



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 15 OF 2008**

REPUBLIC **PROSECUTION**

=VERSUS=

MBARUK MWANGETI **ACCUSED**

JUDGEMENT

The accused herein **MBARUK MWANGETI** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 14th day of May 2008 at Mshomoroni Village, Kisauni Location within Mombasa District of the Coast Province murdered ELVIS KIOKO”

The accused entered a plea of **‘not guilty’** to the charge and his trial commenced before me on 19th May 2010. The prosecution led by **MR. ONSERIO** learned State Counsel called a total of ten (10) witnesses in support of their case. **MR. AZIZ** Advocate acted for the accused.

The brief facts of the prosecution case as narrated by the prosecution witnesses is that on 14th May 2008 the deceased who was separated from his wife went to the home of his said estranged wife in Kisauni, where she lived with her brother (the accused) her mother and the couple’s children. The neighbours suddenly heard shouts from that house and ran out to check. They found the accused brandishing a knife and the deceased was lying critically injured with a stab wound to his chest. The neighbours managed to lock the accused in the house and called the police who came and arrested the accused. The deceased was rushed to hospital where he succumbed to his injuries. The accused was later arraigned in court and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. The accused gave a sworn defence in which he denied the charges. It is now upon this court to determine whether the prosecution have proved this charge of murder beyond a reasonable doubt.

In any charge of murder the prosecution must prove the following three ingredients:

- 1) The fact and the cause of death of the deceased
- 2) That the deceased met his death as the result of an unlawful act or omission of the accused – this forms the **“actus reus”** of the offence
- 3) That the accused committed the said act or omission with malice aforethought – this forms the

'mens rea' of the offence

The fact and cause of the death of the accused in this case is certainly not in any doubt. **PW1 ISSA CHOLO CHIRAU** and **PW2 HARRISON WARRINGRON MWANGACHA** both neighbours to the accused testify that they saw the deceased lying outside the accused's house bleeding profusely. **PW3 PATIENCE ELVIS KIOKO** who was the estranged wife of the deceased confirms that when she rushed back home she found her husband lying injured on the ground. She confirms that the deceased was rushed to a nearby clinic but he later died. **PW7 DICKSON KILONZO** went to the mortuary at Coast General Hospital where he saw the body and identified the dead man as his brother **ELVIS KIOKO**.

The cause of the deceased's death is proved by the evidence of **PW10 DR. K.N. MANDALYA**, the consultant pathologist who conducted a post-mortem examination on the body of the deceased. He confirms that the body had deep stab wounds on the upper torso and chest. He opined that the cause of death was *"haemographic shock due to stab wound to chest and lung"*. The doctor filled and signed the post-mortem report which he produced in court as an exhibit **Pexb1**. This is medical expert evidence which is not challenged nor controverted and confirms the evidence of the witnesses who said the deceased suffered stab wounds to the chest.

The next question to be considered is whether it was the accused who committed the unlawful act of stabbing the deceased leading to his ultimate demise. There was no eyewitness who testified that he actually saw the accused stab the deceased in the chest. However **PW2** told the court that upon hearing the commotion outside his house he rushed out to find the accused brandishing a knife and the deceased lying nearby critically injured. **PW2** says the accused was belligerent and violent thus he mobilized youth to lock him inside the house. **PW2** then set about trying to rush the deceased to a medical centre for treatment.

The evidence of **PW2** is corroborated in all material respects by the testimony of **PW4 FREDERICK KARIUKI GICHINGA**, who was also a neighbour. He too heard the commotion and rushed outside to check. He said he found the deceased lying bleeding on the ground and accused was shouting saying that he had stabbed the deceased.

Last but certainly not least is the evidence of **PW1** who told the court that he was on his way home when he saw a crowd. As he approached he was accosted by the accused who was holding a knife. The accused attempted to stab **PW1** (probably to prevent him moving too close). **PW1** picked up a stick and hit the accused's hand thereby saving himself from being stabbed also. The evidence of **PW1** is corroborated by **PW2** who told the court that he saw the accused attempt to stab **PW1** as well.

The incident occurred at night – the witnesses all state that it was about 9.00 p.m. However they all state that they were able to see and identify the accused well because there were bright security lights both in the corridor and outside the houses. Aside from this visual identification there is evidence that these witnesses were able to recognize the accused whom they all knew very well as he was a neighbour. The incident took a period of time the accused was waving the knife about and shouting and it took time to subdue him. Thus these witnesses had more than ample time to see and identify the accused. I find there has been a clear and positive identification of accused with no room for a mistaken identity.

As stated earlier no witness actually saw the accused stab with deceased. However in that scenario - the deceased lying bleeding profusely and the accused brandishing a blood-stained knife about, the circumstantial evidence clearly points at the accused as the one who stabbed the deceased. Circumstantial evidence is defined in the case of **MWANGI –VS- REPUBLIC [1983] KLR 522** thus:

"... It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference' [of guilt]

The set of facts in this case lead to only one logical conclusion – that it was the accused who stabbed the deceased. No other hypothesis is feasible given the circumstances. In cross-examination **PW2** says:

“Accused had a bloodstained knife and he was chasing people”

One of the ‘**people**’ whom the accused chased and attempted to stab was **PW1**. The fact that this knife was not recovered does not weaken the prosecution case. **PW9 PC JAMES MWAI** was the first officer to arrive at the scene. He testified that:

“I rushed to the scene at Mishomoroni and I found the accused standing outside the door with a big crowd. When accused noticed I was a police officer he entered the house. Accused was holding a knife. When accused emerged from again from the house he did not have the knife ...”

Clearly the accused upon seeing a police officer took quick action to dispose of the incriminating piece of evidence i.e. the knife. **PW2** also told the court that accused’s mother who was also present at the scene took away the knife and hid it (no doubt in an attempt to prevent police finding the knife).

In his evidence the accused whilst conceding that the deceased did come to their home on the material night denies that it was he who stabbed and killed him. The accused claims that the accused was stabbed by an unknown intruder who attacked him **before** he arrived at the house. This is a very unlikely tale. Why was this unknown intruder not seen by any of the neighbours who were at the scene? How does the accused explain the presence of a knife in his hands? There is no reason advanced why **PW1** and **PW2** would want to fabricate evidence against the accused. They had no possible motive to do this. Further as a court I was able to observe the demeanour of these two witnesses as they testified. They struck me as honest and reliable witnesses who simply told this court what they had seen.

PW5 PATIENCE who was the estranged wife of the deceased told the court that she was at the home of her boyfriend when she received the call about the incident from one of her tenants. In her own words **PW5** states:

“my tenant told me that my brother and my former husband have fought”

The message was that the altercation was between the accused and the deceased. No mention was made of this unknown intruder. Similarly **PW3 LAZARUS NJUE** who was the boyfriend to **PW5** told the court that they received a call informing them that:

“there was a fight in her [PW5’s] plot between her brother Mbaruk and her former husband Elvis Kioko”

PW3 who rushed to the plot with **PW5** goes on to state that:

“I asked who had injured Kioko. The residents in the plot said it was Mbaruk”

At no time did any person mention this unknown intruder. The reason is because there was no such intruder. The truth of the matter supported by the evidence is that it was the accused who stabbed the deceased. The fact that after the incident the accused ran away and hid in the roof probably in an attempt to escape is proof that he had a guilty mind – he was well aware that he had committed an offence. I therefore reject the accused’s defence as a pure fabrication. From the foregoing I am satisfied that it has been proved that it was the accused who unlawfully stabbed and killed the deceased. The actus reus of the offence of murder has been proved as against the accused person.

Lastly the question of mens rea or malice aforethought needs to be considered. There is evidence that the relationship between the deceased and the family of his estranged wife **PW5** was strained. This is not unusual in such circumstances. **PW5** having parted way with the deceased lived with her family including the accused who was her brother and the couple’s children in her plot at Kisauni. The deceased often used to come to that plot to visit his children. In his evidence **PW2** told the court:

“The deceased used to come there to visit his children. The accused at times used to chase and beat the deceased. The accused and his family did not welcome the deceased to their plot”

Under re-examination **PW2** reiterates:

“I have lived in that plot for 17 years. I was aware of disagreement between the accused’s family and the deceased who was married to their sister. The couple were separated”

PW2 was a long-standing neighbour who knew the family well. As I have stated earlier he had no reason or motive to lie to the court. On her part **PW5** stated:

“I had severally told the deceased not to come to my plot but he would not heed ...”

It is clear that the attempts by the deceased to come and visit his children were resisted by the accused and his family. They did not want him in their plot. Even if this was the case, which was understandable in view of the strained relationship, the accused had no right to take the law into his own hands by stabbing the deceased. The proper thing would have been to report to the police and have him removed, or to take out a restraining order to prevent the deceased from visiting that plot. The motive is very clear. The accused had a bad relationship with the deceased due to the deceased’s strained relationship with his sister. The accused did not like the deceased coming to visit the couple’s children in their home. Thus the accused must have engaged in an altercation with the deceased and stabbed him. The accused’s actions were unreasonable and criminal. Firstly because by all accounts the deceased was unarmed and secondly the accused had more civilized options to resolve the dispute. There is no doubt that the accused intended to kill or at the very least cause very grievous harm to the deceased. As such I find that malice aforethought is proved. The mens rea for the offence of murder has been proved as against the accused.

Following my findings above I am satisfied that the prosecution have proved their case beyond a reasonable doubt. I therefore convict the accused of this charge of Murder.

Dated and Delivered in Mombasa this 16th day of March, 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Oduor holding brief for Mr. Aziz

Mr. Gioche for State

Mr. Gioche: Treat as 1st offender.

Mr. Oduor in mitigation: Accused is a family man and the sole bread-winner. This is a first offence. We pray that this court exercise mercy.

COURT: The accused acted unlawfully in attacking and stabbing the deceased as he did. As a result of his actions a human life was needlessly lost. Although following the Court of Appeal ruling in the case of **GODFREY NGOTHO MUTISO –VS- REPUBLIC** the death penalty is no longer deemed mandatory I do nevertheless feel that a stiff deterrent sentence is called for. As such I do hereby sentence the accused to serve forty (40) years imprisonment. He has a right to appeal.

Dated and Delivered in Mombasa this 16th day of March 2012.

M. ODERO
JUDGE