



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 5 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

SAMSON EKILANI.....ACCUSED

JUDGMENT

1. **Samson Ekilani** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 25th day of January 2017, at **Kocholia** area in **Teso North** sub County of **Busia** County, murdered **Dennis Etait**.
3. The prosecution contended that the deceased escorted a co-worker and when he returned, he informed his employer that he had fought but declined to say with whom. It later transpired that he fought with the husband of his co-worker who is the accused person.
4. Samson Ekilani, the accused contended that a man went to his house and pulled his wife out and asked her to follow him. The two fought and the intruder ran away.
5. The issues for determination are:
 - a) What is the effect of the evidence of the spouse of the accused which was tendered without his consent;
 - b) Whether the accused was provoked; and
 - c) Whether the offence of murder was established.
6. This was a very strange case. The prosecution decided to call the wife of the accused as a witness without informing the court about the intention so that the consent of the accused could be sought. This was deliberate on the part of the prosecutor for she was led on her relationship with the accused at the tail end of her evidence. It was in her last sentence that she said the accused was her husband. Interestingly, the defence counsel did not raise any protest but proceeded to cross examine her. Section 127(2)(ii) of the Evidence Act Provides:

(2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:

Provided that—

(i)

(ii) save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;

In the instant case, the accused person did not apply for his wife to be called by the prosecution nor was his consent sought. I accordingly expunge her evidence from the record.

7. From the evidence of Dennis Aboli (PW1) who was the employer of the deceased and Martha Nabwire (the wife of the accused) the deceased escorted Martha Nabwire at about 9 p.m. and returned after about one hour. He said he had blood on his collar and when he asked

him about it he said he had fought. When he asked him whom he fought with, he told him that he was going to tell him later. His (PW1's) wife, Stella testified to the same effect.

8. It would appear that that the deceased did not wish to disclose why he fought. If he was attacked innocently, he could not have had reasons to conceal the identity of the person he fought with from his employer and his wife. Secondly, although there was no evidence that was adduced of the distance between the hotel and the home of the accused, one hour appears to be inordinately long considering that he was just escorting the lady.

9. The accused in his defence contended that he was a night guard. He was called by his mother and informed of a sick child. When he went home, he did not find his wife. She returned at about 10 p.m. Shortly thereafter, a man pushed the door went and grabbed his wife's hand and asked her to follow him. When he asked the man where he was taking his wife, the man punched him. A struggle ensued between the two and they pushed each other outside. The man eventually ran away.

10. Sergeant Janet Chiema (PW7) was the investigating officer. Her evidence was that she established that the deceased was a lover of the wife of the accused. On the material night, she was collecting her items to go and spend the night with the deceased. This evidence gives credence to the version given by the accused in his defence.

11. The version of Cleophas Juma (PW4) has very little weight for we cannot be sure whether the incident he testified to is the same that led to the death of the deceased herein; he did not identify any of the two fighters or the woman.

12. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

13. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

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.

In the instant case the prosecution has not proved malice aforethought against the accused.

14. The evidence on record has established that the accused was provoked by the action of the deceased and he also acted in self defence. The offence of murder has not therefore been proved against him. I accordingly acquit him of the offence of murder and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 12th day of February, 2020

KIARIE WAWERU KIARIE

JUDGE