



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL CASE NO. 26 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL KIPRONO KEMEL.....ACCUSED

J U D G M E N T

1. The Accused Person in this case was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the charge are that on 25/9/2017 at about 21 hours at **TILILBEI** Village, **KAPLELARTET** Sub-County in **SIGOWET SOIN** Sub-County within **KERICHO** County, the Accused Person Murdered **GEOFFREY KIPKEMOI KEMEI**.
3. The Accused Person pleaded not guilty to the charge. The prosecution called a total of seven (7) witnesses whose evidence in summary was as follows:
4. **PW.4, ANNA CHEPKORIR SIGILAI** was visiting **PW.5 ALICE CHEPKEMOI** who is a sister to the Accused Person when the Accused Person entered the house of PW.5 at 8.30 PM on the material day and without saying a word he stabbed PW.4 on the left side of the cheek and left ear using a pocket knife.
5. PW.4 said the deceased had been sent by PW.5 to get a D-light which she wanted to use for preparing supper.
6. When the deceased who had arrived with the D-Light asked the Accused Person why he had stabbed the visitor, the Accused Person turned and stabbed the deceased on the neck. The deceased fell down and the Accused Person ran away.
7. PW.4 ran away to a neighbour's house where she spent a night and went to seek Medical Assistance the following day.
8. PW.5 said she was busy preparing dinner when the incident occurred. She had sent the deceased for a D-Light and she heard him asking the Accused Person why he had stabbed the visitor.
9. This court took over the case at this stage and after complying with Section 200 of the Criminal Procedure Code, heard the evidence PW.2, CPL. DANIEL ONYANGO who was recalled for purpose of producing the Exhibits.
10. PW.6, the Government Analyst based at Kisumu produced the Government Analyst Report after examining the following samples.
 - a. **A Knife**
 - b. **A T-Shirt**
 - c. **A Blood Sample of the Deceased.**
11. PW.6 said the knife had blood stains which matched the blood sample of the deceased and the T-Shirt was heavily stained with blood which matched that of the deceased.
12. **PW.7 – IP ROBERT KYALO MAINGI** who investigated the case charged the Accused Person with this offence. The Post Mortem Report was produced by **PW.1 DR. RONALD LANGAT** who formed the opinion that the cause of death was cardiac arrest secondary to hemorrhagic shock due to bleeding of rent vessel of the heart and hemothorax causing respiratory failure.

13. At the close of the prosecution case, the Court ruled that the Accused had a case to answer and the Accused Person was placed on his defence.
14. The Accused Person said in his defence that on 25/9/2017 he was at his home during the day.
15. He said he went to visit a friend called **ERICK KIPROP** who was making illicit brew commonly referred to as *changaa* and he drank the *changaa* and returned to his home between 8-9 p.m.
16. The Accused Person said upon returning, he went to his sister's house where he found people drinking *changaa*.
17. He said he was very drunk and does not recall anything. He said he met a friend to his sister called Anna. He said while talking to the visitor the deceased entered with a knife.
18. The Accused Person said he fought with the deceased and they both fell down and the deceased fell on the knife and it stabled him on the neck. The Accused Person said he was shocked to see blood oozing.
19. The Accused Person called two witnesses, **KENNEDY KIPRONO CHEPKWONY** and **BARNABAS KIPLANGAT SAINA (DW.2 and DW.3)** who said when they arrived at the scene upon hearing screams, they found the deceased had been stabbed. The two witnesses did not witness the incident.
20. The parties relied on submissions filed earlier which I have duly considered.
21. It is the duty of the prosecution to prove the guilt of the Accused Person and the standard required is beyond reasonable doubt.
22. For the offence of Murder to be proved, the prosecution must establish the following:-
- a. **The death of the deceased.**
 - b. **That it was the Accused Person who caused the death of the deceased.**
 - c. **That the Accused Person had malice aforethought.**
23. On the issue of the death of the deceased, **DR. RONALD LANGAT (PW1)** who performed the Post Mortem confirmed the death. The Doctor said the cause of death was Cardiac Arrest secondary to hemorrhagic shock due to bleeding of rent vessel of the heart and hemothorax on the left causing respiratory failure. The Doctor produced the Post Mortem Report as Exhibit No.1 in this case.
24. On the issue as to whether it was the accused person who caused the death of the deceased, through an unlawful act or omission, **PW.4 ANNAH CHEPKOECH SIGILAI** was an eye witness to the incident. She said the Accused Person accosted her and stabbed her with a pocket knife twice on the left cheek and left ear for no reason.
25. The Deceased who had been sent for a D-Light by **PW.5 (ALICE CHEPKEMOI)** saw the Accused Person stabbing her and when the Deceased asked the Accused Person why he had stabbed her, the Accused Person turned and stabbed the Deceased with the same knife on the neck and the deceased fell down unconscious.
26. The Accused Person ran away and PW.4 said she went to a neighbour's house where she stayed until the following day when she went to seek medical attention. She still had scars on her left cheek and ear when she testified in Court. There is evidence that it was the Accused person who inflicted the deceased with the fatal injuries.
27. On the issue as to whether the Accused Person killed the Deceased with malice aforethought, in this case the motive of the attack has not been disclosed. Section 206 of the Penal Code defines malice aforethought as follows:-
- 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.**
28. Malice aforethought describes the *mens rea* or the mental element required for a conviction of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender.
29. Section 203 of the Penal Code states that any person who causes the death of another with malice aforethought by an unlawful act or omission is guilty of Murder.
30. In the case of **JOSEPH KIMANI NJAU VS. REPUBLIC (2014) eKLR** the Court of Appeal stated that :- **“In both 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 actus reus and mens rea have**

been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution” Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is unlawful act or omission that causes death of another.”

31. In **ANTHONY NDEGWA NGARI VS. REPUBLIC [2014] eKLR** the Court of Appeal sitting in Nyeri held that: **“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”**

32. The Prosecution submitted that the deceased ought to have known that stabbing someone with a knife would cause death and therefore *mens rea* has been proved and further that the action amounts to *actus reus*.

33. The evidence on record however is that the Accused Person and the deceased were brothers and they lived peacefully. It is not clear why the Accused Person attacked PW.4 and then turned to the Deceased and inflicted him with the fatal injuries.

34. In **ROBA GALMA WARIO VS. REPUBLIC [2015] eKLR** the court held that; **“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”**

35. In **REPUBLIC VS. TUBERE S/O OCHEN 1945 12 EACA 63** the court laid down the guidelines to establish whether there was malice aforethought: **“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident.”**

36. In the circumstances, I find that the prosecution proved the offence of manslaughter in the current case.

37. The Accused Person in his defence said he was drunk and he does not know what happened. He said he saw the deceased holding a knife and the two of them fought and the deceased fell on the knife and it stabbed him.

38. I find that there is evidence that the Accused Person was the one who was armed with a pocket knife. He stabbed PW.4 on the left cheek and left ear and when the Deceased inquired why he was attacking PW.4, the Accused Person turned and attacked the Deceased with the same weapon by stabbing him on the neck. The Deceased fell down unconscious and subsequently died as a result of the said injuries.

39. **Section 179 (2) of the Criminal Procedure Code states as follows When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.**

40. The application of Section 179 of the Criminal Procedure Code was given by the Court of Appeal in the case of **RASHID MWINYI NGUISYA & ANOR VS. REPUBLIC [1997] eKLR**.

41. In **DAVID MWANGI NJOROGE VS. REPUBLIC [2015] eKLR** Ngenye-Macharia, J observed: **“...the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with.”**

42. The **Black’s Law Dictionary 9th Edition** page 1186 defines a cognate offence as:-**“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.**

43. I find that the Accused Person is guilty of manslaughter and I accordingly convict him of the lesser offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 5TH DAY OF NOVEMBER, 2021

A.N. ONGERI

JUDGE