



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE 15 OF 2005

REPUBLIC.....PROSECUTOR

VERSUS

JOHN EBENYO.....ACCUSED

JUDGEMENT

The Accused **JOHN EBENYO** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 7th January, 2005 at about 8.30 p.m. at Baringo Estate in Eldoret Town in Uasin Gishu District within Rift Valley Province murdered **JAIRUS OMACHO NDALA**.

The Prosecution called six (6) witnesses.

PW 1, one Dickson Kituyi Ndala a brother to the deceased testified that on 7th January, 2005 in the evening he went home with his brother, the deceased. They found that their mother had made tea which they drank. He then went to collect water from a well nearby. He then heard some noise of things falling. He saw the wife of their neighbour, the Accused John Ebenyo (identifies the Accused in the dock) run to PW 1's brother's house. He saw her enter the deceased's house. He left the well to find out what was happening. He said that it was about 8 p.m. There was moonlight and no clouds, he said.

PW 1 said that he saw his brother push the Accused. That the Accused then stabbed the deceased on the neck. His brother shouted that he had been stabbed. He saw them struggle and fall to the ground. PW 1 said that he tried to stop the Accused and take away the knife but he was too strong for him. That the Accused ran but fell down. The neighbours and another brother of PW 1 caught him. PW 1 said that he did not see any knife or weapon then. He saw his brother bleeding profusely. They went to look for a vehicle. Their neighbour who had a vehicle was not there. When he came back, PW 1 found that his brother had died. The Village Elder was informed and the Police were called. That the Police arrived around 10 p.m. The Accused had been over-powered and his hands tied. PW 1 said that the next morning he saw a knife on the ground. It was short and sharp at one end. That it had a grey handle. It had blood on it. He handed over the knife to the Village Elder. He identified the knife shown to him in Court as the knife he saw. PW 1 said that there was no dispute or quarrel between the Accused and the deceased or with his family. PW 1 said that the deceased did not have a weapon.

Upon cross-examination, PW 1 said that the Accused had quarreled with his wife. That she is the one who ran first. He did not see any stabbing of the deceased. That the deceased was stopping the Accused from entering his house. They struggled at the door. The Accused wife was inside the deceased's house. It was one room divided by a curtain.

PW 1 said that the Accused had some relatives in his house but they left that night after the incident.

PW 2 was one Rose Nasambu, wife to the deceased. She said that she was at home on 7th January, 2005 at about 8.30 p.m. She was with her husband the deceased and his brother called Dickson. She said that a woman then came running into their room. She was a neighbour who lived with the accused. She said that the woman was the Accused's wife. She ran into the house crying. That she said that her husband wanted to kill her. That the deceased stood up to help her. PW 2 said that the deceased met the Accused at the door. She then heard the deceased say that he had been stabbed.

She said that there was moonlight outside while there was a wick lamp ("koroboi") in the room. PW 2 said that she heard her husband shout in Kiswahili – "**Nimedungwa kisu.**" She said that she was three (3) metres away. She went to the door. Her husband had fallen outside. PW 2 said the incident did not take long. The struggle took about three (3) minutes. She did not hear them talk. She screamed. The neighbours came. She said she did not leave the room. The neighbours who came were John, Dickson (a brother to the deceased) and Muliro. That the neighbours caught the Accused and tied his hands. The Village Elder was called who in turn called the Police. That the Police arrived about 11 p.m. The deceased had died. PW 2 said that she saw the knife in the morning. It was outside the house. That it was a short knife. She identifies the knife in Court. She called her husband's family who came and called the Village Elder. The Village Elder collected the knife. PW 2 identified the Accused in the dock. That they had been with Accused for three (3) months.

Upon cross-examination PW 2 said that they were eating at the time. They were her husband, his two brothers, Dickson and Muliro and herself. She said that she did not see any struggle at the door. She did not see the Accused stab the deceased. She said that it was dark at the door. That the Accused's wife jumped and ran out when the struggle was taking place. That she ran out when she heard the deceased shout that he had been stabbed. She confirmed that there were no differences between them and the Accused. She said the knife did not belong to her husband.

PW 3 was Aggrey Muliro Ndala, a brother to the deceased. He said that on 7th January, 2005 he came from work and went to rest at home. A quarrel broke out between his neighbour John Ebenyo and his wife. That they spoke in Turkana language, which PW 3 did not understand.

PW 3 said that he went to his deceased's house. That they were neighbours. He lived two (2) doors away from the deceased and three (3) doors from the accused's. He left for his room when he heard his brother the deceased shout, "**Nimedungwa kisu.**" He spoke in Kiswahili. PW 3 said he went out quickly and found the deceased and Accused struggle at the door. He said that he tried to take the knife away. That the deceased fell down. That they caught the Accused and tied him up. They went to look for a vehicle. They found one but it had no fuel. Upon returning he found his brother had died. There were many neighbours who had gathered. That the Village Elder came and then the Police. The Police took pictures of the body and the Accused. That the Police then took the Accused to the Station and the body to the Mortuary.

PW 3 said that there were no differences between the deceased and accused. That the Accused was still near in the compound and they hardly knew each other. He said that the next morning the knife was found. He saw it. That it had two sharp sides. That it had blood on it. That it was slightly bent. He identifies the knife in Court.

Upon cross-examination, PW 3 said that he did not see the struggle as he was still in his room. He said that when he came out the deceased had already fallen down. PW 3 tried to catch the Accused. He did not see any knife that night. PW 3 said that the Accused had a visitor that night. That the visitor took something and ran away. That he did not know the visitor but later heard that he was called Peter Eyapa. He said that the incident took place after dinner.

PW 4 was the Dr. Joseph Embenzi, who was allowed to produce the post-mortem report under the provisions of Section 32 of the Evidence Act, Chapter 80 Laws of Kenya with the consent of the Accused's Counsel. The post-mortem was carried out by Professor Koslova at the Moi Teaching and

Referral Hospital. Dr. Embenzi had worked with her for six (6) years and was familiar with her handwriting and signature.

PW 4 testified that the post-mortem was carried out on 12.01.05. The body had an oval shaped wound measuring 5.5x22 cm on the left side of the chest. There was a wound on the neck. The apex of the right lung had been ruptured. PW 4 stated that the wounds were caused by a weapon like a knife, Somali sword etc. It must have been sharp on both edges. He said that there was a lot of bleeding. The cause of death was stab wound penetrating the right chest with damage of great blood vessels, apex of the lung, resulting in massive pneumo-haemothorax, excessive loss of blood. There was another stab wound on the left side of the chest. He was of the view that great force had been used.

PW 5 James Wainaina the Village Elder of Baringo Estate where the deceased lived. He testified that on 7th January, 2005 he was at home when he was called by one John and Waweru who lived in the Village. He was told that there had been a bad fight in the neighbourhood. PW 5 went to the scene and found two people on the ground. It was about 10 p.m. in the night. He switched on his spotlight. One person was tied with a rope while the other was on the ground with a lot of blood. He had been stabbed and was dead.

PW 5 called the Police. He said that the one who was alive was the Accused (identifies the Accused in the dock). He did not have any injuries.

PW 5 said that the next morning the deceased's wife brought a knife to him. It had blood on it. That it was a double-edged sword. PW 5 said that he remembered seeing a knife sheath on the Accused belt the previous night. PW 5 identified the knife and belt. He also identified the sheath.

PW 6 was Police Constable Elam Juma Mutonyi attached to the Eldoret Police Station. He said that he was on duty at the Station on 7th January, 2005. While attending to another case at Moi Teaching and Referral Hospital at about 10.30 p.m. he received information on the Police VHF set from Divisional Control Room and was instructed to proceed to Baringo Estate at a scene of a murder.

With the help of Administration policemen, he was able to locate the scene of the incident. He found a dead body between House No. 1 and 2, three metres from the door. Also at the scene was another person who had been tied with rope about seven metres from door 1 and 2. PW 6 was told that he was the suspect.

PW 6 said that they took the dead body and the suspect. They could not contact the Scene of Crime personnel and no photographs were taken. However, PW 5 drew a sketch map of the scene. He interviewed the witnesses. He was told that the incident followed a domestic quarrel between the suspect and his wife. That the wife ran for assistance into the house of the deceased. He testified that he did not recover any weapon that night but he collected a pouch tied to the Accused's belt which he suspected had held a weapon. PW 5 identified the belt and the pouch and which he produced as Ex. P. 3 and P. 4. He learnt of the recovery of the knife the next morning. He received it from the Village Elder. PW 5 produced the knife as Exhibit No. 2.

During cross-examination PW 5 testified that he learnt that the wife of the suspect had ran away and that she may have gone to Lodwar.

After the prosecution closed its case, the Court upon consideration of the evidence placed the Accused on his Defence. The Accused gave a sworn statement.

The Accused confirmed that he lived in Baringo Village in Eldoret. He used to work as a watchman for a company. He said that he knew the deceased.

That on the 7th January, 2005 at about 8.30 p.m. he reported on duty. He had quarreled with his wife earlier in the day. He said he wanted to find his spot light. His house was in darkness. He said that a stranger entered his house. He did not know who it was. That the person started wrestling him. They fell

to the ground. He said that he had a Turkana knife which he normally carried. It was held at his waist. He said that during the struggle his wife was in the house. That she never ran away. He said that he later learnt that the person had died. He said that he had a good relationship with the deceased.

Upon cross-examination the Accused said that he quarreled with his wife about their children. That she used to leave the children alone when she delayed at her work-place.

He denied that his wife ran away or that he followed her out of the house. I admitted that the knife produced in Court was his. He however denied stabbing the deceased. He said that the knife was in its sheath and was loose.

I have carefully considered the testimonies of the prosecution witnesses and that of the Accused. I have considered all the evidence and submissions by Counsel. I have also carefully perused the proceedings and analysed the evidence.

I do find that the deceased and accused were neighbours. On the 7th January, 2009 between 8 p.m. and 8.30 p.m. there was a quarrel between the Accused and his wife. The Accused stated that he quarreled with his wife during the day. His wife was seen by PW 1 running away into the deceased's house. When PW 1 rushed to find out what was happening he found his brother pushing the Accused away from his door. I do find that the Accused having quarreled with his wife followed her when she ran out of their house. I find that the Accused's wife ran for assistance or safety into the deceased house, a neighbour.

PW 1 found the Accused at the door of the deceased. He saw them struggle and fall to the ground. PW 1 saw the Accused with a knife and he tried to snatch it from him but the Accused over-powered him. With the help of neighbours and family members the Accused was arrested and tied up on the spot.

PW 2 was the wife of the deceased. She was with her husband inside their house at 8.30 p.m. on the material day. She said the Accused wife came running into their house. She said that her husband the Accused wanted to kill her. The deceased stood up and went to the door where he met the Accused.

I do find from the evidence of PW 1 and PW 2 that the deceased stopped the Accused from entering the house in pursuit of his wife.

There was a struggle and suddenly the deceased shouted in Kiswahili – **“Nimedungwa kisu”** meaning that **“I have been stabbed with a knife.”**

I do find that the deceased then fell down to the ground bleeding profusely. This was stated by PW 1, PW 2 and PW 3. All three gave similar evidence which corroborated each other. The deceased fell down, bled heavily and died three (3) metres from his door step.

None of the three saw the Accused stab the deceased. However, there is consistent evidence by all the three (3) that there was a struggle at the door when the Accused attempted to force his way into the deceased house. He was in pursuit of his wife who had run into the house for refuge.

As the struggle went on the deceased shouted that he had been stabbed with a knife. The deceased and the Accused then fell down on the ground. The deceased bled and he died on the spot.

The Accused tried to run away but he was arrested and tied up with a rope. PW 1, PW 2, PW 3, PW 4 and PW 6 all testified that the Accused was arrested at the spot and tied up with the rope until the police came.

The next morning PW 2 found a knife outside the house and called the family and neighbours. The knife was taken to the Village Elder and then the Police. The knife was produced in Court. It was identified by PW 2, PW 1 and PW 3.

When the Accused was shown the knife in Court, he admitted and confirmed that the knife belonged to

him.

I do find that the Accused in his attempt to force his way into the deceased house, struggled with the deceased and while in the process, he stabbed the deceased several times with the said knife produced as Ex. No. 2 as a result of which the deceased sustained serious injuries. The deceased bled profusely and died on the spot.

I do find that the Accused did stab the deceased with his knife several times. I have considered the post-mortem report and the evidence of the PW 5, the doctor and do find that the deceased died due to injuries resulting from stabbing. He died from stab wounds penetrating the right chest with damage of great blood vessels, apex of the lung resulting in massive pneumo-haemothorax and excessive loss of blood.

I do find that the stab wounds were inflicted upon the deceased by the Accused during the struggle using his knife (Ex. No. 2). I do find as a matter of fact that the Accused stabbed the deceased and caused the injuries from which the deceased died. I do not accept the defence evidence which was weak and unbelievable. The deceased never entered the Accused house to attack him. There was no reason for such an attack in the dark and this did not happen. The Accused wife was not in her house but at the deceased's house.

I do find that while the deceased and the Accused had no previous dispute or quarrel, the Accused was incensed and angry with his wife and ran after her with an intention to cause her harm or cause her grievous harm.

I do find that while attempting to carry out an unlawful and malicious harm or grievous harm on his wife, he was blocked or stopped from doing so by the deceased as a result of which the Accused got upset/annoyed and stabbed the deceased several times on the neck and the chest.

I do hold that the aforesaid amounted to malice aforethought, albeit transferred. In the English case of LATIMER (1886) 17 QBD 359 AT 361 the Court applied the doctrine of "**transferred malice.**" Lord Coheridge CJ stated:-

"It is common knowledge that a man who has unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the Judges call general malice, and that is enough."

I do hold that the Accused intended to assault his wife or cause her grievous harm and in the process of carrying out the intention he got involved in a struggle the deceased who was acting as a good neighbour or Samaritan to prevent him from beating or harming his wife. During the struggle the Accused with intent to cause grievous bodily harm stabbed the deceased several times causing the severe injuries.

I find that this transferred malice amounted to malice aforethought. In any case, the mens rea herein is established by the circumstances. The stabbing herein was intentional. The Accused intended to cause grievous harm to the deceased. The attack was unprovoked and in the circumstances actuated by malice. The malice can also be inferred from the vicious and brutal attack. The Accused used such force and violence in the stabbing that it can be only have been intended to cause grievous harm.

I do find that the Accused with malice aforethought caused the death of the deceased by unlawful acts and omissions. The deceased died as a direct result of the injuries he sustained upon being stabbed by the Accused several times with the knife.

I do find the Accused guilty of the murder of **JAIRUS OMACHO NDALA** contrary to the provisions of Section 204 and 205 of the Penal Code.

DATED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF JUNE, 2009.

M. K. IBRAHIM

JUDGE

Court:

I invite the Accused to mitigate before sentence.

Mr. Misoi:

An incident due to domestic quarrel relating to children. Accused has children. The Accused is needed by his family. Court considers a lighter sentence.

Mr. Chirchir:

He may be treated as a first offender. Only one sentence available.

SENTENCE

I have considered the mitigation by the Accused. The only and mandatory sentence provided by the law under Section 204 of the Penal Code is that of death.

Had the Court commuted the Charge to manslaughter, he should have been sentenced appropriately due to the brutal and vicious manner the attack on the deceased took place. It was unprovoked and the life of an innocent Kenyan lost. The maximum sentence would have been recommended.

I now hereby sentence the Accused to death.

Right of Appeal within fourteen (14) days.

DATED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF JUNE, 2009.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Chirchir for Mr. Omutelema for the State

Mr. Misoi for Mr. Miyienda for the Accused.

Mr. Ekitela – interpreter Turkana