



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL CASE NO. 4 OF 2017
REPUBLIC.....PROSECUTION
VERSUS
WARIO FORA BORU.....ACCUSED

JUDGMENT

A. The charge

1. The accused person herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars of the offence being that on 12.02.2017 at Embu GK Prison, Itabua location of Embu County murdered Mohammed Said Omar.
2. The accused pleaded not guilty to the charge and the case proceeded to full hearing.

B. Prosecution's evidence

3. PW1 (Charles Mutembu Gerald) testified that he was the Officer –in- Charge, Embu GK Prison and that on 12.02.2017 at around 5am, he was in his house when he heard gunshots and after which he called the sleeping-in officer one Senior Sergeant Okumu to check what was going on. That he engaged his boss in-charge of the County, a Mr. Okioga, and informed him of the incident. At around 6am, he was called by the OCS Itabua, CIP Nyongesa who told him that the accused herein was at Itabua Police station reporting that terrorists had invaded the prison and the OCS brought the accused to the prison under tight security so as the report could be verified. That before they went, PW1 had gone round the prison compound and had spotted the body of the deceased at the roundabout near the administration block and had seen the gun the accused had signed for the previous evening adjacent to the Women Prison Camp fence. That the deceased's body had a gunshot wound on the chest and was bleeding profusely.
4. PW2 (Kenneth Muriithi Njagi) testified that he reported to work at 6.30pm on the night of 11.02.2017 and was deployed on guard duties together with PC Okoth, PC Mbuthia and PC Wario and at around 5am, he heard PC Wario's phone ringing and PC Wario requested (PW2) to let him go to the house briefly and a few minutes later he heard gunshots and came out of the bus where they were housed. That he went towards the Protestant Church and he was shot at on his legs and he noticed that it was PC Wario who was shooting at him. He asked him why he was shooting him but the accused did not answer him. He shot at him again but the bullet missed him and he fell and rolled to a safe place and when he could not roll any more, he lay helplessly until when one Cpl. Kibachau came to his rescue and he was taken to the hospital. In cross examination, he testified that he was working together with the accused until 5am when the accused excused himself to go to his house. It was his evidence that there were security lights at the place the accused shot him and that he recognized the voice of the accused who was wearing uniform but had a civilian jacket. In re-examination he testified that they had worked for long and he could identify him in darkness.
5. PW3 (Sergeant Rikana Nyakimura) testified that he was the deceased's and the accused's colleague and that on 12.02.2017 at around 5am he was asleep in his house when he heard gunshots from the Administration Block and at around 6am, he went out to see what had happened. He found the deceased on the ground and his body had bullet holes on the chest. That later, the OCS Itabua went to the prison with the accused who was in the police vehicle. In cross examination, he testified that he did not witness the incident.
6. PW4 (Senior Sergeant Joseph Lupia Ongesso) testified that on the material day he heard gunshots from the Administration Block. That two of the officers went and told him that one PC Muriithi who had been on duty was calling for help and when he went to the scene, he found the deceased's body lying on the ground and had gunshot wounds and injuries on the legs.
7. PW5 (Alex Chirchir) testified that he is an Assistant Police Commissioner stationed at DCI Headquarters Nairobi, Ballistic Section. That he carried out examination on the two rifles, 24 rounds of ammunition, two magazines and 25 expended cartridges after which he concluded that the firearms and ammunitions are capable of being fired and further that the 14 cartridges were fired from the same rifle (G3 rifle serial

number 96-075345). He produced the ballistic report and memo form as PExbt 3(a) and PExbt 3(b) respectively.

8. PW6 (Dr. Samuel Gatei Ngatia) testified that he conducted postmortem on the body of the deceased herein (Mohammed Said Omar) and he formed the opinion that the cause of the death was hemorrhage due to the perforating wounds on the chest. He produced the postmortem report as PExbt 10. In cross examination, he testified that a perforating injury can be caused by any other object but he formed the opinion that the death was caused by a gunshot because of the nature of the wound and the existence of the gun powder.

9. PW7 (PC Muriigi Musavi) testified that he was the Scene of Crimes Officer. That he conducted investigations over the matter and produced photographs as PExbt 11(i-xx) and a certificate dated 28.03.2017 as PExbt 12.

10. PW8 (CI Nicholas Nyongesa) testified that he was the OCS Itabua Police Station at the time of the incident and that on 12.02.2017, at around 5.30am he was in his house when the duty officer called him and informed him that a prison officer was reporting an attack at the prison. That he proceeded to the station and found the accused who reported that when on duty in the prison with PC Muriithi one of their colleague called Mohammed had attacked them and snatched his rifle from him and that PC Muriithi intervened and was shot. That he was able to mobilize the police and they went to the prison with the reportee and on arrival, he saw a dead body near the administration office. He further testified having found several spent cartridges at the scene and the body had big gushing wound on the chest which he identified as gunshot wounds.

11. That he recovered a G3 rifle Serial No. 96-075345 with a detached magazine and which was empty. That he interrogated senior officers and gathered that the reportee and one PC Muriithi were together on duty on the night of the incident and the said PC Muriithi was seriously injured. He further testified that as they were proceeding to the police station, the accused told him that he killed the deceased due to their wrangles at the prison mosque and further that the deceased wanted to take his (accused's wife). The witness produced PExbts 1, 4, 5, 6, 7, 8 and 9. In cross examination, he testified that he did not record the confession by the accused person herein.

12. PW 9 (Dr. Joseph Thuo) testified that he conducted mental assessment and found that the accused was mentally fit to plead to the charge and stand trial for the offence of murder. He produced the assessment report as PExbt 4.

13. PW 10 (Jamleck Kinyua Mbuva) testified that he was the prison's armory on 11.02.2017, he issued the accused with a rifle G3, one magazine with 20 rounds of ammunition but he did not return the rifle on 12.02.2017 as was expected. Further that, PC Muriithi was also issued with a rifle, one magazine and twenty rounds of ammunition on 11.02.2017 but that he did not return the same. He produced a copy of the arms' register as PExbt 2. In cross examination, he testified that he did not witness the incident.

14. PW 11 (PC John Gitui) testified that on the material day, he carried out investigation over a murder incident at the Embu GK prison and wherein the deceased herein had been shot and where from he collected the various exhibits. He took the body for postmortem and produced the guns as exhibits.

15. The prosecution proceeded to close its case and in a ruling delivered on 20.11.2019, the accused was put on his defence.

C. Defence's case

16. The accused in his defense gave sworn evidence that on the material day (12.02.2017), he left Embu Prison and went to Embu Town to buy medicine and spent the whole day there since he misplaced the keys to his house. That, the following day he woke up for the mosque and went back to hotel and that he was given a lift to the station at around 9.30am and went to his house. It was his evidence that he did not kill the deceased herein and neither was he on duty on 11.02.2017 as he was off-duty since he was sick. In cross examination he testified and reiterated that he was not in the night shift on the night of 11- 12.02.2017 and that he was on day shift. The defence proceeded to close its case.

D. Issues for determination

17. The parties proceeded to file written submissions. The prosecution submitted that the evidence tendered was sufficient to sustain a charge of murder and the elements of the said offence. Further that there is both direct and circumstantial evidence which was never rebutted.

18. The defence on its part submitted that the evidence of PW2 was not sufficient to warrant a conviction on basis of identification evidence of a single witness as to being the one who fired the shots as it was dark. Further that, there was contradiction on the expert's evidence and that of the other witnesses in relation to the two rifles. Further that there is doubt as to who discharged the fatal bullet and thus the doubt ought to be in favour of the accused and he ought to be acquitted for failure by the prosecution to discharge the burden of proof.

E. Issues for determination

19. I have considered the evidence tendered before this court both by the prosecution and the defence and the rival written submissions. The accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The offence of murder is defined under section 203 of the Penal Code in the following terms; -

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

20. From the above definition, it therefore means that for the prosecution to secure a conviction on a charge of murder, it has to prove, beyond reasonable doubt, three ingredients. Those ingredients are as follows: -

a. the death of the deceased and the cause of death;

b. that the accused committed the unlawful act which caused the death of the deceased; and

c. that the accused had malice aforethought.

(See Anthony Ndegwa Ngari –vs- Republic [2014] eKLR and Johnson Njue Peter –vs- Republic [2015] eKLR).

21. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with, and in this case, prove that the accused herein murdered the deceased (see Woolmington –vs- DPP (1935) AC 462). The standard of proof which is required of the prosecution is that of “beyond any reasonable doubt” (See Miller –vs- Ministry of Pensions, [1947] 2All ER 372). The question therefore is whether the above ingredients were proven to the required standards.

F. Application of the law and determination

22. As for the **proof of the death of the deceased and the cause of the death**, PW1, PW3, PW4, PW6, PW7, PW8 and PW11 all testified as to having seen the body of the deceased lying in a pool of blood and which appeared dead. PW6 further testified as to having conducted post-mortem on the said body and upon which he formed an opinion that the deceased died as a result of hemorrhage due to the perforating wounds on the chest. He produced the postmortem report as PExbt 10. As such, the death of the deceased was proved.

23. Right to life is protected by our Constitution under article 26 and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. In Guzambizi Wesonga –vs- Republic [1948] 15 EACA 63 the court held that; -

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”

(See also Sharm Pal Singh [1962] EA 13 and Daniel Nzioka Mbuti & another –vs- Republic (supra)).

24. The cause of the death of the deceased herein was not excusable or authorized by law and thus the same was unlawful.

25. As to whether the accused person committed the unlawful act which caused the death of the deceased, I note that the only prosecution witness who witnessed the incident was PW2. He testified that they were together on duty with the accused and who sought time to go to the house and on coming back, he started shooting as a result of which, he (PW2) was shot on both legs. All the other prosecution witnesses testified as to having found the deceased lying on the ground.

26. I note that the accused raised the issue of and submitted that the conditions for identification were not favourable as it was dark and as such, PW2 could not be able to identify the accused. However, PW2 on cross examination testified that he had worked with the accused for long and he could even identify his voice from a far.

27. The law on identification and particularly on identification by a single witness is well set out in our jurisprudence. The Court of Appeal for Eastern Africa in Abdalla Wendo –vs- Republic [1953] 20 E.A.C.A 166 held on this issue as follows:

“Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or / direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

28. In Roria –vs- Republic [1967] EA 573, the same court held that;-

“A conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification.”

29. Further, the Court of Appeal in the case of Wamunga –vs- Republic (1989) KLR 426 followed this view when it stated:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

30. In Ogeto –vs- Republic (2004) KLR 19 the court of Appeal held that;-

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”

31. The need for the trial court to warn itself of the dangers of relying on the evidence of visual identification by a single witness was discussed by the Court of Appeal in **Paul Etole & Reuben Ombima -vs- Republic** Criminal Appeal No. 24 of 2000 where the court held as thus:-

“The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”

32. The factors that ought to be considered when the evidence turns on identification by a single witness were discussed in the English case of **R v Turnbull & Others (1976) 3 ALL ER 549** where it was held that:-

“...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation" At what distance" In what light" Was the

observation impeded in any way...." Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance" Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

33. From the evidence on record and which was not controverted, the accused herein was working as a prison warden together with PW2. In fact, the evidence by PW2 was to the effect that they were together on night shift on the material date before the accused herein excused himself and after which PW2 heard gunshots. He further testified that he saw the accused herein shooting and when he asked him why he was doing so, the accused shot at him. In my view, the evidence on record does not create any doubt as to the witness not being able to identify the accused. Having worked together and the fact that there was security light at the place he was shot. I find that the circumstances were favourable for identification. The evidence of PW2 was on recognition and not identification.

34. As to whether the accused had malice aforethought, malice aforethought is the mental element (*mens rea*) of the offence of murder. Section 206 of the *Penal Code* defines it as follows;

206. 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.

35. The Court of Appeal in **Bonaya Tutu Ipu & Another -vs- Republic [2015] eKLR** stated as follows on the prove of malice aforethought:-

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT -Vs- UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in REX -Vs- TUBERE S/O OCHEN (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of

malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”

36. In the instant case, the evidence by PW6 was to the effect that the cause of the death was injuries caused by a gunshot because of the nature of the wound and the existence of the gun powder. The witness testified that the wound was on the chest and was 2.4 inches in diameter in the anterior chest at the T4 level left of the sternum. PW5 a ballistic expert testified that he examined the guns, magazines, cartridges and rounds of ammunition and upon examination, he concluded that cartridges were fired from the same rifle (G3 rifle serial number 96-075345). From the register produced by PW10, the said gun was given to the accused herein and which rifle was collected from the scene of the crime. It is clear therefore that the same was used to kill the deceased herein. It is my view therefore that from the weapon used and the part of the body injured, it can only be said that the accused had intentions to cause death or grievous bodily harm. In my view, malice aforethought was proved.

37. The accused raised the defense of alibi to the effect that he was away from work on the material date. The burden of proving the falsity of the defense of alibi rests on the prosecution. (See **Victor Mwendwa Mulinge –v- R, [2014] eKLR**).

38. However, the Court of Appeal in **Erick Otieno Meda –vs- Republic [2019] eKLR** while discussing the defence of alibi laid down rules to be applied in considering the defence of alibi and the Learned Judges of Appeal held as thus;-

“23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:

An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.

An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014))

39. In the instant case, the said defence was not raised during the prosecution’s case to allow them time to disprove the same. Further, the same was never corroborated by any other evidence. As such, the same cannot stand.

40. Taking into account all the above, I find that the prosecution has tendered sufficient evidence to prove the charge of murder against the accused and I convict him accordingly.

41. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JULY, 2021

L. NJUGUNA

JUDGE

.....for the Accused

.....for the Prosecution