



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 10 OF 2008

REPUBLIC PROSECUTION

=VERSUS=

JACOB JUMA MSITUNI ACCUSED

JUDGEMENT

The accused **JACOB JUMA MSITUNI** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge are:

“On the night of 20th and 21st March 2008 at Mtopanga village in Bamburi Location, Mombasa District within Coast Province murdered KARISA MENZA”

The accused who was represented by **MR. LEWA** Advocate entered a plea of **‘not guilty’** to the charge. His trial commenced on 25th May 2009 before Hon. Justice F. Azangalala at the Mombasa High Court. The Honourable judge heard the evidence of six (6) prosecution witnesses. Following the transfer of Justice Azangalala to Eldoret High Court, I took over the hearing of this case and heard the seventh witness before the prosecution led by **MR. ONSERIO** learned State Counsel closed their case.

The brief facts of the prosecution case were that on the night of 21st March 2008 community policing officers who included the deceased were on normal patrol in the Mtopanga area. At about 4.00 A.M. they were resting outside French Court Club. The accused and a lady walked by quarrelling. The accused held the lady and began to beat her. The community policing officers intervened to separate them. The accused then ran away. Shortly thereafter the accused returned armed with an iron rod and a knife. **PW1 SILA ABDI** one of the community policing officers testified that the accused was singing traditional songs and saying that he was ready to kill somebody. The deceased phoned Bamburi Police Station to alert police about the commotion. The community policing officers then began to chase the accused with a view to apprehending and holding him until the police arrived. The accused took off with the others in hot pursuit. The deceased was closest to the accused. As the deceased was about to catch hold of him the accused turned back and knifed the deceased in the neck. The deceased fell to the ground bleeding profusely from his wound. The accused ran off and escaped. Efforts were made to take the deceased to hospital in a taxi but he died before reaching help. The accused was later arrested 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 elected to give a sworn defence in which he categorically denied having

stabbed and killed the deceased.

In a charge of murder the prosecution must prove all the following three ingredients of the charge –

- 1) The death of the deceased person and the cause of that death
- 2) That the deceased met his death as the result of an unlawful act or omission on the part of the accused – this forms the '**actus reus**' of the offence.
- 3) That said act or omission was committed by the accused with malice aforethought – this forms the '**mens rea**' of the offence.

In this case the fact and cause of death of the deceased have been satisfactorily proved. **PW1, PW2 HAMISI ALI MWAJUMA** and **PW5 ALBERT OKOTH ZADRACK** were all eyewitnesses to the incident. They all confirm that the deceased whom they knew well and identify as **KARISA MENZA** was stabbed and died right before their very eyes. **PW3 PC SAMMY GITHIERA** confirms that he arrived at the scene on the night in question only to find that the deceased had already succumbed to his injuries. **PW3** assisted to take the body to the mortuary.

Similarly there is no mystery about the cause of the deceased's death. **PW7 DR. K.N. MANDALYA** confirms that he conducted an autopsy on the body of the deceased. He noted a deep cut wound to the neck which stab wound had severed the major neck artery. In his opinion the cause of death was '**haemorrhagic shock due to stab wound to the neck**'. This corroborates the evidence of the eyewitnesses at the scene.

The next crucial question is whether it has been proved beyond a reasonable doubt that it was the accused who stabbed and killed the deceased. As stated earlier there were at least three (3) eyewitnesses to this incident. **PW1** told the court that he, the deceased and **PW3** were all community policing officers who were out on patrol on the material night. **PW1** goes on to narrate how they intervened to stop a fight between the accused and his lady companion. All seemed well – the couple stopped fighting and the accused went away. However the accused returned shortly thereafter armed to the hilt with an iron bar and a knife – clearly he had not taken kindly to the interruption of his fight. The evidence of **PW1** is corroborated in all material respects by the testimony of **PW2** who was also a community officer on duty with **PW1**. Both witnesses state that although the incident occurred at 4.00 A.M. they were able to see the accused well because the area was well lit with security as well as the lights from the nearby bar. In his evidence **PW1** says:

“As we rested we saw the accused quarrelling with a girl. They started fighting. We rose to investigate what was happening. The fighting was on the road. They were about 30 metres away. We were able to see them. There were security lights from shops nearby and light from the club”

Apart from the benefit of the security lights in the area the evidence of **PW1** is that they approached the quarrelling couple i.e. moved close to them allowing them a perfect opportunity to see and identify them. Similarly **PW2** in his evidence states:

“The place was well lit with security lights or street lights”

Both witnesses gave a very vivid account of the events of that night. Their evidence was mutually corroborative upto and including the fact that the accused returned to the scene fully armed and singing tribal songs. It is clear that this incident took more than a couple of minutes and both witnesses caught much more than a fleeting glance at the accused. They were able to see him well enough to make a positive and clear identification.

The evidence of **PW1** and **PW2** is further corroborated by the evidence of **PW5** who was also at the scene that night. In his evidence he states that he is a security officer at the nearby bar. He heard a commotion outside and came to check. He found the accused outside engaged in an altercation with one

'Mercy' who was his cousin. **PW5** said he spoke to the accused and advised him to surrender himself to the police – clearly this witness also had ample time and opportunity to see the accused and to make a positive identification. All three witnesses state that they chased the accused and never lost sight of him. They all witnessed him turn back and stab the deceased in the neck. **PW1** and **PW5** both testified that they actually saw the knife in the accused's hand.

In his defence the accused concedes that he was at the '*locus in quo*' on the material night and he also concedes that he did have a disagreement with a lady called 'Mercy'. In his own words the accused says:

“On 20/3/2008 at 12.00 midnight I was drinking beer. I then left and went home. I was with Mercy whom I met at the bar. We disagreed on the way home near Friends Corner. Mercy was pulling me and I slapped her. We continued to struggle. A crowd gathered I ran away”

The accused claims that after the quarrel he left and went home. He categorically denies having returned to the scene armed with a knife and stabbing the deceased. However there is no evidence or even any suggestion that the three witnesses had a pre-existing grudge against the accused. They would have had no motive to identify him as the man who stabbed the deceased unless they actually saw him commit the act. All three eye-witnesses gave clear and consistent evidence and they all remained unshaken under cross-examination by defence counsel. **PW6 CORPORAL MAURICE ORERA** told the court that after his arrest the accused led police to his residence in Viikwatani Village in the Mtopanga area. Police searched his house where they recovered an iron bar **Pexb1** and a kitchen knife **Pexb2** which had blood stains. Both items were produced in court as exhibits. It cannot be a mere coincidence that a man brandishing an iron bar and a knife kills the deceased and the accused has in house a similar iron bar and a blood-stained knife. In his defence the accused admits that the knife was found in his house, but claims it is his kitchen knife used for domestic chores. Even if this were his normal kitchen knife that fact does not rule out the possibility that it was this very knife which the accused picked and used to attack the deceased. From this weight of evidence I am satisfied that there has been a clear, positive and reliable identification of the accused as the man who stabbed the deceased. This unlawful act of stabbing the deceased was the proximate cause of his death. I therefore find that the '*actus reus*' of the offence of murder has been proved as against the accused.

The court now has to consider whether the third ingredient of malice aforethought has also been proved against the accused. Malice aforethought is defined in Section 206 of the Penal Code as follows:

“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”.***

In this case the unlawful act complained of was the stabbing of the deceased by the accused. The evidence from the pathologist **PW7** is that this stabbing was of such great force that it severed major neck vessels and fractured the 4th and 5th vertebrae causing massive bleeding in the neck. It is clear that the accused delivered a very deep and forceful cut to the deceased's neck. The accused must have been well aware that the severity of that cut would kill or at the very least cause grievous harm to the deceased. I am

satisfied therefore that malice aforethought as defined in Section 206(b) has been proved to have existed. I therefore find that in stabbing the deceased as he did the accused had the requisite mens rea required for the offence of murder.

Before I conclude I have noted that two witnesses did not testify. One was the accused's female companion '**Mercy**' and the other is the investigating officer. Did the failure of the two to testify in any way weaken or diminish the prosecution case? In my view the answer would be in the negative. The accused himself in his defence did concede that he was at the scene with '**Mercy**' on the night in question. He further concedes that he and Mercy were engaged in an altercation just as narrated by **PW1**, **PW2** and **PW5**. This '**Mercy**' could have been considered an eyewitness but in view of the fact that the court has already heard from three (3) eyewitnesses her failure to testify does not in any way weaken the prosecution evidence.

Likewise the failure of the investigating officer to testify does not diminish the strength of the prosecution case. The three eyewitnesses have given a clear narrative of events as they occurred. The investigating officer would have simply come to recap their evidence. There are in my view no loopholes or anomalies in the prosecution case such as would have required clarification by an investigating officer. The chain of evidence is cogent and reliable. For these reasons I find that notwithstanding the failure of these two witnesses to testify the prosecution have discharged their burden or proof in this case. I am satisfied that the guilt of the accused herein has been proved beyond a reasonable doubt and I do hereby convict him of the offence of Murder as per the charge.

Dated and Delivered in Mombasa this 12th day of March 2012.

M. ODERO

JUDGE

In the presence of:

Mr. Lewa for Accused

Ms. Macharia holding brief for Mr. Onserio for State

MR. LEWA: We submit that the accused is a young man. He regrets the incident and is remorseful. We ask court to exercise leniency.

M. ODERO

JUDGE

COURT

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I have considered the mitigation raised on behalf of the accused. The accused perpetrated a ghastly and unprovoked attack against the deceased leading to the senseless loss of a human life. The accused was under no threat himself. The deceased was unarmed. I am mindful that the death penalty though constitutional is not the only available sentence in a murder case [see **GEOFFREY NGOTHO MUTISO –VS- REPUBLIC CRIM APPEAL 17 of 2008**]. I hereby sentence the accused to serve forty (40) years imprisonment. He has a right to appeal against both conviction and sentence.

M. ODERO

JUDGE

13TH MARCH 2012

Ms. Macharia for State