REPUPLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 109 OF 2015

LESIIT J

REPUBLIC.....PROSECUTION

VERSUS

DAVID MACHARIA MWANGI.....ACCUSED

JUDGMENT

1. The accused **DAVID MACHARIA MWANGI** is charged with murder contrary to **section 203** as read with Section 204 of the **Penal Code**. The particulars of the offence are:

> **"On the 15th day of November 2015 at Lunga Lunga Slums in Industrial Area within Nairobi County murdered STEPHEN NDUNGU NJOROGE"**

2. The prosecution called a total of 6 witnesses. The prosecution case was that the accused was married to PW1 but the two were not living together. On the material afternoon, PW1 was called outside by a neighbour, the deceased in this case. She went out to find the accused beating their daughter. PW1 testified that when she asked the accused why he was beating the child, the accused let go of the child and told her that he had no interest with it but wanted to draw her attention.

3. It is said that an altercation took place between the accused and PW1 as PW3 watched from a distance. The accused flashed out a knife and lifted it to stab PW1. Just as he struck, the deceased blocked PW1 by jumping in between her and the accused. In the process the deceased was stabbed on the neck. He died at the scene before he could be taken to hospital.

4. The accused was arrested within 200 meters to the area where incident occurred by Administration Police Cpl. Karanja, PW5. That was few hours after the incident. The same officer had earlier visited the scene and found the body of the deceased body still lying on a corridor at the scene.

5. PW6 produced the Post-mortem form which indicated that the cause of deceased death was exsanguation due to penetrating sharp force trauma to the neck. The stab wound was on midline of the neck and was 7 cm long with sharp edges. The trachea and the left carotid artery were both severed. The Post-mortem was P.Exh.4. He also produced and P3 Form P. Exh.5 showing accused injury on the nose and confirming that he was fit to stand trial.

6. The murder weapon was found by PW1 inside accused shop on 24th November, nine days after the incident. She then called PC Musyoka, PW4 who went to the shop and recovered the knife. It was P. Exh.I. It was wrapped in cloth, P. Exh.2 and a bag, P. Exh.3.

7. The accused was put on his defence. He gave an unsworn statement. He stated that on the material day he went to a bar owned by his estranged wife, PW1 where he sat and shared alcohol with the deceased. He said that they bought each other drinks after which PW1 sent her daughter to demand payment from him. He said he pinched the child because he got annoyed feeling that PW1was slighting him. He said that PW1 got annoyed, took a knife and stabbed him on the nose. He said that as the deceased tried to take the knife from PW1, he got his chance and escaped. He said that later that day he was arrested by Police Officers led by PW1.

8. The defence through Mr. Wakaba advocate raised issue with the numerous contradictions in the prosecution evidence. Counsel submitted that even though PW1 denied carrying out a bar at the scene, and even though PW3 reluctantly admitted there was one PW4 the first Police Officer to visit the scene said he saw a bar at the plot where incident occurred. Mr. Wakaba also raised issue with the chain of custody of the murder weapon, the knife. He raised issue with failure to call PC Bitok and CPL Talam who carried away the body from the scene of crime saying it denied the court an opportunity to know exactly where the body was.

9. Mr. Wakaba urged the court to note that accused made no attempt to escape which was not consistent with a person with a guilty mind.

10. The prosecution was led by Mrs. Kinoti. However, towards the close of the prosecution case Ms. Onunga, took over the case. In the Learned Prosecution Counsels submission, Ms. Onunga urged that the prosecution had established that the deceased died as a result of the unlawful act by the accused. Further, counsel urged that malice aforethought was established on grounds the attack against the deceased was excessive; that great force had been used and area of the body targeted being the neck, a most sensitive part of the body was proof of existence of malice.

11. I have considered the evidence by both the prosecution and the defence. The charge facing the accused is that of murder. It is the duty of the prosecution to adduce evidence to prove that the accused caused grievous harm to the deceased through an unlawful act as a result of which injuries he died. The prosecution must prove that the unlawful act was caused by malice aforethought.

12. Malice aforethought is not defined but **section 206** of the **Penal Code** gives the circumstances which, if proved malice aforethought will be found to exist. These are:

> **"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) …"**

13. The standard of proof is beyond any reasonable doubt.

14. The defence and the prosecution have raised pertinent issues in this case. From these I find that what the court needs to determine is as follows:

> **(i) Whether the prosecution case had material inconsistencies and contradictions.**
>
> **(ii) Whether the chain of custody of the murder weapon left alone to be desired.**
>
> **(iii) Whether the motive for attack was established.**
>
> **(iv) Whether there was malice aforethought.**
>
> **(v) Whether the prosecution failed to avail key witnesses.**
>
> **(vi) Whether accused defence can stand.**

15. Regarding inconsistencies and contradictions in the prosecution case, Mr. Wakaba urged that the issue of whether or not PW1 was running a bar at the plot where incident occurred was material given the accused defence. Mr. Wakaba suggested that since the accused defence was that the attack took place at the bar, it was important for the prosecution witnesses to be honest about the bar.

16. ln Uganda the Court of Appeal in the case of **TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA, 6** it is not every contradiction that warrants rejection of evidence. As the court put it:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

17. The Ugandan case is persuasive. The issue is whether there were such serious contradictions in the prosecution case as to warrant the rejection of the prosecution evidence.

18. I considered the evidence of PW1 and nowhere did she mention owning any bar. More importantly her evidence is clear the incident took place outside the gate of the plot where she, PW3 and the deceased lived. More significantly the defence did not pose any questions to PW1 regarding any bar at the plot.

19. I agree PW3 admitted after rigorous cross-examination that there was a bar owned by PW1 at that plot. And PW4, the first police officer to reach the scene, that is apart from the Administration Police who had gone before them, also said he saw a bar at the plot.

20. Given the fact that PW1 did not talk of the bar featuring during the incident, and considering she was never cross-examined about its

existence, I find it was not material to the case. I find that the issue of the bar arose after the testimony of PW1 and was in the circumstances an afterthought. Was it true that the attack on the deceased occurred inside the bar, it was only prudent for the defence to cross-examine PW1 concerning that fact. Having not done so, I find that issue was immaterial. Consequently the reluctance of PW3 to admit the existence of a bar at the plot was inconsequential.

21. The defence position was that since the accused defence was that accused and deceased were drinking together just before the incident. The defence case was that it was PW1 who had the knife and that by the time he, the accused left the bar, the deceased was alive and well.

22. I noted that it was not suggested to PW1 that she was the one who stabbed the deceased. Neither was such a suggestion made to PW3, the only other eye witness at the scene at the time called by the prosecution. I find that allegation implicating PW1 with the offence was an afterthought.

23. The defence raised issue with the claim of custody of the knife. It was the defence case, and the prosecution does not deny that accused left the keys to his shop with PW1. It is not denied that PW1 called police to the shop nine days later to recover the knife. The innuendo by the defence is that accused had the time and opportunity to hide the knife there.

24. I have considered the evidence regarding the knife. PW3 corroborates PW1's evidence that it was the accused who had the murder weapon. Their testimony was that the accused was beating his child on the buttocks with the knife when PW1 and the deceased went to intervene. PW3 corroborates PW1's evidence that the accused announced that PW1 would not live to see another day and that when he lifted his hand to strike PW1 with the knife, the deceased moved between the two and was struck.

25. The evidence of both PW1 and 3 is clear that the accused left the scene immediately after the assault. He was nowhere near the scene when PW1, 3 and others went to the AP Camp to report. He was also nowhere when the Police visited the scene the first time. I find from that evidence that the accused had an opportunity to hide the murder weapon before his arrest.

26. I find that the prosecution has adduced sufficient evidence to prove that the accused was the one who had the knife just before the attack on the deceased, and that he left with it. The recovery of the knife from his shop nine days later is no surprise. PW1 testified that accused gave her the keys at the AP Camp the same day of incident after his arrest. That was not challenged either in cross-examination or defence.

27. I will consider motive and malice aforethought simultaneously. Regarding motive in **Choge Vs Republic (1985) KLR1** the court of appeal held as follows:-

> "**Under section 9(3) of the Penal Code (cap 63), the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.**"

28. PW1's evidence was that she had ended her relationship with the accused and that he was not happy about that. She said that the accused had made three attempts at her life and that neighbours are the ones who intervened and disarmed him. PW1's allegation that accused attempted to kill her before is a very serious allegation. However no evidence was called to support it. Not even evidence of a report to the Administration or Regular Police. Even PW3 in her testimony did not make any reference to such previous incidents.

29. I find that the allegation of previous attempt on PW1 by the deceased was not established. The motive of the attack was also not demonstrated. However, by dint of **section 9(3)** of the **Penal Code**, it is not necessary to prove motive, especially in this case which relies on direct evidence as opposed to circumstantial evidence against the accused. Failure to prove motive is not fatal to the prosecution case.

30. Regarding malice aforethought the law describes the circumstances that could constitute the same. Under **Section 206(b)** of the **Penal Code**, (quoted herein above) malice aforethought can be established even where the person intended to be murdered or grievously harmed is in fact not the one injured.

31. Furthermore, malice aforethought can be inferred by the nature of the weapon used, the area of the body targeted and the manner in which the injury was inflicted. In this case the weapon used was a knife, the area of the body targeted was the neck and the manner the injury was inflicted was by force trauma.

32. The evidence before the court shows that the accused wanted to stab PW1. When he lifted his hand with the knife to strike that evening, he was clearly aiming at PW1. The weapon of choice was a sharp knife. The area of the body he targeted was the head or neck region.

33. The postmortem form shows that the injury inflicted on the deceased was a stab which was 7 cm long or pierced the midline neck area and severed the trachea and the carotid artery. These were very severe injuries. All establish that the intention of the assailant was to cause either death or grievous harm. I find that malice aforethought was proved in this case within the provisions of **section 206 (a)** of the **Penal Code**.

34. On the question of witness(es) not called to testify, the defence took issue with failure to call police officer CPL Talam and PC Bitok who carried away the body from scene to tell the court where the body was found. I find that issue immaterial. PW5 Administration Police CPL Karanja was the first police officer to reach the scene after the murder. His evidence was good having been the first to attend to the scene. He gave a detailed account of where the deceased body was found. He said it was lying on a corridor outside the houses at the plot.

35. The defence contention was that the body was at a bar inside that plot. That was proved wrong by PW5. There was no need to call other police officers to testify as to where the body was found. I find the evidence of PW5, supported by evidence of PW1 and PW3 was sufficient to establish that fact.

36. The issue of the number of witnesses who should be called to testify to prove a fact depends on whether their evidence would be sufficient to establish the fact in issue, or the truth. That was the legal position as set out in **Bukenya Versus Uganda BUKENYA & OTHERS 1972 EA 542** LUTTA Ag. VICE PRESIDENT held:

> **"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

37. I find that the witnesses called by the prosecution were sufficient to establish the facts in this case. The final issue is whether the accused defence can stand. I am aware that the accused has no burden to prove his innocence or prove his defence. Creating a doubt in the prosecution case, or in the versity of the testimony of the prosecution witnesses is sufficient to warrant his acquittal.

38. The accused contended that he shared drinks with the deceased when PW1 came at him with a knife and injured him on the nose. The P3 form filled after the accused was examined reveals he had an abrasion on the nose.

39. I examined the evidence of PW1 and PW3 who were at the scene at the time of attack. No question was put to them that PW1 was the one who cut the accused on the nose. Neither was any suggestion made that in fact it was PW1 who armed herself with the knife. It was not put to either PW1 or 3 that it was PW1 who stabbed the deceased with the knife. I find that the accused defence that it is PW1 who had the knife and was the aggressive one was an afterthought.

40. I examined the demeanour of PW1 and 3 in this case. I found that they were credible witnesses, that they were worthy of belief, and that they told the truth in this case. Their evidence received support from PW4 when he said he found the body of the deceased within the plot, and not inside a house of building. I accept their testimony and find that the case against the accused person was established on the required standard.

41. Having considered entire evidence adduced in this case, I am fully convinced that the accused stabbed the deceased as he tried to stab PW1. The force used and area of body targeted leaves no doubt that at the time of attack the accused had formed the necessary intention to cause death or grievous harm even though the person injured was not the one he aimed at or intended to harm.

42. I am satisfied that the prosecution has proved the charge of murder contrary to **section 203** of the **Penal Code**, as against the accused beyond any reasonable doubt. Accordingly, I reject accused defence and find him guilty of murder contrary to **section 203** of **Penal Code** as charged and convict him under **Section 322** of the **Criminal Procedure Code**.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2019.

LESIIT J

JUDGE