



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 76 OF 2017

(Formerly Machakos HCCR No. 24 of 2016)

REPUBLIC.....PROSECUTOR

VERSUS

DAVID WAMBUA MUTUNGA.....ACCUSED

JUDGMENT

1. **David Wambua Mutunga** the accused, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 of the Laws of Kenya. The particulars are that on the 5th day of May, 2016 at Ulu Trading centre, Malili division, Mukaa sub-county within Makueni County, the accused murdered Alex Matingoi.
2. The prosecution called six (6) witnesses in support of its case while the accused gave a sworn defence without calling any witnesses.
3. **PW1 Jonathan Ndaruko**, testified that on 05/05/2016, he was at home in Ermamen village when his brother Lawrence called and informed him that Alex Matingoi had been stabbed. He woke up his father (PW2) and they started looking for transport. He got a motorcycle man (*Musembi*) whom he asked to rush to the scene. Before leaving home, his brother Benson Wambua informed him that Alex had passed on. They arrived at the scene and found the deceased lying on the corridor of Anita's bar.
4. He had injuries on thighs, lower back and finger. He advised Lawrence to report at Salama police station. There was electricity at the scene. The police arrived afterwards, followed by the proprietor of Anita Bar who opened the bar. They placed the body in the vehicle at around 5.00am.
5. In cross examination, he said that the scene was a public place but they did not find the accused there. The deceased was a form two student who had been sent home for fees. The scene was 3 ½ kilometers from their home. He couldn't tell what the deceased was doing there but he had been with him in the shamba upto lunch time. He did not see the deceased leaving hence could not tell what he was wearing.
6. The deceased used to live with their mother and brothers. He got a motor vehicle from Konza-eight kilometers away after he had started walking. There is no guard at the bar though the market has security. They arrived at the market at midnight.
7. **PW2 Mweka Kashu**, the deceased's father, recalled that on 05/05/2016 he was called by PW1 and informed that his last born son from the 1st house had been stabbed. He proceeded to the scene with PW1 and found him already dead. They picked a torch from the scene and saw that he had stab wounds on the thighs, back and face. His son said that he knew the culprit and they saw him at the stage boarding a matatu. They gave chase with the police landrover and eventually arrested him. They recovered a bloodstained knife, in a sheath, from him. The culprit's jeans trouser and shoes had blood. He identified the knife as EXB1 and blue jeans as EXB2.
8. In cross examination, he said that the deceased was on midterm. He stayed with them but as maasais, they do not follow young men. His son Wambua was the one who identified the accused. He had never seen the accused before. The accused was carrying his blood stained knife on the waist of his trousers. The jeans had a lot of blood on it at the front. He couldn't remember the deceased's clothes being given to them. The accused was not stopped from boarding the matatu by any officer. He did not see the sheath for the knife. The knife was on accused's waist but he did not check for details.
9. **PW3 James Ndaiya Mwega**, the deceased's brother, testified that on the midnight of 5th and 6th May 2016, he was called by Mutunga and informed that his kid brother Alex had been killed. PW1 called and advised him to report at Salama. They reported and got officers who they went with to the scene. They arrived at Ulu past midnight and found the deceased lying down dead.
10. He had several stab wounds and had fallen near Anita's club. Anita arrived and explained what she knew. She said that before dying, the deceased had said that Wambua was the killer. They placed the body in the vehicle and left. He saw Wambua boarding a matatu at the stage

to Salama. They followed the matatu and caught up with it. He found Wambua seated in the middle and pulled him out. A blood stained knife was recovered from him and he had a well packed bag.

11. Upon cross examination, he said that he was at Chumvi when the incident occurred and was informed about it before midnight. The body was near a street, five (5) metres from the market. The deceased never spoke to him, PW1 or PW2. Mutunga is also called Shadrack and he works with the said lorries. He was from the river when he met the deceased.

12. The accused had been employed in a butchery by his father's cousin and he (PW3) was a good customer to the accused. Ben used to work with the accused. The deceased's trouser and jacket had cuts and they saw injuries on the hand, forehead, back and thighs. It was like the deceased and accused knew each other. The accused did not know he was being followed.

13. When they found the matatu, it had stopped and passengers were alighting. The accused did not resist. The conductor told them that the accused was going to Emali. The knife was seen when he was placed on the ground on his tummy. He had a sheath for the knife but he (PW3) did not state that in his statement. The deceased had gone home for school fees.

14. **PW4 Ruth Wangari Kahi**, was a Government analyst based at forensic laboratory at the Government chemist for six years at the time of testifying. She gave her qualifications. Her duties include analysis of body tissues and fluids, specifically DNA, to determine the presence and origin of any evidence material. On 13/05/2016, they received the following items from PC Katuma of Salama police station and they were to analyze them for any blood stains and their origin.

- ü Finger nails of Alex Matingoi in a khaki envelop
- ü Blood sample of the deceased
- ü The suspect's Brown leather jacket in a khaki envelop
- ü The suspect's blue trouser in a khaki envelop
- ü A knife in a khaki envelop

15. Further, she testified that the jacket and jean trouser had slight blood stains and the knife was moderately stained with blood. Her conclusion was that the DNA from blood stains in the jeans trouser was of an unknown male and the DNA from blood stains in the jacket and knife matched the blood sample of the deceased. She produced the report and memo as **EXB 3a & b**.

16. Upon cross examination, she said that the report was prepared by Lawrence Kinyua Mutui who was away in Denmark for further studies for four years. She proceeded to explain that slightly stained means a little blood or some stains. Moderately stained means between heavily and slightly stained. The knife was stained at the tip. She agreed that handling of the knife after recovery is very key for their results. Drying off of blood depends on storage and intensity of the blood. Dryness would be the best condition to store blood. The blood sample of the accused was not submitted to them.

17. **PW5 Benson K. Musyoka** of Ulu, Mukaa, testified that on 05/05/2016, he was in Ulu, Kajiado side and was working with the accused in a butchery. He left the butchery for the market-about 100 meters away. The accused called him to go and pick his money at Anita bar. He went but did not find the accused. He inquired from the bar owner, Anita, who said that the accused had left. He inquired from some Maasais around and they said that the accused had left ½ glass of alcohol.

18. PW5 went to GK's bar and ordered ½ Napoleon and soda. He shared the drink with his watchman friend, Mrefu. After five minutes, the accused arrived and said that the deceased had taken his phone. The accused who was very angry, took PW5's torch and left.

19. A youth by the name Babu arrived and told them that the accused had stabbed the deceased and run away. PW5 proceeded to the scene with Babu, Mrefu and others who were in the bar. They found Anita and Esther *alias* Kasta who said that they found the deceased on the ground and he told them that it was the accused who had stabbed him.

20. PW5 and his group found the deceased on the ground and there was blood. He called his boss James Kaurai who arrived at the scene and called the deceased's relatives. They went to look for the accused who was living with PW5 but had taken away all his clothes. He was found in Kiongwani in the wee hours of the morning. The accused is also called Mutunga.

21. In cross examination, he said that he worked in the kitchen and the accused worked at the counter of the butchery. The accused left him in the butchery. PW5 knew the deceased as Matingoi. Anita bar and GK's bar were about 20 meters apart and they are at a market. He did not witness the incident and did not know what work Babu used to do.

22. He said they found people at Anita's bar and there are watchmen there. The accused told them that the deceased had taken his phone but he never said where he was going. He had told PW5 that he would go to Ulu that day. PW5 and accused used to talk and sleep in the same house. He wouldn't know the time that the deceased was stabbed.

23. **PW6 PC Silas Karenga** of Parklands police station and formerly of Salama police station, was the investigating officer in this case. He testified that on 06/05/2016 at 2.25 am, while at the station PW3 reported that he had received a call from his brother Jonathan Mueka who informed him about the death of his younger brother at Anita bar. The culprit was Wambua the accused. PW6 proceeded to the scene with C.I Hassan and they found the deceased lying on a corridor near Anita's bar. He had injuries on both thighs and left side of the back. He found a torch near the body.

24. He interrogated Ngui, the owner of Anita bar and she said that she heard a voice saying; *“It’s Wambua who works in Kiuro butchery and he stabbed me with a knife.”* She then went out and found the deceased lying on the ground dead.

25. They kept the torch as an exhibit and took the body to Machakos. On their way, PW3 spotted the accused trying to board a vehicle to Mombasa. They intercepted the matatu at Kima stage and PW3 identified the accused. They searched him and found him with a blood stained knife. The postmortem was conducted at Machakos level 5 hospital and he forwarded the exhibits to the government chemist for analysis. He produced the knife, blue jeans and brown jacket as **EXB 1, 2 and 4** respectively.

26. Upon cross examination, he said he found Anita at the bar when he reached there. The deceased was a student and there was a distance from the scene to his home. He did not ask about the incident time from the reportee. He didn’t know who else worked at Anita’s bar and did not gather any information of watchmen there. They found people at the scene and there was light. He did not draw any sketch plan. They recovered the knife which was not tacked into anything. He was with the OCS and PW3 when he recovered the knife.

27. They recovered the clothes from the accused at Salama police station. He did not prepare any inventory and didn’t know why the accused stabbed the deceased. The two are not related and he never learnt of any disagreement between them. He never arrested Benson Kyalo Musyoka who was a suspect, and it was the OCS who released him. PW6 didn’t know whether there were customers at Anita bar at the time of the incident. He took the torch to the station but after investigation, he did not find it relevant. The torch was not mentioned by any witness. He agreed that he should have indicated the exhibits condition upon recovery.

28. The post mortem report was produced as **EXB 5** by consent. The cause of death was found to be severe haemorrhage secondary to multiple stab wounds.

29. The accused in his sworn defence testified that he used to work in a butchery. He denied the charge and stated that on 05/05/2016, he was at his place of work which he closed at 9.00pm but continued to do the accounts. He then cleared the place, bathed and went to sleep. He opened the butchery the following day and at 8.00am when he brought meat, a police vehicle arrived. A police officer asked for meat and as he prepared to serve, he was told that they wanted him. He was taken to Salama police station and then to the OCS who told him that he had killed somebody at Ulu market. He stayed at the station for 21 days before being taken to Machakos. He denied being involved in the deceased’s death.

30. In cross examination, he denied knowing the deceased as well as the knife (EXB1) and the jeans trousers (EXB2). He said there were lodgings at his work place but they were not occupied. They used to cook food at their butchery. He denied working at Ulu market and neither was his workplace 250 meters from Ulu Market. He confirmed that there were shops at his work place. He did not see anything unusual within the area on that day. Benson (PW2) and Muli used to assist him in the butchery. He used to sleep in a separate room in the butchery. He said that he was arrested at his place of work and not from a matatu.

31. The defence case was closed at that juncture and the accused Counsel requested for time to file written submissions which he never did for over five (5) weeks.

Analysis and determination

32. The charge of murder is defined under section 203 of the penal code as.

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

33. Further section 206 of the penal code defines malice aforethought as follows:

“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

34. For a charge of murder to be established the following ingredients must be proved by the prosecution:

- (i) That the death of the deceased occurred and what caused it.
- (ii) That the death was caused by an unlawful act of commission or omission by the accused (actus rea).
- (iii) That the accused had malice aforethought as he committed the unlawful act (mens rea).

Proof of death

35. PW1, PW2, PW3, PW5 and PW6 found the deceased lying dead at the scene with several stab wounds. The post mortem report indicates the cause of death to be severe hemorrhage due to multiple stab wounds. The report also indicates that the deceased's father (PW2) was one of the people who identified the body at the mortuary. Accordingly, the deceased's death and cause of death were sufficiently proved.

Proof that the death was caused by an unlawful act of commission or omission by the accused.

36. This case is purely based on circumstantial evidence as there was no eye witness. In **Abanga alias Onyango vs. Rep Cr. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. The Court expressed itself as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

37. In **Sawe V Republic [2003] KLR 364** the Court of Appeal stated thus on circumstantial evidence:

1. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

38. The evidence of PW1, PW2, PW3 and PW5 on the deceased's dying declaration was hearsay and unfortunately, the people alleged to have directly heard the dying declaration were never called as witnesses. However, the forensic evidence established that the deceased's blood was present in the jacket and knife that were recovered from the accused. In his evidence, the accused denied ownership of the jeans trouser and knife but not the jacket. The forensic evidence clearly puts the accused at the crime scene and the fact that he was apprehended shortly after the incident adds weight to the evidence.

39. The accused denied having been arrested from a matatu. He said he was arrested at his place of work. His workmate (PW5) explained that the accused left the butchery on 5th May 2016 at 9.00 pm for the market. They met briefly when he told them the deceased had taken his phone. He left while very angry. This was before the killing. They did not meet until the wee hours of the morning when the accused was brought to Salama police station while under arrest. This confirms that he was not arrested from his place of work.

Secondly PW3 and PW6 confirmed that the accused was and indeed arrested from a motor vehicle he had boarded. This evidence was not challenged through cross examination.

40. The accused and PW5 worked together and stayed in the same house. After leaving the butchery the accused did not return there nor to the house. The DNA of the blood on the knife and jacket (EXB1&2) recovered from the accused matched that of the deceased's blood. He did not offer any explanation for his possession of these blood stained items. Secondly the blood on them was not his but of the deceased. A proper explanation was required. I am, convinced that the deceased's death is attributable to an unlawful act committed by the accused.

41. PW5 testified that the accused had come to GKs bar where he was drinking. He was very angry and he told PW5 that Matingoi (deceased) had taken his phone. The accused took PW5's torch which was on the table and he left. They later heard of the stabbing of the deceased by the accused. This court may only speculate on the phone matter but there was definitely a legal way of dealing with the deceased in order to recover the phone. Further, the multiple stab wounds on the deceased give an indication that the accused had purposed to injure him grievously.

Whether the accused had malice aforethought (mens rea).

42. Section 206(b) of the penal code (supra) refers to prior knowledge that one's act would cause grievous harm or death. This is qualified by the evidence of the several stab wounds on the deceased's body.

43. In **Daniel Muthee –vs- Republic [2007] eKLR**, the Court of Appeal stated as follows with regard to the issue of malice aforethought:

“When the appellant set upon the deceased and cut her with a panga several times and proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code.”

44. Similarly and from the totality of the evidence on record, I am convinced that malice aforethought has been established as per the

provisions of section 206(b) of the Penal Code. I find the accused guilty of murder contrary to section 203 of the penal code. He is convicted accordingly.

Signed and dated this 19th day of May 2021 at Milimani Nairobi by:

H. I. ONG'UDI

JUDGE

Delivered this 15th day of June 2021 in open court at Makueni by:

GEORGE DULU

JUDGE