



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 11 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

JOSEPH GIKUNDI MUGAMBI.....ACCUSED

JUDGEMENT

1. The accused was charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap. 63 Laws of Kenya.
2. He pleaded not guilty and matter went into full trial.
3. The prosecution called 3 witnesses and when accused was put on his defence he gave unsworn statement and never called any witness.
4. The prosecution's case is that PW1 Catherine Kaundu sister to the deceased stated that the deceased was her young sister and the accused was her husband thus her brother in-law. She stated that on 21/1/2015 at 9pm at Garissa the accused came carrying cane extra alcohol and started pouring it around and asked where Mercy witness sister was. He was told she had gone to pay Chama's money. He ate ugali at witness's place. It was now 9 – 10pm. He went away and witness went to sleep.
5. After 2 hours witness was called by her brother James who told her that her sister had been slit on throat by Gikundi the accused. She and her husband rushed to the scene and found her. She was lying down cold and they went to police station. She had been cut back of her neck and laid face downward.
6. She identified the clothes deceased was wearing. They were at police station at midnight. They went back to the scene with police officers who took photographs and collected deceased's body. Later they were given body which they took to Meru for burial. Later she learned that accused was arrested in Kilifi.
7. PW2 James Mungai testified that on 21/1/2014 at 10pm he was in Garissa. His sister Mercy came with her friend Tressy to his place. Tressy was a neighbour. Accused came to where they were and he started quarreling his sister Mercy. They had separated in 2013. Mercy was living with witness since August 2013. Accused had gone to Mombasa.
8. After sometime of quarreling he told accused to leave which he did. The witness told his sister Mercy they go home as it was now about 11.30pm. While going home, accused emerged at a corner armed with a panga/machete and cut Mercy the shoulder and the back of her neck.
9. The witness could see the accused well as there was security light illuminating the place. Mercy fell down and accused ran away. The witness followed him but later returned to where Mercy fell.
10. Tressy who was with them hid herself when accused emerged armed with a panga. The witness went to nearby place of PW1 and called her to come and assist in taking Mercy to hospital.
11. She came to the scene but found Mercy had already died. They left the body at the scene and went to the police station. The police came later and collected the body. The witness also later identified the body for postmortem exercise.
12. On cross examination he said when accused emerged he appeared drunk. They used to have marital problem both Mercy and accused.
13. PW3 a pathologist Dr. Richard Njoroge testified on the postmortem he conducted on the deceased's body on 22/1/2014. He noted injuries to be incisive wound on the neck 9cm inflicted by a sharp object.

14. The cut divided spinal cord into two. Also cut on left shoulder. The cause of death was due to massive hemorrhage due to sharp trauma. The postmortem was produced as exhibit Pexh 1.

15. The prosecution closed its case at this stage. The accused was put on his defence and stated that he was arrested in Kilifi. He said he was informed that he was arrested for killing another person.

16. Later he was taken to Garissa and told he killed his wife. He said that he did not know about his wife's murder. He said he has been framed.

17. None of the parties tendered submissions but left the court to decide case on evidence on record. The prosecution has to establish its case beyond reasonable doubt.

ISSUES, ANALYSIS AND DETERMINATION

18. After going through the evidence on record, I find the issues are; ***whether the ingredients of offence of murder have been established against the accused?***

19. Standard of proof:

In Kenya the doctrine on criminal justice is that an accused person under **Article 50 (2) (a)** of the Constitution has the presumption of innocence in his favour guaranteed in the **Bill of Rights** unless the contrary is proved by the State beyond reasonable doubt.

20. That burden of proof is well settled that it's the State that bears the responsibility at all times. The well-established jurisprudence on this doctrine that the accused's guilt rests on the prosecution to prove the charge beyond reasonable doubt can be traced way back to the cases of ***Woolmington vs DPP [1935] AC 462*** and also ***Miller vs Minister of Pensions [1942] AC***.

21. Whereas in the latter case **Lord Denning** stated on this phrase of beyond reasonable doubt as follows:

“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

22. The ingredients of murder are that: the fact of occurrence of death has to be established. The cause of death must be established to be an illegal act by the accused; and finally, the malice aforethought must be established.

23. See **Section 203 of the Penal Code** which provides: -

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

24. **Section 204** provide that:-

“Any person convicted of murder shall be sentenced to death.”

25. **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.”

26. In the case of **ROBA GALMA WARIO VS REPUBLIC [2015] eKLR** where 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.”

27. Malice aforethought was defined in the following cases;

(a) **NZUKI VS REPUBLIC [1993] KLR 171** where the Court of Appeal held that before an act can be murder it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

i. Intention to cause death

ii. Intention to cause grievous bodily harm

iii. Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.

(b) In the case of **DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR)** cited in the case of **REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR, BOSIRE, O'KUBASU and ONYANGO OTIENO JJA.**, while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

28. As to the fact of occurrence of death, PW2 witnessed the cutting of his sister the deceased by the accused on the material night. She died on the spot. PW3 via postmortem established the cuts inflicted by the accused person showed the death was due to massive bleeding. PW1 saw her sister dead body at the scene of crime and they later buried her.

29. The second ingredient is whether the death of the deceased was unlawfully caused? Under Article 26 (1) of the Constitution, **“every person has the right to life”**. It is also stated in subsection (3) that, **“a person shall not be deprived of life intentionally except to the extent authorized by this Constitution or other written law.”**

30. It is vital to note that from these provisions not all homicides are unlawful. As the principle in the case of **Republic vs Gucambizi S/O Wesonga [1948] 15 EACA 65**, articulates death is excusable by law in circumstances of reasonable defence to self, property, as a result of accident or misadventure or in protection of life or property of a third party.

31. In proving the cause of death, **section 213 of the Penal Code** provides acts and circumstances which an inference as to death can be inferred by way of evidence to prove the cause of death.

32. This was the holding in the case of **Republic vs Smith [1959] 2 ALLER 193** where the court held inter alia that:

“If the victim's death is traceable to the injury inflicted by the accused it will avail him nothing to show that the deceased's death might have been prevented by proper care or treatment.”

33. That is why in our courts it is firmly established that proof of death and cause is by way of medical or circumstantial evidence. See **Benson Ngunyi vs Republic CACRA No. 171 of 1984**.

34. As to whether the killing was inflicted by illegal act of the accused, PW1 witnessed it all. The accused defence is a belated alibi which is a clear afterthought. There was no rebuttal of the infliction of fatal injuries by accused as established by PW2's evidence.

35. As to the malice aforethought, the injuries vide PW3 were so severe that they separated the spinal code. The injuries were beyond grievous harm which alone discloses malice aforethought.

36. In recent cases decided by our courts certain key principles have been clearly articulated to describe what it takes for an offender to be held culpable for the offence of murder. In the cases of **Ernest Asami Bwire Abang alias Onyango vs Republic, Ndumbe CACRA No. 32 of 1990, Karani & 3 Others vs Republic [1991] KLR 622, Republic vs Godfrey Ngotho Mutiso [2008] eKLR**, and **James Masomo Mbacha vs Republic [2015] eKLR** the courts have sufficiently inferred malice aforethought from the nature and type of weapon used and really multiple severe bodily injuries to the victim.

37. It is well settled in law that the State duty under section 206 of the Penal Code is to prove one or a combination of the existence of the above circumstances to infer malice aforethought. See **Republic vs Daniel Onyango Omoyo [2015] eKLR**.

38. I note that the State must prove intent to kill or cause grievous harm contrary to section 206(a) and (b) of the Penal Code and in addition malice aforethought to obtain a conviction for the offence of murder.

39. In our instant matter the prove of malice aforethought was beyond reasonable doubt by the evidence on record.

40. Thus, the court finds that the offence of murder is established beyond reasonable doubt and accused is **convicted with offence of murder accordingly.**

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16TH DAY OF APRIL, 2020.

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C. KARIUKI

JUDGE