



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 22 OF 2009

LESIIT J.

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS KARITHI KABURUNGA.....ACCUSED

JUDGMENT

The accused person JULIUS KARITHI KABURUNGA is charged with murder contrary to section 203 is read with section 204 of the penal code. The particulars of the offence are that on the 15th of February 2009, at Muthara Location of Tigania District murdered Henry Kairichi Rukunga.

That the prosecution called five witnesses. Three of these witnesses were eye witnesses of the incident. The facts of the prosecution case are that on the 15th February 2009 at about 2 pm. Caroline Chekei, PW2 saw the accused chasing the deceased in the middle of her compound. PW2 was in the house when she heard the screams. A testimony was that when she came out of her house she saw the accused holding a knife and chasing the deceased inside her compound. PW2 testified that she went out of her house screaming whereupon the deceased and the accused chased each other towards PW1 home. Caroline said that she followed them into PW1's home even though they were much faster than her. By the time she caught up with them in PW1 home the deceased had already been stabled and PW1 was holding the accused. Caroline testified that she continued screaming until Geoffrey came and took the knife from the accused.

PW1 was Jane Rosa Nyoroka she told the court that she was the aunt of the deceased and that the accused was their neighbour. Her testimony was that she heard screams while inside her house. That when she went out she saw the deceased running towards her house and the accused in hot pursuit after the deceased holding a knife with his right hand. She started screaming as she walked towards both of them hoping to deter the accused from stabbing the deceased. She says that by the time she reached the two, the accused had already stabled the deceased. Jane Rosa quickly held the accused and struggled with him until Caroline and Geoffrey arrived. Geoffrey took the knife from the accused eventually members of the public came and bit up the accused.

PW3 Geoffrey Miriti Mitu said that he had no relationship with either the accused or the deceased. His evidence was he just arrived at his house from church when he heard screams. He decided to

investigate and went out of his house only to see Caroline screaming as ran after the accused who chasing the deceased with a knife. Geoffrey decided to go after them in order to intervene. By the time he caught up with the three he found Jane Rosa holding the accused and struggling with him and he immediately took the knife from the accused. He later surrendered the knife to the police.

PW4 was Peter Miriti Mitu a brother of the deceased. He says that he was coming from church when he had screams. By the time he went to where the screams were coming from he found his brother lying dead on the ground and the accused person being held by members of public.

PW5 was PC Kipkoech, the investigating officer of this case. He said that he visited the scene where he found the body of the deceased lying on the ground with the accused also lying next to him with serious injuries. He says that the accused person had been assaulted by members of the public. PW5 confirmed that he took possession of the murder weapon from PW3. It was a knife and produced it as PExh 1. The knife was identified by PW1, 2 and 3 as the weapon used by the accused to stab the accused.

PC Kipkoech produced the post mortem form on the post mortem examination conducted on the body of the deceased by the Dr. Macharia on the 19th of February 2009, the doctor found the deceased was a boy of 16 years old he had a stab wound on the posterior chest wall which penetrated to the left lung and the left ventricle of the heart which caused bleeding in the chest cavity and the heart. The doctor found an opinion that the cause of death was cardiac injury due to a penetrating chest injury.

The accused person was put to his defence he gave a sworn evidence. The accused told the court that he left Nkubu market where he had been working at around 2 pm and went home he said that on his way home, he met with the deceased. The deceased did not respond when he greeted him. As he passed the deceased, the deceased held him and then threatened him with a knife he was holding and he told him that he would know who he was. The accused claimed that the deceased grabbed him on the left arm and on the hand. He tried to show the court the scars but the only one seen was a small mark on the left arm. The accused stated that he struggled with the deceased and disarmed him and that when both of them fell the deceased fell on the knife and was therefore stabbed. In cross examination by the learned state counsel, the accused admitted stabbing the deceased.

You will say that I have considered the entire evidence adduced by the prosecution and the defence witnesses. The burden however lies with the prosecution to prove its case against the accused person beyond any reasonable doubt. The prosecution must to prove through evidence, whether direct or circumstantial that the accused through some act or omission actuated by malice aforethought caused the death of the deceased. Section 206 of the Penal Code gives the various circumstances which if proved would establish malice aforethought Section 206 of the Penal Code defines malice aforethought 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) ...**
- (d) ...”**

The prosecution is relying on both direct and circumstantial evidence. The direct evidence is by PW1, 2

and 3 who saw the accused chasing the deceased with a knife. Among the three only PW1 Jane Rosa said that she saw the accused stab the deceased once on the back. PW2 and 3 could see the accused in hot pursuit of the deceased but did not see him stabbing the deceased because they were following them from a distance.

The evidence of Jane Rosa that the deceased was stabbed once on the back was confirmed through the post mortem examination results. The post mortem form Pexh 2 shows that the result of the examination where that the deceased suffered one stab wound on the back which pierced the lungs and the heart.

The accused person has not denied that he stabbed the deceased once on the back even though that admission was only made in cross examination by the state counsel.

I am satisfied that the prosecution through the evidence of Jane Rosa established beyond any reasonable doubt that the accused stabbed the deceased once on the back. The evidence of Pw2 and 3 places the accused at the scene of the incident. It also establishes that it was the accused who was chasing the deceased and he had chased him for a distance of one and half Kms according to the testimony of PW2. I find that this is both direct evidence of PW1 and the circumstantial evidence of PW3 that it was the accused and no one else who stabbed the deceased thereby causing his death.

In regard to whether the prosecution was established that the stabling was actuated by malice aforethought; the prosecution witnesses were unable to establish any motive for this attack. PW1 an aunt of the deceased and pw4 a brother of the deceased informed the court they were not aware of any grudge between the accused and deceased. There appears to be no motive established for the attack.

When considering whether malice aforethought could be inferred from injuries inflicted on the deceased the Court of Appeal in **MORRIS ALOUCH VS REP CR. APPEALS NO 47 of 1996 (UR)** stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later.”

In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, BOSIRE, O’KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

Before I consider whether malice aforethought was proved I must consider the accused defence. The accused put forward self defence as his defence for this offence.

In the case of **MUNGAI V. REP [1984] KLR 85**, at page 98, KNELLER, HANCOX JJA and NYARANGI Ag. J.A. held:

“However, notwithstanding the fact that section 17 of the Code statutorily requires that criminal responsibility for the use of force in defence of person or property shall be determined according to English Common Law, it does appear that the doctrine is recognised in East Africa that the excessive use of force in the defence of person or property may lead to a finding of manslaughter:

see R v Ngoilale (supra) and R v. Shaushi [1951] 18 EACA 198, the latter of which was cited with approval in Hau s/o Akonaay v R [1954] 21 EACA 276 in which, at pages 277 and 278, the following passage occurs:-

“In the circumstances covered by the Common Law rule cited above and in the circumstances of the instant case there exist elements of both self-defence and provocation. This Court has already in *R v Ngoilale* and *R v. Shaushi s/o Miya [1951] 18 EACA 164 and 198*, indicated its view that section 18 is wide enough to justify the application of any rule which forms part and parcel of the Common Law relating to self-defence and in the latter said (at p 200): -

“No doubt this element of self-defence may, and, in most cases will in practice, merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.”

We have no doubt therefore that, in the instant case, the learned trial judge should have directed himself in accordance with the rule of Common Law which we have cited.”

The evidence by the prosecution establishes that the accused was the one seeing chasing the deceased and that he did see for at least one and half Kms before he finally stabbed the deceased. If the accused had been attacked and provoked by the deceased, the danger that may have been caused to the accused by the attack and provocation had long waned by the time that he stabbed the deceased. It is clear from the overwhelming evidence adduced by the prosecution that the accused had an opportunity to safely escape an attack by the deceased, if any.

I am satisfied from the evidence adduced that the accused was in no danger in life and that therefore self defence is not available to him.

As to malice aforethought the knife the accused used to stab the deceased was presented before the court. It was a dagger with a long blade. The stab wound was found to have penetrated right through the lungs and the heart. Even though it was a single stab, it was a well calculated stab at a most sensitive part of the body. By stabbing the deceased on that part of the body the accused must have known that the injury inflicted was likely to cause either grievous harm or death to the deceased.

I am satisfied that prosecution has established beyond any reasonable doubt that the accused was motivated by malice aforethought when he stabbed the deceased in the afternoon on question.

Having come to the conclusion I have of this matter I find that the prosecution has proved its case against the accused person beyond reasonable doubt. I reject the accused defence, find him guilty of murder and charge and convict him accordingly.

Dated, Signed and Delivered at Meru this 5th day of May 2011.

**LESIIT, J.
JUDGE.**