



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NUMBER 41 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

NICHOLAS SIMIYU WAFULA.....ACCUSED

J U D G M E N T

The accused **Nicholas Simiyu Wafula** 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 are that on the 29th day of November, 2019 at Buema village, Tuuti Sub-location within Bungoma County, unlawfully murdered **Joseph Wamalwa Wekesa**.

The case for the prosecution is that on 29.11.2019, **PW1 Humprey Mulati**, a driver of Hon. Wafula Wamunyinyi was at the home of Matayos Wamunyinyi where there was anniversary of his death. At 2.a.m. he was standing near a vehicle when he saw accused Nicholas Simiyu and the deceased Joseph Wamalwa Wekesa start quarrelling. They then started fighting. People came and separated them. Accused then went to his home and came after about 10 minutes. When the deceased saw accused, he started running away. Accused chased him and stabbed the deceased on right lower part of the chest. The deceased came to the vehicle seeking help. He took deceased to Bungoma West hospital where he was given first aid but died while receiving treatment.

On being cross –examined by Wekesa for accused, the witness stated that there was electric security lights at the function and that the deceased was collecting chairs when accused started chasing him with a knife.

PW3 Meshack Wanjala testified that he was at the anniversary when he saw accused hit the deceased with a fist and they started fighting. The accused then went away and came back with a knife. The deceased on seeing accused with a knife ran towards here the witness was and stabbed deceased on the chest. Accused then left with the knife. On cross examination he stated that he was 4 -5 meters away and was able to see clearly with aid of the security light. He confirmed that both the accused and deceased appeared drunk.

PW4 Evans Khaemba Nyongesa was playing music at the anniversary when at 2 a.m. he started leaving. He then saw accused come from his home armed with a knife. Deceased on seeing him started running way. Accused chashed him and stabbed him on the right side of the chest.

Deceased was taken to the hospital where he later learnt he died.

PW5 Doris Nanjala Nabangi the wife of the deceased was in her house when he heard screams and then heard a Tuk Tuk being driven to her home. Accused then called out asking where was her husband so that he can kill him. The accused then stabbed the dogs which were outside. He hit the glass window and then left. Shortly later she was informed deceased had been stabbed by accused and taken to hospital. She went there and found that he had died.

PW7 No. 66166 Segt Mary Okongo was instructed to go to the home of Hon. Wamunyinyi where there was reported a stabbing incident and the victim had been taken to hospital. She went to the hospital and confirmed the victim had died. She visited the scene and was shown accused's house which they searched and recovered a blood stained shirt which was said to belong to the accused. They did not recover the knife. They then received information accused was at Dawamed Hospital where he was receiving treatment. They went there and arrested him. She observed that he had injuries on the head and hand.

PW1 Dr. Caleb Watta who produced the post moterm report prepared by Dr. Ombongi stated that the deceased had a penetrating injury on right side of chest measuring 4 cm by 15 cm, small wound on right elbow and there was massive blood in chest cavity and lung collapse. The injury damaged the liver. He formed opinion that cause of death was due to a penetrating abdominal injury leading to haemohrage.

Upon being placed on his defence, the accused elected to give sworn statement. He stated that the deceased is a cousin of his father. He testified that on the material day he was at his grandfather's anniversary. There were many people and music was playing. He went to check and was hit on the head and fell down. He became unconscious and only regained consciousness and found himself in hospital. He noticed he

had injuries on the head and right hand. He stated that he did not see the deceased at the anniversary nor did he know who killed him.

Mr. Wekesa for the accused filed written submissions. He submitted that the onus of proof remains with the prosecution at all times and at no time does it shift to the accused person to prove his innocence. To prove the offences of murder, it is paramount that the prosecution proves both *actus reus* and *mens rea*. In this case he submitted that the prosecution had failed to connect the act to the accused person and further that the prosecution has also failed to establish that indeed the accused person had the mental intent of murdering the deceased. Further to that the investigations that were conducted were incomplete and at best shallow. Other than recording statements of strangers no other investigative work was carried out by the investigation officer.

He urged this honourable court to find in favour of the accused person in regards to his defence which was consistent and much more believable as compared to the prosecution eye witness who contradicted themselves and could not give a clear record of the events. He submitted that the prosecution case has a lot of gaps making it porous and shaky. He submitted that the prosecution has not discharged its burden to the required standard of proof and thus prayed that the accused person be accorded the benefit of doubt and thus be exonerated.

The accused is charged with offence of murder contrary to Section 203 of the Penal Code. Section 203 provides;

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

From these provisions, the ingredients of the offence which the prosecution must prove are:

- a) The fact and cause of death of deceased.***
- b) The unlawful act or omission that caused the death.***
- c) The existence of malice aforethought.***
- d) That it is the accused who caused the unlawful act or omission that caused the death of the deceased.***

The fact of death of deceased can be proved by production of the post mortem report performed by a medical doctor. The post mortem report will confirm that the deceased actually died and a death certificate number indicated was issued. The post mortem report will also show the nature and dimension of external injury observed. It will also show the internal appearance of the body and the specified systems which include respiratory, Cardio Vascular, Digestive, Head, Nervous spine column and spinal cord systems. It will also contain the results of the examination and the doctors opinion as to the cause of death.

In this case the doctors observation of the external appearance was that there was a penetrating injury on right chest measuring 4 cm by 15 cm. He also noted a small wound on right elbow. Upon opening the body he observed there was a penetrating injury through the diaphragm on right side, penetrating through the liver and stomach. He found the other systems were normal. From his examination he formed opinion that cause of death was due to penetrating chest and abdominal injuries caused by assault with a sharp pointed object. From the evidence of this witness the fact of death was confirmed. The doctor formed opinion that cause of death was due to a penetrating wound inflicted by an act of assault using a sharp object. The unlawful act therefore causing the death was assault by a person.

The other ingredient of the offence of murder the prosecution must prove is malice afore thought. **Section 206** of the Penal Code on malice aforethought provides:

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

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- 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.***

Malice aforethought or the mens rea is the requisite mental status of an accused which must be proved by the prosecution in an offence of murder. There are two kinds of malice aforethought- the express malice where it is demonstrated that accused specifically intended to kill the victim. The implied malice aforethought is when it is demonstrated that accused consciously disregarded the consequences of his act whether it will cause grievous harm or death.

In **Isaac Kimathi Kamuchobi –V- Republic Nyeri Criminal Appeal No. 96/2007 (VR) Sec. 206** was expounded as follows:

‘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 the accused killed in furtherance of a felony (for example rape, robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous harm he is said to have had constructive malice aforethought (see R -V – Stephen Kiprotich Leting and 3 others 2009 eKLR).

The prosecution can prove malice aforethought by direct evidence where the accused expressed his intention to kill the deceased either to the deceased himself or other person. The prosecution can also establish circumstances from which an inference of malice aforethought can be made by the court.

In **Bunaya Tuta IPa & Another –vs- R (2015) eKLR** the court of appeal stated.

“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 **Chesaki –vs- Uganda CR. Arap 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 Republic –vs- Tubere s/o action 1945 12 EACA 63 former Court of Appeal of eastern Africa status thus on this issue.

It (the court) has a duty to perform in considering the weapon used and the part of the body injured in arriving at the 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 the use of stick.

In this case there is evidence that the weapon used was a knife, the part of the body injured is the chest and abdomen and the type of injuries sustained was by way of stabbing using a knife. The person after stabbing the deceased ran away which conduct shows he knew the consequence of what he had done. From these circumstances, I am satisfied that the prosecution established there was malice aforethought an important ingredient in a charge of murder.

The other ingredient the prosecution must prove is that it is accused who inflicted the injuries from which the deceased died.

PW2 Humprey Mulati testified that he saw the accused armed with a knife chase the deceased and stabbed him. The deceased upon sustaining injuries went to the witness who took him to hospital for treatment. He stated he was able to see clearly using the electric light which was used during the anniversary celebrations.

PW3 Meshack Wanjala Webala and PW4 Evans Khaemba Nyongesa who were at the scene testified on similar terms.

The accused in his defence admits he was at the anniversary ceremony. He testified that he heard a fracas at the place where music was being played and went there to check. He was then hit and fell down. He only came to find himself in hospital. He admitted he knows the deceased but denied meeting the deceased on that night.

Positive identification of an accused is an important element of an offence. This is so because the guilt will be determined in respect to the person and punishment is meted out to the person who committed the offence. Positive identification can be proved by direct evidence of witnesses or inferred from a set of proved facts where circumstantial evidence is relied on. It is for these reasons that identification evidence is treated with greatest care especially where the only evidence connecting the accused to the offence is evidence that shows the accused as the perpetrator of the offence. The care that is required relates to not only truthfulness of the witness, but also the identification accuracy of the evidence. In testing the identification evidence such factors as lighting conditions, distance between witness and accused, period of time the witness observed the accused, and whether there were any obstructions, whether he knew accused before or not, which would imply recognition are factors which will be considered by a court to ascertain whether the identification was accurate and free from error.

In **Roria –V- R 23 EACA**, the court of appeal on the issue of identification rendered itself as follows:

“ A conviction resting entirely on identification invariably causes a degree of uncertainty. That danger is of course granted when the only evidence against an accused person is identification by one witness though 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 circumstances it is safe to act on such identification.”

In this case the accused in this evidence testified that he attended the anniversary on the material night. There was music and he was informed of a fracas, and went to check. **PW2, Humprey Mulati, PW3 Meshack Wanjala, PW4 Evans Khaemba** were all at the scene. Their evidence is that the accused armed with a knife came and on deceased seeing him, started running away. Accused chased him and stabbed deceased. There was electric light which was illuminating the place as there was an anniversary. This was not identification of one witness, but three. They knew the accused and deceased and the conditions of identification were favourable. I am satisfied that accused was positively identified as the person who inflicted the injuries on the deceased. I find conditions of recognition were free from error.

Considering the whole evidence. I am satisfied that the prosecution has proved all the ingredients of the charge of murder against accused beyond reasonable doubt. I therefore find the accused Nicholas Simiyu Wafula guilty of the offence of murder contrary to section 203 as read with Section 204 of the Penal Code and convict him accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY SEPTEMBER, 2021.

S N RIECHI

JUDGE