



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Case 24 of 2004

REPUBLIC.....PROSECUTOR

V E R S U S

EDWARD BURUDI JAMES.....ACCUSED

JUDGMENT

1. The accused person herein, **EDWARD BURUDI JAMES** was arraigned in this court and charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal Code. It was alleged that on 15.4.2004 at Chemuche village in Kakamega District of the Western Province, he murdered BERNARD OKWARE. He denied the charge and at his trial, the Republic tendered forth the following evidence;
2. According to **PW1, Meshack Maneno Shitanda**, on 9.4.2004, the accused person and another person robbed him violently of Kshs.10,000/= and on 15.4.2004, he accompanied the deceased who was a Police officer to go and arrest the accused person and his confederate, one Indimuli. While they failed to get Indimuli at his home, they found the accused person. Appearing calm, the accused person agreed to accompany the officers including the deceased to Malava Police Station. As they walked, the accused called out to the deceased and told him that he wanted to tell him something. When the deceased leaned close to the accused person, the latter whipped out a knife and stabbed the deceased on the left shoulder. He continued stabbing him and PW1 tried to pull the deceased away as **PW3, Reuben Muchika Lucheli**, the village elder, threw his bicycle at the accused person. The accused person lurched out and with the knife he tore off the seat cover of the bicycle. When the deceased tried to draw his pistol, the accused stabbed him in the chest and the pistol fell off. The accused tried to take the

pistol but PW1 picked it and threatened to shoot the accused person. As the accused person raised his hands as if in surrender whilst still holding the knife, PW1 ran away and later handed in the pistol to other police officers. He returned to the scene and the deceased had already died.

3. **PW2, Vivian Wambui**, a police officer, was with the deceased on the mission to arrest the accused person and was present when he was allegedly stabbed by the accused person. She added that she was unable to rescue him from the vicious attacks of the accused person and so she ran away for safety. She later returned to the scene with the O.C.S., I.P. Charles Gimonde and later when the accused person was arrested, she identified him at an Identification Parade.
4. PW3 aforesaid had received the initial report of the alleged robbery of PW1 and he and the Assistant Chief for the area, **Daniel Simiyu** tried to resolve the matter without involving the police. That the suspects, including the accused person agreed to refund the money and an agreement in that regard was drawn up but by 15.4.2004, the money had not been refunded. The witness then accompanied PW1 to Malava Police Station on that day, and the deceased recorded their statements and with PW2 escorted PW1 and PW3 to identify the robbers.
5. It was his evidence that when they found the accused person, he warned the deceased to be careful because the accused person **“was known to be capable of killing people.”** As they walked with the accused person, the accused suddenly stabbed the deceased and PW2 fled from the scene. That after the stabbing, PW1 picked the pistol which had fallen during the incident and PW3 also ran off and watched at a distance as the accused ran after PW1 and the deceased struggling to walk. That he fell down after 400 - 500 metres and then rode his bicycle to Malava Police Station and reported the incident. He did not return to the scene after that.
6. **PW6, Daniel Simiyu** aforesaid confirmed the robbery incident and was with PW2 and I.P. Gimonde when they went to the scene after the incident. That was also the evidence of PW7, I.P. Gimonde aforesaid. He added that after the incident, the accused person disappeared and got employment in a factory in Nairobi and he was later arrested by officers from Parklands Police Station.
7. **PW4, Dr. Ludenyo Maxwell** performed a Post-mortem on the deceased’s body on 19.4.2004 and concluded that the cause of death was **“massive haemorrhage secondary to the stab wounds”**.
8. When he was put on his defence, the accused person admitted stabbing the deceased because the deceased produced a pistol which he pointed at him and told him that he had come to finish him off. That as he struggled with him, keys fell of the deceased’s pocket and he picked the knife attached to the keys and stabbed him severally. He said that he did not know that the deceased was a police officer and that he acted in self defence.
9. From the above evidence, the fact that the deceased was stabbed to death by the accused person cannot be denied because in his sworn statement before this court, the accused person admitted doing so. Even if he had not done so, from the evidence of PW1, PW2 and PW3, no other person could have caused the death of Benard

Okware, a police officer killed in the line of duty other than the accused person. That takes care of the actions as regards the charge that the accused was facing.

10. The more fundamental question is whether the accused had malice aforethought when he stabbed the deceased or whether he acted in self defence and is therefore guilty only of the lesser charge of manslaughter. I have carefully read the evidence on record and I am convinced beyond reasonable doubt that when PW2 and the deceased together with PW1 and PW3 set out to go and arrest the accused person for the robbery against PW1, none of them knew the fate that awaited the deceased. All the three witnesses were categorical that when they confronted the accused person, he appeared calm and the warning by PW2 that the accused was a violent person must have escaped the deceased. All the witnesses said that the accused while walking with them, called out to the deceased and without warning, started stabbing him in the upper body as he held tightly to him. The accused used his own knife to do so and I am satisfied that for fear of arrest and incarceration, the accused decided to turn violent and his victim was the deceased person. S.206 of the Penal Code provides as follows;

“S. 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 of omission causing death will probably cause the death 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.”***

11. Reading the above section with the facts of this case, one is left with no doubt that the accused person intended that the deceased should die and for that reason the charge of murder was proved beyond reasonable doubt.

12. As stated in **Kioko vs R [1983] KLR 289**;

“In a murder or manslaughter charge, the burden never shifts from the prosecution; it is not for the accused to establish his innocence. To refer to certain acts or omissions by an accused person as being inconsistent with his innocence would be to shift the burden from the prosecution and to require the accused to prove his innocence.”

13. Without shifting the burden of proof to the accused person, is his defence of self defence plausible? Sadly, the evidence on record and which has led me to the above conclusion cannot bear him out. If he was really attacked by strangers who threatened him, and he reacted by stabbing the one with the pistol, and having stabbed and immobilized him, why did he run away to Nairobi instead of making a report of a threat to his life? In any event, it was also his own evidence that for robbing PW1, he was eventually convicted and is serving a prison term for that offence and therefore the presence of PW1 at the scene should have notified him that he was being

apprehended for that offence. Instead what he did was to commit a most senseless act against an officer of the law discharging his duties as expected.

14. The accused person's defence is a sham and amounts to an admission and in the end, it does not dislodge the strong evidence against him.

15. Accordingly, I find the accused person guilty of the offence of murder and I hereby convict him of the same and sentence him to death as by law established.

16. Orders accordingly.

Dated, Signed and Delivered at Kakamega, this 21st day of April, 2010

ISAAC LENAOLA

J U D G E