



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL DIVISION

CRIMINAL CASE NO. 3 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MWANGI CHEGE.....ACCUSED

JUDGEMENT

1. The accused **JOHN MWANGI CHEGE** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on 29<sup>th</sup> day of November 2013 at Kayole Corner in Embakasi District within Nairobi County murdered **JAMES KARIUKI**.

2. He first appeared in court on 9/1/2014 before Koriri J. and thereafter on 21/1/2014 when he took his plea and denied committing the offence. After several false starts on 5/4/2016 his trial commenced before me and to prove its case the prosecution called a total of nine (9) witnesses. When placed on his defence the accused offered an unsworn statement in defence.

PROSECUTION CASE

3. On 29<sup>th</sup> November 2013, the deceased had gone to a butchery at Kayole known as “Nyama Base” to eat roast meat popularly known as “Nyama choma” having spent the day with his brother **PW1** transporting and off loading charcoal from Loitoktok to Kayole when the accused uninvited took a piece of meat from his plate which displeased the deceased who in response slapped the accused three times. A confrontation ensued between them and when separated the accused went away to his house which was nearby only to return back with a knife with which he stabbed the deceased twice before running away from the scene leaving behind the murder weapon.

4. This evidence was confirmed by **PW1 JOSEPH GITAU SIMON** who testified that he was together with the deceased upto 10.00 p.m. when they parted ways only to be called one hour later with information that the deceased had been stabbed with a knife by one Chege. He rushed to the scene and found the deceased his brother lying on his back on the knife. When he inquired what had happened, the owner of the butchery informed him that the deceased had been stabbed by someone known as **JOHN CHEGE MWANGI**. He notified his parents through phone before the police took away the body from the scene.

5. It was his further evidence that on 24/12/2014 he was called by one **MWAURA PETER** who informed him that he had heard the accused saying that he is the one who had killed the deceased. The accused was thereafter pointed out by the owner of the butchery and was arrested by the police.

6. **PW2 RACHAEL GATHONI GITAU** was called by **PW1** and informed of the death of the deceased while **PW3 MARGARET NGENDO KARIUKI** was called by the father of the deceased with the same information and on 30/11/2013 together with the father of the deceased viewed the body at the City Mortuary and confirmed that it had a stabbed wound on the left shoulder. **PW 4 DR. JOHANSEN ODUOR** performed postmortem examination on the body of the deceased on 3/12/2013 in the presence of **PW3** and confirmed that he had a stabbed wound on the left side of the neck with a lacerated external jugular vein. As a result of the said examination he formed an opinion that the cause of death was exsanguinations due to stab wound.

7. **PW5 PC GEOFFREY GIKONGA GICHUKI** received a telephone call from an informer on 29/11/2013 at midnight on the murder and rushed to the scene where he found the body of the deceased with a stabbed wound on the neck lying on the ground. They gathered information about how he had been stabbed by one Chege with a kitchen knife who immediately disappeared from the scene. He was able to recover the murder weapon from the scene. He further obtained information that the accused was working in the area as a *matatu* conductor.

**8. PW 6 SGT GEORGE ODHIAMBO** a scene of crime officer was called to the scene and took several photographs which were destroyed during processing; at the trial he produced a certificate to that effect. **PW7 PC WALTER KARUMBA** testified that on 23<sup>rd</sup> December 2013 while on patrol met a group of people chasing a person whom they claimed had stabbed someone with a knife within Kayole Corner whom he arrested and took to the police station. **PW9 PC MAURICE MUNAVI** investigated the case and confirmed that the accused was arrested on 23<sup>rd</sup> December 2013 when he went back to the butchery to confirm whether the deceased had died. He produced the mental assessment report which confirmed that the accused was fit to stand trial. He stated that he recorded a statement from eye eyewitnesses who did not testify and that no identification parade was conducted upon the accused being arrested.

#### **DEFENCE CASE**

9. When put on his defence the accused confirmed that he was working as a *matatu* conductor and that on 23/10/2013 he was at his place of work upto 10.00 p.m. when he took the motor vehicle to its owner. On his way home he was arrested by policemen on patrol on allegation that he was part of those robbing people in the area and was taken to the police station where he was booked in the cells on 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> of December. After 14 (fourteen) days in police custody he was given a recorded statement to sign and asked to produce Kshs.50,000/= . On the 15<sup>th</sup> day he was taken to court and charged with murder. He denied knowing the deceased.

#### **SUBMISSION**

10. At the close of the defence it was submitted by the prosecution that the accused was placed at the scene of crime on 29<sup>th</sup> November 2013. He was well known in the area and was described as such to **PW1** the brother of the deceased. The accused thereafter went back to the area and was arrested by the members of the public on 24<sup>th</sup> December 2013. It was submitted that by arming himself with a knife which he used on the deceased, malice aforethought had been established.

11. On behalf of the accused it was submitted that the case was not proved beyond reasonable doubt as the case was purely based on circumstantial evidence which did not meet the test set out in the case of **REPUBLIC v KIPKERING ARAP KOSKE & ANOTHER, 16 EACA 135**. It was therefore submitted that the prosecution did not provide a strong chain of circumstances which proved the guilt of the accused person. It was submitted that the murder weapon was never taken to the Government Chemist for analysis and therefore no proof that it was used to stab the deceased. None of the prosecution witnesses saw the accused stabbing the deceased neither was there any identification parade conducted. It was finally submitted that the prosecution case was based on hearsay evidence of **PW9** and **PW5** and that the prosecution failed to call vital witnesses thereby denying the accused his right to fair trial under **Article 50 (2) (k)**.

#### **ANALYSIS AND DETERMINATION**

12. For the prosecution to sustain a conviction on a charge of murder under **Section 203** of the **Penal Code** the following ingredients of the offence must be proved beyond any reasonable doubt:-

- a) *The fact and cause of death.*
- b) *That the said death was caused by an unlawful act of omission or commission on the part of the accused.*
- c) *That it was caused with malice aforethought.*

13. The fact and the cause of death of the deceased is not in dispute. **PW2** a brother of the deceased was called to the scene where he found the lifeless body of the same with a stab wound on the neck. **PW5 PC GEOFREY GIKONGA** visited the scene together with **PW6 SGT GEORGE ODHIAMBO** and **PW7 PC WALTER KARUMBA** who confirmed the death of the deceased. **PW8 PC KYALO MUNYAO** attended to the postmortem examination which was conducted by **PW4 DR. JOHANSEN ODUOR** who confirmed the cause of death as exsanguinations due to stab wound and produced the postmortem report in support thereof. It is therefore clear that the fact and cause of death of the deceased was proved beyond any reasonable doubt.

14. On whether the said death was caused by unlawful act of omission or commission on the part of the accused person, as submitted by the defence, the prosecution case is purely based on circumstantial evidence. There was no eye witness called by the prosecution who saw the accused stab the deceased. To sustain conviction based on circumstantial evidence the Court of Appeal as submitted by the defence has set out the applicable principles in the case of **MUSILI TULO v REPUBLIC [2014] eKLR** reinstating the principles as set in the case of **REPUBLIC v KIPKERING ARAP KOSKEI & ANOTHER, 16 EACA 135** as follows:-

- i. *The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.*
- ii. *Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.*
- iii. *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*
- iv. *Before drawing the inference of the accused's guilt from the circumstantial evidence it is necessary to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.*
- v. *It must be ascertained whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt – MUSOKE v REPUBLIC [1958] EA 715.*

15. In this case the circumstantial evidence tendered connecting the accused with the offence charged is the evidence of **PW1** his brother. When he was called to the scene he was told that the deceased had been stabbed by one Chege. This information was given by the owner of the butchery where the deceased had gone to eat meat who gave the name of the accused as **JOHN CHEGE MWANGI**. This evidence was corroborated by that of **PW7 PC GEOFFREY GIKONGA** who testified that he received a cell phone call from an informer on the murder of the deceased at Nyama Base and upon arrival at the scene he gathered information that the deceased had been stabbed by a man known as Chege who immediately disappeared from the scene. He was further informed that the accused was working in the area as a *matatu* conductor.

16. **PW7 PC WALTER KARUMBA** on 23/12/2014 re-arrested the accused from the members of the public at the scene of the murder. It was his evidence that the accused was not known to him at the time but was identified by the members of the public as the one who had stabbed the deceased with a knife. This evidence was corroborated in material particularly by **PW1** the brother of the deceased who had earlier been called by one **PETER MWAURA** with information that the accused had been seen at the butchery where his brother had been stabbed and upon going to the area the owner of the butchery pointed out the accused to them as the one who had stabbed the deceased. This evidence was never challenged by the accused in cross-examination and I find the prosecution witnesses truthful and believable.

17. The evidence placing the accused at the scene was further corroborated by that of **PW9 PC MAURICE MUNAVI** the investigating officer who testified that the deceased had gone to Nyama Base to eat meat when the accused took a piece of meat from his plate which did not please him leading to confrontation between them. It was his evidence that he recorded a statement from eye witnesses including **JOHNSON CHEGE MWANGI** the proprietor of Nyama Base butchery who witnessed the accused stab the deceased twice with a kitchen knife and that on 24<sup>th</sup> December 2013 the accused went back to the butchery to inquire whether the deceased had died or survived. He further recorded statements from **SIMSON WAWERU MACHARIA** and **PETER MWANZIA** all who were working at the same butchery and personally knew the accused and the deceased. They all put him at the scene of the murder. The accused never challenged this evidence by way of cross-examination.

18. Whereas the accused is under no obligation to offer any evidence in his defence, I have taken into account his defence in which he has admitted working as a *matatu* conductor thereby confirming his description by the prosecution witnesses. I have further noted that the same was silent on what had happened and where he was on the 29<sup>th</sup> day of November 2013.

19. I have taken into account the evidence tendered before the court and in particular how and why the accused was arrested and have come to the conclusion that they unmistakably points to the fact that the death of the deceased was caused by unlawful act of commission on the part of the accused person. There is no evidence of a grudge between the accused person and **PW1** the brother of the deceased and neither is there any reason why **PW7 PC WALTER KARUMBA** the arresting officer would have arrested the accused for any other reasons other than to re-arrest him from the crowd who were following him including **PW1** to execute citizen arrest.

20. I have weighed the accused defence and in particular the circumstances leading to his arrest and would dismiss it as an afterthought. I further find that failure to secure the attendance of the eye witnesses which was caused by the fact that the court had granted the prosecution final adjournment in this matter on 8/5/2017 and therefore denied them further adjournment on 28/6/2017 is not fatal to the prosecution case having taken into account the evidence of **PW9** the investigation officer and his explanation on why the said witnesses did not testify.

21. On whether the said commission was caused by malice aforethought on the part of the accused person, I have taken into account the evidence by **DR. JOHANSEN ODUOR** the pathologist in which he confirmed that the deceased had two stab wounds injuries on the left side of the neck which affected his cardio-vascular system and find that the accused intended to and indeed succeeded in causing death and or to grievous harm to the deceased person thereby falling within the definition of malice aforethought under **Section 206** of the **Penal Code** which provides as follows: -

*Section 206 malice aforethought shall be deemed to be established by evidence proving one or more of the following circumstances:-*

*(a) An intention to cause death 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, by a wish that it may not be caused.*

22. I have taken note of the fact that on 24<sup>th</sup> December 2013 the accused went back to the scene to find out whether or not the deceased had died as a result of his action thereby confirming that he had knowledge that his act would probably cause death of the deceased.

23. Having analyzed the evidence tendered before court the submissions thereon and the authorities in support thereof, I am satisfied and hold that the prosecution has proved beyond any reasonable doubt all the ingredients of the offence of murder and thereby find the accused guilty of the murder of **JAMES KARIUKI** on 29<sup>th</sup> November 2013 and convict the same accordingly.

**DATED, DELIVERED and SIGNED at Nairobi this 10<sup>th</sup> day of April, 2018.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Meroka for the State*

*Mr. Wachira for Wakaba for the accused*

*Accused present*

*Court clerk – Paul*