



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 14 OF 2010

REPUBLIC.....PROSECUTOR

VS

M K alias J K.....ACCUSED

JUDGMENT

[1] **MK alias JK** (“the accused”) has been charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code 63 of the Laws of Kenya**. The particulars of the offence being that on the 5th day of March 2010 at Naathu location in Igembe District within the Eastern Province murdered TAITUMU NJAU (“the deceased”). The prosecution called six witnesses to establish its case.

[2] **PW1 Fridah Kendi** recalled that on 5th March 2010 at about 5.00PM she was walking from Mutuati going home. The accused told her that he wanted to have sex but she was not willing. He removed a knife from his trouser waist and stabbed her on her thighs. She screamed and the deceased, her uncle, whom she had noticed walking behind her arrived in about 3 minutes. When he arrived he confronted the accused who stabbed him on the thigh. She went home and then went to the hospital but by the time she was leaving the scene there were people there. She did not know the accused but she had seen him before and could recognize him.

[3] **PW2 Samuel Meeme** testified that when he heard screams he rushed to the scene with one Kinyua. He found the accused stabbing **PW1** on her upper part of the right thigh. She was stabbed when they were about 30 meters away. That the deceased who was 15 meters away from them was coming from behind **PW1**. He met the accused **but** did not talk to the accused. They then saw the accused stab the deceased on the right thigh which caused him to fall. He called Gichunge to come and take the deceased to hospital. Many people were at the scene by that time and the accused had fled.

[4] **PW3 Gichunge M’Kiunga** testified that when he received a call from **PW2** he went to the scene with other people he had called. They found the deceased stabbed on the thigh and lying alone in a pool of blood. He found the deceased crying who told him that he had been stabbed by the accused. He knew the accused and his home. When they arrived at the hospital the deceased died.

[5] **PW4 Joshua Kimenchu** brother of the deceased identified his body before postmortem was done.

[6] **PW5 Dr. Timothy Riungu** produced the post mortem report. The examining officer observed moderate decomposing of the body, deep cut on medial aspect (5 cm long), injury to vessels of the thigh and bleeding thereof. The doctor opined that the cause of death was severe bleeding due to injury to great vessels of the thigh.

[7] **PW6 NO. 56699 CPL Joseph Bomen Dulu** stated that he is attached to Mutwati Police Station where he worked with PC John Chelego before he was transferred. That he knows his handwriting and signature. He took over the file from him and testified on his behalf. He produced PC Chelego’s statement dated 17th March 2010 which was written and signed by him concerning the investigations he conducted.

[8] When placed on his defence, the accused gave sworn testimony and called three witnesses. **DW1 MK** testified that he was born in 1994 and when he was arrested he was 16 years old but his age assessment was not done. He stated that JK or JK are not known to him as he is MK. He affirmed that he did not commit the murder for at the time of the incident he was at home with Martin. That he does not know the deceased or **PW1**. That **PW1** stated that she does not know him but no identification parade was done. He was arrested at his home. He does not know the witnesses even though they come from the same area.

[9] **DW2 Martin Muchiri Thianjuki** asserted he knows the accused very well as he is MMK. That on the material day his father sent him to the father of the accused to check on the cattle he was taking care for his father. He did not find him and his father told him to go back and wait for him until he gives him the report. He waited for him from 2.00PM to 7.30PM. The accused who was a school boy in primary school stayed with him the whole time till 7. 30 PM and at no point did the accused leave him at their home.

[10] **DW3 VK** sister to the accused told the court that the accused was born on 20th February 1994. **DW4 KJ** teacher at [Particulars Withheld] Primary School produced the accused leaving certificate. He stated that the accused was enrolled in Class 1 in January 2001 and left in October 2005. His date of birth was obtained from the admission register. That the accused joined class 1 when he was 7 years but in March 2010 he was not in school as he had dropped out. He was morally upright as at October 2005.

[11] This matter was canvassed by way of written submissions. The prosecution submitted that they have tendered evidence sufficient enough to sustain the charges of murder against the accused. On the issue of age, they argued that no proper document was produced in court to prove the age of the accused but it is apparent that the accused person may have committed the offence when he was a minor of 16 years of age. Owing to the circumstances and seriousness of the offence they submitted that this court has the discretion to find the accused person guilty and sentence him accordingly. They relied on the cases of **Republic v Dennis Kirui Cheruiyot [2014] eKLR** and **JKK v Republic [2013] eKLR**.

[12] The accused submitted that the standard of proof has not been met as the legal procedure followed was unlawful and hurried just to arraign the accused in court. No identification parade was done to identify him after **PW1** stated that she did not know the accused. From the onset the accused was 16 years and no one seemed to care until 2016 when an age assessment was ordered. However, he had already taken plea and 2- 3 witnesses had given their testimony. The defence submitted that the charges before the court are mere fabrication and the evidence is contradictory and inconsistent to prove murder beyond reasonable doubt. He relied on the cases of **JKK v Republic [2013]eKLR** and **Dennis Kirui Cheruiyot v Reublic [2014] eKLR**.

ANALYSIS AND DETERMINATION

[13] Under **Section 203 of the Penal Code:-**

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

From this definition the three key ingredients of the offence of murder which the prosecution must prove beyond reasonable doubt are:

- 1. The fact and cause of death of the deceased**
- 2. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused**
- 3. Proof that the said unlawful act or omission was committed with malice aforethought.**

Concerning fact and cause of death

[14] The fact and cause of death of the deceased are inextricable and may be dealt with together. The prosecution witnesses told the court that the deceased was stabbed. **PW4** who is the brother of the deceased identified his body. According to the post mortem report produced by **PW5** it is indicated that deceased had a deep penetrating cut at the medial aspect of the right thigh. That the cause of death was severe internal haemorrhage due to injury to great vessels. Accordingly, the fact and cause of death of the deceased has been proved.

Died due to unlawful act or omission

[15] The prosecution must prove that the deceased met his death as a result of an unlawful act or omission on the part of the accused. **PW1** told the court that the accused asked to have sex with her. When she turned down the sexual advancements, the accused he stabbed her. When the deceased intervened the accused stabbed him as well. **PW2** averred that he and one Kinyua saw the accused stab the deceased and **PW1**.

[16] **PW6** testified on behalf of the investigation officer PC Chelelgo (Hereafter the IO). He relied on the statement recorded by the IO. **PW6** told the court that on 5th March 2010 at around 8.30PM after receiving instructions from the OCS, PC Chelelgo and Odhiambo proceeded to the scene. On arrival they were told that a person called Taitumu Njau had been stabbed by one MK. The injured person had been taken to hospital by Joseph Kinyua and area assistant chief. When they went to hospital they found that the said person had died. He stated that the accused stabbed **PW1** before stabbing the deceased who had come to intervene. Frida screamed for help and ran to her home. Joseph Kinyua who was nearby saw all that happened and ran to the scene. He found the deceased lying on the ground and he tried to arrest the accused. But the accused fled only to be arrested later in Eastleigh Area of Nairobi.

[17] From the evidence produced by the prosecution witnesses particularly **PW2** was that he saw the accused stab **PW1** and the deceased. When he was recalled as a witness he stated that he found the deceased had already been stabbed. What's more he added that when he arrived he found Moses Kinyua and Kendi at the scene. According to **PW6**, Joseph Kinyua was the person who is said to have been at the scene. From the evidence of **PW2** and **PW6** speak of Moses Kinyua and Joseph Kinyua, respectively. From the testimony of **PW6** there is no mention of **PW2** being present at the scene. The evidence of **PW6** was that Joseph Kinyua and area assistant chief are the ones that took the deceased to hospital. Therefore, was **PW2** indeed at the scene to be able to call **PW3** to take the deceased to hospital as alleged by both of them?

[18] Moreover, **PW1** averred that after she had been stabbed she went to home first before going to the hospital. When she appeared before the court she showed the scar on the upper inner part of the right thigh but she did not produce any documentation of medical treatment or an OB or any complaint that she was injured by the accused on that particular date, hence, the scar.

[19] Of material importance is that, **PW6** asserted that the accused was arrested at Shauri Moyo by the members of the public who had

followed him to Nairobi. He was then rearrested by PC Joseph Kairu and CPL Philip Bosire. According to him, both arresting officers recorded statements and stated that the person arrested was JK. In this case the name of the accused person is MK. Who then is JK?

[20] The accused stated that his name is MK and not JK or JK and he was not arrested in Nairobi but in his home. That on the material day he was at home. This was corroborated by the testimony of **DW2**.

[21] In criminal proceedings the burden of proof beyond reasonable doubt lies upon the prosecution. Lord Denning in the celebrated case of **Miller v Minister of Pensions [1947] 2 ALL ER 372** stated *inter alia* as follows:

“Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the court of justice.”

[22] From the evidence adduced in this case there are a lot of contradictions beginning with the identity of the person said to have committed the crime followed by the witnesses and their testimonies. The contradictions and obscurities are substantial and cannot be reconciled by any analysis. Serious doubt has been cast on the identity of the person who committed the crime herein. The doubt should be resolved in favour of the accused. Consequently, I find that the prosecution failed to discharge their burden of proving that the accused, of malice aforethought caused the death of the deceased through unlawful act or omission.

[23] In the result, I acquit the accused of the charge of murder. He shall be set free forthwith unless otherwise lawfully held in custody. It is so ordered.

Dated, signed and delivered in open court at Meru this 5th day of March 2019

.....

F. GIKONYO

JUDGE

In presence of

Muchiri for accused

Muchiri for Thangicia for accused

.....

F. GIKONYO

JUDGE