



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CRIMINAL CASE NO. 21 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MARTIN KINYUA THIONGO.....ACCUSED**

**JUDGMENT**

1. **Martin Kinyua Thiong'o**, the accused, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the information are that on the 29<sup>th</sup> June 2018 at Mathare village, Kajiado North Sub-County, in Kajiado County, he murdered **Lucas Mutemwa Kamuya**.

2. The prosecution called 6 witnesses to establish its case against the accused. **Henry Muli Mathiaka**, (PW1), a brother to the deceased, told the court that on 29<sup>th</sup> June 2018, he received information that his brother, (the deceased), had been attacked and was admitted at **Kenyatta National Hospital**, (KNH). He went to the Hospital and found his brother admitted in critical condition and unable to talk. He had a bandage on the right side of the neck.

3. The witness told the court that he went home but when he came back on 8<sup>th</sup> July 2018, he found his brother slightly better but was only able to mention that he had been stabbed by "**Kinyua**". He left for home but on the following day, 9<sup>th</sup> July 2018, he received a phone call informing him that his brother had passed on. They arranged for the post mortem to be conducted. He identified the body for that purpose. They later took the body for burial.

4. **Peter Mugambi Nyambuga**, (PW2), testified that on 6<sup>th</sup> July 2018, he received a call from **Police Constable (PC) Konde**, (PW6), informing him that a resident of Mathare village had been stabbed and wanted the suspect arrested. PC Konde gave the suspect's name as '**Kinyua**'. The witness told PC Konde that he knew "**Kinyua**". With the assistance of **Barson Luvutse**, (PW3) they traced the said "**Kinyua**" apprehended him; took him to Ngong Police Station and handed him over to PC Konde.

5. This testimony was supported by that of **Barson Luvutse**, PW3. He told the court that he is a member of community policing within Ngong especially in mathare village; that on 6<sup>th</sup> July 2018 he received a call from PW6 informing him that a person called Kinyua had stabbed another person and he wanted Kinyua arrested. He told the court that he knew Kinyua because they lived in the same village; that he and PW2 traced Kinyua who however started running away on seeing them. They managed to apprehend him and took him to the Police Station and handed him over to PW6..

6. **Dr Andrew Kanyi Gachie**, (PW4), the Pathologist, told the court that on 13<sup>th</sup> July 2018, he conducted a post mortem examination on the body of the deceased after the body had been identified to him by a brother Henry Muli(PW 1) and Joan Muli, a sister. According to the witness, the body had a deep stab wound on the right side of the neck, measuring 4x1 cm long about 21cm deep and respiratory organs had water on both sides. The stab wound had penetrated the spinal code at the level of C3-C4. There was also bleeding in the right eye. He formed the opinion that the deceased died due to spinal shock due to cervical spine injury. He produced the postmortem report as **PEX 4**

7. **Naomi Ngendo Njomo**, PW5, the woman who was staying with the deceased, told the court that she had been married to the deceased for 5 years; that she knew the accused and that the accused and the deceased were friends who used to visit one another. The witness testified that on 29<sup>th</sup> June 2018 at about 5 Pm she was going to the shop when she saw the deceased a head of the accused. She heard the accused ask the deceased for a cigarette but the deceased declined. The accused hit the deceased on the chest and as a result, the deceased fell backwards. According to the witness, the deceased also bit the accused on the chin. She and other neighbours stepped in and separated them.

8. She told the court that then accused remove a knife and stabbed the deceased on the neck. They called a motorcycle which rushed the deceased to Ngong Sub County Hospital. The deceased was transferred to Kenyatta National Hospital where he was admitted but, died after a few days later. A report was made to the police and the accused arrested.

9. In cross examination, the witness told the court that the deceased and accused were at the material time drunk and were staggering. She told the court that Mwangi was also with the two. She however told the court that no insults were exchanged between the deceased and the accused. She stated that the accused was the first to hit the deceased but the deceased also retaliated. She also told the court that there no other people present except her.

10. **No 44173 PC Francis Konde**, (PW6) is a police officer attached to Ngong Police Station, and the investigating officer in this case, told the court that on 4<sup>th</sup> July 2018 he received a report from PW5 that her husband, the deceased, had been stabbed with a knife. He recorded her report in the OB. He testified that on 6<sup>th</sup> July 2018, he went to KNH with the intention of recording the deceased's statement but could not do so because the victim was in a critical condition and was under treatment. He went back to the station and got in touch with PW2 who, together with PW3, assisted in apprehending the accused and took him to the station. He rearrested the accused and placed him in the cell. Later on 10<sup>th</sup> July 2018, he received a report that the victim had passed on. He went to the mortuary and confirmed that indeed the victim had died. He organized for the post mortem. He later had the accused charged with murder. He produced medical bill as Pex1, admission card as P PEx 2; death summary as PEx3 and mental assessment report as PEx5.

11. After close of the prosecution case, the accused was placed on his defence and opted to give a sworn testimony. He told the court that he is a casual worker at Ngong Market; that he knew the deceased who was his customer and who went by the street name of "**Sweetie**" but he did not know his official name. The accused told the court that he had known the deceased for about one year and that he used to live at "**Gichagi**" village in Ngong before he moved to Mathari village still in Ngong and they were neighbours.

12. The accused testified that he would occasionally take merchandise to the deceased's place for sale and that he knew the deceased's wife even before she met the deceased. (PW5). The accused further testified that the deceased was his friend; that they used to drink together when they were not working and that they would go for a drink at Shiro's place within Mathari village Ngong and that PW5 would also join them for a drink and they would also smoke bhang.

13. According to the accused, on 27<sup>th</sup> June, 2018 at about 2 p.m. he took tomatoes to the deceased's house for sale; that the deceased bought some but did not have change and that they left together so that the deceased could look for change. He told the court that they left PW5 in the house; that after the deceased got change and paid him, the deceased suggested that they go for a drink at Shiro's place.

14. He testified that he took 4 and a half glasses of changaa and the accused took the same amount of changaa and further that they also smoked a roll of bang. At that point he told the deceased that he was leaving to go and collect his money from other customers and asked him to find out from PW5 whether she would need bananas the following day. The accused told the court they left and on the way they met Mwangi near the deceased's gate; that Mwangi and the deceased picked a quarrel over an issue he did not know and that at that point PW5 was not with them. He told the court that neighbours separated the deceased and Mwangi to stop them from fighting.

15. He told the court that the deceased rushed into his house and came out with a knife and attempted to stab mwangi; that he held him to stop him from following Mwangi because they were already drunk; that the deceased hit him on the chin and in the struggle that ensued, the deceased stabbed himself on the neck and that at that point both of them were holding the knife. He told the court that he did not see PW5 and she did not attempt to help even though they were near the deceased's gate and neighbours witnessed what happened but none of them testified except PW5, the deceased's wife.

16. The witness told the court that he went to Ngong police station to report about the fight between the deceased and Mwangi but he was told by police to go away and although he was injured and he was not issued with a P3 form; that he went to Ngong Sub County Hospital for treatment where he found the deceased and that he was alive. He then went back to his house He was arrested on 30<sup>th</sup> June, 2018 and charged with the offence.

17. In cross examination, he told the court that he was drinking with the deceased; that he was arrested 3 days after the incident and taken to the police station; that he went to the deceased but PW5 was not at home; that he left the drinking den with the deceased and that when they reached the deceased's gate he did not see PW5 at the gate.

## **Determination**

18. I have considered the prosecution's evidence and that of the defence. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 provides as follows:

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

19. Section 206 defines malice aforethought thus:

***"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) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

20. From the above provisions, the prosecution must prove three ingredients to establish the offence of murder. First; that there is death and that the accused caused the death with malice aforethought; that the death was a result of an unlawful act or omission. That is, there must have been an intention to kill the deceased.

21. In *Republic v Andrew Omwenga* [2009] EKLK, after referring to the section 206, the court then stated:

***“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b) That the accused committed the unlawful act which caused the death of the deceased and (c) That the accused had the malice aforethought”.***

22. In *Ojuri Anjola v The State* C/A AK/39/11[212] NGCA 16(04December 2012), the Court of Appeal of Nigeria, *Nweze, JCA.* stated:

***“Superior courts in England; Nigeria and other Commonwealth jurisdictions are unanimous on the constitutive ingredients of the offence of murder, as could be gleaned from the applicable Code provisions. Thus, in a charge of murder, the prosecution is obliged to prove: (1) that the deceased died; (2) that his/her death was caused by the accused; (3) that she/he intended to either kill the victim or cause her/him grievous bodily harm,”***

23. And in *Madu v State*, (2012) JLP 57108 (SC), [2012] 15 NWLR (PT 1324) 405, *Ariwoola JSC*, writing for the Supreme Court of Nigeria, opined at 443, that:

***“...in a murder charge, prosecution owes it a duty to discharge by proving the death of the victim, responsibility of the accused by act or omission, intentional act or omission of the accused with knowledge that it could cause grievous bodily harm or death. The prosecution must prove that the act or omission caused death but not it could have caused death.”***

24. The prosecution must prove the ingredients of the offence of murder beyond reasonable doubt. I will return to this later in this judgment.

25. As already stated, the prosecution called 6 witnesses in this case. PW1, the brother to the deceased told the court that he was informed that his brother had been admitted to at Kenyatta National Hospital. He rushed there and found him in a critical condition such that he could not talk. He went home and when he returned after two days, he found him slightly better. The deceased only managed to mention that he had been stabbed by “*Kinyua*” he said nothing to him thereafter. The witness learnt later that his brother had died,

26. PW2 was instructed by PW6 the investigating officer in this case to look for a suspect called “*Kinyua*” and with the assistance of PW3 they apprehended the accused and took him to the police station. PW4 the Doctor who performed the post mortem told the court that the deceased died out of the stab wound he sustained on the neck. PW5, the woman who was staying with the deceased told the court that she witnessed the accused stab the deceased. She was however the only eyewitness who testified in this trial. On the other hand,

27. PW6 is the investigating officer. He told the court that he received a report from PW5 that the deceased had been stabbed. He recorded the report in the O.B and arranged to have the accused arrested. The deceased was taken to hospital where he was admitted but later succumbed to injuries he had sustained. Despite being the investigating officer, he did not take statements from any other potential witnesses.

28. The accused gave a sworn statement but called no witness. His account of the events was that the deceased was his friend and customer; that on the material day, he sold to the deceased some goods and they went out to look for change before they ended up in a drinking joint. They drank changaa and smoked bhang with the deceased.

29. On their way home, they met “*Mwangi*” who picked a quarrel with the deceased which ended into a fight but Members of public separated them. At that point the deceased rushed to his house and came out with a knife intending to stab *Mwangi*. The accused intervened and tried to take the knife from the deceased in order to prevent him from stabbing *Mwangi*. In the ensuing struggle, the deceased accidentally stabbed himself.

30. There is no any other evidence from the prosecution or defence, regarding how the deceased was injured except that of PW5 and the accused. This is so despite the fact that the incident took place within a dwelling area and there is evidence that there were other people, including neighbours, who witnessed the incident. The accused stated that PW5 was not at the scene while she maintained that she saw the accused stab the deceased. What is clear from PW5 is that she did not state categorically that the accused had a fight with the deceased over any other thing except a cigarette. She also said that she saw the accused bit the deceased and the deceased retaliated. Thereafter the deceased removed a knife and stabbed the deceased.

31. From that evidence, the question that arises is; has the prosecution proved its case against the accused? The prosecution was required to prove that the accused, with malice aforethought, committed an unlawful act that led to the death of the deceased. The proof must be one of beyond reasonable doubt.(see *Woolmington v DPP* (1935) A C 462).

32. Speaking of the phrase, “beyond reasonable doubt”, Lord Denning stated in *Miller v Minister of Pensions* [1947] 2 All ER 372 as follows:

***“Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”***

33. And in ***Bakare v State*** (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria, ***Oputa, JSC***, stated:

***“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.***

34. From the above statements of law, the prosecution evidence must prove beyond reasonable doubt that the accused in this case is guilty of the offence of murder he is charged with.

35. The evidence of the prosecution narrows down to that of PW5 only who says that she was present at the scene and saw the accused stab the deceased. Her evidence must be weighed against that of the accused that the deceased had a misunderstanding with one Mwangi which led to a confrontation but members of the public stepped in and separated them. The deceased went for a knife and the accused stepped forward in an attempt to prevent him from stabbing Mwangi. There was a struggle between him and the deceased and in the process, the deceased stabbed himself, while the accused and deceased held the knife.

36. The question to decide is whether that evidence by PW5 compared with that of the accused, has proved the information of murder against the accused beyond reasonable doubt. There is no doubt that the deceased died of a stab wound. There is, however, disagreement between PW5 and the accused as to who stabbed the deceased. PW5 says it was the accused while according to the accused the deceased accidentally stabbed himself as the accused struggled to prevent the deceased from stabbing “Mwangi”.

37. PW5 was not able to give clear and cogent sequence of events leading to the stabbing of the deceased. She attributed it to a disagreement over a cigarette. On the other hand, the accused was able to narrate to the court the events of that day how he went out with the deceased, how they drank and smoked bhang, how they met “Mwangi” and what led to the stabbing. PW5 also agreed that Mwangi was present and that all were drunk and were staggering.

38. Weighing the evidence of PW5 and that of the accused, I am persuaded to believe the accused’s testimony. He was with the deceased, they went for a drink and on their way, and they met “Mwangi who picked a quarrel with the deceased. Mwangi and the deceased tried to fight but were separated by members of the public. The deceased went for a knife intending to stab Mwangi with it but the accused tried to intervene only for the unfortunate incident to happen. From that evidence, it is not clear whether both the deceased and the accused were holding the knife as stated by the accused or only the accused was holding the knife and stabbed the deceased as told by PW5. No other independent evidence by either said was led to assist the court in this regard.

39. It is clear that when the deceased went for the knife, if at all, it was intended for Mwangi and not the accused. The prosecution did not establish any reason why the accused would stab the deceased when there was no issue between the two, except the cigarette as stated by PW5. They were friends and had spent the better part of the day together enjoying themselves.

40. As aptly put by ***Oputa, JSC***, in ***Bakare v State*** (supra), the evidence of the prosecution must prove beyond reasonable doubt that the accused is guilty of the offence he is charged. It should not admit plausible possibilities. That is; the duty of the prosecution is to prove the guilt of the accused beyond reasonable doubt and the court should only convict on the strength of the prosecution’s case but not on the weakness of the accused’s defence. It is my finding and I so hold that the prosecution has not discharged its burden in this case.

41. Even if I were wrong on this, and had the prosecution established that the accused was responsible for the death of the deceased, then, there would be the question of malice aforethought. The two were drunk and had smoked bhang. PW5 admitted this in her evidence. This would then raise the issue of whether the accused really intended to kill the deceased and was in the frame of mind to do so. In the absence of any concrete evidence that the accused really committed this offence. The benefit of doubt must go to him.

42. Flowing from my analysis above, the upshot is that the prosecution has failed to prove beyond reasonable doubt that the accused committed the offence he is charged with. I enter a verdict of not guilty and acquit him. He shall be set at liberty unless otherwise lawfully held.

**Dated Signed and Delivered at Kajiado this 1<sup>st</sup> Day of November 2019.**

**E C MWITA**

**JUDGE**