



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Case No. 4 of 2003

REPUBLIC.....RESPONDENT

VERSUS

EUGENE LUBANGIACCUSED

J U D G M E N T

Eugene Lubangi MPOSHI was charged in this court with the offence of murder contrary to section 204 of Penal Code in that on 21st day of October 2002 at about 2.00 a.m. at Bamburi area in Mombasa District murdered ATHANAS KILONDA hereinafter called “deceased”.

Post mortem examination was done 9 days after death by DR. Mandalya. The report is exhibit 2. In the pathologist opinion the death was due to haemorrhage shock due to perforating wound of the liver in keeping with a sharp object. He added that the injury on one finger must have been caused when deceased was defending himself. The blood of the deceased, his clothes and a knife submitted for examination all fell in blood group “AB” and the opinion of Government Analyst was that the bloodstains on the knife and clothes could have originated from the deceased

The evidence was to how the deceased met with his death was given by prosecution witnesses.

The deceased as a member of a musical band owned and managed by Crispin Tambwe (PW 1). The accused was also a member of the said band.

On 20/10/2002 the band was playing at Zaituni Bar in Mtopanga estate.

The accused was not taking part in the performance but he came up at night during a break time. He found the band leader sitting at a table. He started complaining about the deceased saying he (accused) can even kill him. He talked of locking up of his voice by deceased with Uchawi (witchcraft). And that in 3 days the deceased would be buried here in Kenya. This evidence was supported by PW 2 who said the accused was complaining to him that deceased was taking his place in the band saying he had great powers of black magic and he could use it on anyone who was giving him trouble and that in 3 days time one of them (him or accused) would die.

The same story was repeated by PW 4. PW 4 added that when the matter was reported to deceased, the deceased said “why does Eugene (accused) say I shall die. What have I done to him?” PW 4 said that the deceased appeared to be afraid of the accused.

PW 4 walked with deceased to the compound occupied by accused. PW 4 entered his room and deceased entered into accused door opened by accused’s wife who informed deceased that her husband (accused)

had gone to sleep. Thereafter PW 4 heard a girl (now deceased) say at his door "Get up there are people fighting". PW 4 woke up dressed and went out of house. He found deceased lying down at accused's entrance and the Accused was standing over him with a knife in his right hand.

On seeing this, PW 4 ran to the Zaituni Bar to report that accused had stabbed the deceased. PW 4 identified the knife in court.

The wife of Mark also saw what happened at the scene. She saw the deceased at the door with injury on the right side of the body. He was talking addressing the accused. She saw the accused with a knife. She knew the knife because the tip was bent. Another member of the band PW 8 went to the scene and found the deceased tying a cloth around the wound.

PW 9 was one of the vigilantes checking on security around the building. He heard noise and with another person came to the scene. They saw a person get out of the house saying "As I said I shall finish you and I am going to do so".

The vigilante stopped him and asked him go to police. On the way the accused threw away the knife but the witness picked the knife which was blood stained and took it to the police station.

At the scene members of the band including PW 1 came and took the deceased to hospital (C.G.H.). the deceased was also taken to another hospital in town and later returned to the Coast General Hospital where he later died.

The accused gave sworn evidence. He said sometime he had throat illness and he purchased medicine and stayed home for one week recovering. He said he had a dispute with band owner (PW 1) regarding some payments due to him. He admitted meeting other band members at Zaituni on that evening. He also met deceased but it was not a happy meeting. He thereafter went to his house alone where he slept but at about 2.00 a.m. he heard his wife talking to someone at the door. He looked and found it was the deceased with a nylon cloth in his hand. The accused admitted that there was a struggle between him and deceased. They both fell down. He admitted the knife exhibit was from his house. He also noticed that the deceased was bleeding and was holding his stomach. When Mark came to the scene accused was holding the knife. He said to deceased 'You are a Mchawi'. Then the accused and his wife and child were getting out of the house leaving deceased there when the vigilantes came to the scene and escorted them to the police station. At this time the accused was still carrying the knife. He admitted this. However he said he was asked by the vigilantes to throw away the knife. This is not likely. The vigilantes picked the knife and took it to the police station. Later he returned to his house and washed off the bloodstains on the floor. In conclusion he could not tell how the deceased was injured.

I have taken full consideration of all the facts stated by the prosecution. I have also evaluated the evidential trial value of the statements by the witness.

I find that the threats made by accused against the deceased were real and well supported by evidence. The deceased was frightened by these threats and wanted to find out why the threats. When deceased went into the house of accused he was not armed.

It is clear inside the house there was confrontation but it was the accused house and he must have known where to find the knife. The Pathologist said that the deceased must have been defending himself when he was injured in one finger. "One finger cannot hold the knife" he said. The accused was found by PW 4 holding the knife over the deceased body at the door. He admits he had the knife in his hand.

It is clear there was no injuries found on the accused and the bloodstains in the exhibits were found to have originated from the deceased blood grouping "AB". The blood of the accused was not tested.

The evidence at the scene supported by blood testing indicates that only deceased was injured and I have come to the conclusion that the injuries were inflicted by the accused with the knife exhibited.

Counsel for the accused has submitted a list of 7 authorities to support the defence. He relies on *Woolmington vs. DPP* [1935] All E R 734.

The passage relied on is reproduced hereunder:

“If at the end and on the whole case, there is a reasonable doubt, created by the evidence given by either the prosecution or prisoner, whether the prisoner killed the deceased with a malicious intention. The prosecution has not made out a case and the prisoner is entitled to an acquittal. When dealing with a murder case the crown must prove:

- a. *death as the result of a voluntary act of accused and*
- b. *malice of the accused”*

The other authority cited is **R v Lobell 1957 I ALL E.R 734** the passage relied on states:

“Where the defence of self defence is set up in a Criminal case the onus of proving the accused guilty remains on the prosecution; and if on the whole of evidence the jury are in doubt whether the act was done in necessary self defence, they should find accused not guilty.”

In the present case the accused had already expressed the intention to kill the deceased within 3 days. The deceased who was well known to the accused entered the house of the deceased unarmed and the accused confirmed this in his evidence. The accused alleged a struggle but only the deceased was injured. The accused was found holding the knife and he threw it away when it was picked by vigilantes.

This evidence leaves no room for doubt that it was the accused who stabbed the deceased with that knife. And it is my finding that the accused was not acting in self defence at all.

The authority of **Robert Kinuthia Mungai v. R** is not relevant here.

On the other hand the authority of **Manzi Mangi v. R [1964] E.A. at 289**. The deceased issued threats and followed with action which could have killed the accused.

The accused embarked on self defence and his actions lead to the death of the deceased (attacker). The court of Appeal held that the onus was on prosecution to show that the appellant was not acting in self defence.

In this case the deceased who was heard by PW 8 to say “Semeji njoo uone wamenidunga kisu – come and see they have stabbed me with a knife”

The accused was fulfilling his intentions expressed earlier regarding his wish to kill the deceased within 3 days. The defence also relied on the judgment of Criminal Appeal in **Kenga v. Republic [1999] I E.A. 141**. in which case the court held that the accused does not have to prove provocation but only to raise a reasonable doubt as to its existence. There was positive and un rebutted evidence that the appellant went wild and lost his power of self control so soon as he saw the deceased at his homestead.

The visit despite constant warning was totally uncalled for. The visit was meant to annoy the appellant and the act constituted grave provocation.

The circumstances in this case are quite different. Both the accused and the deceased were friends they lived in a Swahili house close together and worked together. The accused saw the deceased enter into his house unarmed. It was unreasonable to say that he was afraid for his and his family life. It is clear he took his kitchen knife and stabbed the deceased in an episode, which he said took one (1) minute. There was no provocation. The sworn evidence of the accused shows that there was light in the house of accused.

“I saw the deceased was bleeding. I snatched the knife from him. The knife was from my house. Then he was holding his stomach as he left through the door. I was holding the knife. March came out and found him there. Susan, wife of Mark was trying to cover him”. So the accused left the deceased at the scene bleeding and went away.

The deceased was taken to hospital by other persons. I have no doubt that the death of Athanas Kilonda was caused by the injury inflicted by accused on his body.

The three assessors sitting in this trial were of the opinion that the accused committed the offence and I do not hesitate in agreeing with them though I am not bound by their opinions.

I therefore find the accused guilty of the offence charged. I convict him accordingly.

The sentence is mandatory specified by law. The accused is condemned to death as provided by law.

Dated at Mombasa this 18th day of January 2006.

J. KHAMINWA

J U D G E

18/1/06

Coram: Khaminwa J

Kazungu – clerk

Mr. Ademba for state

Mr. Njiru for Accused.