



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL CASE NO. 12 OF 2015**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**MWINZI MULI.....ACCUSED**

**JUDGEMENT**

1. The accused was charged with offence of murder contrary to section 203 and 204 of Penal Code Cap 63 Laws of Kenya.
2. Particulars being that on 3/6/2015 at around 5pm at Kasaini Location in Tseikuru Sub-County within Kitui County murdered Mwinzi Mwambu.
3. The prosecution called 3 witnesses and closed their case.
4. The court held that the accused had a case to answer and he was put on his defence. He opted to give sworn evidence but did not call a witness.
5. The parties were directed to put submissions and highlight. Only prosecution filed same by date of preparing the instant judgment.

**EVIDENCE TENDERED**

**6. PW1 Peter Mwendwa Maluki** testified that on 3/6/2015 at around 4 pm with 3 others who included Mwinzi Mwambu deceased herein went to one Kilonzo's home where a person had died. It was on a Saturday. They had gone to console the bereaved family.

7. On arrival they found other people in the said home. In about 3 minutes of arrival the accused arrived and asked Mwinzi Mwambu, "*Did you refuse with my money?*" The said Mwinzi Mwambu (deceased) said that as he had come back that day, was to pay him his money. The witness was about 3 steps away. Then he heard Mwinzi Mwambu cry that he had been hurt. He cried 3 times. The witness turned back and he saw accused stab him on the chest. He asked the accused what he was doing. The accused pulled the knife from the deceased and then he jumped fence holding knife, leaving deceased at the scene. The witness followed him and screamed but the accused managed to escape. They went back to the scene and saw deceased move backwards and lie down. The owner of the home arrived on board of motorcycle and proceeded to the police station to report at Masyungi Police Station. At 9pm the police came and took the body to the mortuary. The accused was arrested later after sometime from his hiding place. He identified the knife which was used to stab upper and lower side of the chest of the deceased.

**8. PW2 Munyoki Mwambu** brother to the deceased testified that on 2/7/2015 he went to witness the postmortem being conducted over the body of his deceased brother. He observed one knife stab injuries of the heart in the heart in the middle. The second cut he observed was cut on lungs which had collapsed. He also saw cut on the stomach. The body was released to the family after postmortem for burial.

**9. PW3 Kilonzo Mwasi** testified that on 3/6/2015 at 6 pm he closed his hotel and went home. He found people gathered who had visited his home as they had lost a child who had died. However he found a body of the deceased lying within his compound. He knew the deceased. People were viewing the body; people informed him that the deceased was stabbed by the accused with a knife. He rushed to the police station by use of his motorcycle. The police came to the scene and collected the body and took it to the mortuary.

**ISSUES ANALYSIS AND DETERMINATION**

10. From the evidence tendered and the submissions on record, the singular issue is; whether the ingredients of murder were proved beyond reasonable doubt?

11. Section 203 of the Penal Code provides: -

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

Section 204 provide that:-

**Any person convicted of murder shall be sentenced to death.**

Section 206 on Malice aforethought states:-

**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.”**

12. In the case of *Anthony Ndegwa Ngari vs Republic [2014] eKLR* the elements of the offence of murder were listed as follows: -

**(a) the death of the deceased occurred;**

**(b) that the accused committed the unlawful act which caused the death of the deceased; and**

**(c) that the accused had malice aforethought.**

13. On the first issue to whether death occurred, same is not contested. PW1 witnessed the stabbing of deceased, while the PW2 witnessed the postmortem being performed.

14. As to whether the accused committed the unlawful act which caused the stabbing of the deceased, PW1 witnessed the incident of accused stabbing the deceased with a knife which accused removed it from the deceased body after stabbing and ran away while holding the same knife.

15. On the part of the accused in his own defence on oath, he stated that he stabbed somebody who wanted to rob his money. He never denied stabbing the deceased occasioning him the injuries.

16. However, the prosecution did not produce the post mortem report and no evidence was led to rule out natural causes as the reason for his death.

17. In *Ndungu vs Republic [1985] KLR 487* the Court of Appeal stated (page 492):-

**“.....where the body is available and the body has been examined a post mortem report must be produced, the trial court having informed the prosecution that the normal and straight forward means of seeking to prove the cause of death is by regularly producing the post mortem examination report as a result of which the medical officer who performs the post mortem examination is cross examined.....”**

18. More recently in *Chengo Nickson Kalama vs Republic [2015] eKLR* the same court while upholding its decision in *Ndugu vs Republic (Supra)* and commenting on the Tanzanian case of *Republic vs Cheya & Another [1973] EA 500* stated: -

**“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt. Accordingly, the Judge erred in convicting the appellants.”**

19. Again in *Joseph Angote vs Republic [2018] eKLR* the same court declined to send a case for retrial after it found that during the trial the prosecution had not produced a post mortem report and a retrial would then have provided the prosecution a chance to address that serious omission.

20. I am of course aware of the decision of that court in *Dorcas Jebet Ketter & Another vs Republic [2013] eKLR*. The circumstances of this

case are however distinguishable from those of that case in that there, the body was burnt beyond recognition and no post mortem was conducted.

21. I am however satisfied that there is evidence to prove beyond reasonable doubt that the accused person occasioned the deceased grievous harm. The evidence of PW1 which is corroborated by the testimony of PW2 and PW3 who observed injuries on the deceased body was cogent and credible. PW1 knew the accused person a fact which was not contested.

22. In *Ndungu vs Republic (Supra)*, the Court of Appeal recognized that even where the accused is not found guilty of murder he can be convicted on a lesser cognate offence. The evidence on record vide PW1 testimony, the accused stabbed the deceased and then removed the knife and he ran away with the knife.

23. According to PW1 testimony, the accused person confronted the deceased for refusing to give him his money. That the deceased responded that he had come back that day and would pay him the money. The witness moved a few steps away – 3 paces away and heard the deceased complain that he had been hurt.

24. Accused conceded that he stabbed somebody who wanted to rob his money.

25. In sum the court finds the accused person guilty of grievous harm contrary to Section 234 of the Penal Code and convict him accordingly.

26. Accused will be sentenced after mitigation.

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 21<sup>ST</sup> DAY OF JANUARY, 2020.**

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**C. KARIUKI**

**JUDGE**