



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NO. 8 OF 2016**

**DANFORD KABAGE MWANGI.....ACCUSED**

**-VERSUS-**

**REPUBLIC.....PROSECUTION**

**JUDGMENT**

The accused person **Danford Kabage Mwangi** (the accused) is charged with murder c/s 203 as read with s.204 of the Penal Code. It is alleged that on 15<sup>th</sup> August 2016 at Kiganjo Shopping Centre Kiganjo within Nyeri County he murdered **Emmanuel Khamisi Simiyu (the deceased)**.

The case for the prosecution is that on 15<sup>th</sup> August 2016 about 6:00pm the accused and the deceased (also known as Manu) who were known to each other were both at Kiganjo Shopping Centre. According to PW1 Michael Kariuki Thangu, PW4 Mary Njeri Mwangi, PW5 Aden Salim, PW6 Alice Wandia Kariuki, the two engaged in a physical fight which they fought in several phases. These witnesses witnessed the fight at different stages.

PW4 **Mary Njeri Mwangi** testified that the accused walked into Whispers Bar where she was working looking for the deceased. He was drunk. When he did not find him there he uttered something about the deceased refusing to greet him for the last time. The accused left. A few minutes later she heard a commotion outside the bar. Some people were fighting. She learnt later that Manu had been stabbed with a knife by the accused.

PW6 **Alice Wandia Kariuki** on her part was selling vegetables at her *kibanda*. The two whom she knew, came to her *kibanda* while making noise and holding and struggling with each other. They started fighting. She told them to leave her *kibanda*. They were separated by members of the public but continued the fight some minutes later. Though she did not see any weapon, during this second fight she saw Manu fall down and the accused run away towards some bushes.

According to PW1, he arrived at the point where the two were fighting and were separated by members of the public. When they were separated he saw the accused rush to some '*kibanda*' where spinach was being sold. He saw him attack Manu and saw him stab the deceased. After that he took cover at PW2's chemist. That upon being stabbed Manu fell down and appeared dead. The crowd formed and was baying for the accused's blood.

According to PW5's testimony, his barber shop was just where the fight was happening. He heard noises and went out to see what the noise was about. He saw the accused standing with the deceased. Then he saw Manu fall and then Muriithi rush towards some bushes. He saw that Manu had sustained injury and was bleeding from the chest.

PW3 **James Karuri Thengera** a veterinary doctor happened to be passing by in his car. He was stopped by members of the public to take Manu to hospital. As they were going in his car they had a tyre burst and Manu was transferred to another motor vehicle and taken to hospital. He noticed that Manu was bleeding.

In the meantime, according to PW2 **Aisha Munuhe** the accused person in the company of his mother and brother took refuge in her chemist. Accused was without a shirt and was bleeding below the nose. She closed the chemist but members of the public were outside baying for his blood. Some began to throw stones. One member of the public had to calm them down as she called someone to call the police who arrived soon thereafter led by PW9 No.233689 **Assistant Supt of Police Joy Marete**, the OCS Kiganjo police station by then.

PW9 said she found an irate mob which wanted to lynch the suspect. She had to fire one round of ammunition in the air to disperse them so that the police would access the suspect. They got him out of the chemist. She noted that he had injuries which he had sustained following a beating the mob before getting into the chemist. The booked him in the cells at Kiganjo Police station and went to look for the victim. At

Nyeri Provincial General Hospital they found that the victim had succumbed to the injuries on upper chest, left side and had died. The body was removed to the mortuary.

The following day, PW9 visited the scene and recovered from some bushes near the scene of the fight a blood stained knife, a shoe and a motor cycle which had been burnt into a scrap heap Registration No. KMCJ 745P. She also noted that there were blood stains in front of the barber shop.

PW10 No.83009 PC **Richard Kioko** was the investigating officer. He received the case on 16<sup>th</sup> August 2016. He was taken to the scene by PW9. He took over the blood stained knife and shoes from the OCS recovered at the scene and took soil sample from the scene. He forwarded all of them to the government chemist for forensic examination together with blood samples of the deceased and the accused person. He visited the scene and drew a sketch plan. He took the accused for mental assessment to determine whether the accused was fit to stand trial. **PW11 Dr. Ruth Gathuru** produced the accused's psychiatrist report. He was found fit to plead upon examination on 8<sup>th</sup> September 2016.

PW8 **Elizabeth Waithera Onyiego** the Government Analyst produced the analysis report which confirmed that the knife, shoe and soil were stained with deceased's blood.

PW7 **Dr. Gathua Beatrice** produced the postmortem report on behalf of **Dr. Kagema**. The deceased was 28 years old male. There was dried blood over the chest wall right side of the neck and right upper limb. There was a gaping wound on right upper chest wall just below the clavicle measuring about 4 X 2 cm and 17 cm deep, and another smaller wound continuous with this one measuring about 0.5 X 1 cm, the chest muscles were cut and the auxiliary artery was severed. Cause of death was hypovolemic shock, excessive bleeding secondary to stab wound. The postmortem was conducted on 19<sup>th</sup> August 2016.

At the close of the case for prosecution and hearing and considering the rival submissions accused was placed on his defence.

The accused person gave his defence on oath. He denied the offence. He testified that on 15<sup>th</sup> August 2016 he was at Kiganjo market from 3:00pm at a function at Corner Bar. He was taking wine. About 7:00pm he decided to go home. He was drunk. When he left the bar, the way out was through a corridor where he met four men who attacked him. He was hit on the mouth and face. When he began to scream they also screamed shouting thief! thief. They removed his shirt, T-shirt, jacket. They beat him up thoroughly and he lost consciousness only to find himself at Naromoru police station without his phone, T-shirt, shirt and jacket and money. It is here that he was told he had killed a person and he was going to be charged. He denied that the motor bike was his. He testified that he was a community policing elder and had caught one Kariuki who had stolen chickens – that the said Kariuki was one of his assailants and the motorcycle belonged to him.

He denied taking refuge in PW2's chemist maintaining that when he was attacked he collapsed lost consciousness, only to find himself at the police station. However, he had no evidence that he had been treated in hospital for injuries sustained or that he made a report to police of the alleged assault and robbery on him.

At the close of the defence, counsel for accused adopted the submissions made earlier. He submitted that the accused was very drunk on the material date to the extent that he was incapable of knowing what he was doing. That there was evidence of a fight between the accused and the deceased and under **s.17 of the Penal Code** the accused's use of force in those circumstances was acceptable and negated the intention to kill.

That the prosecution had failed to prove the charge of murder- that only a single blow was applied and it killed the deceased. The offence of murder was not proved.

The state through Mr. Magoma state counsel submitted that there was uncontroverted corroborated evidence that accused had stabbed the deceased, and even though there was a fight, the accused arming himself with a knife was evident of prior motive, malice aforethought to kill him.

In response counsel submitted that the accused was very drunk and had tried to run to escape the rage of members of the public that he had not armed himself with a knife but had picked one at the 'kibanda' nearby. Both the accused and deceased had not moved from the scene of the fight hence malice aforethought cannot be proved.

The issue for determination is whether the prosecution has proved its case beyond a reasonable doubt.

The offence of Murder is provided for under s. 203 of the Penal Code thus:

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

Hence the ingredients of murder are-

- i) Death of a person
- ii) through unlawful act/omission of the accused
- iii) with malice aforethought.

Death was proved beyond a reasonable doubt by the evidence of the pathologist, the cause of death was shock resulting from excessive

bleeding caused by stab wound. The stab wound was not just a mere stab wound. It was a wound that not only cut the chest muscle but severed the auxiliary artery hence death was unlawful.

Who caused the stab wound?

The testimony of PW1, 4, 5 and 6 is clear that there was a fight. All these witnesses knew both the deceased and the accused person neither of them was a stranger. The offence was committed in the evening, towards and around 7:00pm the fight between the two was witnessed by these witnesses and PW1 saw the accused rush to the *kibanda* which is where the knife came from.

PW1 said he did not see the weapon but he saw the accused stab the deceased- PW5 saw the two standing together and suddenly deceased fell down- there was no intervening activity between the two struggling/fighting the second time, and the deceased falling down and bleeding from the chest. The accused's running away was witnessed by prosecution witnesses although it would appear the mob caught up and beat him fearing him to take refuge in the chemist. Hence every piece of evidence point at the accused person as the one who had reason, opportunity to stab the deceased.

Accused's testimony that he was attacked by four people and lost consciousness only to find himself at the police station is not credible. PW2 testified how he and his mother and brother took refuge in the chemist where PW9 rescued him from and took him to the police station. True, he had sustained injuries as witnessed by PW2 and PW9 but he was not unconscious. This story about being robbed is also not tenable as it is clear from PW1's, PW2, PW4, PW5 and PW6 that the crowd went after him after it was realized he had stabbed his friend.

The police recovered the knife, the blood stained shoe and soil which were confirmed by the government analyst to contain the blood of the deceased.

Though the investigations were a bit sloppy, going by the manner in which PW9 presented her evidence, not stating in her evidence that she had collected specimens from the scene, not having secured the scene; It is clear to me that the evidence presented by all the witnesses adds up. PW4 confirmed that accused appeared drunk when he went to her bar looking for deceased. The two were separated but was fighting again and the second time accused rushed to the *kibanda* which is where he picked the knife. There is no evidence that the deceased was armed but PW6 did state that when they were fighting the first time he appeared to overwhelm the accused person.

Be that as it may despite the accused's denials it came out in submissions that the accused wanted this court to consider the fact that he may have acted in self defence. His counsel Mr. Gathiga Mwangi cited s.17 of the Penal Code which states: -

#### **Defence of person or property**

*“Subject to any express provision of this code or any other law in operation in Kenya, criminal responsibility for the use of force in defence of a person or property shall be determined according to the principles of English Common Law”.*

Except for citing the section, counsel did not go further to submit exactly how he expected this provision to serve his client. On the face of it, it would appear that the argument is that accused was clinging on self defence- defence of his person. There is no evidence on record is that the accused was not attacked by the deceased- the evidence is that they were arguing for whatever reason, when they got into a physical fight, and he is the one who went for the weapon which was sharp and used with so much force that it caused a gaping wound 17cm deep and 4 X 2 cm wide.

By picking the sharp knife and rushing to stab the deceased and using that much force, the accused intended to cause grievous harm. The thought process of rushing to pick the knife stabbing the deceased and then running away, that adds up to create the impression of intention to cause grievous harm.

What more evidence of malice aforethought as defined under s.206 of the Penal Code could this court ask for? It is established where there is evidence proving any or more of the following circumstances: -

a) *An intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.*

In this case, the injury caused on the deceased demonstrated that the person who caused it intended to do grievous harm by its nature and the nature of the weapon used.

b. *Knowledge that the act or omission causing death will probably cause death of or grievous harm, to some person whether that person is actually killed or not, although such knowledge is accompanied by indifference whether death/grievous bodily harm is caused or not, or a wish that it may be caused.*

The taking of a sharp object, and applying force to it sufficient to cause the kind of injury inflicted on the deceased.

Thus the fact of death was proved. It was unlawful as it resulted from a stab wound.

The fact of malice aforethought as defined by s. 206 of the Penal Code was established by the evidence of the accused, after separation rushing to grab a sharp knife and stabbing the accused, intending to cause grievous harm. On this I rely on John **Mutuma Gatobu V Republic [2015] eKLR** where the Court of Appeal rendered itself thus

*“Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal Code .....*

*There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought.” (emphasis mine)*

I find therefore that the offence of murder c/s 203 as read with 204 of Penal Code is proved to the required standard. I find the accused guilty and convict him accordingly under s. 322(2) of the CPC.

**Dated, delivered and signed in open court at Nyeri this 17<sup>th</sup> day of May 2019.**

**Mumbua T Matheka**

**Judge**

In the presence of:-

Jerusha: Court Assistant

Accused person

Mr. Magoma for the state: Accused be treated as a 1<sup>st</sup> offender

Ms. Miriti: The accused person is from humble background. He has four children, is the only bread winner. We pray for lenience.

**Court:**

1. Bond is suspended pending sentence.
2. Pre-sentence report and victim impact statement be availed by the County Director Probation and After Care services, Nyeri County on or before 3<sup>rd</sup> June 2019.
3. Order to be served on County Director Probation Officer and After Care services, Nyeri County for compliance.
4. Mention on 3<sup>rd</sup> June 2019 for the reports.
5. Accused Remanded in custody at King'ong'o GK Prison.

**Judge**