



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 16 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

LEONARD MWANGEMI MUNYASIA.....ACCUSED

JUDGMENT

The accused **LEONARD MWANGEMI MUNYASIA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were as follows

“On the 27th day of March, 2011 at Taveta Township within Taita Taveta County within Coast Province murdered ERICK OMWENGA MAGEKA.”

The accused who was arraigned in court on 5th April, 2011 entered a plea of ‘*Not Guilty*’ to the charge. His trial commenced before me on 11th July, 2012. The prosecution led by **MR. ONSERIO** learned state counsel called a total of eight (8) witnesses in support of their case. **MR. HAMZA** Advocate acted for the accused.

The evidence of the prosecution witnesses was that on 27th March, 2011 at about 4.00 p.m. the deceased who was an Administration Police officer was seated on a bench outside the office of the District Commissioner in Taveta. The accused came into the compound appearing like he was coming to make a report. The accused sat on the bench next to the deceased. Suddenly the accused pulled out a knife with which he stabbed the deceased on the left side of the chest. The deceased gave a shout and pulled out the knife which was stuck in his chest. Blood began to spurt out of the wound. The accused tried to run away but he was chased and apprehended by other officers who were at the scene. The deceased was rushed to a nearby clinic and then to the Kilimanjaro Medical Centre in Moshi Tanzania where he unfortunately lost the fight for his life. The accused was taken to Taveta police station and later to Voi police station where he was detained in cells. Upon the conclusion of police investigations the accused was arraigned in court and charged with this offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He elected to make an unsworn statement in which he denied any involvement in the death of the deceased. It is now the duty of this court to analyze the evidence on record to determine whether the charge of murder has been proved as is required by the law.

The charge of murder is defined by section 203 of the Penal Code as follows

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

The prosecution therefore is obliged to tender proof of the following three ingredients in order to establish a charge of murder

1. Proof of the fact and cause of death of the deceased.
2. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused.
3. Proof that said unlawful act or omission was committed with malice aforethought.

Evidence abounds regarding the fact of the death of the deceased. The deceased met his death in broad daylight in the presence of several witnesses who included his fellow police officers who were with him at the **DC’s** office at Taveta. All these witnesses say they saw the deceased with a knife sticking out of his chest. They saw the deceased himself pull the knife out of his own chest and blood began to gush out of the wound. These witnesses who knew the deceased well identify him as ‘*Erick Omwenga Mageka*’ a police officer.

Evidence regarding the cause of death was tendered by **PW1 DR. HESBORN DIANGA ODEP** a medical officer based at Taveta District Hospital who conducted the autopsy examination on the body of the deceased. He told the court that upon examining the body he noted stab wounds to the chest and lacerations to the lung and heart. His opinion was that the cause of death was “*massive intrathoracic haemorage secondary to cardiac laceration and left lung laceration due to penetrative chest injury*”. The doctor further opined that “*the injuries were most likely caused by a sharp pointed object*”. This corroborates the evidence of the eye witnesses that the deceased had a knife stuck into his chest.

Having established the fact as well as the cause of death the prosecution needs to go further and adduce evidence to prove that it was infact the accused who stabbed and killed the deceased. As stated earlier there were several eye witnesses to this incident. **PW2 APC GEORGE OCHIENG** and **PW3 APC DENNIS MUSUMBA ASENWA** are both Administration Police officers who on the material day were stationed together with the deceased at the Taveta District Commissioner’s office. **PW2** and **PW3** told the court that they were both planning to go to another venue to watch a football match. However the deceased who was on duty was seated on a bench outside the office. A man whom both witnesses identify as the accused came into the compound and greeted them. He then went and sat next to the deceased on the bench. In his evidence **PW1** told the court that he suddenly heard the deceased shout “*what is wrong*”. When he looked up he saw the deceased with a knife stuck in his chest. On his part **PW2** stated as follows

“One man came and greeted me. He also greeted PW1. He moved to sit next to the deceased on the left side. He drew out a knife and stabbed the deceased in the left side of his chest.....”

Both witnesses identify the accused as the man whom they saw sit next to the deceased and later stab him. It must be remembered that it was 4.00 p.m. and broad daylight. Visibility was good. The accused greeted both witnesses before he went to sit next to the deceased. They each had ample opportunity to see him well. **PW4 APC PETER KIPROTICH KIMEI** who was also present at the District Commissioner’s office gave a similar account of the events of that day. He too identifies the accused as the man who came and sat next to the deceased. In his evidence **PW4** states

“A man came as a reportee and sat next to Eric [the deceased] on his right side. Then I saw the accused stab the deceased on the left side of his chest.....”

PW7 JOHN KASSIM SHEBETA was not a police officer like the other witnesses but was a security officer attached to the District Commissioner’s office in Taveta. He told the court on the material day he was within the compound with **PW2**, **PW3** and **PW4**. His narration of events is as follows

“I do recall 27th March, 2011 at 4.20 p.m. I was on duty at the District Commissioner’s office. There were three police men there. One was in uniform. He is called Mageka [the deceased herein]. The other three were within the compound but were in civilian clothes. A brown man came and he went to the officer in uniform as if he wanted to make a report. He deceased was seated on a bench. I was just five feet away at the gate. The brown man came and approached the deceased. He sat to the left of the deceased. The man pulled out a knife. The deceased was looking at his cell phone screen watching a match. The man stabbed the deceased on the left side of the chest. The deceased shouted for help.....”
[my own emphasis]

The account given by this witness is no different than that of the other witnesses. Under cross-examination by defence counsel **PW7** states

“I could see the accused very well. We were face to face. The accused pulled out a knife and then stabbed the deceased on the left side.”

I was able to observe the demeanour of this particular witness as he testified and in my view he was an honest and truthful witness. He was clear and concise in his testimony and remained unshaken under cross-examination by defence counsel. Whereas the other prosecution eye-witnesses were police officers and colleagues of the deceased **PW7** was not a police officer and was an independent and impartial witness. He simply stated what he had seen.

I have no doubt that there has been a clear and positive identification of the accused as the man who walked into the District Commissioner’s compound and sat next to the deceased and later stabbed him. All the witnesses testify that it was the deceased who himself pulled out the knife from his own chest. The accused was apprehended immediately within the same vicinity. At no time did the witnesses lose sight of him. The blood-stained knife used to stab the deceased was recovered there at the scene and was produced in court **Pexb1**. All the eye-witnesses state that upon being caught the accused was searched and a panga was recovered hidden in his trouser. The said panga was also produced in court as an exhibit **Pexb3**. A further thorough search at the police station conducted by **PW3** produced a smaller knife hidden on his person. The same was also produced as an exhibit **Pexb4**. It appears that the accused walked into that compound armed to the hilt. His intentions were obvious.

In his defence the accused denies that he is the man who stabbed the deceased. He states that on that day he had taken his wife to Taveta hospital where she delivered a child. Accused claims that he only went to the District Commissioner’s office which was opposite the hospital to wait for his wife. One wonders why accused could not wait for his wife in the hospital grounds. What necessitated his going to the District Commissioner’s compound? There is no evidence that the wife of accused delivered a child on that day or on any other day for that matter. His said wife did not testify as a defence witness. No medical documents are produced. In short there is nothing produced to support this defence. From the evidence before me I am satisfied that it was the accused who stabbed and killed the deceased on the material day. The ‘*actus reus*’ for the offence of murder has been satisfactorily proved.

Finally the prosecution is required to prove the *mens rea* for the offence of murder which is defined as malice aforethought. Malice aforethought is defined in section 206 of the Penal Code 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.”

There cannot be any doubt at all that by plunging a knife deep into the chest of a fellow human being, the intention was certainly to cause death or at the very least to cause grievous bodily harm to the victim. The intentions of the accused were also very evident from the fact that he went to the compound fully

armed with two knives and a panga concealed about his person. Though it is common in rural Kenya for folk to have in their possession pangas which are often used for farm work, the fact that these were hidden on accused's persons is very telling. Why would a man hide a panga in his trouser leg unless he had some ulterior motive?

In defence the accused claims that he is a mental patient and has been on medication. However there is nothing to suggest that the accused was suffering mental illness at the time of this incident so that his power of reasoning was in any way impaired. I note that the psychiatrist's report dated 25th October, 2013 indicates that accused suffers from bipolar disorder for which he has been under treatment. However the psychiatrist goes on to state of the accused that

“He is currently stable both mentally occupationally and socially. He is therefore fit to plead and he is also fit for further service.”

The mere fact that the accused suffers from mental illness does not mean that he was incapable of formulating the *mens rea* necessary for the offence of murder. Many persons who suffer mental illness are able to function well and live normal lives under medication. This incident occurred in March, 2011. The accused is said to have been under treatment since 2010 one full year **before** the incident. There is nothing to indicate that at the time of this incident the accused was suffering from a psychotic episode that would have affected his mental capacity to formulate the malice aforethought necessary for murder. I note that the issue of his mental capacity was not raised at all during the trial. This issue only came up in defence and is clearly an afterthought. I therefore reject this defence. I find that the accused was mentally capable and that he did have the necessary *mens rea* at the time when he committed this act. I am satisfied that the prosecution have proved this charge of murder to the standard required in law. I therefore enter a verdict of ‘*Guilty*’ and I convict the accused as charged.

Dated and delivered in Mombasa this 18th day of July, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Yunis h/b Mr. Hamza for Accused

Mr. Jami for State

Court Clerk Mutisya

Mr. Jami:

Treat as a 1st offender.

Court:

Mention 22nd July, 2014 for mitigation.

M. ODERO

JUDGE

18TH JULY, 2014

22/07/2014

Before Hon. Lady Justice M. Odera

Mr. Mureithi for State

Mr. Hamza for Accused

Court Clerk Mutisya

Mr. Hamza:

The accused is terminally ill and has to visit a psychiatrist regularly. He is a family man and is the sole bread winner. We seek leniency. The accused has no earlier criminal record. We urge court to give him credit for this. I do urge the court to give the accused credit for this. The court now has a discretion on sentencing. The death sentence is no longer mandatory following a decision of the Court of Appeal. The accused was out on bond but has attended all the session of his trial. He has never absconded. He is remorseful. In the circumstances I do urge the court to impose a lighter sentence.

Mr. Mureithi:

I leave it to court.

Court:

The accused herein launched (an unprovoked) attack on a police officer and killed him. A deterrent sentence in my view is called

for. Accused is sentenced to serve thirty (30) years imprisonment.

Right of appeal explained.

M. ODERO

JUDGE

22ND JULY, 2014