



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 31 OF 2012

[FORMERLY NYERI HCCR 11 OF 2011]

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS WANDERI MWANGI.....ACCUSED

JUDGMENT

1. On the night of 14th December 2002, Benson Chege Kinyua (hereafter *the deceased*) suffered a fatal stab wound on the left side of his chest. He was pronounced dead on arrival at Murang'a Hospital.
2. One witness said that he saw the accused stab the deceased outside a bar styled *Mwafrika* at Wanjengi Trading Centre.
3. The Republic thus brought *Information* to the High Court charging the accused with *murder* contrary to section 203 as read with section 204 of the **Penal Code**. The particulars are that on 14th December 2002 at Wanjengi village in Murang'a within the former Central Province, he murdered the deceased.
4. The prosecution called five witnesses. The first was Benson Irungu Kamau. He testified that on the material night at around 8:30 he heard some noise outside *Mwarafika* Bar at Wanjengi Trading Centre. He saw the accused stab the deceased on the left side of the chest. He sought for help and together with Irungu and Kamenchu, they took the deceased to a nearby clinic. They were then referred to Murang'a Hospital. Before embarking upon the journey, they reported the matter to Kiroyo Police Station.
5. The deceased died before they could get to Murang'a Hospital. PW1 said that the accused was well known to him as they both hail from the same area. On further examination, he said that he was some meters away from the scene and that there was electric lighting at the vicinity.
6. Githugu Chege (PW2) is a cousin of the deceased. He was also at Wanjengi that evening. As he left the centre, He encountered four or so people carrying the deceased. They asked him to assist. He only realized that the injured person was his cousin when they got to the local clinic at Wanjengi. He said the deceased had a cut wound on the right hand side of the thorax. On cross-examination, he said that the the accused and the deceased were friends; and, that he was unaware of any grudge between them.
7. PW3 was Julius Kinyua, a younger brother of the deceased. He was not at the scene. He learnt of the incident at 11:00 p.m. He and other members of the public joined the police in searching for the accused. They did not find him. He said that the accused and the deceased were "great friends".
8. PW4, Daniel Kihui, is also a brother of the deceased. He was informed by PW2 about the stabbing. He advised PW2 to take the deceased to the local clinic at Wanjengi. He joined them there. He said the deceased was bleeding from the left side of the chest. They were referred to Murang'a Hospital. He did not go there and was later to learn that the deceased died on the way.
9. On 19th December 2002, he together with PW3 and PW5 identified the body of the deceased at the Murang'a Hospital for post mortem purposes.
10. On 9th October 2019, the prosecution sought a further adjournment to call three remaining witnesses. Noting the previous adjournments and that the case dated back to the year 2012, I granted a *last adjournment*. When the trial resumed on 16th January 2020, learned Prosecution Counsel, *Ms. Gichuru*, sought yet another adjournment on the same grounds advanced earlier. I found little merit and ruled that the matter proceeds at 11.00 a.m. The prosecution failed to procure any more witnesses and closed their case.
11. When the accused was placed on his defence, he made an unsworn statement. He said that he asked for a drink from the deceased who

was his friend and neighbor. That a confrontation ensued and the deceased went to the nearby butchery and got a knife. That after dragging the accused from the bar, a fight ensued. He said the deceased was beating him and grabbed him from the collar. The deceased then drew out a knife from his belt. He said that in the course of the struggle they fell down and the deceased was stabbed. Fearing for his life, he ran away and hid at home.

12. He added the following-

After a few years I sought advice. I learnt that Chege died the following morning. I decided after a few years to report the matter on February 2011 at Murang'a Police and I was then charged

13. Learned counsel for the accused, Ms. King'oo, filed final submissions on 10th June 2021.

16. I will commence with a procedural matter. The evidence of PW1 was first taken by Ngaah J on 4th October 2013. When Waweru J took over the matter, he explained section 200 of the **Criminal Procedure Code**. The accused applied to recall PW1 for further cross-examination. An order to that effect was granted on 22nd July 2015. PW1 was unavailable on the next date. In the meantime, the parties engaged in plea bargaining which was not fruitful. At the next hearing date, PW1 was still unavailable and Waweru J took the evidence of PW2 and PW3. When I subsequently took over the proceedings on 9th October 2018, I explained the rights under section 200. The accused and his counsel now elected to proceed from where the matter had reached. I then recorded the evidence of the last two prosecution witnesses.

14. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*.

15. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

17. The legal and evidential burden rests squarely on the Republic. **Woolmington v DPP** [1935] AC 462, **R v Kipkering arap Koske & another** 16 EACA 135 (1949), **Bhatt v Republic** [1957] E.A. 332.

18. There is *no* doubt about the *death* of the deceased. On 19th December 2002 PW3, PW4 and PW5 identified the body of the deceased at the Murang'a Hospital for post mortem purposes.

19. The only serious gap is that the prosecution did *not* call the pathologist or produce his post mortem report. I however find that the cause of death can be clearly inferred from the following set set of circumstances: PW1 saw the accused stab the deceased on the left side of the chest. PW4 saw blood oozing from the left side of the deceased's chest. The accused himself *admitted* that the deceased was stabbed by a knife in the course of their fight. Lastly, the deceased succumbed to that injury soon thereafter as he was being ferried to the hospital.

20. I thus entertain no doubt that the deceased succumbed to those injuries *immediately after* the attack. Any other interpretation would be a travesty of justice. I find some support in **Ndungu v Republic** [1985] KLR 487. The Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial *unless* the cause of death is *too obvious*. The Court stated at page 493-

Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.

21. From the description of injuries by PW1, PW2 and PW4, I entertain *no* doubt that the cause of death was *unlawful*. The only live question now is whether the accused person, *of malice aforethought*, killed the deceased.

22. That issue is intertwined with *identification*. PW1 knew the accused. There were lights and he was only a few metres away. He saw the accused stab the deceased. This was evidence of *recognition*; far more reliable than simple identification. **Wamunga v Republic** [1989] KLR 424, **Maitanyi v Republic** [1986] KLR 198 at 201. Furthermore, and like I have stated, the accused *admitted* that they fought with the deceased save that he claimed that the deceased is the one who had the knife; and, that it stabbed him when they fell in the course of a struggle.

23. I will now turn to the other key elements. The prosecution is obliged to *prove* the *mens rea* for murder: that the accused was of *malice aforethought*. The accused and deceased were friends. There was no evidence of any bad blood between them. If the accused is to be believed, the altercation at the bar was over insistence by the deceased that the accused should "get married". Why a mundane matter like that would lead to a full blown fight is intriguing.

24. On the face of it, there is absence of a *motive* for the murder. I am alive that the prosecution was *not* obliged to prove motive. However, the accused *disappeared* from the *locus in quo* for *many years*. The murder took place on 14th December 2002. He did not present himself to the police until *9 years later* in the year 2011. From his statement, he said that he knew as early as the following day that the deceased had died. He said he feared beatings from the police and thus went into hiding on the night of the murder. He said that after many years and "consulting" he surrendered.

25. By going into hiding for so many years, I readily draw a negative inference. I find that his defence that it is the deceased who went for a knife at the butchery or that he was stabbed in the course of the struggle unbelievable. That version is also discredited by the evidence of PW1 who clearly saw the accused stab the deceased on the chest. By employing a knife to stab the deceased, he *knew or ought to have*

known that it was likely to cause grievous harm or death. He thus had *malice aforethought* as defined in section 206 (b) of the **Penal Code**.

26. The entire corpus of direct and circumstantial evidence points *irresistibly* and *exclusively* to the guilt of the accused. I find *no* defence or hypothesis that exonerates him.

27. The upshot is that the prosecution has proved the charge *beyond reasonable doubt*. The accused, *of malice aforethought* caused the death of the deceased by an *unlawful* act. I accordingly enter a finding of *guilty*. The accused is hereby *convicted*.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 21ST DAY OF SEPTEMBER 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Ms. Gakumu for the Republic.

Mr. Gitonga holding brief for Mrs. Wanjau for the accused.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.