



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 13 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MWAKI KALUNGE.....ACCUSED

JUDGMENT

1. DAVID MWAKI KALUNGE ('the accused') herein has been charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence are that on the 8th day of February 2014 at Makutano Trading Centre, Imenti North District within Meru County murdered ANTHONY MUTHETHIA THIURU ("the deceased"). The prosecution called seven (7) witnesses to establish its case.

2. PW1 Fredrick Kimathi Murira told the court that on 8th February 2014 at 2.00 PM he took his motorcycle to a garage opposite Three Steers Hotel in Meru called Kwa Maiko. There he found the accused and deceased fighting. The accused drew a knife from his pocket and stabbed the deceased on the chest. The accused wanted to stab him for a second time but the knife hit the deceased's palm. He helped the deceased into a vehicle and was taken to hospital where he later passed on.

3. PW2 Philip Mugambi Koome testified that on the material day he was in an Mpesa shop when he saw two people pushing each other in a garage on the opposite side of Three Steers Hotel. When he went there he saw the deceased was one of them. He tried to separate them. He saw the deceased walking away but the accused said something and the deceased went back. Someone he did not know tried to separate them. But the accused went to his motorcycle removed a knife and approached the deceased and stabbed him on the hand. The deceased fell down but when he tried to wake up the accused stabbed him again on the shoulder and again on the chest. They helped the deceased together with the accused and took him to hospital. On arrival the doctor told them that the deceased had already died.

4. PW3 Moses Kinoti Muriungi told the court that on 8th February 2014 when he was walking to board a *boda boda* at Three Steers stage he saw a fight in the garage opposite the stage. He went to join the onlookers where he saw the deceased and accused fighting. The fighting had already begun. He tried to separate them but he was unsuccessful. The two fell down then saw the deceased oozing blood. He does not know whether the accused had stabbed him but blood was oozing from his chest.

5. PW4 Scholastica Kathambi wife to Dennis Kiogora stated that she received a phone call from Jediel who informed her that her brother in law had been stabbed. She and the deceased's mother went to the hospital but found that he had passed on.

6. PW5 Dennis Kiogora brother to the deceased testified that when he arrived at the hospital he found that his brother had died. He and his cousin called Quinulas Mureithi in the company of the doctor and police officer identified the body. He stated that the body had injuries on the left side of the chest, left hand and at the back right side. He stated that the two had no enmity but he cannot say whether they were friends. After the deceased's death the accused called their mother and told her that he was willing to pay all expenses for the funeral. He told her that he was remorseful and wanted reconciliation.

7. PW6 Quinnlas Murithi affirmed that he identified the body which had three stabs wounds on the left hand, left side of the chest and back.

8. PW7 Dr. Maria Mwangi produced the post mortem report on the examination of the body of the deceased that was conducted by Dr. Guantai Koome. She stated that the external injuries on the body were a cut wound on the left middle finger, stab wound on the left side of the chest approximately 4 cm wide which extended to the chest. The second stab wound was located on the right scapular region. The internal injuries were haemothorax that is accumulation of blood in the chest cavity. There was also laceration to the lung and to the left ventricle of the heart. The cause of death was haemothorax due to stab wounds on the chest.

9. At the close of the prosecution's case the accused gave a sworn testimony. **DW1 David Mwaki Kalunge** told the court that on the

material day he took his motor bike for repair at Terrace garage. The deceased came to the garage at 1. 00 PM and asked him to take him to his home in Naari. He told him that his bike was faulty but the deceased accused him of being discourteous to him because he is poor. He showed him Kshs. 200/= and insisted that he takes him home. The deceased told him that he was going to buy his own bike; he told him to go ahead and buy his own bike. The deceased also challenged the accused that he cannot beat him in a duel and the quarrel continued.

10. The deceased attacked him and a fight ensued. They fell down and the deceased overpowered him as he was on top of him. He could not breathe so he reached for a spanner and hit him with it to be able to release himself. **PW2** then came and held the deceased and that is when he saw that the deceased was bleeding from his chest. He asked **PW3** for money which he used to take the deceased to hospital where he died.

Submissions

11. This matter was canvassed by way of written submissions. The accused submitted that from the evidence adduced the accused cannot be said to have premeditated the attack and fatally injured the deceased. Furthermore, the investigating officer did not tender any evidence despite the prosecution having been given sufficient time. Therefore, the facts of the case do not prove the offence of murder but the lesser charge of manslaughter. He relied on the authorities of **Maurice M. Kenyatta v Republic Criminal Appeal No. 144 of 2000** and **Nolega Simiyu & Another v Republic Criminal Appeal No. 343 of 2006**.

ANALYSIS AND DETERMINATION

Preliminary issue

12. The defence seems to lay substantial premium on failure to call the investigating officer as a witness. I do not think failure to call the IO to testify would prevent a court of law from convicting a person where there is sufficient evidence which proves the charge beyond any reasonable doubt. On this, I am persuaded to cite Dulu J in the case of **Aden Dahir Nuno v Republic [2015] eKLR** that:

“The appellant has complained that the investigating officer was not called to testify in court. Even if this was true, in my view the failure of an investigating officer to testify in court is not fatal to a conviction. Provided the evidence on record is sufficient to sustain a conviction, the failure of an investigating officer to testify cannot vitiate a conviction.”

I will now proceed to evaluate the evidence adduced against the threshold provided in law.

Elements of murder

13. According to **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.”

Thus, the prosecution must prove beyond reasonable doubt the following:

1. The fact of the death of the deceased

2. The cause of such death

3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

4. Proof that the said unlawful act or omission was committed with malice aforethought

The fact and cause of death

14. The fact and cause of death of the deceased may be handled together because of their intrinsic connexion. From the evidence adduced, the accused and the deceased engaged in a fight. As a result, the deceased was injured. According to **PW4** and the post mortem report is that the cause of death was haemothorax (accumulation of blood in the chest cavity) due to stab wounds to the chest. Before post mortem was conducted the deceased's body was identified by **PW5** and **PW6** which was confirmed by **PW4**. Accordingly, I am satisfied that the fact and cause of death of the deceased has been proved beyond any reasonable doubt.

Death was due to unlawful act or omission

15. The prosecution needed to prove is that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, that is *actus reus*.

16. It is not in dispute that a fight ensued between the accused and the deceased. According to the persons present **PW1** and **PW2** the accused used a knife to injure the deceased. **PW3** stated that he did not see a knife but when the two were separated he saw that the deceased was bleeding. When put to his defence the accused stated that he hit the accused with a spanner but upon being separated he noticed that the deceased was bleeding. He asserted that he did not see any sword or knife neither did he have any himself. In his defence he claimed that he would not have stabbed the deceased intentionally as he was a friend and customer.

17. It is apparent that the deceased sustained injuries during the fight with the accused. The accused inflicted the injuries on the deceased as a result of which the deceased died. Although the accused stated that he used a spanner to injure the deceased as a way of freeing himself, evidence from PW1 and PW 2 show that the accused had a knife which he used to stab the deceased. The deceased was not armed and therefore use of a dangerous weapon to free oneself would not yield the defence of self-defence. Medical evidence also shows that the injuries were inflicted by a sharp object: a spanner is not a sharp object. I therefore find that the accused used a knife to stab the deceased. For that reason I am satisfied that the prosecution has proved beyond reasonable doubt that the deceased met his death as a result of an unlawful act committed by the accused.

Malice aforethought

18. Did the accused have the necessary malice aforethought in causing the death of the deceased? **Section 206 of the Penal Code** gives circumstances where malice aforethought is deemed to have been established as follows:-

“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) an intent to commit a felony;

(d)”

19. According to the evidence adduced, the deceased’s body had three wounds. The post mortem report lists these injuries to be; on the dorsum of the left middle finger, chest left side extending to the thoracic cavity and on the right scapula region. During cross-examination the doctor **PW 7** stated that the injury at the back was just below the shoulder blade. Its size has not been detailed and it could be caused by someone falling on a sharp metal. However, according to the report the cause of death was haemothorax due to stab wounds to the chest.

20. In this case **PW 1** and **PW 2** stated that the accused had a knife which he used to stab the deceased. The accused disputed this. I have however made a finding that the accused used a knife to stab the deceased as a result of which injuries the deceased died. Although there was a fight between the two, stabbing with a knife a person who is not armed is clear intention to cause the death of or to do grievous harm to the person. Also, the accused is deemed to have knowledge that the act of stabbing a person with a knife on the chest and head will probably cause the death of or grievous harm to the person. It is not enough for the accused to merely claim that he did not intend to kill the deceased for he was his friend and customer. Indifference whether death or grievous bodily harm is caused or not, or a wish that it may not be caused is immaterial in this case.

21. Coupled with the foregoing, such a severe wound inflicted by a knife supports the intention to cause death or grievous bodily harm. Such wound cannot be inflicted by a spanner as alleged. I should be clear that the doctor during cross-examination merely expressed an analogy that such injury may also be caused by falling down on a sharp object. The stab herein was inflicted by the accused using a knife. The stab was made on one of the sensitive parts of the body. In conclusion, by stabbing him the accused must have known that the injury inflicted would cause grievous harm or death. Thus, I am satisfied that the prosecution has proved that the accused had malice aforethought in causing the death of the deceased.

Guilt of the accused

22. Consequently, I find the accused guilty of the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya** and accordingly convict him for the murder of ANTHONY MUTHETHIA THIURU. Right of appeal 14 days.

Dated, signed and delivered in open court at Meru this 2nd day of October, 2019.

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F. GIKONYO

JUDGE

In presence of

Mrs. Ntarangwi for the accused

Accused - present

Namiti for state

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F. GIKONYO

JUDGE