



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 29 OF 2017

FORMERLY MACHAKOS HCRC. NO. 84 OF 2015

REPUBLIC..... PROSECUTION

-VERSUS-

NGUI MUTUKUACCUSED

JUDGMENT

1. **Ngui Mutuku** the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on the 7th day of November 2015 at Mbulutoni village, Ndituni sub location, Kiteta location in Mbooni East sub county within Makeni county murdered **Ndaka Maithya**.
2. The prosecution case is premised on the evidence of seven (7) witnesses. **Pw1Jane Mutua** is a shopkeeper at Mbulutoni. She testified that she was in her shop preparing lunch on 7th November 2015 at 11:00am when the accused entered very fast and took the knife she had. She followed him to find out his reason for doing so. He ran across the road and stabbed **Ndaka Maithya** the deceased.
3. She just saw blood flowing from the deceased's left hand. She was joined by **Stella Mwikali (Pw2)** a neighbor in screaming and people came. Among those who came were Kyalo Ndambuki and Musyoka Mbatha. They chased the accused. She later identified the knife at the police station (EXB1).
4. The witness said the accused used to stay behind her shop. In cross examination she said the accused had been to her shop the previous day to buy items. On the day of incident, the accused had been in her shop to take tea which she sells. She was not aware of the accused having been with the deceased and his mother who had beaten him the previous night. She denied seeing any injuries on the accused. She confirmed witnessing the accused stab the deceased only once and they chased each other with the deceased ahead.
5. **Pw2 Stella Mwikali** confirmed having been in her shop at Mbulutoni on the material day and time with her children. She had entered the bathroom behind the hotel when her child reported to her that the accused had been stabbed by the deceased. She ran out and found the deceased and accused chasing each other to the shamba.
6. She first saw blood on the road. The deceased was ahead of the accused. She and others started screaming as they ran. She was able to see the accused holding a knife. She and others followed them and after going round a huge stone they found Ndaka having fallen down and was bleeding profusely, and was picked up by Kyalo. She saw an injury on the deceased's upper and lower part of the left hand.
7. The deceased was carried to the road by several people. At the road they found the accused having been arrested by members of the public. The deceased was taken to hospital on a motorbike. The witness knew both the accused and deceased prior to this incident. She identified EXB1 as the knife she had seen on the date of incident.
8. In cross examination she said she was not so keen on what the two people were wearing but their faces. Her child who had called her from the bathroom did not record a statement. She said the accused had been in her hotel the previous day but she never saw the deceased nor his mother.
9. **Pw3 Phyllis Wayua Maithya** is the deceased's mother. She said on 7th November, 2015 8:30 – 11:00 am she was home, when she heard screams from Mbulutoni and she went there. She found the deceased having been stabbed on the upper part of the shoulder/back. After a while the culprit whom she knew as Ngui was brought having been arrested by members of the public for stabbing the deceased. The deceased was taken to hospital at Tawa and died thereafter.
10. In cross examination she admitted having been at Kwanthenya who sells alcohol and left at 10:00 am. She denied having seen the accused or deceased at Nthenya's, nor taking alcohol there. She also denied having beaten the deceased's wife nor the accused because of

Kshs.250/=. She said the deceased had slept in his house the previous night and was up at 5:00 am and never told her where he was going.

11. **Pw4 Maingi Maithya** works as a cook at Utuneni secondary school. On 7th November, 2015 at 10:00 am he was called by his mother (Pw3) who informed him of what had happened to his brother the deceased. He went to the scene and saw seven (7) stab wounds on the deceased's body i.e. one on hand, three on right back and three on left back. He was helpless and was not talking. He took him to hospital but he never made it.

12. In cross examination, he denied accused being his cousin. He said he had been with the deceased and Pw2 on the morning of the date of death. He had also seen the deceased the previous day at 7:00 pm, and confirmed that he had slept in his house. He did not know if the deceased was drunk that day and he denied ever having seen the accused and deceased together.

13. **Pw5 APC Godfrey Njuguna** was at Nguluni A.P post on 7th November, 2015 at 11:30 am when he received a call from a member of the public informing him of fights at Mbulutoni village, where Mutuku was beating people. APC Mutisya and him left for the scene, and on the way they met members of the public having arrested Nguu Mutuku the accused whom they took him to Tawa police post.

14. In cross examination, he said when they received the accused, he was bleeding from the head. He did not know who had injured him but he learnt the accused had been fighting with someone at the Mbulutoni village.

15. **Pw6 Sergeant Ephantuis Kinyatta** testified that on 7th November 2015 at 11:30 am he was at Tawa patrol base with others when they received officers from Ngiluni AP camp, members of the public and a suspect (Nguu Mutuku) who had assaulted Ndaka Maithya. He said the suspect appeared to have been beaten by members of the public though the injuries were not serious. He was taken to Tawa hospital and was treated. While there, the victim was brought by members of the public. He was unconscious with three deep cuts on the right upper hand.

16. Officers visited the scene but the weapon used was not recovered. It was however recovered later on 23rd January, 2016 and brought to the police station wrapped in a polythene paper. He was led to the place where the knife was recovered and it was confirmed to have been on the route the accused used. The owner of the knife (Pw1) was called and she was able to identify it. The knife was produced as EXB1 and the polythene in which it was wrapped was produced as EXB2.

17. In cross examination he confirmed that the accused had injuries but he did not know what caused them. He said the knife was found on a path and not a public road and also not near Ngiluni AP camp. The one who recovered the knife did not record any statement.

18. **Pw7 Dr. Titus Ndeti** conducted the post mortem on the deceased's body. His findings were as follows:

- *Three (3) stab wounds on:*
 - i. *Right upper limbs*
 - ii. *Right elbow (back) joint*
 - iii. *Right elbow (front) joint*
- *Injuries on left knee*
- *Torn right blood vessels*

He found the cause of death to be cardiopulmonary arrest due to massive hemorrhage from stab wounds. He produced the postmortem report as EXB3. In cross examination he said such injuries can result from a fight.

19. The accused elected to make a sworn defence. He testified that on 6th November, 2015 he was being paid compensation for his injured mouth. He went with the deceased and Wayuwa Maithya for that purpose as they were his friends. They reached Mbulutoni at 6:00 pm and the two friends asked him for alcohol. They went to Ngungani club/bar where they drank upto 11:00 pm. He hid and went to sleep in his house at that market. The deceased still called him twice and he told him he would see him the next day.

20. In the morning the deceased called again asking him to go to them. He passed by them on his way to Tawa to buy materials. They asked him to order for alcohol as punishment for inconveniencing them. He did and paid a bill of Kshs.1,400/=. He refused to pay the previous night's bill and went to relieve himself. On his return he found the deceased gone but his mother (Pw4) was there, and she powered alcohol on him. The waiter called the deceased and informed him of the incident.

21. As he sat the deceased caned him three times. He took off to his house behind the hotel with the deceased in hot pursuit. He stabbed him (accused) on his left hand and even Pw2's child saw it. He too turned to run away with the deceased following him. He got to the corridor and found Pw1 cutting sukuma. He snatched the knife from Pw1 and stabbed the deceased on the arm and they rolled down together.

22. He ran to his house but he was followed by people who took his money, pulled his genitals, removed his shoes and took away his phone. The police later took him away but he had been badly beaten on his head. He was taken to the hospital and later to the cells. He learnt of the deceased's death the next day.

23. Mr. Hassan for the accused submitted that both the accused and deceased were drunk and the accused only grabbed Pw1's knife as a last

resort as he had been cornered. He contended that there was no *mens rea* on the part of the accused to commit murder. That the accused acted in self defence to protect himself from the attack by the deceased. Counsel relied on the case of **Ahmed Mohammed Omar & 5 others – vs- R (2014) eKLR & DPP vs- Morgan (1975) 2 ALLER 347** to support this submission.

24. He further submitted that the accused was not only under belief of being attacked but he was actually being attacked even after trying to escape from his attacker. He asked the court to find that the prosecution had failed to demonstrate any malice aforethought against the accused. That the defence case was consistent and had discredited the evidence of the prosecution. He prayed for the accused's acquittal.

25. Mrs. Owenga for the State submits that the prosecution has demonstrated this as a case of murder. Counsel relied on the case of **R –vs- Samuel Mungai Chege (2019) eKLR & Ogeto –vs- R (2004) 2 KLR14** in defining what malice aforethought is. It was her submission that what the accused did was not in self defence. That in self defence one has to use reasonable force. She argued that the accused's action of snatching Pw1's knife and stabbing the deceased is an indication of pre-meditated action.

Analysis and determination

26. Murder is defined under section 203 Penal Code as follows:

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

The main ingredients to be proved in a charge of murder are:

- i. *The fact and cause of death.*
- ii. *Actus reus. That the accused's action (omission or commission) led to the death of the deceased person.*
- iii. *The killing was pre-meditated i.e. there was malice aforethought (mens rea).*

Issue no. (i) The fact and cause of death.

27. Pw3 and Pw4 who are the mother and brother of the deceased confirmed the death of the deceased. Pw4 is one of those who identified the body to the doctor for postmortem. I find the fact of death to have been proved. **Pw7 Dr. Titus Ndeti** who carried out the postmortem confirmed the cause of death to be **“cardiopulmonary arrest due to massive haemorrhage from stab wounds.”** The report therefore shows that this was not a natural death.

Issue no. (ii) Actus reus. That the accused's action (omission or commission) led to the death of the deceased person.

28. This incident took place in broad day light. Pw1's evidence is that the accused snatched the knife from her, ran across the road and stabbed the deceased. They then chased each other and the deceased was found lying some metres from the scene of the incident and he was bleeding profusely. Pw2 was in the bathroom when her child reported to her that the deceased had stabbed the accused.

29. It is also the evidence of Pw1 and Pw2 that after the stabbing the deceased and accused chased each other with the deceased in the lead. None of those who arrested the accused testified. In his defence the accused admits to having stabbed the deceased with a knife after he allegedly attacked him. The deceased died as a result of the stab wounds caused by the accused. I therefore find that the accused's act of stabbing the deceased led to his death.

Issue no. (iii) The killing was pre-meditated i.e. there was malice aforethought (mens rea).

30. Malice aforethought is defined in section 206 Penal Code 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) *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.*

31. The Court of Appeal in the case of **Ogeto vs- R (2014)2KLR 14** held *inter alia* that:

“Malice aforethought in murder is proved where the accused chases the deceased and when he catches up with him stabs him with a knife on the chest from which wound he fatally dies. Section 206 (a) of the Penal Code on the intention to cause death or grievous harm is sufficiently proved.”

32. The accused in his defence says him, deceased and his mother (Pw3) drunk so much the night before the incident. This was at Ngungani club. The drinking went on even upto the next day. During the drinking spree the deceased and Pw3 beat him up on the morning of 7th November 2015. Alcohol was allegedly poured on him by Pw3.

33. If indeed Ngungani is a club as stated by the accused, then there were other customers there during their drinking. There is no witness from the said club let alone the owner who came to testify on whether indeed the deceased, accused and Pw3 had been there and even fought while there. He also claims to have been followed into the shops/houses by the deceased who stabbed him before he stabbed him using Pw1's knife. He does not say what the deceased had used to stab him.

34. Pw2's child who told her the accused had been stabbed by the deceased did not record a statement with the police and did not testify. Pw2 herself did not witness the stabbing. Her child's statement to her is therefore hearsay evidence which cannot be relied on by this court.

35. Pw1 and Pw2's evidence is that after the stabbing they witnessed the accused chasing the deceased. i.e. the deceased was ahead of the accused. Pw2 further states that as the two chased each other, she saw the accused holding a knife. According to Pw1 the accused stabbed the deceased once before chasing him.

36. The postmortem report (EXB2) shows that the deceased had three stab wounds. It therefore means that when he pursued the deceased he stabbed him twice before his apprehension.

37. The accused says the incident took place in the hotel's corridor near his house and by then he had been stabbed on his hand by the deceased. There is no evidence to confirm that the accused was ever stabbed by the deceased. Pw1 who is the owner of the knife which was the murder weapon categorically told the court that the person who took the knife from her was the accused person and not the deceased.

38. According to the Pw1, when the accused snatched the knife from her, the deceased was nowhere near him. He was across the road just standing. It cannot therefore be true that the deceased stabbed the accused after following him into the hotel and that's when he picked the knife and stabbed him once. I again stress that the accused had three (3) stab wounds and not one (1) and he was stabbed on the road and not in any building.

39. The accused has pleaded self defence having been attacked and beaten by his friends i.e. the deceased and Pw3. Pw3 testified before this court. She is so elderly and cannot be said to have done what the accused claims. She can't beat a man like the accused. It is true that upon re-arrest the accused had injuries. **Pw5 APC Godfrey Njuguga** one of the re-arresting officers said the accused had an injury on the head. It is not lost to this court that he was arrested by members of the public.

40. **Pw6 Sergeant Ephantuis Kinyatta** who received the accused at Tawa police station said the accused appeared to have been beaten by members of the public, and the injuries were not serious. He was taken to hospital before being charged. Pw1 from whom the accused took the knife said she never saw any injuries on the accused person, at the time the knife was snatched from her.

41. It has been established that the deceased was stabbed just once as soon as the accused snatched the knife from Pw1. It means the other stab wounds were inflicted on him as the accused chased him. Would that be said to be still in self defence as submitted by the defence? What was the accused defending himself from? The deceased was not armed at all, and there is no evidence to show that accused's life was in danger. The defence of self defence is therefore unsupported and baseless.

42. The scenario as given by Pw1 is that the deceased was left on the road as the accused ran to the shops and picked a knife and ran back across the road. Secondly it is unknown where the two had come from and what they were upto. They may have collided from wherever they came from which would clearly amount to provocation. The accused says they were drunk. Nobody testified on that save for the accused alone.

43. In the case of **Nebart Ekauta –vs- R (1994) eKLR** the Court of Appeal stated as follows:

“It remained a matter of questioning whether or not the Appellant knew that there was a serious risk that death or grievous bodily harm would ensue from his sustained assault on the deceased. The possibility therefore that the Appellant killed the deceased by a sustained unlawful assault but without the intent necessary to constitute legal malice requisite to the proof of the offence of murder contrary to section 204 of the Penal Code cannot be excused. In the circumstances, we are unable to uphold the Appellant's conviction for murder.”

A similar decision had earlier on been made in **Nzuki –vs- R (1993) KLR 191 where Hyman –vs- DPP 1975 E.A 55** was cited.

44. From the evidence on record the accused is the one who inflicted the fatal injuries on the deceased. He was not defending himself from anything and the deceased had not injured him. The accused stated that the two of them had been drinking the whole night, a fact disputed by Pw3 and Pw4 who said the deceased had spent the night at his home. He however left very early on 7th November, 2015 for a place not known to Pw3 or Pw4. It is therefore not clear what may have transpired between the accused and deceased at whatever place they had come from.

45. The question that begs an answer is whether the killing was premeditated. My answer is that from the evidence, it is not very clear. For that reason, I make a finding that the unlawful killing was not premeditated. I will therefore reduce the charge.

46. **I find that the accused is guilty of manslaughter contrary to section 202 as read with section 205 of the Penal Code. He is convicted accordingly.**

Delivered, signed & dated this 17th day of December, 2019 in open court at Makueni.

.....

H. I. Ong'udi

Judge