The important ingredient for the offence which the prosecution must prove are that the accused was the one who inflicted the cuts on the deceased, that the deceased died as a result of the said cuts and that at the time he cut the deceased, the accused had formed the necessary malice aforethought to either cause deceased death or grievous harm.
6. Section 206 of the Penal Code sets out the circumstances which constitute malice aforethought as follows:

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) an intent to commit a felony;

(d) 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. I have carefully considered the entire evidence adduced by the prosecution and the defence. I have also considered submissions by Mr. J. G. Gitonga for the accused and Mr. Moses Mungai for the prosecution.
8. The issues in this case are whether the evidence of PW5 that she saw accused going round deceased home as deceased was coming to report to her soon after the attack was reliable. Secondly whether the statement by deceased to PW1 meets the test of a dying declaration? Thirdly whether alleged grudge between PW1 and accused could be the reason for PW1's evidence against accused? Fourthly whether alleged grudge between accused and PW3 and deceased provides the motive for this attack.
9. There was no eye witness of the attack. There were however evidence of PW5 that the deceased ran towards her gate calling her, PW5 saw accused carrying a panga going round the homestead of the deceased. PW5 stated that she did not talk to the accused because she was in shock due to the injuries she saw on the deceased and secondly because she feared accused may harm her as he was armed.
10. In his defence the accused stated that PW5 had a grudge against him because of a tree she bought from one Mwenda in 2005. The grudge arose because PW5 cut the tree and it fell into his, accused shamba destroying his food crops and his latrine. The accused stated that he reported the matter to the Administration who told PW5 to pay for the damage. That as a result, PW5 threatened that she would one day revenge.
11. Mr. Gitonga urged that the evidence of PW5 was unreliable. Mr. Mungai urged that the alleged grudge could not be a ground to fix accused with such an offence.
12. I did consider PW5's evidence. She was very clear that just when she went out to answer the deceased who was calling her walking towards her, she saw the accused person going round deceased home carrying a panga. The incident was at 12.20 pm so it was in broad day light. There was no one else around the scene at the time.
13. Regarding PW5's grudge against the accused I considered it a lie. Nowhere during the cross examination of this witness was she asked of a grudge against accused at all.
14. The other evidence against accused was the dying declaration. The deceased informed his son in law PW1 that it was Muthalie who cut him.
15. The test to apply in order to determine whether deceased statement was an afterthought is well settled.
16. In **CHOGE –V- R [1985] KLR 1.** It was observed as follows:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.

17. I find that the deceased made the statement implicating the accused when his death was imminent and at a time when the controlling force was to tell the truth about the cause of his death. The test was met and therefore the accused statement that "Mwithalie" was the one who cut "him" was a dying declaration.
18. There are two issues which arise. The first is whether the evidence of PW1 was reliable. It was accused defence that PW1 had a grudge against him because when PW1 was a teenager, three years earlier, he stopped him from defiling his daughter and prevented him, PW1, from befriending her.
19. I did consider the evidence of PW1. Nowhere did the defence cross examine him on the alleged grudge or any grudge at all PW1 may have had against the accused. In PW1's evidence he stated that the accused was known to him because he was his teacher in Primary School. I do not believe that there was any grudge between accused and PW1. The accused defence about preventing PW1 from befriending his daughter is an afterthought and I agree with Mr. Mungai at that point.
20. The second issue which arises is whether by Mwithalie, the deceased met the accused. On this point I considered evidence of PW5 that accused was within deceased homestead soon after the incident. That was the direction from which the deceased was coming. PW5 saw the accused carrying a panga. The evidence of PW5 tied up with the evidence of PW2 regarding how he found the accused soon after the incident. PW2 found the accused surrounded by members of the public in his compound and carrying a bloodied panga. The accused was the immediate neighbour of the deceased on one side. On the other side the deceased bordered with PW1.
21. From PW2 evidence the accused had not left the vicinity after the attack on the deceased. He was still within the neighborhood of deceased home when PW2 found and arrested him. The panga was not an exhibit.
22. PW2 was the Area Assistant Chief. Apart from finding accused with the blood stained panga soon after the attack PW2 stated that deceased had reported an issue he had with the accused over a stolen phone a few days to the incident. He however, said accused and deceased had no disagreement.
23. PW3 wife of the deceased gave evidence to the effect that she lost a phone on 4th March, 2009. That as a result her husband the deceased decided to request for a Notice appealing to people to return if they found it from the Assistant Chief.
24. PW3 stated that as they waited for the Notice, one day before the incident, the accused started throwing stones in their home. The deceased confronted him about it and he stopped. However, the very next day the deceased was murdered.
25. The accused in his sworn defence denied having any grudge with the deceased saying he was his great friend. He also denied throwing any stones at the home of the deceased.
26. I find that the evidence against the accused was circumstantial evidence. The evidence that the accused had a panga at deceased home soon after deceased was cut taken together with the dying declaration by the deceased and PW2's evidence that he had a blood stained panga soon after the incident all form a chain so complete that there is no escape from concluding that it was the accused who hurt the deceased.
27. The evidence of PW2 and 3 that there was an issue over stolen or missing phone between accused and deceased, and evidence of stone throwing by PW3 all seem to provide a motive for the attack. Nevertheless even where motive for murder is not established same is not fatal to the prosecution case.
28. The panga, the murder weapon was not exhibited in court. In fact the Investigating Officer was not called as a witness. It is important for the prosecution to adduce all necessary evidence they have in order to assist the court arrive at a just decision. PW2 and 5 talk of accused having a panga with him. It was not exhibited. I find however, failure to exhibit it in court is not fatal to the prosecution case as the evidence adduced by the witnesses was sufficient to establish the facts.
29. I find prosecution has proved that the deceased died of injuries he suffered in the attack.
30. I find that the prosecution has proved its case against the accused on the required standard. I find accused defence was bare denial and allegations of grudges against him by PW1 and 5 afterthought. I reject his defence in total.
31. I am satisfied that the prosecution has proved their case against the accused beyond any reasonable doubt. I find the accused guilty of the offence of murder contrary to section 203 of the Penal Code and convict him accordingly.

DATED SIGNED AND DELIVERED THIS 31st DAY OF JULY, 2014

LESIIT J

JUDGE.