



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 1 OF 2014

MOSES KANYI MUCHIRI.....ACCUSED

-VERSUS-

REPUBLIC.....PROSECUTION

JUDGMENT

The accused person **Moses Kanyi Muchiri** is charged with murder c/s 203 as read with s.204 of the Penal Code. It is alleged that on 25th December 2013 at Ndunyu market in Mahiga location Nyeri South Sub County within Nyeri County he murdered Samuel Muchungi Njoroge alias Kigumo.

This matter was part heard before Justice Mativo who heard PW1 to PW8. I only heard PW9, PW10 and the accused person's defence.

From the evidence as recorded, the accused person and the deceased were friends. Each of them was employed in a butchery at Ndunyu market. They would frequent Karumaindo Bar where PW1 Purity Muthoni Maina was the bar tender for alcoholic drinks as the bar was to just nearby. Sometimes, Purity's customers would order meat from their respective butcheries.

On Christmas eve of 2013, the two appear to have decided to entertain 'sherehekea sikukuu' in the peculiar way among some Kenyans. Taking alcohol. They went to Karumaindo Bar and were being served by PW1 who was being assisted by Grace Wanjiru Nderitu PW2 as PW1 had very many customers that day. They were each taking a hot drink 'Kenya King' and 'Jezebel' respectively with each mixing his favourite with 'Allsops' beer. They drunk until about 11:00pm when they left briefly then came back. By then the bar was closing. It is one Carol who came in first after PW1 had closed the door. She was joined by deceased who bought both her and PW1 a beer. Carol finished her drink and left. The accused and deceased had sat at the rear room by themselves. There were other customers at the front of the bar. This time PW1 gave them their bill of what has accrued before they left the first time. It was Kshs.840/-. They began to argue as to who was to pay the bill. PW1 left them and went to collect bottles at the front of the bar. While doing so she heard noise at the rear. She went there and saw the deceased pinned to the wall by the accused who was holding a knife. The deceased was also holding the accused. She went out shouting for help calling Joyce PW2 and one customer by name Stephen Gitari PW3.

When they all went back they found the deceased lying on the ground bleeding from the chest and at some point there was a knife sticking out of his chest. PW1 tried to call her employer on phone but she could not get through – so she walked to his house to call him. She came back with him only to find that the deceased was dead. She went into shock and had to be admitted in hospital overnight. She identified the knife she saw the accused holding that night as P Exhibit 1.

In her testimony PW2 said she did not know the two, accused and deceased well but they were customers at PW1's bar on the night of 24th December 2013. She testified that she heard them quarrel over who was to pay the bill and at some point PW1 went to the room where the 2 were and came out shouting that the two were fighting. She went there- only to find one of the 2 customers on the ground bleeding with a knife in his chest, while the other one was walking out. She went out shouting that someone had been stabbed with a knife and she PW1 went to bring the owner of the place, only to come and find the deceased was dead. She witnessed PW1 collapse in shock and confirmed that PW1 was taken to hospital that night.

PW3 Stephen Gitari Kabuya was also in the bar that night. He stayed there drinking until around midnight- he was about to leave when he heard noise. He turned to the place where the noise was coming from and found the deceased on the ground and a knife also on the ground. He heard someone running and saw it was the accused person. Members of the public arrested him and police came later. PW1 went to call her boss.

He did not know the accused but he knew the deceased. Many people came and accused was beaten by the mob. He denied quarrelling with the deceased over a woman or fighting that night. He said the accused was caught by members of the public while trying to climb the wall – he tried to save him.

PW6 No.42761 CPL Joseph Kisili was based at Munyange police station. The early hours of Christmas day 2013 he was rang by the OCS around 3:30am and summoned to the office. He went there and together they went to the scene of the murder. It is the owner of the bar who had made a report of the stabbing. They found the main door of the Karumaindo Bar closed. They entered through the back door- the first person they came across was the accused lying in a pool of blood. He could not get up though he tried.

Further inside they found the deceased lying near the door- near his body was a knife and a piece of newspaper. He identified the knife and piece of newspaper. They cordoned the scene and called scenes of crime personnel. PW5 No.81255 PC James Kiprotich Chepchieng came and took photos of the scene.

PW6 then escorted the body to the mortuary.

On 26th December 2013 he accompanied PW4 Peter Njoroge father of the deceased to the mortuary where the postmortem was conducted. The pathologist, PW10 Dr.Peter Murimi found that the deceased had a single penetrating chest wound on anterior chest wall approximately 5cm from the nipple approximately 2cm from the sternum which was still oozing blood. The right atrium was perforated, pericardium had a puncture wound- cause of death was cardio pulmonary system collapse due to stab wound on right atrium of the heart. He produced the post mortem report P Exhibit 2.

PW9 No.74942 CPL Richard Odhiambo was the investigating officer then. He received a call on Christmas morning of 2013 at 4:00am from Deputy DCIO. They proceeded to scene in convoy which Deputy OCPD and found officers from Munyange police station (PW6) under the command of their OCS.

The body of the deceased was in a room behind the bar- the backroom- he saw the knife beside the body and a piece of newspaper. There were blood stained sandals which he collected.

At the verandah behind the bar they found the accused whom he described as pretending to be unconscious. His clothes – white striped shirt, pair of jeans were blood stained.

After the scenes of crime personnel finished their job, the body was removed to the mortuary. The suspect was also taken to Othaya District hospital. He collected the suspect's clothes which were allowed to dry and he kept in his custody. He requested for blood samples from the suspect- which order was granted. He collected blood samples from both the suspect and the deceased and escorted the same together with the deceased's clothes and those of the suspect to government analyst.

He recorded statements from witnesses and formed the opinion that the accused had stabbed the deceased following an argument over the drinks bill. He presented the accused to the psychiatrist on 9th January 2014 – he was examined by PW7 Dr. Momanyi Brian who found him fit to stand trial. He caused the accused to be charged with this offence on 9th January 2014.

The government analyst report was produced by PW 7 Lawrence Kinyua Muthuri. The samples were received on 30th December 2013 but report was dated 28th May 2015. He found that the knife, the sandals indicated as the accused person's were stained with blood of the deceased. He also found that the jeans for the accused person was stained with both the accused's and the deceased's blood. The accused's T-shirt was stained with his own blood and T-shirt marked as deceased's was stained with blood of an unknown male.

In his defence the accused made a sworn statement. He denied killing/stabbing his friend. He stated that on the material night it was true that he and his friend went to drink at the said bar. However, that it was the deceased who brought meat from his butchery for some customers around 11:30pm. That thereafter they began to argue over the bill and the customers began to beat the deceased. He went to assist the deceased but Gitari hit him telling him to keep out of their issue –present was a lady by name Makena whom he said was a friend of both the deceased and Gitari.

He said he was epileptic at that time and when Gitari hit him he fell down unconscious and when he came to, the police were there. They tried to get him up. That is when he saw his friend lying on the ground as well. He heard people saying that he had stabbed his friend but he said he did not have a knife- it is his friend who had the knife which he was cutting meat for the customers. He said deceased was his friend, they did the same work and he had no reason to quarrel because the bill was his.

In his submissions on behalf of the accused Mr. Muchiri wa Gathoni argued that the deceased and the accused were very good friends and started drinking together in the early afternoon. That the kind of alcohol they were taking was not just ordinary drinks but very strong, stronger than ordinary beer. Both were very drunk. They bought each other drinks till past midnight. They had no grudge against each other, none had the intention of hurting, injuring or causing harm to the other.

It was also submitted that at some point a commotion arose and there was a bar fight where according to the accused his friend was attacked by some persons including one Gitari. That when he the accused tried to assist his friend he too was attacked and was injured seriously as evidenced by his own P3 produced by PW9. That he was found unconscious by the police and there was no evidence that he had committed the murder. That malice aforethought had not been proved beyond a reasonable doubt.

As to where the knife came from, it was the accused's testimony that the deceased brought it in as he served his customers meat. That the accused's employer confirmed that that knife was not from his butchery, and according to accused it is the deceased who used the knife to cut meat for customers. Hence, the accused did not go with a knife to the bar with the intention of killing the deceased. That even if the accused hurt the deceased, it cannot be the offence of murder. That the accused was beaten and also taken for dead. He was the scape goat. Counsel urged the court to find that it was PW3 and others who injured accused who also killed the deceased.

Mr. Magoma for the state argued that the prosecution had proved that the accused had a knife whose purpose was to cause grievous harm or

injury to the deceased. That the accused had not denied the fact that he had a knife, that he was seen pushing the deceased against a wall while raising the knife by PW1 and when she returned he had already stabbed him. That the accused cannot deny having stabbed the deceased and the issue of intoxication was an afterthought. That intoxication was not a defence as the accused did not get intoxicated without his consent. That he was injured by the irate mob who saw what he had done and attempted to escape. That if he was intoxicated he would not have attempted to escape.

In his rejoinder Mr. wa Gathoni argued that the issue of intoxication came from prosecution witnesses. That the prosecution had failed to prove any preparation or planning on the part of the accused.

I have carefully considered the evidence and submissions before me. The issues for determination which will culminate to whether the prosecution has proved their case beyond a reasonable doubt are;

1. Whether the deceased was murdered?
2. Whether the murder was committed by the accused person.
3. Whether there was malice aforethought.

Murder is defined by section 203 of the Penal code as where 'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'

The prosecution must prove:

- (i) the fact and cause of death

It is not disputed that the deceased died. The PW1, 2 and 3 were at the scene. They saw this. The same was confirmed by the pathologist who conducted the postmortem and confirmed that cause of death to have resulted from a stab wound. Death from a stab wound is not something that one causes to themselves in the natural cause of events. It was not a natural death but resulted from the act of some other person causing the stab.

- (ii) Actus reus- who done it? And Malice aforethought?

In arriving at a definition of malice aforethought I rely **John Mutuma Gatobu V Republic [2015] eKLR** the Court of Appeal

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

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."

Hence it was not necessary as submitted by counsel for the accused for the prosecution to establish that accused had 'made plans or preparations' to kill the deceased. They just needed to establish any or a combination of the ingredients as set out under s. 206 of the Penal code.

To establish the charge of murder both the actus reus and mens rea as defined by s 206 must be proved beyond a reasonable doubt. That is what the court of appeal in **Joseph Kimani Njau V Republic [2014] eKLR** the stated: -

"In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard."

On (ii) Actus Reus: The evidence before me was clear 1st hand eye witness. The accused and the deceased were quarrelling. They were the only ones in the rear room according to all the prosecution witnesses. It is the defence that the accused brought in the knife for the legit business of cutting the meat. It is this knife the accused was seen by PW1 holding the deceased against the wall with the knife raised while the deceased was also holding him; the appearance of a fight. She barely turned to call for help only to find the deceased down with the knife in his chest and the accused taking off. Though no one actually saw him stab the deceased, the evidence is that they were just the two of them in that room and the only deduction is that accused stabbed the deceased. The accused's defence that there was another commotion where other persons attacked the deceased and himself is not borne by evidence. That would have been witnessed by PW1. There is no reason put forward by the defence why PW1 would lie against the accused person. She knew both of them, both were her customers, and there is nothing to show she had anything to gain by lying about what she saw.

- (iii) Malice aforethought

Malice aforethought is defined under s. 206 of the Penal code which include:

- i. The intention to kill

- ii. The intent to do or cause harm
- iii. Knowledge that the act or omission will cause death or grievous harm
- iv. The intention to commit a felony

From the evidence before me it is clear that the accused person did not come to the bar with the intention of harming the deceased. In fact, the prosecution did not prove that he came with the knife to the bar. It is conceded by the defence that there was a knife in the bar that was brought in by the deceased. The two were drunk. That was established by the prosecution witnesses. It was also established by the doctor who treated the accused that night that he was drunk.

The defence did not raise a defence of intoxication. The accused person simply admitted he was very drunk that day and so did the prosecution.

While section 13 of the Penal Code states clearly that intoxication is not a defence unless as under section 2 (a) *the state of intoxication was caused without his consent by the malicious or negligent act of another person; or (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.* However, under s 13 (4) *Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.*

It is my view that the circumstances of this case are such that the accused person did not form the intention to kill the deceased. They argued. There was a knife nearby. They struggled in their drunkenness and the outcome was that deceased was stabbed. The fact that it was one stab wound also indicates the possibility of the sobering realisation that he had actually stabbed his friend and the denial caused by the stupor of alcohol. Look at what these two friends were drinking. I hear they are also known as ‘makali’; *Kenya King* and *Jezebel* which were mixed with beer. Look at how long they had been drinking. It is evident that there was no malice aforethought on the part of the accused.

So What happens now?

In **Peter Kiambi Muriuki V Republic [2013] eKLR** the Court of Appeal reduced a charge of murder to manslaughter as mens rea was not proved. Citing its earlier decision this is what it said:

“In **Nzuki -V- Republic (1993) KLR 171**, the Court in substituting Nzuki’s charge of murder with manslaughter observed:

“there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased 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 any 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.”

The court then went on to state:

Their evidence did not prove mens rea and did not establish malice aforethought. We find that mens rea for murder was not adequately established and proved to the required standard and we agree with the state that the charge of murder should be reduced to manslaughter. The upshot is that we quash the conviction for murder and set aside the death sentence and substitute in its place a conviction for manslaughter”.

These words apply to this case as there was absence of malice aforethought. The only tenable offence in the circumstances is manslaughter.

I therefore substitute offence of murder with manslaughter c/s 202 as read with 205 of Penal Code and convict the accused person accordingly.

Dated, delivered and signed at Nyeri this 17th May 2019.

Mumbua T Matheka

Judge

In the presence of:-

Court Assistant: Jerusha

Mr. Magoma for state

Mr. Warutere holding brief for Mr. Muchiri wa Gathoni for accused.

Accused present.

Judge