



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Case 33 of 2008

REPUBLIC.....PROSECUTOR
VERSUS
DOUGLAS ANGONGA OBIMBO.....ACCUSED

JUDGMENT

Douglas Angonga Obimbo, (hereinafter “*the accused*”), is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that the accused, on the 16th day of May, 2007, at Santana Village of Portreitz Location in Mombasa District within Coast Province, murdered Abubakar Iddi (hereinafter “*the deceased*”).

The prosecution was led by Mr. Onserio, Learned State Counsel, whilst Mr. Mushelle represented the accused. The state called a total of ten (10) witnesses. Its case is as follows:- At about 8.00 a.m. on 16th May, 2007, Abubakar Yusuf, (PW 2) was at his friend’s, (Tedy’s) house when he heard people quarrelling outside. He went outside and saw a person, he knew as Kalulu Carlos struggling with the deceased. The said Kalulu was asking for a mobile phone which he alleged the deceased had which fact, the deceased denied. Kalulu aimed to box the deceased but the deceased held him by the knees. Kalulu then removed a knife from his right trouser pocket and stabbed the deceased just above the abdomen. The deceased moved for 50 metres as Kalulu followed him and fell down. PW 2 and Tedy tried to arrest Kalulu but he threatened them with the same knife and ran away as Tedy gave chase. Kalulu told them that he would kill the deceased unless he (the deceased) gave him his phone.

PW 2 placed the deceased on a handcart and took him to a clinic at Bomani where the Doctor at the clinic pronounced the deceased dead. PW 2 testified that Kalulu Carlos is the accused and he knew him prior to the attack.

PW 3, Salim Mohamed Athumani, on his part, witnessed the incident as he stood outside his house on the material date at 8.00 a.m. He saw the deceased and Kalulu (the accused) quarrelling. The accused held the deceased and demanded his phone or else he would kill him. The deceased denied having the phone where upon the accused removed a knife from his trousers and stabbed the deceased below the chest. PW 3 screamed and as members of the public gathered the accused started running away with PW 3 and others in hot pursuit. The chase was not successful. PW 3 reported the matter to the deceased’s relatives and the police.

The deceased’s body was subsequently taken to Coast General Hospital Mortuary where a Post Mortem was conducted by Dr. Mandalya, PW 5. The pathologist formed the opinion that the cause of death was due to hemorrhagic shock due to a stab wound on the left chest. In the doctor’s opinion, the wound was consistent with having been caused by a sharp instrument which had cut in the heart, lung and liver. The body of the deceased was identified to the pathologist by PW 4, Ramadhan Iddi Mzee, the deceased’s nephew and PW 6, PC Paul Nduva.

On 7th December, 2008, Rashid Ndoli Ongodi, (PW 1), a member of the Community Policing Service at Chicago village, was on such duty at 11.50 p.m. with his colleagues when they arrested the accused at Magongo. The accused was then armed with a panga which he removed when he was confronted by PW 1 and his colleagues. He was overpowered and taken to the local leader of the Community Policing Service, Ali Sadler Juma, where the accused was recorded as having killed somebody named Douglas Angonga Kalulu. The accused was later taken to the police where he was re-arrested and charged as already stated.

SUMMARY OF EVIDENCE

PW 1, Rashid Ndoli Ongodi, in December, 2008 was a member of the Community Policing Service at Chicago village. On 7th December, 2008, at 11.50 p.m., while at Magongo area, with three of his colleagues, the accused approached them. He did not know that PW 1 and his colleagues were members of the Local Community Policing Service. He removed a panga but PW 1 and his colleagues grabbed him and snatched the panga from him. They took the accused to their leader, Ali Sadler Juma, where they found that the accused was recorded as having killed somebody. They subsequently took the accused to Changamwe Police Station.

PW 2, Abubakar Yusuf, recalled the 16th May, 2007 at 8.00 a.m. At that time, he was at his friend's house when he heard noise of people quarrelling. When he went outside, he saw Kalulu Carlos struggling with the deceased. Kalulu was asking for his mobile phone from the deceased who denied having the same. Then Kalulu aimed to box the deceased and the deceased held him by the knees. Kalulu removed a knife from his right trouser pocket and stabbed the deceased in the abdomen. The deceased moved away as Kalulu followed him holding the said knife. The deceased then fell down 50 metres away from where he had been stabbed. According to PW 2, there were many people who included those who were leaving a funeral nearby and school going children. PW 2 and his host tried to arrest Kalulu but he threatened them with the same knife saying that he would kill the deceased and anyone who dared intervene unless he was given back his mobile phone. He then escaped. Kalulu according to PW 2 is the accused.

PW 2 took the deceased to Bomani Clinic where the doctor at the clinic pronounced him dead. He reported the attack to the deceased's relatives and to Changamwe Police Station.

PW 3, Salim Mohamed Athuman, was at the material time a resident of Magongo Msufini area. He recalled that at 8.00 a.m. on 16th May, 2007, while brushing his teeth outside his house, he saw Kalulu (the accused) and the deceased quarrelling. The accused held the deceased and asked for his phone or else he would kill him. The deceased denied having the phone. Kalulu then removed a knife from his trousers and stabbed the deceased below the chest. He fell down 50 metres away. PW 3 screamed and members of the public came to the scene. The accused started running away and PW 3 gave chase as he threw stones at the accused. He did not manage to get up with him. When PW 3 returned to the scene, he found that the deceased had been taken to hospital. He then went to report to the relatives of the deceased and to the police at Changamwe Police Station.

On 8th December, 2008, PW 3 was informed by members of Community Policing Service that the accused had been arrested and was at Changamwe Police Station. He went to the station and identified the accused.

PW 4, Ramadhan Iddi Mzee, recalled that on 16th May, 2007, while on duty at his place of work at East Motor Industries, he received a telephone call from his wife that his uncle, the deceased, had been killed. He went home and found that the deceased had been taken to Coast General Hospital Mortuary. He went to the said mortuary where he identified the body of the deceased to PW 5 who performed the post mortem on the deceased's body. The body was then released to him for burial.

PW 5, Dr. K. N. Mandalya, recalled that on 16th May, 2007, at about 1.00 p.m., he carried out a post mortem on the body of the deceased who had been brought to Coast General Hospital Mortuary by Changamwe Police Officers. He observed a stab wound which had been inflicted by a sharp instrument and had entered the chest cavity, grazed the surface of the lung, cut the apex of the heart, perforated the diaphragm and the left lobe of the liver. The stab wound had caused massive bleeding in the abdomen and chest. He further opined that the fatal wound was on the heart.

PW 6, PC Paul Nduva, recalled that at about 12.40 p.m. on 16th May, 2007, he was asked by relatives of the deceased to accompany them to Coast General Hospital Mortuary to attend a post mortem which was to be carried out on the body of the deceased. He obliged and witnessed the post mortem performed by Dr. Mandalya. He too, observed the stab wound the deceased had sustained.

PW 7, PC Edward Chepsergon, testified that on 8th December, 2008, while in the Crime office at Changamwe, he was informed by PW 3 that the accused who was in police custody on suspicion of preparing to commit a felony, was also a suspect in respect of a murder committed on 16th May, 2007. He confirmed the report when he checked with the Investigating Officer who had initially handled the murder investigation. PW 7 took over the investigation, visited the scene and recorded statements from some witnesses. He took the accused for mental examination and arranged an Identification Parade which was conducted by IP Thomas Makori who is no longer with the police. He then charged the accused as already stated.

Put on his defence, the accused gave a sworn statement. He testified that he stays at Chicago in Magongo area of Mombasa where he has a food kiosk. On 16th May, 2007, he was at his said business from 6.00 a.m. to 6.00 p.m. He had been attending to his business since. He was arrested on 8th December, 2008, at about 11.00 p.m. by, among others, PW 1 with whom he had had a disagreement and on being arrested, PW 1 instructed his colleagues to beat him up which they did. He was later taken to Changamwe Police Station where an officer alleged that the accused was planning to commit a crime. At the police station PW 1 took out a panga and told the police officer that the accused had intended to use the panga to commit a crime. He denied the allegation and was placed in cells where he stayed until 21st December, 2008 when PW 1 and other witnesses identified him at an Identification Parade. He was then charged with an offence he knew nothing about. It was his case that PW 1 fabricated the offence of preparing to commit a crime and when he saw that it was weak, he instigated the murder charge.

At the conclusion of the evidence, counsel for the accused submitted that the case had not been proved beyond

reasonable doubt against the accused. Counsel contended that the accused had never left his business since the offence was allegedly committed and the belated arrest casts doubt on the prosecution case which is founded on a frame up by PW 1. Mr. Onserio on his part submitted that the evidence adduced is cogent and was unshaken in cross-examination. In his view the charge had been proved beyond reasonable doubt.

ANALYSIS OF THE EVIDENCE

The key witnesses for the prosecution were PW 2, Abubakar Yusuf and PW 3, Salim Mohamed Athumani. PW 2, Abubakar Yusuf's evidence was that at 8.00 a.m. on 16th May, 2007 he was at his friend's house at Magongo when he heard noise of people quarrelling. He went out to investigate and saw that the people quarrelling were Kalulu and the deceased. He had known the accused as Kalulu and he had known him for 4 years prior to the incident. He saw the accused struggling with the deceased asking for his mobile phone. He heard the deceased deny that he had the accused's phone. He saw the accused aim a blow at the deceased who then held the accused by the knees. He saw the accused remove a knife from his right side pocket and he saw the accused stab the deceased in the abdomen. The deceased moved for 50 metres as the accused followed him with a knife in his hand. He saw the deceased fall down. He was a mere 10 metres away. PW 2 and his host tried to arrest the accused but he threatened them with the same knife insisting that he would kill the deceased and anyone who intervened unless he was given his mobile phone. The incident took place at about 8.00 a.m.

PW 2 after failing to arrest the accused returned to assist the deceased. He placed him on a handcart and took him to a clinic at Bomani where he was pronounced dead on arrival. PW 2 witnessed the accused and the deceased quarrel. He witnessed the accused remove a knife from his pocket and he witnessed the accused stab the deceased in the abdomen. He witnessed the accused run away and he witnessed the deceased lose his life. On cross-examination, PW 2 maintained his testimony. He added a significant detail to the incident. He said the deceased was stabbed just below the chest and above the abdomen. It was never suggested to him that he could be mistaken and no grudge was alleged.

PW 3, Salim Mohamed Athumani's testimony was in consonance with the testimony of PW 2. His evidence was that, at about 8.00 a.m. on 16th May, 2007, he was outside his house at Magongo, Msufini area. He was brushing his teeth. He saw the accused, who he also knew as Kalulu quarrelling with the deceased. The accused held the deceased and asked for his phone or else he would kill him. He saw the accused remove a knife from his trouser pocket. He saw him stab the deceased with the knife below the chest. PW 3, screamed and members of the public came to the scene and the accused started running away as PW 3 gave chase as he threw stones at him. He did not catch up with the accused. When he returned to the scene, he found the deceased had been taken to hospital. PW 3 initially witnessed the incident from a distance of 25 metres.

PW 3 had known the accused six months prior to the incident. He also maintained his stand on cross-examination. It was not suggested to him that he could be mistaken. The cross-examination indeed suggested that the accused was provoked by the theft of his mobile phone. No grudge was suggested. I find no conflict in the testimony of PW 2 and PW 3, given that the two initially witnessed the incident from different houses next to the road where the accused stabbed the deceased.

PW 5, Dr. Mandalya's evidence corroborated the testimonies of PW 2 and PW 3. He observed that the deceased had a single stab wound in the interior chest which had been caused by a sharp instrument. He noted that the instrument had entered the chest cavity and had grazed the surface of the lung, cut the apex of the heart and perforated the diaphragm and the left lobe of the liver. He opined that the cause of death was massive hemorrhagic shock due to the stab wound on the left chest. The fatal wound according to PW 5 was on the heart but the bleeding had come from both the heart and the lung.

Dr. Mandalya's testimony was in consonance with that of PW 2 and PW 3 who both testified that the deceased was stabbed once by the accused below the chest according to PW 3 and just below the chest and above the abdomen according to PW 2. PW 2 and PW 3 had no medical knowledge and their description of the injury was not expected to be as specific as that of Dr. Mandalya.

PW 1, Rashid Ndoli Ongodi's testimony was in respect of the arrest of the accused as he (PW 1) carried out his community policing duties in Magongo area. On cross-examination, PW 1 admitted that the accused was initially arrested as a suspect but not for having killed the deceased. It is significant that no grudge was suggested to him.

The accused's defence was that on the material date, he was at his food kiosk the entire day and had regularly carried out his business at the said food kiosk since then until his arrest on 8th December, 2008. He blamed PW 1 with whom he stated there was bad blood. He testified that when PW 1's attempt to blame him for preparing to commit a crime failed, he framed him with the present charge of murder. The existence of a grudge between the accused and PW 1 was never

suggested during cross-examination by counsel for the accused. The accused did not also disclose the nature of the grudge he had with PW 1. Even if there was a grudge, it would probably weaken the testimony of PW 1. But there are the testimonies of PW 2 and PW 3 which have been analyzed above. It was never suggested at any time that the two were carrying out a scheme hatched by PW 1. The two witnesses gave evidence which was cogent. They did so unhesitatingly and in detail. I believed them. Their testimonies clearly displaced the accused's alibi defence and the alleged frame up which I find to be an after thought. I accordingly reject the said defence.

The accused was seen stabbing the deceased by PW 2, Abubakar Yusuf and PW 3, Salim Mohamed. PW 2 took the deceased to a clinic at Bomani where he was pronounced dead on arrival. Dr. Mandalya, PW 5, observed a single stab wound in the chest of the deceased which had cut the apex of the heart, lung and liver. He opined that the deceased died of massive hemorrhagic shock due to the said stab wound. The incident occurred in broad day light at 8.00 a.m. There is, in my judgment, no question of mistaken identity. There is therefore no doubt in my mind that the prosecution has proved, beyond reasonable doubt, that the accused killed the deceased on the fateful morning of 16th May, 2007.

The accused is however charged with murder. The prosecution had therefore to prove, beyond reasonable doubt, that the accused killed the deceased with malice aforethought. The testimonies of PW 2 and PW 3 disclose a quarrel between the accused and the deceased over a mobile phone. That was prior to the fatal stab which resulted in the death of the deceased. In the premises, I entertain doubt as to whether malice aforethought has been demonstrated beyond reasonable doubt. I resolve that doubt in favour of the accused and accordingly acquit him of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. I have however, no doubt in mind that the prosecution has proved, beyond reasonable doubt, that the accused committed the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. I find and hold that the accused is guilty of the said offence of manslaughter and hereby convict him accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 26TH DAY OF JULY 2010.

F. AZANGALALA
JUDGE

Mr. Onserio:

I have no previous record of the accused. He may be treated as a first offender.

Mushelle:

The accused is indeed a first offender. He is married with one child. The accused has been in custody since December, 2008.

The accused is remorseful. The deceased caused the incident. I pray for utmost mercy.

Court:

I have considered the mitigating circumstances given by the accused's counsel. I have also considered that the accused is a first offender and that he has been in custody since December, 2008. Having done so, I also consider that a life was lost needlessly. I sentence the accused to ten (10) years imprisonment. Right of Appeal fourteen (14) days.

F. AZANGALALA
JUDGE
26TH JULY 2010