



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 77 OF 2003

LESIIT J.

REPUBLICPROSECUTOR
VERSUS
MUTABARI MITHIKA.....ACCUSED

J U D G E M E N T

The accused **MUTABARI MITHIKA** is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 8th April, 2003 at Machungulu Sub-Location, in Meru North District, within Eastern Province, he murdered Peter Murungi M'Itumitu.

The prosecution called four Witnesses. There were two eye witnesses of the incident, PW1 and 2. PW1 stated that on the 8th of April 2003 he was at PW2's canteen with the deceased and PW2. At about 9.30pm the accused went and called the deceased outside and asked the deceased to give him some money so that he could eat. He heard the deceased reminding the accused that he had given him Ksh.2000/- at Laare. That the accused told the deceased that if he did not have any money he should borrow, to which the deceased declined. PW1 testified that later as he left the canteen with the deceased the accused removed a knife and stabbed the deceased and that the deceased died on the spot.

The other eye witness, PW2 said that he operates a hotel at Kambiten. PW2 testified that on the material night he was at his hotel when he heard people quarrelling on the road. He said that he went out and was able to identify the people were the accused, the deceased and PW1. PW2 testified that the accused returned to him and told him that he would kill the deceased because he had taken his 1000/-. He said that the accused went back to where PW1, the deceased, and one Peter Murugu M'tumbi were. He said that he saw PW1 and the accused wrestling, and that PW1 managed to take away the stick from the accused. At the same time, PW2 testified that he saw the deceased try to separate the accused and PW1. He then saw the accused remove a knife and stab the deceased on the chest. PW2 stated that the deceased died before any vehicle was found to take him to hospital.

PW2 stated that the accused, the deceased, PW1 and others were all drunk when they went to his hotel earlier that night. PW2 testified that the accused was apprehended by PW1 and other members of public at the scene of the incident.

PW3 was Dr. Kanake who produced the post mortem form on the examination on the body of the deceased. He said that the body had multiple bruises on the hands, elbows and knees. PW3 said that the right arm had human bites. He said that there were three stab wounds, one penetrating the left fifth intercostal space into the thorax, a second stab wound on the left femoral canal and a third stab wound on the left thigh. Internally the deceased had a laceration on the left lower lobe of the lung, another laceration

on left ventricular with hemorrhage in the pericardial space. The cause of death was cardiopulmonary arrest secondly to laceration of the heart and the lungs.

PW4 identified the body of the deceased to the doctor for postmortem on the 11th April, 2003.

The accused gave a sworn statement. He stated that on the material night he went out of his house to collect his money. He said that he returned at 7.00pm and went to his shamba and plucked some miraa. He then returned to his house to chew the miraa. The accused stated that soon after 7 pm some people went to his house and called him outside. The accused said that they were three people and that they started beating him. He showed to the court a two inch healed scar on the right hand. He also showed a small healed scar on the right side of the abdomen. He said that the people injured him and that he sustained a fracture of the right leg. He said that he found himself at Meru General Hospital on a day he cannot recall. He said that he was admitted from April until 12th June, 2003 when he was discharged.

The accused said that he was brought to court on the 28th of June, 2003. The accused denied killing anyone as alleged by the prosecution witnesses. He said he did not know the deceased. In regard to PW1 he said he was his neighbor and that they fought at one time when PW1 cut his trees. He said that PW2 was his uncle. He said that his uncle lied against him and that he had a grudge with him because he rented out his miraa to other people when PW2 declined to pay for the miraa plants he had rented from him.

The accused person is facing a charge of murder. The burden lies with the prosecution to prove the case against the accused person beyond any reasonable doubt. The prosecution must adduce evidence to prove that the accused did an act which led to the injury which caused the death of the deceased. The prosecution must prove that the accused person was motivated by malice aforethought when he committed the act that led to the deceased death. The circumstances which constitute malice aforethought are set out under section 206 of the Penal Code as follows:

“206. 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.”**

Mr. Gichunge for the accused submitted that the incident took place between 8 and 9 pm. Counsel urged that it was the duty of the prosecution to show the court how the two eye witnesses identified the accused. Mr. Gichunge urged that there was contradiction between the evidence of PW1 and 2. Counsel highlighted some of the contradictions. He said that while PW1 said that none of them were drunk PW2 confirmed that PW1 the deceased and the accused were all drunk. Counsel also urged that regarding the people who were at the scene at the time of the incident PW2 did not mention that one Kobia Mutonga Francis was also present as testified to by PW1. Mr. Gichunge was wrong as he did not recognize that Kobia Mutonga Francis who was also at the scene according to the evidence of PW1 was actually PW2.

When PW1 was asked whether he was drunk that day he said that he does not drink and was therefore not drunk on the material night. PW1 did not comment whether the accused and the deceased were drunk that night and in the circumstances PW2's evidence that the entire group was drunk was a general statement. I

don't find PW1's denial that he himself was not drunk, a material contradiction. I find nothing turns on the two issues.

Mr. Gichunge urged the court to accept the accused alibi defence in view of the contradiction in the prosecution case. I will get to this later.

I have carefully considered the evidence adduced by the prosecution and the defence, and the submissions by Mr. Gichunge for the accused. There were two eye witnesses to this incident. PW1 was in the company of the deceased and according to his evidence the two of them had gone together to PW2'S Hotel. According to PW1 the accused found them at the hotel and called out the deceased to demand money from him. The two had an argument before the deceased returned to where PW1 was. They then walked out together and the accused who apparently had not left, attacked the deceased by stabbing him.

PW2 according to his evidence saw the accused talking with the deceased. PW2 said that when the two stopped talking, the accused went to him, PW2, and told him that he was going to kill the deceased because of the 1000/- he owed him. PW2 said that he was attracted to noises, and on going outside his hotel he saw the accused, PW1 and the deceased; and that he witnessed the accused stabbing the deceased.

In the case of **Cleophas Otieno Wamunga Vrs. Republic 1989 KLR 424**, the Court of Appeal stated as follows:-

“The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery C.J. in the well known case of R. VS Turnbull 1976 (3) All E.R. 549 at pg 552 where he said:

‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’ ”

I have tested the evidence of identification by PW1 and 2. I find that both witnesses saw the accused at two intervals. In regard to PW1 the accused came up to where he was seated with the deceased and called out the deceased. The accused was not hiding at that time. The accused admits that PW1 was his neighbour and that they knew each other well therefore there was no doubt that PW1 knew him well and that he had a good opportunity.

In regard to PW2 he was an uncle of the accused. PW2 told the court that after the accused spoke with the deceased he went to him and told him he was going to kill the deceased because of 1000/-. At that time PW2 had a good opportunity to see the accused and being a close relative there was absolutely no doubt that having spoken to him, PW2 could not have mistaken his identity. By the time the accused attacked the deceased I find that it was very clear to PW1 and 2 who the attacker was. I find that the prosecution adduced sufficient evidence to establish that it was the accused who attacked the deceased on the material night.

Apart from the evidence of identification there was further evidence against the accused from PW2. PW2 stated that before the accused attacked the deceased he told PW2 that he was going to kill the deceased over a Ksh.1000/- debt. I find that the accused had formed the necessary malice aforethought to attack the deceased. I also find there was a time lapse between the argument that the accused and the deceased had over money, as witnessed by PW1 and 2; and the time the attack was executed. I find that intervening period was sufficient for the accused to cool off if he felt provoked. I find that the accused armed himself with the sole purpose of either causing death or grievous harm to the deceased. He stabbed the deceased three times, and according to the doctor the wounds were very deep. The repeated stabs on the deceased in sensitive areas as the chest was calculated to cause death or grievous harm to the deceased.

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

In all the circumstances of this case, I find that malice aforethought has been proved beyond any reasonable doubt.

The accused denied the charge and put forward a defence of self defence. First of all he said that three people attacked him in his house. He then said that he was beaten and his leg fractured. He did not say who the three people were. However he implicated PW1 and 2 as having a grudge against him because of incident involving accused’s trees and over miraa respectively. I noted that during the cross examination of both witnesses no suggestion was made to either of them of any pre-existing grudge between them and the accused. I find the allegation of the existing grudge between them was a mere afterthought. I also find accused allegation he was attacked at home a lie.

I find that the evidence adduced against the accused was very strong and that it dislodged the accused defence. I find that the evidence adduced against the accused by PW1 and 2 irresistibly points to the accused’s guilt as the one who stabbed the deceased causing his death.

Having carefully considered the entire evidence adduced in this case I am satisfied that the prosecution has proved the charge of murder against the accused beyond any reasonable doubt. I reject the accused defence. I find the accused person guilty of murder contrary to section 203 of the Penal Code and convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF NOVEMBER, 2011.

J. LESIT
JUDGE