



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 10 OF 2012

REPUBLIC.....STATE

VERSUS

ROBERT KIPKORIR NGENO.....ACCUSED

JUDGMENT

1. The Accused Person, Robert Kipkorir Ng'eno, is charged with murder contrary to Section 203 as read with Section 204 of the penal Code. The particulars are that it is alleged that on the 14th day of February, 2012 at Mlango Village in Kuresoi District within Nakuru County, the Accused Person murdered Evans Kiprotich Martim (Deceased).

2. The Prosecution called six witnesses in a bid to prove its case.

3. The first witness was Dennis Kiptum Ndumbi. He is a brother to the Deceased. He testified that on 14/02/2012 at 8:00pm he was at home when Josphat Mutai went there and reported that a man by the name "Smart" had stabbed the Deceased. He ran to the Mlango Trading Centre and found his brother, the Deceased, by the pool table bleeding profusely. He and others at the scene hailed a man by the name Wesley who helped to take the Deceased to Kuresoi hospital from where they were referred to Kericho Hospital. Unfortunately, the Deceased died while undergoing treatment at the hospital.

4. Dennis testified that he knew "Smart" as Robert Kipkorir Ng'eno – the Accused Person in the case.

5. The second witness was John Sitonei. He is also a brother to the Deceased. He identified his body for post-mortem.

6. The third witness was Wilson Cheruiyot Langat. He is a brother to the Accused Person. He testified that he did not witness anything on 14/02/2012 – but that he "heard" that his brother had killed a person.

7. The fourth witness was Josephat Mutai Kibet. He testified that on 14/02/2012, he was playing pool at Mlango Trading Centre. He was with many other people but could not remember the others. He testified that he does not know what happened or how the Deceased met his death. Indeed, he claimed that he only learnt the following morning that he had died. He insisted that he did not even see the Deceased on the day he died.

8. The fifth witness was Chief Inspector Festus Kisinga Nangi. He was the OCS at Kureso Police Station when the incident happened. He testified that he was not an Investigating Officer in the case but that the Accused Person surrendered to the Station and said that he wanted to make a confession. He further said that he explained to him "the circumstances of making a confession" and that he was at liberty to call a lawyer and a relative. CI Kisinga testified that the Accused Person decided to call his father who was present as he made his confession. CI Kisinga said that the Accused Person then proceeded to make his statement in Kiswahili after he had cautioned him and after he confirmed that he understood the caution.

9. CI Kisinga produced the "Statement Under Inquiry of Robert Kipkorir Ngeno." It is dated 15/02/2012. It is in Kiswahili and translated into English. Both versions are hand-written. At the end, it bears the signature of the Accused Person. Every page also bears the signature of the Accused Person.

10. Dr. Titus Ngulungu, a Pathologist, was the sixth witness. He testified on behalf of Dr. Soi of Kericho District Hospital who was out of the country. It was Dr. Soi who performed autopsy and filled the Post-mortem Examination Report. Dr. Ngulungu produced the Form on his behalf. The Report showed that the Deceased had stab wounds to the back of the left shoulder; two stab wounds on the left side of the trunk; a stab wound just above the buttocks; and stab wounds on the right arm; left arm and right inner thigh. The doctor concluded that the cause of death was cardiopulmonary arrest due to excessive hemorrhage due to multiple stab wounds in keeping with a fatal assault.

11. The final witness was Corporal John Gikonyo who was the Investigating Officer in the case. He took over the file from PC Benjamin Siele after the latter's transfer out of Kuresoi Police Station. He could only testify as to what he learnt from reading the Statements. He testified that he had learnt that the Accused Person had reported to the Police that he is the one who had stabbed the Deceased but that no murder weapon was ever recovered.

12. Put on his defence, the Accused Person delivered a straight denial: he did not kill the Deceased. He testified that the Deceased never went to his shop on 14/02/2012 and that he, therefore, never killed him. He said that the Deceased was a neighbour and a customer and that he had no reason to kill him.

13. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

14. To successfully obtain a guilty verdict in a murder charge, the Prosecution, therefore, is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

15. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

- i. *Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not;*
- ii. *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;*
- iii. *Intent to commit a felony; or*
- iv. *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.*

16. Did the Prosecution adduce sufficient evidence to establish the three elements of the offence of murder beyond reasonable doubt?

17. There is no question that the Deceased died. His two brothers testified as much as did Dr. Ngulungu. A Post-mortem Report confirmed as much. There is no contestation that the Deceased died of cardiopulmonary arrest due to excessive hemorrhage due to multiple stab wounds in keeping with a fatal assault

18. Was he killed by the Accused Person; and with malice aforethought? The only witness who was at the scene when the Deceased was allegedly stabbed, was PW4 (Josephat Mutai Kibet). However, he remarkably told the Court that he was not sure what "happened exactly" and he does not know how the Deceased met his death or even how he died. As if to emphasize, PW4 said: "It is my evidence that I do not know anything that happened to the Deceased."

19. However, a clear link between the death of the Deceased and the Accused Person is provided by the confession produced by CI Kisinga. It contains clear admissions of commission of an offence by the Accused Person. In relevant part it states as follows:

I do remember on the 14th day of February, 2012. I reported on duty as usual at about 6:00am. I work for myself and I don't have any other workers. I cook mandazi, chapatti and meat, is prepared by order. I continued working until 9:30pm....when one young man known to me as Evans Kiprotich entered the hotel and came straight to the kitchen where I was busy cooking and gave me a punch on the face. I asked him what was his problem but he instead produced a kitchen knife and stabbed me on the left arm. I got hold of him and took from him the said knife. I used the same knife and stabbed him three times on the back near the shoulders and right hand. He fell down. I left him there and went outside the hotel....I left immediately and headed to Kuresoi Police Station using a motorbike to make a report....

20. CI Kisinga explained in detail the circumstances under which he recorded the confession. He explained that he cautioned the Accused Person in Kiswahili; and that he informed him that he had a right to record the statement in a language of his choice; and further that he had a right to have present his lawyer and any family member. The Accused Person chose to have his father present. His statement was recorded in Kiswahili and was then translated into English. The Accused Person signed the statement and every page thereof.

21. When CI Kisinga was on the witness stand to produce the Confession as an exhibit, neither the Accused Person nor his lawyer objected to the authenticity or voluntariness of the Confession. Indeed, it was admitted into evidence without protest. The cross-examination by the Accused Person's lawyers did not at all detract from the authenticity or voluntariness of the confession.

22. In Kenya, confessions are governed by the Constitution of Kenya 2010; the Evidence Act (Cap.80); the Evidence (Out of Court Confessions) Rules, 2009 and decisional law.

23. Article 49 of the Constitution guarantees each arrested person certain rights including the right to be informed promptly, in language that the person understands, of the reason for the arrest; the right to remain silent and the consequences of not remaining silent; to communicate with an advocate, and other persons whose assistance is necessary and not to be compelled to make any confession or admission that could be used in evidence against the person.

24. The same article (Article 49(4)) also excludes the admissibility of any evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

25. Similarly, Article 50 (2) (l) guarantees each Accused Person a right to refuse to give self-incriminating evidence.

26. As a general rule, confessions in Kenya are inadmissible in a criminal trial unless the confession passes muster under rigid rules provided in the Evidence Act and Rules promulgated thereunder. The statute as well as these rules is inspired by both our Constitution as well as our history where confessions extracted by torture and ill-treatment were widely used to obtain positive verdicts in politically-motivated criminal trials.

27. Section 25 of the Evidence Act defines a confession thus:

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

28. The Evidence Act was amended by Act No. 5 of 2003 and Act No. 7 of 2007 by inserting into the Act Section 25A which reads as shown below:

25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

29. The rules envisaged under (2) above are known as the Evidence (Out of Court Confessions) Rules, 2009 (hereinafter the "Confessions Rules".) The Confession Rules specify the rights of an Accused Person who wishes to record a confession.

30. Rule 4 provides that, among other things, the Recording Officer:

- a. Shall ask and record the Accused Person's preferred language of communication;
- b. Shall provide the Accused Person with an interpreter free of charge where he does not speak Kiswahili or English;
- c. Shall ensure that the Accused Person is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;
- d. Shall ensure that the Accused Person is informed of his right to have legal representation of his own choice among others;
- e. Shall ask the Accused Person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

31. In addition to this, the Confessions Rules require the Accused Person to be informed of the option to record his own statement in his preferred language or to have it recorded for him (Rule 7); the option to clarify or add anything in the statement after the same has been recorded (Rule 8) and the requirement to administer a caution before recording the statement (Rule 5).

32. In the present case, I have carefully looked at the circumstances under which the Confession was recorded. It is a textbook example of a valid confession. CI Kisinga fulfilled all the legal requirements for the recording of a confession as explained above. He is a Police Officer of the rank above an Inspector of Police. He cautioned the Accused Person. He informed him of his right to have a legal representative. He asked him to have a family member present. The Accused Person chose to have his father present. He recorded the statement in Kiswahili; then translated it into English. He read back the Confession to the Accused Person and the Accused Person confirmed it was accurate. Finally, the Accused Person appended his signature to the Statement and each page thereof.

33. This scrupulous adherence to the law must have informed the Accused Person's decision not to challenge the authenticity of the Confession and demand for a Trial-within-a-Trial. Consequently, the Confession was admitted into evidence and is probative of the questions at issue. It is noteworthy, also, that the Confession is not only internally coherent – but is also consistent with the surrounding evidence of how the Deceased died. In particular, it tallies with the autopsy results.

34. I, therefore, accept the Confession as voluntarily given; and as reflective of what happened on 14/02/2012. If I do so, however, since there is no competing narrative, I have to accept the narrative as told by the Accused Person therein. That narrative is that it was the Deceased who attacked the Accused Person, punched him and attempted to stab him with a knife. This triggered a defensive reaction by the Accused Person who grabbed the knife and used it to stab the Deceased several times.

35. The question I must answer is whether in the self-confessed actions by the Accused Person one can find the element of malice aforethought. Under section 206 of the Penal Code, malice aforethought is established when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or
- 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; or
- c. Intent to commit a felony; or
- d. 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.

36. In the *Nzuki v R (1993) KLR 171*, the Court of Appeal remarked as follows:

There was a complete absence of motive and there was absolutely nothing on the record from which it can implied that the Appellant had any of the intentions outlined with the fatal consequences. Other than observing that the Appellant viciously stabbed the Deceased and in so doing intended to kill or cause him grievous harm, the Trial Court did not direct itself that the onus of proof of that necessary intent was throughout on the Prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the Appellant beyond reasonable doubt. In the absence of proof of malice aforethought to the required standard, the Appellant's conviction for the offence of murder is unsustainable. His killing of the Deceased amounted only to manslaughter.

37. The remarks by the Court of Appeal in the *Nzuki Case* are apposite here. The confession admitted into evidence in this case shows that it was the Deceased who first attacked the Accused Person. He not only punched him but fished out a knife and attacked him with it.

38. To sustain a murder charge, the Prosecution would have had to prove beyond reasonable doubt that at the point at which the Accused Person stabbed the Deceased, the Accused Person had the requisite malice aforethought. In my view, there is no evidence to establish this even in the confession. What the confession establishes is that the act of stabbing the Deceased was committed in the in the absence of premeditation or contemporaneous commission of another felony. It was also committed in the act of self-defence since the Accused Person was under attack by the Deceased. However, it is also clear that the Accused Person responded with excessive force. There is no evidence at all that the Accused Person faced imminent death or risk of serious injury and there has been no suggestion or evidence that the Accused Person held an honest even if mistaken belief that it was only by repelling the Deceased using the knife that he would have preserved his life.

39. Consequently, even though the Deceased was the unlawful aggressor, it was unjustifiable for the Accused Person to respond with deadly force. The Defence of self-defence, though suggested by the circumstances, is "imperfect" in this case since the Accused did not hold a reasonable belief that it was necessary for him to repel the attack with deadly force to avert an imminent infliction of death or serious bodily harm to himself.

40. Consequently, my conclusion is that the Prosecution has not proved the third necessary element to establish the offence of murder against the Accused Person: malice aforethought. Murder cannot be established in the absence of the third element of premeditation. Instead, the Prosecution has established all the elements for the lesser but cognate offence of manslaughter: the unlawful killing of a human being. Consequently, this Court finds the Accused Person guilty of the lesser but cognate offence of manslaughter contrary to section 202 as read together section 205 of the Penal Code and is so convicted.

41. Orders accordingly.

Dated and delivered at Nakuru this 14th day of May, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Verne Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.