



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 10 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

BONIFACE NDAVI NGUNIA.....ACCUSED

JUDGMENT

1. The accused Boniface Ndavi Ngunia stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 27th May, 2014 at about 3 pm at Kangalu Trading Centre in Mwingi Central District of Kitui County murdered Patrick Mbui Nzambi. He has denied the charge.

2. In supporting their case, the prosecution has called nine (9) witnesses. PW1 was Zipporah Mwendu Vundi of Kangalu village who is a farmer. It was her evidence that on 27th May 2014 while at home at 3 pm, she heard the voice of the accused coming from the shops. It was a noisy voice which continued for 5 minutes and stopped. She did not understand what the accused was saying. She knew the accused only by the name Ndavi who was a neighbour.

3. According to her, after a half an hour, she heard screams from the shops and run there where she met the mother of the accused in the shop of the deceased. The mother of the accused was holding the deceased and asked her to enter the shop to assist but she refused because the shop was full of blood stains. Then the mother of the accused then threw a handbag to her, and asked her to pick a phone therein and call the sub-chief. She phoned the sub-chief and then together with another woman who had just arrived and a son of the deceased, they screamed and the public rushed there. Later the police came and took away the body at 6 pm.

4. In cross-examination, she said that her home was approximately 100 metres from the shop. She insisted that the voice she heard was that of Ndavi the accused, even though she did not meet him at the scene. She said that the assistant chief was called Mutua Kasina while the village elder was called Grace Nzioka.

5. PW2 was Monicah Kavuo Kimanhi. It was her evidence that on 27th May 2014 she met Ndavi the accused on the road at around 3 pm carrying a knife near Mutuo's canteen and he told her to go away. According to this witness, this incident occurred near the shop of Kyalo Mbui also called Mbui Nzambi the deceased. She proceeded home and shortly on arrival, heard screams and run to that direction only to find that Kyalo had been killed in his shop. In cross-examination she said that she did not see the killer of the deceased. In re-examination she said that what she saw something that looked like a knife.

6. PW3 was Josphat Kimanzi Mbui a farmer and resident of Kabuoni and uncle of the deceased as well as the accused.

7. It was his evidence that on 27th May 2014 at 2.30 pm while from church with his wife Janet Kimanzi met Patrick Mbui the deceased at Migwani/Garissa junction. The deceased was on a motorcycle and they proceeded home. At around 3 pm however, he heard screams from the Kangaru directions. They rushed there for about 300 metres and met 7 to 8 people at the deceased's canteen and they saw the deceased lying down in the canteen. They met the accused's mother sitting down on the side of the canteen. They were informed by a woman that Ndavi the accused had run away and on their way home they were informed by other people that Ndavi had been seen proceeding towards Kilimani School. He phoned a shopkeeper at Kilimani and after 10 minutes the shopkeeper called back to say that he had seen Ndavi on the road trying to board a matatu. According to this witness, Ndavi was arrested at Mbondoni and the police picked him from there. He stated that he attended the postmortem examination on 6th June 2014 at Migwani Hospital with Beatrice the wife of the deceased.

8. In cross-examination, he stated that though he did not witness the killing, he coordinated the arrest. He said he was away that the accused was assaulted.

9. PW4 was Beatrice Kilute Mbui a tailor at Kangalu Sub-Location, Kavuoni Trading Centre, and the wife of the deceased of 15 years with

three children. It was her evidence that on 27th May 2014, her deceased husband who was a shopkeeper proceeded to his shop at Kangalu at around 6 am. At 10 am, as was his usual practice, he picked her on a motorcycle to her tailoring business. They passed by the shop where the accused Boniface came and asked for a kilo of maize and wanted to pay through transfer of telephone credit of Ksh.50/= but the deceased refused and closed the shop. According to her, the accused got annoyed. The deceased then took her to Mbondoni to her tailoring business and then proceeded to do motorcycle operation business and at 2.30 pm, came back to her tailoring shop with milk and juice and then proceeded to Kangalu to open the shop. Shortly thereafter, she was called on phone and informed that Boniface had done an awful thing at Kangalu and had threatened to go to her and kill her.

10. She then called her husband on phone and the phone was on an answering machine. She thus took her motorcycle to the shop and found people crying who restrained her from entering the shop. She forced her way into the shop, only to find the body of her husband lying in a pool of blood, and was informed that Boniface was the culprit. Later, the police came, took photographs and also took the body away.

11. It was her further evidence that she met Ann Musyoki Ngunia, the mother of the accused, sitting outside a shop with a blood stained blouse and a skirt. She noted that the shop was disturbed with spilled items. She later identified the body of the deceased during postmortem examination.

12. She stated that deceased had a phone make E10 (ESQ) (ID), and that she later put the phone memory card in the radio and she heard the voices of Boniface and the deceased. A demonstration of the voices was played in court through the radio and sounds of a quarrel and groans in Kikamba language were heard. She also stated that days later in a nearby unused pit latrine, she noticed a piece of wrapped newspaper and called an old man called Thiaka who unfolded the newspaper and found a knife which she handed over to the police, as she thought it was the murder weapon.

13. In cross-examination, she said that she recorded her police witness statements on 8th July, 2014 and 1st December 2014. She said that her business was to make dresses at Mbondoni, and that the accused was jealous of her husband because he was financially stable. She said that in the 10 years she had known the accused, he asked the deceased many times how he got his wealth while he (accused) had only a miraa farm. She stated that her husband's phone had no password. She did not know if Paul Thiaka recorded a witness statement.

14. In re-examination, she stated that the recovered knife was stinking and she handed it over to the police.

15. PW5 was Mary Mutemi Maithia a farmer at Kangalu village. It was her evidence that on the 27th May 2014 she came from the office of the assistant chief at 11 am and called the deceased on the phone wanting to know if the shop was opened. The deceased told her that he was at Mbondoni and would call her on the phone once he arrived at the shop. He then called her at around 3 pm and she proceeded to the shop about 1 kilometre away. As the deceased served her, Boniface (the accused) arrived holding a bottle of Karubu traditional liquor and ordered out of the shop, entered the shop and called Patrick a cow. According to her, Boniface appeared drunk and shortly thereafter came out of the shop and called her a wizard and then threw his "akala" plastic shoe which he was holding in his hand, and told her to bewitch the shoe. He then said he was going away but would come back.

16. She then entered the shop to pick her 4 kilos of flour, got her change and proceeded home. While at home, a lady called Caro Kilonzo called her on the phone and asked her to hurry to Kangalu Shopping Centre. She ran there led by her younger brother and met a crowd wailing at Mbui's shop. According to her, this was around 4 pm and she noted the mother of accused Ndavi, Ann Musyoki Ngunia, sitting nearby with blood stained clothes and hands. Later, the police arrived and collected the body.

17. In cross-examination she denied telling the police that she went to the shop to beg for flour. She stated that she did not witness the killing.

18. PW6 was John Musyoka Ngondo a cousin of the deceased. It was his evidence that he knew Ndavi the accused as a relative and that on 27th May 2014 at 3.30 pm, as he was doing cultivation near Kangalu market he heard desperate screams from the direction of the shops. He ran there only to find that Patrick had been stabbed in the chest with a knife. Patrick was held by the mother of Ndavi who said that Ndavi had stabbed Patrick Mbui with a knife.

19. He then removed things from the shop and also shifted Patrick who was by then breathing heavily. The public had already gathered and Alfred Mutua Kasine the chief arrived. Later, the police arrived with the accused, took photographs at the scene and took away the body and asked witnesses to meet them the next day to record statements. It was his evidence that he met the accused earlier day and that he heard him threatening to kill people including a young man called Munyoki Katumo. He said that the mother of Ndavi fainted after he told her that Patrick had died.

20. In cross-examination, he stated that he did not see the knife and denied stabbing the deceased. He said he did not see anyone running away from the scene.

21. In re-examination he said that he did not see the accused before the killing on that 27th May, 2014.

22. PW7 was Grace Nzioka farmer at Mbondoni in Kangalu. She knew both the deceased and the accused.

23. According to her, on 27th May 2014 at 4 pm as she was coming from paying school fees, she was phoned by Mary Mutemi and informed that Ndavi had killed Kyalo the deceased. On rushing to the scene, she met the crowd and the deceased on the floor with blood stains splashed all over. The police later arrived in a motor vehicle with Ndavi. It was her evidence that she later met the mother of the accused who confirmed the killing.

24. In cross examination, she said that she was related to the mother of Ndavi and that there was no grudge between them. She agreed that she took over as the village elder from the mother of Ndavi but disagreed that she tarnished her name in order to get the post.

25. In re-examination, she stated that she was elected as village elder in March before the incident which occurred in her area in May.
26. PW8 was the investigating officer Police Constable Justus Kipchumba Bett. It was his evidence that around 4. 30 pm on 27th May 2014 he received a phone call from the assistant chief. abou. Together with the OCS IP Lempasi, Cpl. Leonard Abuya, and Cpl. Driver Waigua they proceeded to the scene. On the way they were informed that Boniface had been arrested at Mbondoni Trading Centre, they proceeded there, re-arrested him and saved him from the angry public.
27. They then proceeded to Kangalu Trading Centre and to the scene where they found the shop disturbed, counter shelves overturned, items such as maize grains spilled all over the entrance and the deceased lying in a pool of blood which was still oozing from the chest. They took photographs though he was not a Scene of Crime Officer as the Scenes of Crime Officers were far away in Kitui. He noted a deep cut on the right side of the chest below the armpit, and after searching did not find a murder weapon. There was a motorcycle loaded with shop items outside the shop and a blue “leso” piece of cloth at the doorsteps.
28. They took the body to Migwani Hospital to await postmortem examination and he recorded witness statements. According to his investigations, the accused and the deceased were not on good terms and on that day the accused had asked for maize flour from the deceased in exchange of 50/= airtime but the deceased declined the suggestion.
29. It was his evidence that on 3rd June, 2017 postmortem examination was conducted in his presence by Dr. Christopher Wahinya.
30. It was also his evidence that on 8th July 2014, a mobile phone, a radio and a memory card were received by him from the wife of the deceased Beatrice, the and the assistant chief who said that they had discovered recorded audio evidence which he played and noted voices in Kamba language and sounds of groaning together with utterance of abusive words by the accused. He produced the phone and memory card as exhibit 2.
31. It was also his evidence that on 26th November 2014 he received a knife from Beatrice, the wife of the deceased who said that she had spotted it in a pit latrine behind the shop. The knife was rusty therefore blood stains and fingerprints could not be traced. He produced it as exhibit 6.
32. In cross examination, he said that it was not fair to say that voice identification was erroneous. He said that the deceased’s wife explained to them the motive of the killing. He could not confirm if deceased complained about the threats to the police. He said he did not know the accused before, but insisted that the phone belonged to the deceased though he could not confirm ownership of the sim card from Safaricom or Zein Ltd. He also did not verify or confirm the audio recording but said that the assistant chief understood what was said in the recording. He stated that he recorded a statement from a person who picked the knife though he did not testify in evidence. He said that the DCIO called the Government Analyst about the knife before deciding not to take it for analysis. He agreed that there might have been physical confrontation before the death.
33. In re-examination, he said that accused ran to his house, changed clothes and that the house was burnt by the public.
34. PW9 was Dr. Christopher Wahinya. It was his evidence that on 3rd June 2014 he conducted postmortem examination of the deceased at Migwani Hospital at 1 pm. The body was identified by Beatrice and Josphat and he found a deep cut on the right shoulder blade, and heart chamber was empty due to bleeding. Cause of death was hemorrhage due to cut of a major artery. He filled and signed the form. He produced the postmortem report form as exhibit. He was not cross examined.
35. When put on his defence, the accused elected to give unsworn testimony. He said that he was a family man with four children and that on 27th May 2014 he woke up at 7 am as usual and fetched water from his father’s well. He then proceeded and obtained transport to go and buy pesticides and came back home. At 4 pm, he left home again and got transport to Mbondoni arriving at 5 pm. He bought cigarettes and then entered a miraa kiosk where as he bought miraa he was attacked from behind, lost consciousness only to find himself at Mwingi Hospital where he remained for two weeks. He was then charged with the offence he did not know. He stated that at 3 pm he was in Mwingi Town 6 kilometres away from Mbondoni and that Monicah Kavuo PW2 must have seen him on his way to Mwingi at around 10 am when he passed her home. He said that he had no issue with the deceased.
36. This is a murder case and the prosecution is required to prove all the elements of the offence of murder beyond any reasonable doubt. See the case of **Woolmington vs DPP [1936] AC 462** and **Aniseth vs Republic [1963] EA 206**. The accused has no burden to prove his innocence. The elements of murder are firstly whether the deceased died. Secondly, whether the death was unlawful. Thirdly, whether the accused caused the death of the deceased. Fourthly, whether it was caused with malice aforethought.
37. Did the deceased die? The evidence of witnesses who know the incident and went to the scene is all consistent that the deceased died in his shop at Kangalu. He lay on the floor and was bleeding from the chest. The police who arrived later found him in that state. Postmortem examination was conducted a few days later by Dr. Christopher Wahinya PW9 at Migwani Hospital who confirmed that the deceased died due to shock occasioned by bleeding. I find that the prosecution proved beyond any reasonable doubt that the deceased died and that he died of shock due to bleeding after having been stabbed in the chest.
38. The next issue is whether the death was unlawful? There is no suggestion either from the prosecution or the defence that the death of the deceased was due to a lawful reason. Considering the circumstances and evidence before me, the death of the deceased through stabbing in the chest was not lawful. I find that the death of the deceased was unlawful and was caused by unlawful means.
39. The third issue is whether the death of the deceased was caused by the accused. The prosecution say so. The defence denies that allegation. The accused in his statement of defence stated that he was not at the scene. There is a mention by prosecution witnesses of his mother having been present but she was not called to testify. No reason was given for the failure of the prosecution to call the mother of the

accused to testify in court.

40. No one witnessed the killing. The case is thus a case based on circumstantial evidence. In a case based on circumstantial evidence, the prosecution has to prove that all the facts and circumstances point to one hypothesis that the accused must have caused the death and no other person. The murder weapon was not produced in court, though a knife was mentioned. The accused was not found with any blood stained clothes. He was arrested by members of the public because of a phone call identifying him by name. The clothes he wore during the incident were said to have been burnt in his house by the members of the public.

41. The evidence of witnesses who met him before the incident clearly shows that he had an issue with the deceased on the fateful day. One of the witnesses PW5 Mary Mutemi stated that he had threatened to go home and come back to the deceased's shop. The wife of the deceased Beatrice PW4 was aware of a disagreement from the morning, while PW2 Monica Kavuo saw the accused at 3 pm proceeding to the scene with a knife. The accused was arrested apparently running away from home for an unexplained reason. The accused gave an alibi defence to which he doesn't have a burden to prove. See the case of **Aniseth vs Republic (Supra)**. The audio recordings which were played through radio before me in court were not challenged by the defence, except to doubt the ownership of the sim card. Even if those recordings were discounted, in my view, all the circumstances and evidence on record point to the accused as the culprit who killed the deceased on that day, and no other person. I thus find that the accused caused the death of the deceased.

42. I now turn to malice aforethought. Malice aforethought is defined by statute under section 206 of the Penal Code (Cap. 63). It is an intention to cause death or do grievous bodily harm even if the perpetrator does not care whether death will occur or not. With the facts and the evidence before me, it is clear from the evidence of the wife of the deceased PW4 that there was a long standing feeling of jealousy by the accused against the deceased. On the fateful day also, the accused was seen and heard by witnesses threatening the deceased. The deceased appeared to have left the shop for some time hopefully to let the accused ease off. He did not ease off and he came back to the shop in the afternoon when it was open, deliberately provoked a situation and then went back home, picked a knife and stabbed the deceased once in the chest. It was a vicious stab wound. It was intended to cause death or do grievous bodily harm. I find that the prosecution proved that the accused caused the death of the deceased with malice aforethought.

43. I therefore find that the prosecution proved beyond any reasonable doubts all the elements of the offence of murder against the accused person. I thus find the accused guilty and convict him of the offence of murder contrary to section 203 as read with section 204 of the Penal Code, under section 215 of the Criminal Procedure Code.

Dated, and delivered at Garissa this 19th day of September, 2018.

.....

George Dulu

JUDGE