



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO.1 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

SIMON MBIRIRI WANJIKU alias WAHIU.....ACCUSED

JUDGMENT

1. **Simon Mbiriri Wanjiku alias Wahiu**, the accused, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars are that on the 1st day of December, 2018 at Oloosurutia village, Kiserian Location in Kajiado North Sub County within Kajiado County, he murdered **Joseph Ndegwa Karanu**.

2. The prosecution called 8 witnesses to prove its case against the accused. PW1, **Maxmiller Mamey Olumba**, a tenant at the accused's mother's premises where the deceased was also a tenant, testified that on 1st December, 2018 at around 7 am, she was preparing to go to church when she heard a commotion. She heard the accused saying remove your things and leave. She later heard a person saying "he has killed him." She rushed to the scene and saw the accused's brother. She heard him saying "let them kill one another." She moved closer and saw both the accused and deceased bleeding. The deceased had a knife and was holding the accused. She pleaded with the deceased not to stab the accused but he told her that the accused had killed him.

3. The deceased unbuttoned his shirt and showed her an injury on his abdomen. His intestines were protruding. She asked the deceased to come to her. The deceased moved towards her and handed over the knife to her. The deceased asked for drinking water but they declined to give him water. A vehicle came and they rushed the deceased to Matasia Nursing Home for treatment. At the Nursing home, the medical attendants were unable to attend to the deceased due to the extent of the injuries. They referred the deceased to Kenyatta National Hospital (KNH).

4. The witness told the court that they called for assistance from the police and police officers from Kiserian police station came with a police vehicle and rushed the deceased to KNH. She later recorded her statement with the police and learnt that the deceased had passed on. She identified the knife that the deceased had used in court. In cross-examination, she told the court that she heard commotion within the accused's compound.

5. PW2, **Esther Mbaire Gathenya**, testified that she knew both the accused and the deceased who lived in the same compound where she was also a tenant. She told the court that on 1st December, 2018, she was sleeping when she heard a commotion where the accused and the deceased had a confrontation. She heard the deceased tell the accused you know you have killed me. She went outside the house and saw the deceased holding a knife. The deceased stabbed the accused on the shoulder. She went back to her house to see her children who were crying. She also told court that she saw PW1 ask the deceased for the knife.

6. PW3, **Edwin Ndungu Karanu**, a brother to the deceased, testified that on 1st December, 2018, he received a call informing him that his brother had been injured and had been taken to Matasia Nursing Home. He rushed to the nursing home but was informed that his brother had been referred to KNH. He went to KNH where he was informed that the deceased had been taken to theatre. He waited until 8.30 pm when the deceased was taken to the ICU. He was later informed that the deceased wanted to talk to him. He was taken to the ward and the deceased informed him that the accused had stabbed him. The deceased later passed on. On 6th December, 2018 he witnessed the postmortem after identifying the body for that purpose.

7. PW4, **Dr. Midia**, a pathologist based at KNH, testified that on 6th December, 2018, he conducted an autopsy on the deceased's body after it was identified by PW3 and a sister. The body was of an African male of good nutritional status and well preserved through refrigerator. The body had signs of medical interventions through surgical scar operation on the middle abdomen. It was pale, a sign that the deceased had lost a lot of blood. Internal examination revealed that the right lung had collapsed. There was blood within the lung space showing internal bleeding. Further examination revealed a stab wound on the lower part of the chest. The trajectory of the stab wound was through the left lobe of the liver which was repaired and there was blood, about 200ml. The lower part of the intestines had also been repaired. The stab

wound went through the colon and there were also repairs in that part of the body. The rest of the body was normal. He concluded that the deceased died due to excessive loss of blood caused by a penetrative stab wound which went through the chest to the abdomen.

8. **PW5, Fredrick Mariara**, a clinical officer at Matasia Nursing Home, testified that on 1st December, 2018 he was on duty when a patient was taken to the hospital with injuries in the abdomen. The patient had injuries in the upper abdomen and the intestines were out. They administered first aid, cleaned the wound and bandaged it. They notified the police and a police vehicle from Kiserian police station came and transferred the patient to KNH since their facility could not handle the situation.

9. **PW6 CI Peter Omaro Sigara**, formerly the DCI Kiserian police station, testified that on 1st December, 2018, he received a call from a lady that there were two people at Oloosurutia and one of them had been stabbed and rushed to Matasia Nursing Home. The other person was lying in the house. He recorded the report in the OB and proceeded to the scene in the company of CPL. Salat, the duty officer. At the scene they found the accused lying in his mother's house injured. They were assisted by members of the public to put him in the police vehicle. He had stab wounds on the back and shoulder. They took him to hospital but passed through Matasia Nursing Home where he found the deceased at the casualty. The deceased had a stab wound in the stomach which had been bandaged. They were advised to take the patient(deceased) to KNH given the seriousness of the injury he had. They put the deceased in the vehicle, recovered a knife at the Nursing Home and proceeded to KNH with both injured men. (the deceased and the accused).

10. On 2nd December, 2018, he received a call that the patient (deceased) had passed on. The accused was from then considered a suspect and was placed in custody while in hospital. He was discharged three days later and taken into police custody. He recorded statements from some witnesses. He identified the knife in court 'MFI 1'

11. **PW7, PC Wesley Komen** testified that on 17th December, 2018 he proceeded to KNH to relieve a colleague. At the Hospital, he was informed that the suspect (accused) had been discharged. He then escorted the accused (suspect) to Kiserian Police station, where he was instructed to transfer him to Ngong Police station which he did and booked him for murder.

12. **PW8, PC Dickson Misati** testified that on 6th December, 2018, he was assigned by PW6 to continue with investigations of the case. He visited the scene on 7th December, 2018 and recorded statements from some witnesses. On 13th December, 2018, he sought more time from the court at Ngong to hold the accused for further investigations. The accused was later charged with the offence after he concluded investigations. He produced the murder weapon (knife) as an exhibit-PEX1

13. In his defence, the accused gave a sworn testimony and told the court that the deceased was his friend and they had known one another for 5 years. The deceased was also a tenant in his mother's premises. He told the court that on 30th November, 2018, at 8am, a man he had assisted get a tenant called and asked him to go for his commission. Since he did not have fair to Ongata Rongai, he asked the deceased for money and the deceased gave him Kshs. 150 and also offered to accompany him to Ongata Rongai.

14. He told court that since the Kshs. 150 could not be enough to take the two of them to Ongata Rongai, they decided to walk through a short cut to Nkoroi where they boarded a matatu to Ongata Rongai. They met the man at Sirona restaurant where he bought them tea. He later went with the man to the office where he was given Kshs. 15,000 and Kshs. 500 for fare.

15. The accused testified that they left and proceeded to a butchery where they roasted meat and drunk up to 9 pm. They then boarded a matatu to Kiserian where they parted ways. He gave the deceased Kshs. 500 and called a motorcycle to take the deceased home. He remained at Kiserian town and continued enjoying himself.

16. According to the accused, the following day at 6.30 am, he boarded a motorcycle home and was dropped at the gate. The deceased came from behind as he answered a short call asking him where he had kept the money and stabbed him twice at the back. They struggled and the deceased again stabbed him at the ribs. As the deceased aimed to stab him at the neck, he (accused) raised his hand and the deceased stabbed him near the armpit (which he showed to the court). They struggled and fell down while the deceased was still holding the knife. The accused was hit on the head and lost consciousness. When he came to, he found himself in Ward 5 at KNH.

17. The accused testified that he was admitted in hospital from 1st December, 2018 to 12th December, 2018 when he was discharged and taken to police station where he was informed that the deceased had died. He was later charged with murder. He denied killing the deceased and maintained that it was the deceased who attacked him with a knife. He also told the court that he had no grudge with the deceased as they were best of friends. He produced his discharge summary dated 3rd December, 2018 as an exhibit.

18. In submissions, defence counsel submitted that the prosecution did not prove all the ingredients of the offence. According to counsel, for the prosecution to succeed in an information of murder, it must prove that there was malice aforethought and an unlawful act or omission on the part of the accused that caused the death as required by section 203 of the Penal Code.

19. Relying on section 206 of the Penal code, counsel argued that the prosecution had the burden to prove that the accused person had the intention to cause the death or to do grievous harm to the deceased; that he had knowledge that his act or omission would probably cause death to the deceased and that he had the intention to commit a felony. According to counsel, PW6 testified that had it been that the accused died, the deceased would have been the one facing murder charges and if the deceased survived then both of them would have been charged with the offence of affray contrary to section 92 of the Penal Code.

20. Counsel argued that there was neither direct; indirect nor circumstantial evidence to prove the intent on the part of the accused to cause the death of the deceased, hence *mens rea* was not proved. He relied on **Joseph Kimani Njau v Republic** [2014] eKLR, where the Court of Appeal emphasized on the need for the prosecution to establish both *actus reus* and *mens rea* beyond reasonable doubt in proving the case of murder.

21. Regarding proof that the death of the deceased was a direct consequence of an unlawful act or omission on the part of the accused person (*actus reus*), counsel argued that none of the witnesses saw the accused stab the deceased, PW2 testified that she saw the deceased stabbing the accused and the accused testified that the deceased attacked him from the blues, a fact that was corroborated by the medical report.

22. According to defence counsel, it was not disputed that the deceased attacked the accused from behind, stabbing him several times and that the accused tried to hold the knife to stop the deceased from further stabbing him. It is the defence case that the ingredients of the offence of murder were not proved beyond reasonable doubt. He urged that the accused be acquitted under Section 215 of the Criminal Procedure Code.

23. The prosecution did not offer any submissions.

24. I have considered the evidence of the prosecution and defence as well as submissions. The accused was charged with murder under section 203. The section provides that **“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”** The ingredients of the offence of murder are: death of a person, caused by an unlawful act or omission, with malice aforethought.

25. Section 206 of the Act defines malice aforethought thus:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

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.

26. In the present case, there is no doubt that a person died. PW3 testified that he was informed that his brother was in hospital. He rushed to Matasia Nursing Home but his brother had been rushed to KNH. He went to KNH and found the deceased had been rushed to theatre. He later saw him in the ward. The deceased died two days later. PW6 rushed the deceased to KNH where he was admitted. He later received information that the deceased had passed on. PW4, the doctor who performed a post mortem on the deceased's body confirmed that indeed there was death.

27. The cause of death was due to injuries the deceased sustained. PW1, PW2, PW5 and PW6 saw the injury the deceased had, a stab wound in the abdomen with intestines were protruding. PW4 told the court that there was a stab wound on the lower part of the chest and the trajectory went through the left lobe of the liver and extended to the colon. He concluded that the deceased died due to excessive blood loss caused due to a penetrative stab wound through the chest to the abdomen.

28. That evidence is clear that the deceased's death was caused by an unlawful act, namely; a penetrative stab wound which caused injuries to the liver, intestines and colon leading excessive blood loss.

29. The last ingredient is who caused the injuries. That is was the accused responsible and did he have malice aforethought or intention to **cause the death or do grievous harm to the deceased, or he knew that his act could cause death or grievous harm.**

30. In *John Mutuma Gatobu v Republic* [2015] eKLR, the Court of Appeal stated of malice aforethought:

Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal...There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, its it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought.

31. In *Joseph Kimani Njau v Republic* (supra), the Court of Appeal stated:

In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard.

32. The main witnesses in this trial were PW1 and PW2 for the prosecution who were supposed to be the eye witnesses. PW1 told the court that she heard a commotion, the accused saying remove your things and leave. She later heard a person saying “he has killed him.” The witness was not out then. She did not tell the court how she knew the voice was that of the accused. When she went out, the accused's brother was at the scene and he said “let them kill one another.” When she moved closer she saw both the accused and deceased bleeding. It was the deceased who had a knife and was holding the accused. She pleaded with the deceased not to stab the accused. The deceased had an injury in his abdomen with his intestine protruding. She pleaded with the deceased to go to her and the deceased handed over the knife to her.

33. PW2, **who** knew both the accused and the deceased also heard a commotion. She heard the deceased tell the accused you know you have killed me. She again did not tell the court how she knew that it was the deceased saying so. She went outside the house and saw the deceased holding a knife. The deceased stabbed the accused on the shoulder. She went back to her house to see her children who were crying. PW1 asked the deceased for the knife.

34. The two witnesses did not see the accused stab the deceased. They also did not see how the deceased sustained the injuries. Both witnesses, however, saw the deceased holding a knife and PW2 stated that she saw the deceased stab the accused on the shoulder. PW6 confirmed that when he went to the scene, the accused was lying injured while the deceased had been rushed to hospital.

35. The accused testified in his defence that the deceased abruptly attacked him as he returned home, asking him where the money he had was. They struggled and fell down while the deceased was still holding the knife. The accused was hit on the head and lost consciousness. When he came to, he was in a Ward at KNH.

36. The evidence from both the prosecution and defence left no clue on what exactly happened to the deceased. Who stabbed him or under what circumstances the deceased was stabbed remain unclear. In ***Dickson Mwangi Munene & another v Republic*** [2014] eKLR, the Court of Appeal stated that either intentional or reckless killing, constitutes malice aforethought under section 206 of the Penal Code which is the *mens rea* of the crime of murder.

37. ***Isaak Kimanathi Kanuachobi v Republic*** [2013] eKLR, the Court of Appeal held that there can be constructive malice aforethought in terms of section 206 of the Penal Code thus:

There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See Republic –v– Stephen Kiprotich Leting & 3 Others (2009) e KLR HCCC No. 34 of 2008). In the circumstances of this case, where there was a fight involving the appellant and others in a place of worship leading to another fight where the appellant stabbed the deceased with fatal consequences, we do not think there was malice aforethought at all. The appellant should not have been convicted of murder but should have been convicted of manslaughter. (See Juma Onyango Ibrahim – vs- R, Criminal Appeal No. 312 of 2009 Court of Appeal (Kisumu).)

38. In the above case, although the appellant had stabbed the deceased leading to death, the court did not find malice aforethought that would have supported a conviction for murder.

39. In ***Isaak Kimanathi Kanuachobi v Republic*** (supra), where *mens rea* had not been proved although the appellant had caused the deceased's death, the Court of Appeal stated:

In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.

40. The decisions referred to above are clear that the prosecution must prove *actus reus* and *mens rea* beyond reasonable doubt in order to prove murder. In the present case the prosecution neither proved *actus* nor *mens rea*. Although PW1 and PW2 told the court that they heard a commotion and when they went out they found the two men in a confrontational position, there was no evidence that the accused stabbed the deceased or inflicted the fatal injury on the deceased to persuade this court to even infer constructive *mens rea*. The court cannot, therefore, consider whether there was *mens rea* when there is no proof of *actus reus*. The court cannot even summon the aid of circumstantial evidence in the circumstances of this case.

41. This is a clear case of poor investigations or unwillingness of witnesses to come forward and assist the court in unravelling this murder. Although the accused's brother was said to have witnessed what may have happened, no effort was made to have him record a statement on what he witnessed.

42. Having considered the evidence on record, the law and decisions, the conclusion this court comes to is that the prosecution has failed to prove its case against the accused beyond reasonable doubt. The court has no option but to acquit him, which I hereby do.

43. The accused is acquitted of the charge of murder.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 16TH DAY OF JULY 2021.

E C MWITA

JUDGE