



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO.23 OF 1998**

REPUBLIC PROSECUTOR

versus

DAVID WANDERI WANYAGA ACCUSED

J U D G E M E N T

David Wanderi Wanyaga was charged with murder contrary to section 203 as read together with S.204 of the Penal Code in that on 19-1-1995 at Ngala Estate in Malindi Location within Kilifi District of the Coast Province murdered JAMES KIBULU KINYANJUI. The prosecution called 8 witnesses while the defence called none except the accused gave evidence on oath.

The evidence of PW.1 stated that he was living with the deceased in one house but difference rooms and on the morning of 19-1-95 he noticed that the accused had come early and asked for the deceased. The witness told the Court that he answered the accused by telling him that the deceased was still asleep but that he the accused could wait for him at his room but the accused declined saying he would just wait by the door of the accused. Thereafter nobody really talked of what happened whether deceased came out of his room or whether deceased and accused were ever seen together. All that there is is the testimony of the accused himself as to what happened.

The witnesses who spoke of what they saw after deceased was stabbed was PW.2 a brother to the deceased. He got information early that his brother was taken to the Malindi Hospital and went there where he found him writhing in pain with a stab wound on his stomach. The deceased died soon thereafter and was taken to Kilifi mortuary from where he later arranged for his burial. He said that from hospital that day he went to where his brother used to stay and found drops of blood on the floor of the house near the main door to his brother's house. PW.3 Francis Mwaura Kinyanjui found his slain brother being taken to the hospital with accused surrounded by people. Accused agreed to have stabbed the deceased when PW.3 asked him. He said he locked up accused in the verandah of the house and called the police. PW.4 Anne Farid who stayed about 250 yards away remembered that on that day at about 6.30 a.m. a Mr. Waweru who stayed with accused asking for her mobile phone to call 999 saying accused had been stabbed. She rang 999 herself then she said at that time the deceased came out from his house dressed in pants holding his stomach with his hands and he made to walk towards PW.4's house and tried to sit by her door steps but he failed to manage and fell down on his side. He was bleeding. He was put in a van and was taken to the hospital then she saw Ex.1, a rusty short knife down where deceased had fallen. She said that accused told the people at the scene that he stabbed the accused PW.6 David was driving to work in the morning when he stopped where many people were seated and he saw deceased bleeding so with the help of people around he conveyed the deceased to the hospital. PW.8 Dr. Peter

Njiru Murata was the doctor at Kilifi District Hospital where on 17- 1-95 he performed a post mortem on the body of the deceased James Kiburio Kinyanjui who was identified to him by PW.1 David Kamau Kinyanjui. He found the deceased to be 26 years of age, a male African with a penetrating stab wound on the right side of the abdomen. He found that the stab wound penetrated and perforated internal vessels and found –

The prosecution produced two statements, first by C.I.P. Onyango PW.5 and secondly another by No.214599 IP. Abdala Wafula a charge and caution statement. The first statement the accused challenged the statement saying it was not read to him and that it was taken irregularly, and in his evidence in trial within trial the accused repudiated the whole statement saying it was not what he had written. However the court having heard evidence from both C.I.P. Onyango for prosecution and from accused ruled that the statement was voluntary and admitted same in evidence. The statement said:-

“I remember very well on 19-1-95 at about 7.00 a.m. I left my house at Parani Estate to Ngala Phase II. I went up to the house of Jimmy Kinyanjui. On arrival I found him with Mr. Waweru. He was asleep. He was asleep but I waited for him to open the door. When he opened and found me at the door. He pushed and hit me with the door. I also pushed the door inside as I wanted to get into the house, when I had the intention of seeing and demand the payment of KSh.20,000/- which I had given him for business. When I got into the house he got hold of the stool as he wanted to hit me. We got hold of each other and both fell down near the kitchen. I got hold of his hand, took away the knife from him and stabbed him on the stomach once. I was afraid of the mob justice and locked myself in his house. Immediately the police came I came out of the house. I was arrested and taken to Police Station while Jim was taken to hospital.”

PW.6 David Kamau Kimani was driving to work in the morning when he saw people standing around near a man bleeding on the stomach lying down and by help of the crowd he took him to the hospital. PW.7 No.214599 IP Abdalla Wafula recorded a charge and caution statement which was produced as Ex.3 without objection from the defence. That statement was produced as Ex.3 and in it accused said:- “It is true I killed the deceased James Kibulu Kinyanjui with no intention. He was holding a knife in his hand and wanted to stab me with it. I got hold of his hand so that he may not stab me and that is when we started struggling and the knife stabbed his stomach. That is all.”

PW.8 Dr. Peter Njiru Murata performed post mortem on the deceased the body being identified by David Kamau Kinyanjui, PW.1 he found the body of a 26 year old male African having a penetrating stab wound on the abdomen on his right side and that the stab wound penetrated and stabbed or perforated internal organs and he found the cause of death to be cardiac pulmonary failure due to hemorrhagic shock. He produced the post mortem report as Ex.4.

In his defence accused elected to give a sworn statement and called no witnesses. He stated that he had gone to deceased's home in the morning to find out why deceased had not reported to work the previous day 18-1-95. He said that the deceased was their treasurer for the business. The deceased welcome him in and explained that he wanted to rest. After that the deceased invited him for a cup of tea in the kitchen and it was at the time of tea that accused asked for money, which accused person said he did not have, but accused retorted that deceased being treasurer should not be saying that he had no money, but as the accused was still reasoning with deceased the latter took a knife from a shelf in the kitchen and made for stabbing accused, but accused got hold of deceased's two hands and both struggled in which struggle deceased was overpowering accused when the latter released the deceased who fell down on the knife thereby stabbing himself. The accused became free and ran out shouting then people came.

That was the evidence. It has established that the deceased and the accused were business partners. They traded together as vegetable vendors although there was no evidence of the turn out and the amount of investments and or the level of stake holding or share of each partner. The turnover of the business of its worth is not shown. However it was not controverted that they co-operated in the business whatever the business and that the deceased was treasurer. It is established in the evidence that accused went early to the deceased's house and waited for him to wake up. It is from this juncture that the controverted

evidence of accused takes sway. He says when accused person opened the door they talked and he led him to the kitchen for tea. It was when he asked him about money that accused person grew Violent and strived to stab him with a knife which as they struggled he fell on and hurt himself. appears the accused is saying that he did not stole the deceased, that the deceased fell on the knife as a result of the force from him the accused and that he applied the force as they were struggling so as to avoid himself being stabbed by accused in other words the force whatever force he used was in self defence and lastly that it was by accident the knife stabbed the deceased or that it was unintended self inflicted wound.

The Doctor PW8 found the stab wound to have been penetrating resulting in damage to other internal vessels. It was his opinion that it was consistent with a sharp object and indeed the accused says he stabbed himself death was due to homorganic. It is I think in evidence that stab wound caused the death of deceased. The main question to answer is whether accused stabbed the deceased or whether deceased got stabbed as he fell from accused thrust and does this make accused guilty of murder.

Accused gave three statements in this trial. The repudiated confession of the accused from his enquiry statement was that as a result of struggle he got the deceased with it. Here it would mean that the accused deliberately inflicted the injury intentionally because then he was not then acting in self defence. He had the knife while the other person had only the stool if at all, and if he was to act in self defence he ought to have retreated as much as reasonable to avoid exacting this assault. Thirdly his previous action immediately following the stabbing shows his ominous conduct against the deceased. He came early and waited at the door for the sleeping man to wake up and refused PW.1's invitation to him to wait in the house. He came for his money and therefore to stab accused was surely within his motive to inflict a sense of retribution. How can this court act on the repudiated confession? In R. v. LEBASHA (1936)3 EACA 48 the Court said:-

“---- A trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on the confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot be but true.”

This court can taking this confession arrive at a conviction. In his charge and caution statement which was not objected to the accused changed the repudiated confession and now said that the deceased was the one holding the knife and as a result of this struggle the knife (being held by deceased) stabbed the deceased's stomach. In other words the stabbing was an intentional, self inflicted through accident. If that were to be so then he would not be guilty of murder because the act occurred by an accident but more it was not even his act. His act would be the struggle, but again he did so in trying to avoid injury to himself hence in self defence, but in court he said deceased took the knife from the shelf and wanted to stab him when he pushed him and he fell on the knife. It would be seen that the two statements of accused conflict. One says accused stabbed the deceased, the other says deceased stabbed himself accidentally. Where accused gives inconsistent statements that does not necessarily justify rejection of the evidence,

There is no evidence of stabling or of struggle other than what the accused has said to accept the confession and disregard the exculpatory statements of accused in the sworn evidence and caution and charge statements would be giving the prosecution a goal without a score.

The burden at all times in criminal cases rests on the prosecution to prove the case beyond reasonable doubt. No total reliance should be placed on confession to gain conviction prosecution must prove its case beyond reasonable doubt. Barth C.J. said in R. v. KAMU (1924) 10 KLR 8 said:-

“Short acts are usually expedient and every effort should be made to prove the case alleged against an accused without a reliance on a confession which can as easily be retracted as

made. The police should not be satisfied that a confession having been obtained a case is complete.”

In this case the prosecution left deliberately to connect the pieces of evidence that could be relevant. Nobody tried to explain if the knife exhibited here was the murder weapon and explain why it was found 10 yards away from where the fight had taken place in the kitchen. Did the deceased hold the knife on his abdomen – was this deceased’s knife of usual use in the kitchen or accused brought it to use for murder. This evidence was not pursued so accused’s evidence is not disproved and so the finding on this evidence must be that the knife was in the kitchen and that accused and deceased took tea together therein. PW.1 who shared the house with deceased was not asked about this knife.

Then there is deliberate omission of the only eye witness PW.1’s brother in law Anderson Waweru Njuru who was left sleeping in the next room and who must have seen accused come and even witnessed the struggle. The deliberate omission to exclude the testimony of this man is to render the conviction impossible.

Where the prosecution is not using a witness it is desirable that they call the witness and offer him for cross examination.

Here the prosecution deliberately shut out the only eye witness in a style which smacks of dishonesty and abuse of court’s process. It is therefore on this evidence impossible to hold that accused with malice aforethought intended to cause the death of or to do grievous bodily harm to the deceased.

In the Court of Appeal Case of NELSON LEBURTA V. R. C.A. CR. APPEAL NO.4 OF 1998 Chesoni CJH, Gicheru & Bosire JJA said:-

“It is sufficient if there is any evidence which raises a reasonable probability of absence of malice aforethought once this is the effect of such evidence then the onus lying upon the prosecution is not discharged and the offence of murder is not proved.”

Both the two remaining assessors returned verdict of not guilty. On this evidence I agree with them and find the accused not guilty and acquit him of murder. He will be released unless others legally held.

Delivered on this 15th Day of August, 2000.

A.I. HAYANGA

JUDGE

Read by: J. KHAMINWA

COMMISSIONER OF ASSIZE

In open Court on this 15th Day of August, 2000.