



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO. 4 OF 2015

REPUBLICPROSECUTOR

VERSUS

DAUDI MUKOLA MWAWASI.....ACCUSED

JUDGMENT

1. DAUDI MUKOLA MWAWASI, (the accused person herein) is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that;

“On the 17th of January, 2015 at Matopeni village in Kisauni sub County within Mombasa County Murdered “ABDI MARSА CHUNJE”

2. The accused person was first arraigned in court on 21.1.2015 and on 12.6.2015, he took plea, whereby he pleaded NOT GUILTY and a plea of NOT GUILTY was entered for him.

3. The hearing of the case commenced on 10.12.2015 with M/s Ocholla leading the prosecution’s case while Mr Mushelle, advocate represented the accused person in this case.

4. The prosecution called four (4) witnesses, whose evidence was that deceased, ABDI MARSА CHUNJE and the accused person, had been neighbours in a swahili type of house since 2007. And on 17.1.2015, the accused person is said to have come to the deceased’s house and started hurling insults at the deceased. The deceased equally hurled insults at the accused person despite his wife, ROSE WANJIRU KARANJA (hereinafter referred to as Pw1) trying to stop him. The deceased went out of this house but returned while continuing to hurl insults at the accused person. He left the door slightly open and the accused person came there and continued hurling insults at the deceased.

5. The accused person is said to have dared the deceased that he would hit him with a stone and indeed threw a stone through the open space in the door to the deceased’s house which landed inside the house. When the deceased asked the accused person if he was actually throwing stones at him, the accused person told him that he would do it over and over again. He, in fact went on to throw another stone. Pw1 said she begged her husband, (the deceased) to leave the accused person alone and he obliged and locked the door. At that moment a big stone was thrown at the deceased’s door, resulting into the deceased going out to check on what the accused person really wanted. He got out and the accused person told him in Kiswahili language;

“unaona hii chuma? Nitakutoboa tumbo nayo naujue iko na sumu (Translated into English language to mean:

“ You see this metal, I will pierce your stomach with it and you should know it is poisoned)”

6. According to Pw1, the two continued hurling insults at one another as they got close to each other. She said that after two minutes, she heard screams and people running. She dressed up and some young men came to her house. They included one Murundu who told her that her husband the deceased, had fallen down and their efforts to get him up had been in vain. She accompanied them to where they said her husband had fallen. Pw1 said she saw him lying unconscious on the ground. They carried him to a “tuk tuk” and took him to Makadara (otherwise known as “Coast General Hospital”) where the doctors confirmed him dead. Pw1 told court that she found the deceased lying on his stomach and on turning him to face up, she saw he had been stabbed near the naval on the right side and he was bleeding. She did not find or see the accused at the scene.

7. The matter was reported to Nyali police station and, Pw3, No. 63512 Sergeant Joseph Nyasimi, the investigating officer interrogated the wife to the deceased, Pw1 who explained what had happened. He then accompanied the deceased’s wife to their house at Matopeni village where he was shown where the deceased had been picked from after being stabbed. Pw3 said that he inspected the scene and found nothing

significant or blood or signs of it. They were shown the deceased's house but it was locked with no one in it. Pw3 also went to Coast General Hospital where he saw the deceased's body and noticed a stab wound on the left side of his stomach. He also arranged for the scene of crime personnel to visit and photograph the scene and the body. He then accompanied witnesses to record their statements.

8. And on 19.1.2015, he was informed by an officer by the name Wekesa that the suspect, who is the accused person herein had presented himself to the DO's office at Kongewea from where he was directed to Nyali police station and he was placed in the cells. He was then charged with the offence of murder on 21.1.2015.

9. Pw4, DR . GILLIAN NJAMBI MWIRURI produced the post mortem report (Exhibit P 1) on behalf of Dr Abdi, who conducted the post mortem examination and filled the same, after the prosecution applied that he be allowed to produce the same as exhibit P1.

According to the post mortem examination report (exhibit P1), the external appearance of the deceased's body revealed:

1. a cut wound on left iliac region bleeding profusely and was 1cm long.

2.No other visible injuries were noted on the external examination but the internal examination of the deceased revealed a haemoperituma in the digestive system and abdominal aorta was cut and bleeding profusely.

3.It was concluded that the cause of deceased's death was hemorrhagic shock secondary to bleeding and intra abdominal bleeding.

10. At the close of the prosecution's case, despite the defence counsel, Mr Mushelle submitting that the prosecution had not established a sufficient case against the accused person to warrant him being placed on defence for the offence of murder, the accused was placed on defence.

11. The accused person opted to give sworn statement in defence. He introduced himself as Daudi Mukola Mwawasi. He denied that he murdered the deceased, ABDI MARSA CHUNJI. He explained how the deceased and him were good friends and lived in one Swahili house but different rooms. He recounted to court what he did on 17.1.2015 which included going about his business, drinking palm wine and then slept. He said he was woken up after about 30 minutes with the sound of the door being pushed to open loudly. He then got out of the house running as a person got into his house. He fell in the course of running and fainted. He said he was informed of the deceased's death the following day. He also said that he was told by one Hussein that he had seen Abdi, the deceased carrying a knife. He went and handed himself to the police because he had been told that he had stabbed someone with a piece of metal but knew nothing about it.

12. At the close of the defence case, it is now the duty of this court to analyze the evidence as a whole and determine whether or not the charge of murder has been proved against the accused person to the required standard.

13. The offence of murder as defined by section 203 of the penal Code is as follows;

"Any person who of malice aforethought causes the death of another person by and unlawful act or omission is guilty of murder"

From this definition, the prosecution is required to tender evidence which will sufficiently prove;

1. the fact as well as the death of the deceased;

2. that the death of the accused happened as a result of an unlawful act or omission on the part of the accused person;

3. that the unlawful act or omission was committed with malice aforethought.

14. For the fact of the deceased's death, it was the evidence of Pw1 who is wife to the deceased that her husband (the deceased herein) had been exchanging insults with the accused person who is their neighbour and had then gotten out of the house while continuing to do so. That she heard screams and people running. Then some young men came and told her that her husband had fallen. She went to the scene where they managed to put him in a "tuk tuk" and took him to Coast General Hospital as he was unconscious. He was confirmed dead on reaching there. This was confirmed by Pw2, a neighbour to Pw1 and her deceased husband, who said he accompanied Pw1 and her deceased husband to Coast General Hospital where he (deceased) was confirmed dead. This evidence was further corroborated by the evidence of Pw4, Dr Gillian Njambi Muiruri, who produced the post mortem report by Dr. Abdi who performed the post mortem examination on the body of the deceased (Exhibit P1). Even the accused in his defence said he was informed of the deceased's death. The evidence of the deceased's death is un rebutted.

15. As for the cause, Pw1 told court that she found the deceased lying on his stomach and when they turned him up, she said he had a stab wound below the naval on the right side which was bleeding. She also said he was unconscious. Pw2 told court that when he got into the 'tuk tuk' that was taking the deceased to hospital, he said the deceased could not talk and was bleeding from the left side of his stomach where he had been stabbed. Pw4, Dr Gillian Njambi Muiruri gave evidence by producing a post mortem examination report (ExhP1) prepared by Dr Abdi who conducted a post mortem examination on the body of the deceased and found a cut wound on the left iliac region bleeding profusely and was 1 cm long and a haemoperitonium in the digestive system and abdominal aorta was cut and bleeding profusely. The said Doctor formed an opinion that the cause of the deceased's death was hemorrhagic shock secondary to massive intra-abdominal bleeding. The cause of deceased's death has also not been disputed.

16. Having established that the deceased died and the cause of his death, the next issue for determination is whether the accused person

caused the deceased's death.

It was the evidence of Pw1 that on 17.1.2015 at about 8.30am the accused person, who was their neighbour at a Swahili house started hurling insults at the husband who happened to be in the house, while he was at the door of their house. She said that the accused hurled vulgar insults at her husband and her husband equally responded in vulgar language. Pw1 said that she tried to stop her husband from responding to the accused person who was a known drunkard but he would not listen. That her husband then got out of the house to where the accused person was and they continued insulting each other. He then returned to the house but left the door slightly open. That the accused came there and they continued hurling insults at each other. Pw1 said that the accused person then asked the deceased if he wanted him to hit him with a stone and he dared him to do so. The deceased proceeded to throw a stone through the open space of their door into their house. And when the deceased asked him why he had thrown a stone at him, the accused person told him that he would do it again and again. Pw1 begged the deceased to leave the accused person alone and he locked the door. But after a short while, Pw1 said that a big stone was thrown at their house. This is when the deceased said that he was going to find out exactly what the accused person wanted. And despite Pw1's efforts to stop him, the deceased got out where she heard the accused telling him in Kiswahili language

“ unaona hii chuma? Nitakutoboa tumbo nayo naujue iko na sumu” (Translated into English language to mean “You see this metal. I will pierce your stomach with it and you should know it is poisoned!”)

17. Pw1 told court that the two continued exchanging insults and it was clear that they were getting close to each other from the low voices she could hear. She then heard screams from the two and people running. She dressed up and was called by some young men. She found her husband had fallen unconscious on the ground but the accused was nowhere.

18. Pw 2, only gave evidence of how he was a neighbour of the deceased's family and the accused person. He stated that on the alleged date, at 9.30 pm, he was woken up by some noises. He got out but did not see anyone. He then inquired from the deceased's wife and she told him her husband had disagreed with a neighbour by the name Ochido because of drunkenness. He later found the deceased being taken to hospital in a tuk tuk and was informed that he had been stabbed by another.

19. From the evidence of Pw1 and Pw2, none of them witnessed the fatal attack on the deceased. There was no other witness who testified towards the death of the deceased from amongst the neighbours. There was also no evidence of a murder weapon being recovered from the scene. But the accused person was arrested and charged with the offence of murdering the deceased on the alleged date.

20. According to Pw3, sergeant Joseph Nyasimi, the accused person presented himself to the D O's office at Kongwea where he was directed to go to Nyalı police station. He was interrogated and charged with the offence of the murder of the deceased. The accused person, denied having committed the offence but confirmed that he had presented himself to the police station, his explanation of this being that he had been told he had stabbed someone.

21. In analyzing the evidence of Pw1, I find that she confirmed that the accused person was at the scene of incident where he exchanged insults with the deceased on the alleged night. She heard the insults and specifically said she heard him tell the deceased that he would pierce his stomach with a metal which was poisonous.

22. It is worth noting that the accused was a neighbour of the deceased and his wife, (Pw1) and Pw1 said that they had been neighbours since 2007. This incident happened in 2015. Pw2 confirmed that the accused and deceased were neighbours and always quarreled whenever they were drunk. It therefore cannot be doubted that Pw1 knew the accused person's voice to be able to tell that he was the one who was insulting the deceased from outside their house. He was therefore not a stranger to her.

23. The accused on the other hand, does not deny having been at his house which neighbours that of the deceased. He also does not deny that he heard the deceased asking who had knocked on the door and he responded that he was the one, and the deceased hurled an insult at him, but he told him to sleep. He said that he slept and after 30 minutes, heard the door to his house being pushed to open loudly. He got out and ran as the person who had pushed it open got in. That he then fell and fainted and could only hear he was being chased from behind. It is clear that the accused admits having been at the scene and there having been an exchange of words between him and the deceased.

24. There is further evidence that when the deceased was found lying on the ground unconscious, the deceased was nowhere, Pw3, the investigating officer told court that when they visited the scene, they checked the accused person's house and found it locked. He is said to have presented himself to the police on 19.1.2015.

25. In his defence, the accused person told court that the day after the incident, one Hussein told him that they had been looking for him the whole night so they could take his friend to hospital on an allegation that he had stabbed him with a piece of metal. He was then confirmed that the deceased was in the mortuary and was asked to see what to do. From the evidence of the prosecution's witnesses and the accused himself. It is clear that he disappeared after the incident.

26. In my analysis, I find that the accused person was arrested and charged with the offence of murdering the deceased. This was because the happenings of that night as narrated by Pw1 and remain undisputed, were a sequence. The accused is heard exchanging insults with the deceased, the deceased comes out and they continue with the exchange, a scream is heard and the deceased is found having fallen on the ground with a stab wound on his right side and is unconscious, meanwhile the accused is nowhere to be seen.

27. It is clear that while no one witnessed the accused fatally attack the deceased, the circumstances surrounding the incident that led to his being suspected are quite connected.

28. To rely on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, all the facts so established should be consistent only with the hypotheses of guilt of the accused, and the circumstances

should be of a conclusive nature and tendency and should be such as to exclude every hypothesis but the one proposed to be proved.

In the case of **REPUBLIC VRS DANIEL KARANJA WAIRIMU** (2016) e KRL, Odero J, quoting from SARKAR on EVIDENCE at pages 32-33.

“(circumstantial evidence must be a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt. Circumstantial evidence should not only be consistent with the guilty of the accused, but should be inconsistent with his innocence. The way to deal with circumstantial evidence was stated in TOPER V R (1952) ac A C Page 489 as follows;

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicions on another. It is also necessary before drawing the inference of the accused’s guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence”

29. I find that the prosecution was able to justify the inference of the accused person’s guilt to the exclusion of any reasonable hypothesis of innocence from the sequence of events of that night as narrated by Pw1. In fact it should be noted that this was evidence of a single identifying witness. She identified the accused person from his voice, which she recognized since they had been neighbours (had lived next to each other for about 9 years) and from the fact that he and her deceased husband always quarreled whenever they were drunk. This evidence was not disputed and neither did the defence by the accused person dislodge her evidence.

30. The last question for determination is whether it was established that the accused person committed the offence with malice aforethought. Malice aforethought under section 206 of the Penal Code is defined as;

“(a) an intention to cause death of or to do grievous harm to an 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. It was established that the deceased was found to have a stab wound on the right side of the naval which was confirmed by the evidence in the post mortem report (Exhibit p1). This was definitely caused by someone who stabbed him with a weapon. By stabbing another in the stomach one’s intention would clearly be to cause grievous harm to another. This is what is likely to have happened in the case between the accused person and the deceased, and it ended up being fatal.

32. In view of the above mentioned reason, I find that the circumstantial evidence in this case points to the guilt of the accused person, whose defence did not displace the same. And by stabbing him in the manner he did, he wanted to cause him grievous harm, from which he died.

33. I hence find the accused person guilty of the murder of the deceased ABDI MARSJA CHUNJE contrary to section 206 of the Penal Code, and convict him accordingly.

It is so ordered.

Dated and delivered at Mombasa this 8th day of June, 2018.

HON. LADY JUSTICE D. O. CHEPKWONY

In the presence of:

M/ Ochollo, counsel for the state

Mr Mushella, counsel for the accused

Accused – Present

C/clerk- Beja Nduke

12.6.2018

Before Hon. Justice D O Chepkwony

C/clerk- Beja

M/s Mutua, counsel for state

Mr Mushelle, counsel for the accused.

Accused – Present

M/s Mutua- I am instructed that there are no previous records with regard to the accused person.

Mr Mushelle – In mitigation.

The accused person is a first offender. It is clear that the accused person and deceased were friends and neighbours. They used to drink together and each time they would insult one another and even fight. The accused person has been in custody since 2015. The circumstances are such that although mandatory sentence is death, according to famous case of Francis Kariuki Muruatetu and another, it was clearly stated that sentence is The discretion of the court. And if a section provides that there is only one sentence, it means that the court is deprived of its inherent discretion.

It was therefore noted that depending on the circumstances of each case, the court has powers to give any other sentence.

In view of the fact that the deceased and accused were drunk and great friends. He is very remorseful. We pray for the court to exercise its discretion judiciously and accord an appropriate sentence.

Court – Having listened to the counsel on record with regard to the record and mitigation for the accused person, I have also considered the circumstances under which the offence was committed. It is true that on the date of the alleged incident, the accused person was said to have been drunk, although there was no certificate to confirm this.

Recently, the supreme court in the case of Francis Kariuki Muruatetu and another, decided that the death sentence is unconstitutional and deprives a judicial officer of its inherent jurisdiction. It recommended for parliament to make amendments to this effect.

However, there is yet to be such an amendment for now, in the constitution and relevant statute. The death sentence remains mandatory for the offence of murder.

Having looked at all the circumstances raised by the record, mitigation by defence counsel and circumstances of the case, the accused is hereby sentenced to serve a life imprisonment.

Right of appeal 14 days.

HON. LADY JUSTICE D. O. CHEPKWONY

12.6.2018