



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL CASE NO. 44 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES OMWAKA NDUDE.....ACCUSED

JUDGMENT

Charles Omwaka Ndunde (*the accused*) is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (*Cap. 63, Laws of Kenya*).

2. The prosecution alleged that the accused on the 30th day of April 2009, at Race Course Estate within Nakuru District of the Rift Valley province murdered Duke Kipchumba Koskei.

3. To prove its case, the prosecution called five witnesses. PW1, the first witness, the father of the deceased testified that he had first gone to the nearby shops when he heard screams as of those of his wife, Jane Kwamboka, and his son, the deceased. He hurried back towards the area of the screams only to find that not only his son, the deceased but his wife, had been stabbed by the accused on the right of the chest and thigh, and the head respectively.

4. As his son the deceased could hardly talk, he rushed to look for a taxi, and he rushed the deceased to St. Elizabeth Hospital, who after giving both the wife and the deceased first aid advised him to take the two injured persons to General Provincial Hospital – Nakuru. Though the deceased was attended to promptly by the medical staff, he died two hours later from the fatal injuries inflicted on him by the accused.

5. PW1 testified that his wife went beserk and removed her clothes when she was informed of the son's death. He also testified that when he went back to the scene of the crime, and did not find the accused, a watchman at the scene called the Police from Bondeni Police Station, but who upon reaching the scene, did not find the accused at his residence. The accused had been subjected to mob attack and had also been rushed to the same General Provincial Hospital where he was found on 2nd May 2009. His wife, though healed on the head wound, never recovered mentally and kept having headaches. She died in May of 2009.

6. PW1 confirmed upon cross-examination by counsel for the accused, that he indeed did not witness the stabbing, but saw the accused running away about five metres away from where he was standing, the accused was retreating from a hostile crowd, and that he saw the face of the accused clearly as the road was lit by electric lights.

7. According to information from the crowd generally, the accused had locked his wife in his house, and that the wife of PW1 had as a good neighbour and family friends of the accused gone to the

accused's house to find out what the problem was. He could not however tell why other neighbours did not respond to the screams of the accused's wife, or why his son, the deceased was stabbed.

8. PW1 also testified that the knife used for stabbing the deceased was recovered near the house of the accused where he had thrown it, probably when confronted by the mob.

9. PW2 a Police Officer on duty at Bondeni Police, received a report of a fracas at Race Course area, the accused had stabbed Duke Kosgei, a youth aged 17 years, and who had died on the way to Nakuru General Provincial Hospital.

10. PW2 testified that they searched for the weapon, and recovered it at the scene, "*where they had been fighting*". The accused was traced to the Provincial General Hospital on 2nd May 2009 at about 1.00 p.m. when PW1, by the deceased's father who informed PW2 that the accused had been admitted to Ward 7 of that hospital and was about to be discharged. He arrested and charged the accused with the offence of murder.

11. When cross-examined, as to how the accused got injured, PW2 testified that the accused had, after stabbing of the deceased and his mother, run and jumped over the wall, and perhaps injured that the knife was blood-stained but was not dusted for finger-prints.

12. PW3 and PW4 merely attended the Post-Mortem examination of the deceased's body.

13. PW5 performed the post-mortem. The deceased had one injury which severed the bronchial vessel and caused massive blood loss. He put the cause of death to massive haematoma.

14. With that evidence, I put the accused to his defence. The accused is a motor bike operator commonly referred to as "*boda boda*" (*border to border*). He plies his trade between 6.00 a.m. to 6.00 p.m. on the average. Upon his return he inquired from one of his younger children where his elder brother was, and he was informed that he had been taken to town by the deceased Charles Omwaka Ndunde.

15. The accused testified on oath that he was repairing his bicycle when the child returned and obtained no response from the children why he had chosen not to go to school and instead gone to town. A little later the deceased came and questioned him why he was asking the child why he had not gone to school. He however did not answer and the deceased went away.

16. However a little later while resting in his one-roomed house, he heard his door being pushed open and the deceased once again asked him why he had been questioning the child and that before he was able to answer, he was hit by the deceased. He ran out of the room, followed by his attackers, and that he slept in an abandoned building until the next day when he was rescued by some good samaritans, and went to General Provincial Hospital Nakuru where he was treated and admitted for one day.

17. The accused also testified that he was taken from the hospital by persons who claimed to be Police Officers from Bondeni Police Station. The accused testified that he was attacked by the deceased, his mother and sisters, and that he did not kill the deceased, who was his neighbour and lived three plots away from his house, and that he had not visited them that day, and that his attackers did not give any reason for attacking him.

18. The accused reiterated his evidence when cross-examined by the Prosecution Counsel, that he was attacked by the deceased, his mother and sisters. He had spoken to the deceased earlier at about 5 p.m., but not to the deceased's mother or brother.

19. The accused did not call any other evidence, and closed the defence case. Counsel for the accused relied upon his earlier submissions that there was no case to answer, and submitted that the prosecution had failed to discharge its burden of proof that the accused had committed the felony of murder.

20. In criminal law, the felony or offence of murder is constituted by two elements, the act of killing, (*the "actus reus"*) and secondly, the malice aforethought (*the "mens rea"*). In this case, there is no doubt there was a killing, (*the actus reus*). The question is whether the other element, the malice aforethought, (*the "mens rea"*) was proved. The *mens rea* is proved or established when the elements in Section 206 of the Penal Code are established by evidence -

(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 followed by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.

(c) an intent to commit a felony.

(d) - (not applicable in this situation).

21. I have in light of the above provisions of the law considered the evidence adduced by the prosecution as well as the evidence of the accused or the defence evidence. I discern these parallel themes.

22. **Firstly**, there is evidence of the prosecution (PW1), that the deceased's family and that of the accused were friends. The two families lived about two houses apart, in a single room building. The accused is said to have developed or had a quarrel with his wife and locked her in the house. The mother of the deceased having heard that information, either alone, or in company of her son, the deceased, went to plead with the accused to spare his wife, and that it is at that point when the accused attacked the deceased as well as his mother, stabbing the latter on the head and the former on the chest and the thigh (*according to the evidence of PW1 and PW2*).

23. The **second** version of evidence of what happened is that of the defence, the accused himself (DW1). He returned home and found his younger son and asked him where his elder brother was. The younger son informed him that the deceased had taken his elder brother to town, instead of going to school. The accused later inquired from the elder child why he had chosen to go to town with the deceased instead of going to school. Perhaps, frightened, the child informed the deceased, that his father had questioned him on his truancy. Again, probably, as family friends, the deceased came and inquired of the accused why he was asking the boy why he had failed to go to the school. The accused testified that he did not respond to the deceased.

24. The accused contends in the third theme that he was attacked while half asleep, and that he woke and run away, and slept in an abandoned building until the next day, when some good samaritan took him to the General Provincial Hospital Nakuru, where he was admitted for one day, and was arrested by the Police while in the process of being discharged.

25. The question then becomes, which of these essentially two versions of the events is the more probably one?

26. I must, for reasons following dismiss the version advanced by the accused. If the question was merely of his elder son failing to go to school, why would he lock up the wife in the house? Why would the mother of the deceased, (*a senior lady – whose son was 17 years – nearly an adult*) be concerned and go to his house to reconcile the accused and his wife. Why would the deceased's mother and sisters all attack him? That is highly improbable. Young children would always be curious to see how their elders solved disputes. It is no excuse or defence to say that why did the immediate neighbours not intervene. It was acknowledged by PW1 (*the father of the deceased*) that his family and that of the accused were friends, and that is most probably the reason why the mother of the deceased went along to calm the situation down.

27. On the other hand, if indeed, the accused's elder son, failed to go to school (*as testified by the accused*), the accused had a legitimate interest in finding out why a 17 years old boy, would take away his young son, and cause him to miss school. The untoward intervention by the accused and his mother would probably have put him in a rage, thus causing him to stab and inflict upon the deceased a fatal injury to the bronchial vessel, from which the deceased bled to death. In other words the accused was provoked, in the manner envisaged by Section 207 of the Penal Code, that he stabbed the deceased and his mother in quick succession in the heat of passion, and before he had time to cool down. In such circumstances the offence committed is not murder, but manslaughter only.

28. In the circumstances of this case, and the evidence of the accused himself and in terms of Section 179 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*), I find the accused guilty of the offence of manslaughter and I convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

29. I call upon counsel for the accused in terms of Section 329 of the Criminal Procedure Code, to submit on sentence.

30. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 31st day of October 2014

M. J. ANYARA EMUKULE

JUDGE