



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 11 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

AB.....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. Particulars being that on 16/6/2014 at [particulars withheld] village, Bura Tana Sub-County, Tana River County murdered TAI.
3. The accused pleaded not guilty and matter went into full trial.
4. The prosecution called 7 witnesses. PW1 EJ sister to accused testified that while at break in school at 11am a bell rang. She saw TA the deceased herein together with I both Standard 8 pupils take their bicycle and rode out of the school compound and others followed.
5. Thereafter shortly she heard people make noise and ran towards the school. The shouts and the noise were saying brother to E (witness) had stabbed a pupil. He (her brother) came to school but she did not know why he came there.
6. The injured pupil was taken to hospital. At 1pm she heard the pupil died. She learned that the reason for fight was because the deceased T was her boyfriend.
7. PW2 testified that on 12/6/2014 as they swept class they saw letter which they read which was about the love affair of E PW1 and the deceased.
8. He said it was said he witness did not want the 2 to love each other. He looked for PW1 and they fought over it. They were sent to call parents over it.
9. PW3 Chairman of the school was at school as pupils had fought. On 16/6/2016 he learnt that girls fought over a boy Twaha the deceased and that the boy had died.
10. He testified that while in school he heard pupils screaming “*anamfuata anamfuata*” and when he came out he saw A (accused) chasing T (deceased). They followed them and found T writhing in pain saying he had died. He was taken to hospital. He died on arrival to hospital.
11. PW4 was told about stabbing of deceased by one father of accused and was told the reason of attack was because of love issue involving (accused's) sister E and deceased. He called accused to come and surrender to the authorities which he did.
12. PW5 IH testified that on 16/6/2014 at 11.30am, he was with T deceased. They were from school and both with deceased rode a bicycle. As they were proceeding home the accused followed them and whistled. He was on foot.
13. The witness jumped off the bicycle and walked towards the school. He saw PW2. Then the accused was near house, near the village. Accused met deceased and fight ensued. The deceased struggled and freed himself and started running away.
14. The accused took deceased's bicycle and followed deceased. They met at open field which could be seen from far. The accused on reaching where deceased was, left the bicycle and chased the deceased on foot. The deceased then turned and went to pick the bicycle.

15. The accused held him from the back to wrestle him. A fight ensued. When the accused wrestled deceased down, he abandoned the bicycle and the 2 started a fist fight. Then the deceased ran and fell down.
16. When witness arrived, he noticed intestines were protruding out. Deceased laid down bleeding profusely. Many people gathered and they took him and placed him under a tree. He was later taken to hospital but died on the way.
17. When he arrived at the scene, he saw deceased lying down, intestines protruding out while accused was at the scene holding or carrying his knife. He (accused) then put knife to its folder. He (accused) then escaped.
18. PW6 was accused's uncle. He testified that on 16/6/2014 at 12noon PW2 came to him to seek transport assistance to transport young man who had intestines injuries. He said the young man was TA.
19. He told him he was stabbed by AB. They went together to the scene and found the young man and took him to hospital but he died on the way.
20. PW7 investigated the case and later the accused was charged with the offence.
21. When the court was called to make a ruling on whether accused had a case to answer, the court ruled that a prima facie case was disclosed and thus put accused on his defence.
22. In his defence he denied killing anybody and stated that he did not know why he was arrested. He never called any witness.
23. The defence stated that it would not submit but rely on the record. The prosecution submitted that all ingredients of murder were established via 7 prosecution witnesses.
24. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. Those ingredients are as follows: -

a) Proof of the fact and the cause of death of the deceased;

b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

c) Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the 'mens rea' of the offence.

25. Upon going through evidence on record, I find the issues are whether the ingredients of murder were proved?
26. First issue is proof of death. It is not denied nor contested that the accused injured the deceased with a knife. PW5 witnessed the incident of accused starting a fight and pursuing the deceased until the place he lied down with intestines protruding while profusely bleeding.
27. Accused was standing by the deceased holding a knife then he escaped and left PW1 and deceased at the scene. PW2 also saw accused chase the deceased. Thus, the death of the deceased was thus proved to have occurred as PW1, PW2 and PW6 all narrated that the deceased died on the way to hospital.
28. The issue as to whether the death was solely caused by the stab executed by accused, the court will discuss the issue later.
29. As to the malice aforethought, 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."

30. Section **206** defines malice aforethought as follows:-

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

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;

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."

31. The accused saw PW5 and deceased on a bicycle and started fighting with the deceased. Deceased ran away but accused pursued him upto an open field. He caught up with him and he continued to fight him. When he tried to run away, he held him down and that is the time the stab with a knife was effected. He then ran away.
32. By stabbing deceased with a knife to the extent that the intestines came out, the accused had malice to cause grievous harm and/or death.

He has flatly refused to defend his act but just stated in defence that he did not know why he was arrested. Thus, the court finds the attack was unjustified and malicious.

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

34. 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 appellant.”

35. 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.

36. 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.

37. In light of the above decisions the court held that the prosecution had not proved the charge of murder beyond reasonable doubt. I am however satisfied that in our instant case, there is evidence to prove beyond reasonable doubt that the accused persons occasioned the deceased grievous harm.

38. The evidence of Pw5 witnessed the fight between the accused and deceased in the deceased was stabbed with a knife by the accused and then accused escaped with the knife used to attack the deceased. He saw deceased intestines oozing out as he was profusely bleeding. He knew the accused person and it was in broad day light.

39. 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.

40. I find the accused person guilty of grievous harm contrary to Section 234 of the Penal Code and convict him accordingly.

DATED, SIGNED AND DELIVERED AT GARISSA THIS 2ND DAY OF APRIL, 2020.

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C. KARIUKI

JUDGE