



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MERU

CRIMINAL CASE 92 OF 2005

REPUBLIC PROSECUTOR

VERSUS

BRUNO KIMATHI ACCUSED

JUDGMENT

The deceased, Josephat Muimenti died on 23rd September 2005 from stab wounds inflicted by the accused person. The only eye witness was PW1 Isaiah Mugambi (Isaiah) who testified that on the day in question (23rd September 2005) at about 2.30pm he saw the accused person chasing the deceased. He confirmed that the accused person was known to him before. The accused person caught up with the deceased and stabbed him with a knife.

He saw both drop down. When he got to the scene he noticed that the two had injuries. The rest of the witnesses got to the scene after the incident. The doctor in his report found that the deceased suffered a single stab wound on the left side of the chest which severed the rib through to the chest cavity. The deceased died of a heart failure due to the stab wound.

The accused person's explanation of the events leading to the fatal stab was that he had been heavily drinking with the deceased on the fateful day when a dispute arose over a loan of Kshs. 100/= which the deceased from sought him. When the latter told the deceased that he did not have the money, the deceased became abusive. He suddenly took a panga and began to slash the accused person. The accused person ran away but the deceased followed him still cutting him. The accused person went to the hospital and was treated. He relied on treatment notes which did not indicate the hospital, although in his testimony he stated that it was a dispensary near his home. One of the two treatment notes is dated 29th September 2005.

Once again he confirmed that he did not go to the hospital on the same day. I have considered the evidence adduced in this trial and submissions for both sides. While there is no dispute that the fatal stab on the deceased was inflicted by the accused person the questions raised from the evidence are whether the accused person acted in self-defence or whether he was intoxicated.

The final issue raised is whether the accused person's constitutional right under section 72(3) of the Constitution was infringed. The burden of proof is on the prosecution to show beyond reasonable doubt that the accused person had malice aforethought. While the accused person has maintained that it was the deceased who started the fight; was the first to deliver the first blow; chased him and continued to cut him, it was the evidence of Isaiah that it was the accused person who was chasing the deceased.

I am persuaded by Isaiah's evidence. He is an independent witness. He knew the accused person prior to this date, although the accused person denied that he knew him. Either way there is no evidence of bad blood or any other reason why he would testify against the accused. He was the only witness who saw immediate events which led to the fatal stabbing.

In **Ogeto V. R.** (2004) 2KLR 14 it was held that:-

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with greatest care the identification evidence of such witness especially when it is shown that conditions favouring a correct identification were difficult.”

See also **Marube V. R.** (1986) KLR 356. The attack took place in broad day light between 2.30 – 3.00pm. Isaiah was only 30 paces from the scene. He got to the scene and took the weapons from the two. He confirmed that indeed the accused person also had injuries. I find this evidence credible and hold that it was infact the accused person who was chasing the deceased. While the accused person was categorical that the deceased was stabbed accidentally as they struggled, Isaiah maintained that when the accused person caught up with the deceased, the latter stopped and turned to face the accused person. The accused person then stabbed him. The stabbing by the accused person was therefore not accidental. But since Isaiah did not see at what stage the accused person was stabbed, it is safe to conclude that this fight started elsewhere only culminating with where Isaiah eventually saw it. It is therefore probable that the injuries sustained by the accused person were inflicted by the deceased. The court saw for itself the healed scars on the accused person.

I come to the conclusion that the deceased attacked the accused person first using a panga. The accused person chased him and stabbed him with a knife. In a case of self-defence, if an accused person finds he is in evident danger from his attacker, he must retreat from the danger but, if he finds that he cannot retreat any more then he would be justified to use force to defend himself. See **Musyoka & others V. R.** (2003) IEA.

After having been cut on the shoulder and having overpowered the deceased, the accused person ought to have left the matter at that. But he did not. He gave chase until he revenged with a fatal stab through the vital body organs. It follows, therefore, that the accused used excessive, indeed unnecessary force in the circumstances. The issue of intoxication has also been raised. None of the witnesses appeared to be aware of the place the accused person alleged they were drinking local brew.

Before I conclude it was submitted that the accused person's right under section 72(3) of the Constitution was infringed. It is not disputed that the accused was arrested on 23rd September 2005, on the same day of the incident. He was brought to court for the first time on 20th December 2005. That is a period of nearly three (3) months. It is now settled that where the question of delay in taking a suspect to court after arrest is raised the burden of showing that he was taken as soon as was reasonably practicable is upon the prosecution. See **Ndede V. R.** See also **Albanus Mwasia Mutua V. R.** Cr. App. No. 120 of 2004.

It is also settled that so long as the prosecution has offered a reasonable explanation the burden will have been discharged. However, if there is no explanation or if the explanation is not reasonable the suspect is entitled to an acquittal.

The delay in this case of nearly three (3) months have been explained on failure to trace all the witnesses; that the exhibits taken to the Government analyst took some time to be received back; that the accused had to be taken for mental examination.

In my considered opinion the framers of the Constitution were definitely aware of the processes involved in investigating crimes. That is why they set a ceiling of fourteen (14) days in capital offences and twenty four (24) hours in other offences. While it is appreciated that the police must record statements from witnesses, where exhibits require analysis, the same must be forwarded to the expert for that purpose and in the some cases the accused may require mental assessment, I maintain that all these steps must be taken

within the time frame set by the law.

Indeed the Legislature was alive to the fact that genuine difficulties may pose challenges that may necessitate the time to be extended hence the enactment of section 72(4) of the Constitution which allows for extension of time. As must be clear from the foregoing I find that the prosecution has failed to explain the delay of three months in this case. The accused is entitled to his liberty the evidence adduced notwithstanding.

In the result the proceedings are illegal and annulity. It is ordered that the accused shall be released forthwith unless he is otherwise held for any lawful reason.

Dated and delivered at Meru this 4th day of February 2009.

W. OUKO

JUDGE