



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 30 OF 2012 (MURDER)

REPUBLIC PROSECUTION

VERSUS

HENRY MUGENDI IGOKI ACCUSED

J U D G M E N T

1. The accused faces a charge of murder contrary to Section 203 as read with 204 of the Penal Code to which he pleaded not guilty.
2. The prosecution called nine (9) witnesses in this case. The background facts are that on 22/08/2012 after 9.00 pm, PW4 and a friend PW5 went to Mini Bar where PW5 was selling food to patrons. PW4 later went with her baby to PW5's house where she put the baby to sleep. She was joined by the accused who was a cousin to PW5 shortly afterwards. When PW5 came home later that evening, she picked a quarrel with the accused who had refused to leave the house on her request. After an exchange, the accused hit PW5 and a fight broke up.
3. The father and uncle of PW5 and the deceased went to the house and tried to intervene to stop the fight but the accused turned on the deceased for asking him why he was beating a father and his daughter. He hit the deceased knocking him down. He then stabbed him on the chest with a knife he had removed from his trouser pocket. The accused then left the scene as the matter was reported to the AP Camp Siakago and later to Siakago police station. The deceased died of the injuries inflicted on him.
4. The accused in his sworn statement of defence denied having gone to Kanyuambora market where the house of PW5 is situated on the material day. He told the court that he spent the whole day of 21/08/2012 at Ishiara and returned to their Kanyuambora home 7.00 pm. He said he was accompanied by his wife Hanisia Wanja to Ishiara. On 22/08/2012 the accused said that he spent the day at the family shamba working till evening.
5. Later he received a report that someone had been killed and that PW4 and PW5 were arrested as suspects. When he went to see them at Siakago police station, he was arrested and later charged with the offence. The accused said he was framed by PW4 who was his former girlfriend and a mother of his baby.
6. The accused produced a copy of the investigation diary to show that PW5 was arrested wearing a blood stained jacket. This was supported by OB 11 of 22/08/2012.
7. The defence in their submissions said that it was not clear from the evidence who caused the death of the deceased. That PW4 was the only witness who said she witnessed the accused stabbing the deceased with a knife. The case of **MAITANYI VS REPUBLIC [1986] KLR** was cited where it was held: -
 - i. *Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lesser the need for testing with the greatest care the evidence of a single witness respecting identification especially when is known that the condition favouring were difficult.*
 - ii. *When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression in description.*
 - iii. *The court must warn itself of the danger of relying on the evidence of a single identification witness, it is not enough for the court to warn itself after making the decision. It must do so being considered and before the decision. It must do so when the evidence is being considered and before the decision is make.*
 - iv. *Failure to undertake an inquiry of the correct testing is an error of law and such evidence cannot safely support a conviction.*
8. The defence urged the court to rely on the **MAITANYI** case and to warn itself of the danger of relying on the evidence of a single witness

and also to scrutinize with care the evidence of PW5.

9. The defence also raised the issue of investigations leaving out crucial evidence of one Mate and the forensic evidence of the blood stained jacket recovered from PW5.

10. The defence urged the court to disregard the evidence of PW5 and acquit the accused person.

11. The evidence of PW4 who claims to have witnessed the murder must be closely scrutinized as submitted by the defence. This court associates itself with the holding in the Maitanyi case that it has to warn itself of the dangers of relying on the evidence of a single witness.

12. PW4 testified that she was in the house of PW5 at wonder Price Bar and Mini Bar keeping her company as she sold food to customers in the bars which was her business occupation. She later proceeded to the house of PW5 to put her baby to sleep. It is while in the house alone that the accused found her there.

13. It appears that the presence of PW4 in the house in the company of a man did not please PW5. While still at her place of work, PW4 said PW5 has sent one Kinyua to tell the accused to leave her house but he declined to do so.

14. Finally, PW5 came home where she ordered the accused and PW4 to leave her house. PW4 carried her child on her back and went outside the house where she stood. It is at this juncture that the accused and PW5 quarreled and fought. PW4 screamed for help and the father of PW5 and one Eusebio her uncle came to the scene. Their intervention could not stop the accused from fighting with PW5. The father of PW5 was also hit by the accused.

15. The deceased went to the scene with PW5's father and one Eusebio and he also intervened asking the accused how strong he was to fight a father and his daughter. The accused hit the deceased knocking him down. He then removed a knife from his trouser pocket and stabbed the deceased on the chest.

16. PW5 testified about her altercation with the accused that occurred at her home and explained how it generated into a fight between them. She also told the court how the two fought and how her father intervened and was beaten by the accused. The accused turned on PW5 again and hit her with a stick knocking her down. She testified that she became unconscious and was to gain it much later after the deceased had been killed.

17. The evidence of PW4 on the fracas and the fight at the house of PW5 was corroborated by PW5 herself. The accused was said to have been a bit drunk at the time of the incident. He became violent and attacked anyone who tried to stop him from beating PW5. This is how the deceased became a victim. It is only PW4 who witnessed the accused remove a knife from his trouser pocket and stab the deceased on the chest.

18. The investigating officer did not explain why he failed to record the evidence of Mate who was an eye witnesses at the scene of crime. This was lack of due diligence in the investigations and it appears neither the prosecution nor the defence dealt with this omission.

19. However, the evidence of PW4 and PW5 places the accused at the scene of crime. That evidence was corroborative on how the fracas started, progressed into a fight between the accused and PW5 and later spread to other people who had come to the scene to separate PW5 and the accused.

20. The ingredients of the offence of murder were set out in the case of **REPUBLIC VS GACHANJA [2001] KLR 428** where it was held: -

3. There are three essential ingredients of the offence of murder, which the prosecution must prove beyond reasonable doubt;

a) Death of a person;

b) that the accused caused the death through an unlawful act; and

c) That the accused had malice aforethought.

21. The accused denied having been at the scene of crime and said he spent the day working at the shamba and did not go to the bar on the material evening. I did not believe the accused in that he was well known to PW4 and PW5 who saw him at the scene starting and taking active part in the fracas and the fight that followed. PW4 saw the accused pick up the murder weapon and stab the deceased.

22. PW5 explained in her evidence that when the incident took place, there was electricity lights from a shop opposite the home which lit the scene up to the door of Wanja's house. The fight and the stabbing of the deceased took place outside the house of PW5 as revealed by the events that unfolded.

23. The accused alleged in his defence that PW4 was his former girlfriend and had his baby whom he had denied fathering. This brought differences between them and accused believes it led to PW5 framing him. This allegation was dislodged by the events preceding the assault on the deceased.

24. PW4 had met the accused outside Wonder Price bar where he had offered her a drink which she declined. The accused was to follow PW4 to the house of PW5 when she took the baby to sleep. He stayed with PW4 in the house for quite a while as PW5 went on with her business of selling food to the bar patrons. In fact, the accused did not differ with PW4 at all that evening.

25. The time spent together by the accused and PW4 in the absence of the owner of the house demonstrates harmony and friendship between them. In this state of affairs, there is nothing to support the allegation of framing up. It is the owner of the house PW5 who did not want the accused in her house as was later demonstrated by the events that unfolded when she came home.

26. The evidence of PW4 and PW5 placed the accused squarely at the scene. The two witnesses described the scene and the chain of events in clear and fine details and dislodged the defence of the accused turning into a mere denial.

27. The evidence of the killing of the deceased cannot be said to be purely that of a single witness. PW5 was present and actively involved in the fracas at the scene until she was hit with a stick by the accused and fell unconscious. PW5 witnessed and participated in the events leading to the stabbing of the deceased. Although PW5 did not witness the actual stabbing due to her unconscious state, the rest of her evidence corroborated that of PW4 in material particulars.

28. The accused in his denial of being at the scene denied himself the chance of explaining his presence which was supported by ample evidence. However, the burden of proof lies with the prosecution to prove the offence and it must be satisfied beyond any reasonable doubt.

29. It was held in the **GACHANJA** case (supra) that: -

1. It is a cardinal principle of law that the burden to prove the guilt of an accused person lies on the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities.

2. The standard of proof placed on the prosecution to prove the guilt of an accused person is proof beyond reasonable doubt.

30. It is therefore trite law that the court may convict on the evidence of a single witness provided the same is credible and reliable. I have carefully scrutinized and evaluated the evidence of PW4 and PW4 and has no doubt that they were credible and reliable witnesses.

31. PW3 Dr. Macharia Haron of Ishiara District Hospital conducted the post mortem on the body of the deceased. He found that the deceased had among other injuries a deep wound in the anterior chest wall caused by a sharp object. The cause of death was a cardiac-terponade due to massive bleeding in the heart. I am of the view that sharp object is consistent with a stab using a knife as the witness testified.

32. PW4 and PW5 said in their evidence that they had been initially arrested as suspects but later released. PW5 was hurt in the fracas by the accused and became unconscious for some time. This explains that the police took a blood stained jacket from her house. It is the accused who brought up this issue in his defence with a view of exonerating himself.

33. PW8 Dr. Thuo examined the accused on his mental status and found him fit to plead.

34. I am of the considered opinion that the prosecution has proved beyond any reasonable doubt that it is the accused person who inflicted the fatal wound in the chest of the deceased which caused his death. *Actus reus* has been proved on the part of the accused.

35. Section 206 describes malice aforethought 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. The evidence of PW4 and PW5 is that the fatal assault on the deceased resulted from a fracas followed by a fight between PW5 a fight between PW5 and the accused. The accused was an unwanted guest in PW5's house and when he was asked to leave, he kind of felt offended and turned violent. He hit PW5 who hit him back and the fight continued. Any person who intervened to stop the fight including the father of PW5 who was the uncle of the accused as well as the deceased attracted the wrath of the accused.

36. With this evidence which has been well corroborated, I find that the killing of the deceased was not premeditated. The prosecution has not proved malice aforethought on the part of the accused from the evidence on record.

37. I find the accused guilty of the lesser offence of manslaughter contrary to Section 205 of the Penal Code and convict him accordingly.

38. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 15TH DAY OF OCTOBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muthoni for accused person

Ms. Mati for State