



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mudanya (Criminal Case 22 of 2017)
[2023] KEHC 1619 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1619 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE 22 OF 2017
MM KASANGO, J
MARCH 10, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

JACOB ASWANI MUDANYA ACCUSED

JUDGMENT

1. Jacob Aswani Mudanya, pleaded not guilty to a charge of the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). Prosecution called 7 witnesses while the accused testified under oath in his defence.
2. The prosecution's case is that accused who had rented an apartment above a shop of Martin Mwangi Mune on July 4, 2017 went to Martin's shop, holding a hockey stick and seeming very agitated. The accused did not respond to the inquiry from Martin on what the problem was. Upon going out of that shop, Martin and those who were in the shop saw stones being thrown to the shop by the accused, which broke the window pane.
3. The deceased in the company of Ashton Chuma and his girl friend Susan Mutheu Masila arrived at the shop and were being informed of what transpired. Prosecution adduced evidence that as that discussion proceeded, the accused hurriedly arrived and stabbed the deceased and Ashton. The deceased was far more grievously stabbed and he was taken to hospital immediately by *boda boda*. He died as he was about to be taken to theatre. Ashton was treated and discharged.
4. Accused stated in his defence that on the subject night, he saw as he stood at his balcony deceased Martin and Victor pointing at him. Recalling that a week earlier those three persons had attacked him while they were drunk, the accused went downstairs to find out what the issue was. On going downstairs, accused found Victor, Ashton, Dr Weru and Rasta taking alcohol at the Martin's shop. Accused said that he was asked why he attacked the deceased a week prior. Accused responded that



he was defending himself and he declined to talk to them further because they were drunk. Accused alleged Victor roughly touched him with his shoulder and even tried to hit him with a stool but it was thwarted and he, the accused took the opportunity to go back to his apartment. Further, that Victor continued abusing him as he left. As the accused was leaving his apartment to travel out of town, he said he found seven people blocking his path. He threw stones at them. He returned to his apartment and later found those persons were not at the parking. They began to approach him and he noted Victor had a knife. That a fight ensued and Victor dropped the knife when he hit him with a hockey stick. The accused picked the knife and as the fight progressed he stabbed deceased and Ashton.

Analysis

5. The prosecution proved the first element of murder, that is the death and cause of death of the deceased. Death was proved by deceased's father and by the doctor who performed the postmortem examination. That postmortem revealed cause of deceased's death was hypervolemia shock due to massive intrapentoneal hemorrhage due to stab wound severing mesenteric vein.
6. The prosecution was required to prove that the accused committed the unlawful act which caused the death of the deceased.
7. Prosecution relied on three eye witnesses one of whom was stabbed though not fatally, alongside the deceased. All those witnesses testified of an agitated accused who without provocation went into Martin's shop with a hockey stick and on being asked why he was agitated retreated out of the shop then threw stones into that shop resulting in the breakage of the window panes. As people gathered discussing that occurrence, the prosecution's witnesses stated that the accused came hurriedly and stabbed the deceased and Ashton. The stabbing of the deceased was very serious because those witnesses spoke of seeing the intestines of the deceased.
8. The accused in his defence stated that he stabbed the deceased and Ashton as they attacked him. He stated he stabbed them only once because he was defending himself.
9. I have considered the entire evidence and the submissions of the parties. The essence of the defence offered by the accused was not to put to the prosecution witnesses and can only be termed as afterthought. The accused however does confirm having the hockey stick, throwing stones and stabbing deceased and Ashton. That admission is compatible with the prosecution witnesses' evidence.
10. The accused failed to explain why he would be attacked by a crowd of people as he alleged since he had only been a tenant of the apartment for one month, prior to the incident in question. This is more so unbelievable because Ashton in his evidence said he did not know the accused prior to that incident of his and deceased's stabbing. Martin the owner of the shop, which was referred to as movie cum café shop, knew the accused because he had gone to that shop about 5 times to buy chips. Susan Mutheu had also noted the accused was a resident of that apartment.
11. The defence offered by the accused fails to displace the very clear, consistent and cogent evidence of the prosecution. That evidence painted a picture of a person, that is the accused who while unprovoked went to Martin's shop and soon after broke its window panes by throwing stones and to cap it all, without provocation and having had to contact with Ashton and the deceased stabbed both of them.
12. The defence of self-defense fails in this case. The accused did not prove it all that he was under attack justifying accused to defend himself. The accused failed to prove that he was being attacked so as to put him in immediate peril: See the case of Court of Appeal of *Abmed Mohammed Omar V Republic* (2014) eKLR.



13. It is this Court's holding that the accused committed the unlawful act which caused the death of the deceased.
14. The prosecution in my view did prove that the accused had malice aforethought. Malice aforethought was discussed in the case of *Republic Vs James Kioko Malungu* (2021) eKLR:-

“47. In the case of *Nzuki V Republic* [1973] Klr 171 the Court of appeal stated that in the commission of the offence of murder it must be committed with the following intentions: -

- “(i) The intention to cause death;
- (ii) The intention to cause grievous bodily harm;
- (iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those circumstances to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”

15. The accused in stabbing the deceased in the abdomen must have intended to cause grievous harm to the deceased. He knew the risk to the deceased in stabbing him as he did. It follows that this court finds the accused had malice aforethought.
16. I have considered the submissions filed by the accused where he faulted prosecution for having not produced Victor to testify and the *boda boda* who took deceased to hospital, the doctor who gave the deceased first aid, deceased's girlfriend, Dr Weru and the Land lady. Those witnesses except Victor according to prosecution were not present during the incident. Even if they were present the prosecution provided sufficient evidence of the occurrence on the night in question which proved beyond reasonable doubt that the accused stabbed the deceased. The deceased's girlfriend, the *boda boda* operator, the care taker, the land lady and the doctor who gave deceased first aid were not present at the scene. There would be no value in adducing their evidence. The investigating officer stated in evidence that when accused stabbed the deceased and Ashton those that were present were Martin, deceased, Ashton and his girlfriend. Those persons except the deceased testified.

Disposition

17. In the end, I find Jacob Aswani Mudanya guilty of murder of Jackson Gathitu deceased and I convict him as charged.
18. I will invite the accused to address me before his sentence. I wish it to be noted that accused was remanded in respect of this case and in respect to a case before Thika Chief Magistrate's Court being Criminal Case No 3072 of 2017. It will be important for this Court to be acquainted with the outcome of that case at Thika Chief Magistrate's Court before giving credit of sentence to the accused as provided under Section 333 (2) of the *Criminal Procedure Code*.



JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

court Assistant: Mourice/Julia

Accused: present

For Accused: Mr. Njehu

For the State: Mr. Gacharia

Court

Judgment delivered virtually.

