



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL CASE NO. 174 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

SMN.....ACCUSED

JUDGEMENT

1. The accused was charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap, 63), Laws of Kenya.
2. Particulars being that on 18/4/2013 in Kilungu District within Makueni County murdered DMN.
3. The accused pleaded not guilty and matter went into trial.
4. The prosecution called 3 witnesses.
5. PW3 AKN, is the mother of both deceased and the accused who testified that on 18/7/2013 at 5.30 am she was asleep when she heard noise outside the house. She went outside the house to check what was happening. She found accused standing and deceased lying down, the accused was holding a panga.
6. The accused ran away. She saw the deceased had a cut on the head. He was bleeding thus she went back to the house to get a clothing to cover the bleeding wound. She also noted deceased had cuts on both legs and the elbow. She asked accused who was a distance why he had done this to the deceased. He replied that he was not sleeping, because his brother (the deceased) in dreams was running after him to cut him (accused). Then the accused ran away.
7. The PW3 dressed the deceased's wounds which were bleeding. Meanwhile she screamed and people came to the scene.
8. Prior to people coming her son N joined her and also was screaming. The deceased was carried and taken to hospital. Some people went to report the incident to the police.
9. After deceased's situation worsened while at Machakos Referral Hospital, he was taken to Kenyatta National Hospital where he was admitted. After 2 months he passed on while at Kenyatta National Hospital.
10. The deceased and accused used to have problems. The deceased had a pool table and a barber business which he had left his brother managing when he had mental illness. He had also solar and a mattress in the same premises. Some of the things in the business disappeared during that period accused was running the business.
11. When deceased recovered from mental illness, he started demanding the same things which were missing. This generated conflict between the 2. PW2 also testified that a panga was recovered at accused's door step which she gave to the police.
12. On cross examination PW3 stated that at the time of the incident, it was dark but she could see the accused. The deceased did not run away completely but stopped at a distance. She could see him holding a panga.
13. PW1 was the investigating officer IP Edward Mung'asya who testified that on 18/4/2013 a report was made at Kilome Police Station by the deceased to effect that accused assaulted him "SMN". The report was treated as assault then escalated to attempted murder and after deceased died, it was converted to murder complaint.

14. The deceased reported that he had gone out of the toilet and as he was returning back accused who was holding panga attacked him. The deceased was visited by the OCS in the hospital. PW1 also met deceased in the hospital in Machakos later he was taken to Kenyatta National Hospital where he passed on. The deceased had cuts on legs, knees, and elbow. He got panga from the PW3 mother of the deceased.

15. During investigations the officer gathered that the deceased had a shop at Karongo market which deceased allowed accused to run when he had mental illness. The accused mismanaged it and was closed. Some items were missing.

16. When deceased healed he sought return of his things from the accused thus conflict erupted leading to the vicious attack which caused the deceased's death.

17. On cross examination he said accused was arrested by the Aps and handed over to the police. PW2 a doctor Edwin Walong a pathologist produced postmortem and opined that deceased died due to severe head injuries.

DEFENCE:

18. When accused was put on his defence, he gave a sworn statement and never called a witness.

19. The accused testified that he was awakened by a noise outside his house at about 4.57 a.m. When he went out he heard voice of his brother now deceased call "S". He said no more.

20. It was dark then he saw it was his brother and answered "Eeh". Accused saw him sat leaning against chicken shed which was made of iron sheets. Accused asked his brother whether he had taken the drugs he was using. His brother did not answer him. He went for his mobile phone which had a flashlight.

21. When he came back he saw his brother's eyes oozing tears. His brother tried to talk but could not utter a word. He turned him over and saw injuries on the leg. Accused screamed 3 times. Accused then entered house and got his shirt. He also screamed again while in the house. Then he got a bed sheet which he cut a piece of clothing and dressed the wound on his leg.

22. His mother joined him as he was dressing the wound and she started screaming. His other brother came to join him together with his other brother's wife.

23. Several people from the neighborhood came to the scene. There was one of the neighbour who arrived and checked the deceased and stated that he was dead. Then he asked accused why he was fighting his brother.

24. Accused said he had blood on hand which dropped on the T-shirt he was wearing. Then people started beating him. Thus he ran away into the bush and later hid at his uncle's place. He hid panga in the toilet and entered same toilet and stayed there whole day. Then went home where he got sister who gave him 400/= and he went to Nunguni.

25. Then later went to Machakos to see his brother (victim) in hospital. He found his mother who started crying on seeing him in the hospital. She told him that everybody was looking for him (accused) as he had killed his brother. He left and went to Makutano where he was arrested after some time.

26. The accused was not cross examined. Thus he closed his defence.

ISSUES, ANALYSIS AND DETERMINATION:

27. After going through the evidence on record, I find the issues are:

i. Whether the prosecution proved the case beyond reasonable doubt to warrant conviction of accused on offence charged.

28. To prove offence of murder the prosecution must prove the ingredients of the same offence as stated in the case **REPUBLIC VS DOROTHY AWUOR JUMA [2018] EKLR**, where the court held that the ingredients of murder are:

-Proof of the fact and the cause of death of the deceased;

-Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the 'actus reus' of the offence;

-Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the 'mens rea' of the offence.

29. On prove of death, PW2 Dr. Edwin Walong a pathologist examined deceased and prepared a postmortem report in which he had noted severe head injuries. He opined that the deceased died of severe head injuries.

30. The defence did not contest the fact that the deceased's death occurred. Thus the court holds that the first element as to the occurrence of death of the deceased same has been established.

31. On the second element i.e. whether the accused occasioned the death of the deceased by way of unlawful act, PW3 evidence is relevant. PW3 mother of both deceased and the accused testified that on 18/7/2013 at 5.30 am she was asleep when she heard noise outside the house. She went outside the house to check what was happening. She found accused standing and deceased lying down, the accused holding a panga.
32. The accused ran away. She saw the deceased had a cut on the head. He was bleeding thus she went back to the house to get a clothing to cover the bleeding wound. She also noted deceased had cuts on both legs and the elbow. She asked accused who was a distance why he had done this to the deceased. He replied that he was not sleeping, because his brother (the deceased) in dreams was running after him to cut him (accused). Then the accused ran away.
33. The PW3 dressed the deceased's wounds which were bleeding. Meanwhile she screamed and people came to the scene.
34. Prior to people coming her son N joined her and also was screaming. The deceased was carried and taken to hospital. Some people went to report the incident to the police.
35. After deceased's situation worsened while at Machakos Referral Hospital, he was taken to Kenyatta National Hospital where he was admitted. After 2 months he passed on while at Kenyatta National Hospital.
36. The deceased and accused used to have problems. The deceased had a pool table and a barber business which he had left his brother managing when he had mental illness. He had also solar and a mattress in the same premises. Some of the things in the business disappeared during that period accused was running the business.
37. When deceased recovered from mental illness, he started demanding the same things which were missing. This generated conflict between the 2. PW2 also testified that a panga was recovered at accused's door step which she gave to the police.
38. On cross examination PW3 stated that at the time of the incident, it was dark but she could see the accused. The deceased did not run away completely but stopped at a distance. She could see him holding a panga.
39. When accused was put on his defence he admitted that at 4.57 am, while at home he heard voice of deceased call "Sammy". He went out and saw him leaning against chicken shed which was made of iron sheets. He asked him whether he had taken drugs. He never answered him. He went to his house and came out with flashlight.
40. When he came back he could see tears oozing in deceased's eyes. He turned him over and saw injuries on the leg. He screamed 3 times. Then he got to his house and got a shirt. He got a bed sheet and dressed deceased leg injury.
41. His mother joined him as he dressed the wound but she started screaming. His other brother joined them. He came with his wife. Several people in the neighborhood joined them. One of them asked him (accused) why he was fighting his brother.
42. People started beating him. He ran into the bush. Later he was arrested by the police and charged.
43. PW1 was the investigating officer IP Edward Mung'asya who testified that on 18/4/2013 a report was made at Kilome Police Station by the deceased to effect that accused assaulted him "SMN". The report was treated as assault then escalated to attempted murder and after deceased died, it was converted to murder complaint.
44. The deceased reported that he had gone out of the toilet and as he was returning back accused who was holding panga attacked him. The deceased was visited by the OCS in the hospital. PW1 also met deceased in the hospital in Machakos later he was taken to Kenyatta National Hospital where he passed on.
45. The deceased had cuts on legs, knees, and elbow. He got panga from the PW3 mother of the deceased.
46. During investigations the officer gathered that the deceased had a shop at Karongo market which deceased allowed accused to run when he had mental illness. The accused mismanaged it and was closed. Some items were missing.
47. When deceased healed he sought return of his things from the accused thus conflict erupted leading to the vicious attack which caused the deceased's death.
48. On cross examination he said accused was arrested by the Aps and handed over to the police.
49. The accused version of the incident of 18/7/2013 is not credible. He has not called any witness to support his theory of the happening. PW1 & 3 testimony shows the accused is the culprit. The mother PW1 found him at the scene holding a panga which was produced as an exhibit. He ran away and was arrested after sometime far from home area.
50. The accused reaction when his mother found him at the scene indicates that he was the person who attacked his brother, the deceased. If it was true that he was not the attacker, he would have taken initiative to report to the police of his brother's injury not go into hiding as he has narrated in his defence.
51. The court finds that it is the accused who caused the unlawful death of the deceased.

52. On whether there was malice aforethought, PW1 and 3 testified as to the grudge generated by the accused mismanagement of the deceased's business of pool table and barber shop. The accused had motive to silence his brother to stop him from demanding his things from him.

53. Thus the court finds that the prosecution has proved its case beyond reasonable doubt.

54. Thus court makes the following orders:

i. The accused is convicted of offence of murder and shall be sentenced after mitigation.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

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C. KARIUKI

JUDGE