



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 6 OF 2005

REPUBLIC.....PROSECUTION

=VERSUS=

CHRISTOPHER KALUME KAPOTE.....ACCUSED

JUDGMENT

The accused **CHRISTOPER KALUME KAPOTE** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge read as follows:

“On the 12th day of February 2005 at Kinoo Village Mitangoni Sub-location, in Kilifi District of the Coast Province, murdered MULWA KITOINGO KATUU”

The accused entered a plea of **‘not guilty’** to the charge and his trial commenced before the High Court in Mombasa on 7th October 2010. The prosecution led by MR. ONSERIO, learned State Counsel called a total of six (6) witnesses in support of their case. **MR. ODHIAMBO** Advocate appeared for the accused.

The brief facts of the prosecution case were that on 12th February 2005 at about 9.00 A.M. **PW3 LUVUNO NDURIA** sent her two children **Anzazi** and **Mwanahamisi** to the nearby shops to buy sugar and bread. A while later she heard the two children shouting that they were being chased. **PW3** and her husband **NGOVI KITAINGE** and the deceased all rushed out to check. They found the accused chasing the two children. The three adults enquired from the accused why he was chasing the children. The accused did not respond. He simply pulled out a small knife with which he stabbed the deceased in the stomach. The deceased staggered into the compound of **PW2 NDOKO CHARO** with his intestines spilling out of the cut wound. **PW2** tied up the wound with a lessa and then rushed the deceased to a nearby clinic. **PW6 GEORGE ARINGO**, a nurse attached to the Armed Forces confirms that the deceased was rushed to the military clinic but unfortunately he was already dead by the time they arrived there. The matter was reported to police. The accused was arrested and charged in court.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He elected to make an unsworn defence in which he stated that it was **PW1, PW3** and the deceased who attacked him. The accused concedes that he did stab the deceased in the stomach but states that he only acted in self-defence. It is upon this court now to determine whether the State have proved this charge of murder beyond a reasonable doubt.

S. 203 of the Penal Code defines the offence of Murder thus:

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

In this case the fact of the death of the deceased is not in any doubt. **PW2** gave the court a graphic description of how after being stabbed, the deceased staggered into her compound holding his stomach which was gaping open with the intestines spilling out. **PW2** did the best she could by reinserting the intestines and binding the deceased’s stomach with a clean lleso. She then went about seeking help to get him to a medical facility. **PW6** confirms that indeed medical help was sought but unfortunately it was too late as by the time the group arrived at the Armed Forces clinic the deceased was already dead. All the witnesses identify the deceased as ‘**Mulwa**’ a neighbour who they knew well.

Aside from proving the fact of death, the law by S. 203 of the Penal Code places a burden on the prosecution to **prove** the **cause** of death of the deceased. It may be argued that the fact that there were witnesses who told court that the deceased was stabbed in the stomach, coupled by the evidence of **PW2** and by the accused’s own admission that he did stab the deceased, the cause of death is so evident that no further proof is required. However the offence of Murder has three key ingredients

- death

- cause of death

- malice aforethought

Each ingredient must be established beyond a reasonable doubt. This court cannot assume that the deceased died of his stab wounds who is to say that he did not die of a heart attack or such other cause. Evidence must be led to show that it was the stabbing by the accused which was the direct and proximate cause of the deceased’s death. How can this cause of death be proven? The best evidence would be by way of medical evidence from an autopsy. In the case of **NDUNGU –VS- REPUBLIC [1985] KLR 487** it was held by the Court of Appeal as follows

“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution”

In this case the prosecution alleges that the cause of the deceased’s death were the stab wounds. Despite evidence that such injuries were serious and grave it is still essential that medical evidence be adduced in order to provide expert medical evidence to support this alleged cause of death. The prosecution did not adduce such expert medical evidence as proof of the cause of death. Only two medical witnesses were called. **PW5 DR. CHARLES MWANG’OMBE** was the Psychiatrist who examined the accused and found that he was fit to plead. He had no evidence regarding how the deceased met his death. **PW6** the military nurse was only able to confirm that indeed the deceased died. He did not carry out an autopsy and thus he too had no evidence to offer on the cause of death. No pathologist was called to testify. No evidence was adduced of an autopsy carried out on the body of the deceased. It is only through such an autopsy that the cause of death can be conclusively determined.

PW2 told the court that the body of the deceased was taken to Mariakani Mortuary. No reason was given why no pathologist was called to testify. This is a case which has been pending in court since the year 2005. It is pure laxity for the prosecution to fail to adduce medical evidence. No valid reason is given for this omission.

In the absence of proof of the cause of death and notwithstanding the strength of any other evidence I find that the charge of murder cannot be deemed to have been proven in law. This omission is fatal to the prosecution case. On this basis alone I acquit the accused of the charge of Murder. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 10th day February 2012.

M. ODERO
JUDGE

In the presence of:
Mr. Obara holding brief for Mr. Odhiambo
Mr. Onserio for State