



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL CASE NO. 15 OF 2010**

**LESIIT J.**  
**REPUBLIC..... PROSECUTOR**  
**VERSUS**  
**PATRICK KAILIKIA M'KAIBI.....**  
**.....ACCUSED**

**JUDGEMENT**

The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on 17<sup>th</sup> day of March, 2010 at Kiurine Village, Mucuune Sub-location Kitheo Location in Meru North District within the Eastern Province he murdered Samson Mugambi M'Nkumbuku.

The prosecution called six witnesses. The case for the prosecution was that the deceased was relaxing with his friends including Kithinji PW1, Norman Gitonga PW3 , Patrick Kinyua PW4 and one Norman Kanyere and one Mugambi M'Mbee at Sammy's Kiosk. While there it is the evidence of the 3 friends that they heard screams coming from the direction of the home of the deceased. The deceased shot up and asked his friends to accompany him to his home just in case his father, whom he had left unwell may have become seriously sick needing to be taken to hospital.

It is the evidence of PW1, 3 and 4 that before they reached the home of the deceased, PW1 was leading the way and immediately behind them were PW3 followed by PW4 and the rest. The group was ambushed by the accused. The deceased was stabbed once and he fell down. PW1 was also stabbed before the accused ran away. The cause of death was stab wound to the heart and to the left lung leading to massive haemothorax.

PW6 also produced the P3 form on the accused which showed that the accused was of normal mental status and that at the time of the examination he had a deep cut between the thumb and the index finger and a cut wound on the forehead measuring 3 cm.

The accused person gave a sworn statement and called one witness. His defence was that he had visited his wife, a sister to the deceased, on the evening in question. He said that he gave 2,000/- to one Peter Ciomboko for the treatment of the father of the deceased who was sick. That as he left the home he was accosted by two masked men who demanded 50,000/- from him. He said that he was forced to kneel down which he did. He said that he grabbed the man who was holding a knife and that he was cut between his thumb. The other person lifted his hand as if to hit him and that in the process the knife went through his armbit. He says that he was then hit on the hand and the knife fell down. The accused admitted that the deceased was stabbed by him as he struggled to take the knife from his, accomplice. He said that he had no intention to kill or to fight.

The defence witness Daniel Kimathi testified that he was at the home of the father of the deceased in the company of the deceased. That as they sat there the accused person found them. That he and the deceased left for the canteen leaving the accused behind. DW2's testimony was that the accused was not armed when he saw him at the home of the deceased.

The accused person is facing a charge of murder. The prosecution has to adduce evidence to establish that the accused person, by some deliberate act which was calculated and motivated by malice stabbed the deceased as a result of which injuries the deceased died. The prosecution should prove its case against the accused beyond any reasonable doubt.

The accused has not denied that he stabbed the deceased. He has only qualified the facts by claiming that it was in the cause of struggling over a knife with another (probably PW1) that the deceased was stabbed.

The facts by the prosecution bring out a completely different scenario from that of the defence. The prosecution case was that at first someone was heard screaming at the home of the father of the deceased. Those screams were heard by 4 witnesses. These were PW1, 3 and 4 who were with the deceased at Sammy's kiosk a distance from the said home. The other person who heard the screams was PW2, one Grace Gatumua a sister in law to the accused and a sister to the deceased. It is clear from the prosecution case that PW2 was not with the deceased and his friends. In fact she was unaware of their presence. PW2 said that she went home to find out what was happening and she found her sister who had been screaming. That sister is the wife of the accused person. She said that her sister reported to her that the accused was the one causing her to scream because he had gone to their parents home to disturb her as usual.

PW2 explained that when she heard her sister screaming she decided to go check on her. PW2 explained that she left her sister with the accused because she did not want to interfere as the two are married. PW2 stated that the two and lived together on and off due to marital problems. PW2 explained that the wife of the accused, her sister, had been home only for two weeks having been beaten by the accused. PW2's testimony was that no sooner had she reached her house 25 meters from her parents home, she heard new screams and the voice of PW1 saying that the accused had murdered the deceased.

When PW1, 3 and 4 heard the screams at the home of the deceased they escorted the deceased home to find out what could have happened. Their evidence was that they were ambushed by the accused, who had hidden behind the shadow of an avocado tree, armed with a sharp weapon which he used to stab the deceased and PW1.

The question is whether the accused ambushed the deceased stabbing him to death; or whether the accused was ambushed by PW1 and the deceased disguised with masks and demanding money from him. The prosecution must prove that the accused was motivated by malice aforethought when he stabbed the deceased and that his intention was either to cause death or grievous harm to the deceased. I am guided by section 206 of the Penal Code which 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 evidence establishes the fact that the deceased was the only brother of PW2 and the sister of the wife of the accused. PW2's testimony was to the effect that the accused had threatened that he would kill the deceased because he was the one who counseled his wife to leave him and due to fear the deceased had shifted base to Nairobi where he was living. PW2 said that the deceased had just come from Nairobi to check on their ailing father when the incident occurred.

The evidence of PW2 established that the accused and his wife had serious marital problems and that often the accused seriously beat his wife causing her to return to her parents' home and to seek medical treatment. It was also established that the accused and his wife had three children and that her parents were demanding dowry from the accused which the accused was refusing to pay.

The accused in his defence created a different picture that he was in very good terms with his wife. He said that he had visited her at her parents' home and had given her money for food. The accused defence that he was in good terms with his wife cannot be true. We have evidence of 4 witnesses who heard her screaming at her parents' home on the material night. One of these witnesses PW2, confirmed that the reason the accused wife was screaming was because the accused was harassing her, and according to PW2 it was a usual occurrence between them. I find that the accused conduct after committing the offence was conduct of a man with a guilty mind. He escaped from the scene. He also got rid of the weapon used in the attack. The evidence of PW1 was he saw the accused and deceased wrestling before silence followed. The struggle accounts for the injury the accused sustained.

I find that the prosecution has established beyond any reasonable doubt that the accused went to the home of his wife's parents to harass his wife who had ran away from him. The prosecution case has also established that the accused had pronounced threats against the life of the deceased before this incident. I find from my analysis and evaluation of the entire evidence by both sides that it was the accused who waylaid the deceased. I am satisfied that the prosecution has proved beyond any reasonable doubt that the deceased had armed himself with a sharp object and lay an ambush against the deceased and attacked him, and fatally wounded him as he went home on the material evening. The prosecution has therefore proved that the accused had formed the necessary malice aforethought to either cause grievous harm or the death of the deceased. I reject the accused defence that he was a victim of an attempted robbery by the deceased and another. I find that the deceased was the victim, and the accused the villain.

Having come to the conclusion I have of this case, I find the accused person guilty of the charge of murder contrary to section 203 of the Penal Code and convict him accordingly.

**DATED, SIGNED AND DELIVERED THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2011.**

**J. LESIIT**  
**JUDGE**