



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 50 OF 2016

REPUBLIC PROSECUTOR

VERSUS

PETER GITAHI NDUMIA ACCUSED

JUDGMENT

1. The Accused Person, Peter Gitahi Ndumia, is accused of killing, with malice aforethought, John Githira Mwangi (Deceased), on the night of 22/06/2016 and 23/06/2016 at Zimmerman Estate – Kasarani sub-county within Nairobi County contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code.

2. Kevin Okoth testified as PW1. The Deceased was a supervisor in his place of work – a butchery known as Corner Butchery in Zimmerman, Nairobi.

3. Kevin testified that he was at work on 22/06/2016. The Deceased stopped by the Butchery at around 11:00am and then left with some friends. He came back at around 4:00pm a little drunk. From then he was in and out of the Butchery until around 9:45pm. At that time, the Deceased went to the Butchery to have a conversation with Kevin about sales for the following day. A customer came by and Kevin went in to serve him.

4. Kevin testified that he saw the Deceased walking towards a group of men who stood chatting about five metres away from the Butchery. The Accused Person was one of the men. Kevin could not understand what was said but he saw the Deceased suddenly slapping the men. The men were speaking in Kikuyu which Kevin does not understand.

5. Kevin says that the altercation seemed to have cooled off but about five minutes later, he saw the Accused Person heading off away from the Butchery while the Deceased followed suit. A few minutes later, Kevin heard some noise and came out to investigate. That is when Kevin says he saw the Accused holding a knife engaged in a heated conversation with the Deceased. Again, he could not understand what they were saying as the exchange was in Kikuyu. They were now standing by the gate of a school just next to our butchery.

6. Kevin says he was barely five metres away from them. Sensing that the exchange would get physical, Kevin went to call George, the person working in the butchery next door, to come and assist. When he came back with George, Kevin testified that he found the Deceased and the Accused Person tangled together in a brawl; struggling and fighting on the ground: the Deceased was flat on the ground and the Accused Person was on his knees on top of the Deceased.

7. The Deceased had grabbed the Accused Person's shirt. Kevin and George pulled the Accused Person away in a bid to separate the two disputants. Kevin says that it is at that moment that they realized that the Deceased, who was underneath the Accused Person, had been stabbed; his intestines were already spilling out on the left side. The knife was on the ground.

8. Kevin and George started screaming for help. Kevin also testified that he held on to the Accused Person to make sure that he would not run away. The Deceased remained on the ground unable to speak or move. A mob came and forced the Accused Person to sit and wait for the Police. Shortly thereafter, a doctor from a nearby clinic came and pronounced the Deceased dead at the scene.

9. By and large George, who testified as PW2, corroborated Kevin's narrative. He testified that on the material night, Kevin came running to call him at the butchery he works in. When he went out with Kevin, they found the Deceased on the ground with the Accused on top of him. They pulled the Accused Person away from the Deceased. That is when they saw the Deceased's intestines spilling out of a stab wound on the left side of his abdomen. There was a knife besides the Deceased Person.

10. Dickson Wamae Maina (PW3), a friend to the Deceased who lived nearby, was called by his wife about what had happened on the scene. He rushed to scene where he found the Deceased lying with a stab wound on his left abdomen, intestines spilling out – and the Accused Person seated on a stone nearby. He noticed that the Accused Person had injuries on his face. He called the Deceased's brother, David Mwangi (PW4) who also rushed to the scene from Roysambu. He the Deceased had already died by the time both arrived. Three

days after the incident, David went to identify the body for post-mortem examination.

11. Corporal Michael Mwaniki was attached to Kasarani Police Station on the day of the incident. He was on patrol duties on that day. He received a call from the OCS informing him of a murder scene at Zimmerman with a request that he rushes there. He did. He and his colleagues found a crowd near Corner Butchery. He noted that a Police patrol car under Corporal Chacha had already arrived. The Accused Person was already inside the parked Police vehicle. Upon inspection of the scene, Corporal Mwaniki saw the body of a man lying dead. The man had a single stab wound on his left side on the lower abdomen region. It turned out that the man is the Deceased. The Corporal also recovered a knife which was lying next to the body. The Corporal identified the knife which had earlier been identified by Kevin.

12. Dr. Dorothy Mugwero, a Pathologist working for the Ministry of Health, performed the autopsy on the body of the Deceased. She was presented with a body that a single a stab wound on the left side of the abdomen with the entire small intestines herniated out (popping out of the wound). The wound was going through to the left side of the trunk/back. On its longest dimension it was about 25 cms in length. It was sharp on one edge.

13. There was marked colour of the skin and membranes depicting blood loss. Internally there was about 1.6 litres of bloods collected in the internal cavity. The small intestine had been cut and the blood vessels that supply intra-organs were also cut. Further examination did not reveal any other abnormal features.

14. Dr. Mugwero concluded that the cause of death was abdominal injuries due to penetrating sharp force trauma. She produced the Post-mortem Report as an exhibit in the case.

15. PC Bernard Kiplangat Serem, a Scenes of Crimes expert went to the scene and took some photos which he produced as exhibits in the case as well.

16. Finally, Corporal Paul Chebet testified as PW9. He visited the scene on the day of the incident. He found the Deceased lying outside near Corner Butchery and a knife on the right side of the body. He became the investigating officer in the case. After his investigations, he concluded that the Accused Person had committed murder and recommended that he be charged with the current offence. The Corporal produced the knife as an exhibit in the case.

17. When put on his defence, the Accused Person denied stabbing the Deceased with a knife. He gave a sworn statement. His narrative was that on that day, he was standing near Corner Butchery waiting for his brother as they were to have a meeting. The Accused Person testified that the Deceased confronted him and asked him what he was doing there. He claimed that the Deceased was drunk and that he attacked him by slapping him all the while accusing the Accused Person of obstructing his butchery. The Accused Person says that as the Deceased tried to slap him, he went off balance and clutched on to the Accused Person's shirt. This, the Accused Person says, forced both of them to tumble down a flight of stairs near the butchery and a nearby kindergarten. From the fall, the Accused Person says he ended up on top of the Deceased. It was at that point that someone pulled me away from the Deceased. As he was walking away, he heard someone screaming that the Accused Person had stabbed the Deceased.

18. The Accused Person insisted that he did not have the knife which was produced in Court and that he never stabbed the Deceased.

19. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

20. Flowing from this definition, the Prosecution is required to prove beyond reasonable doubt the following three crucial ingredients in order to return a guilty verdict:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

21. In its closing submissions, the Defence seeks to parry the murder charge on two grounds:

a. First, the Defence argues that from the evidence presented by the Prosecution, it has not been established beyond reasonable doubt that it was the Accused Person who stabbed the Deceased. In particular, the Defence emphasized that none of the Prosecution witnesses saw the Accused Person stabbing the Deceased. The Defence impugns the credibility of the only witness (PW1) who allegedly saw the Accused Person with the knife that allegedly inflicted the stab wound. Further, the Defence argues that the Accused Person could not have had the knife since it is established that the knife was from the Corner Butchery and the Accused Person had no access to the Butchery.

b. Second, the Defence argues that even if the incident happened as told by the Prosecution witnesses, the element of malice aforethought cannot be deduced from the circumstances.

22. Both the Prosecution and the Defence are united that the Deceased, John Githira Mwangi, died on 22/02/2016 near the Corner Butchery in Zimmerman. They are also both united that the cause of death was a single stab wound on the left side of the lower abdomen.

23. However, the two sides sharply diverge on who caused the stab wound: the Prosecution insists that it was the Accused Person; while the Defence insists that it was a self-inflicted stab wound which occurred when the Deceased drunkenly staggered down some stairs while holding the Accused by the shirt.

24. The case, therefore, turns on the credibility and plausibility of the two dueling narratives.

25. The Prosecution case turns on two crucial witnesses: PW1 and the Pathologist. PW1 was categorical that he saw the Accused Person with a knife just before he pulled him away from the Deceased where they had tumbled together. He identified the knife in Court as one from the Corner Butchery even though he could not explain how the knife had left Corner Butchery. PW1 was clear that he was barely five metres away from where the Accused Person and the Deceased were confronting each other. He was also clear that there was sufficient light from the Butchery illuminating the scene. This part of the evidence was corroborated by PW2, PW3, PW4 and the Investigating Officer. PW1's narrative remained unshaken through heavy cross examination by the Defence Counsel, Mr. Otieno.

26. The Defence theory is that the Accused Person never had the knife – and it has not been shown how he could have retrieved the knife from the Butchery. The Defence insists that it was the Deceased who had the knife in one of his hands and that it stabbed him when he fell as he tried to slap the Accused Person.

27. The Defence theory is disproved as implausible by the Pathologist. Dr. Mugwero was clear that the stab wound was a penetrating one and, from its position, it was very unlikely caused by falling on the knife. The stab wound was on the left abdomen; it was also penetrating. Besides, the knife was found – not on the body of the Deceased – but on the right hand side of the body. This, to my mind, completely blazes the Defence theory that the Deceased either fell on the knife or mistakenly stabbed himself in a drunken stupor as he and the Accused Person fell. I found the testimony of PW1 straightforward and credible about what transpired. I believed him when he testified that he saw the Accused Person with a knife. The events pan out: it was the knife that alarmed him sufficiently to go and call for help to separate the two men who were confronting each other. When they came back, the two men were already on the ground – and when they were separated, the Deceased had the stab wound.

28. Though no witness saw the Accused Person actually stabbing the Deceased, the circumstantial evidence is compelling here that it points inescapably to the guilt of the Accused Person and no other reasonable or plausible explanation exists. While accepting that the Prosecution bears the burden of proof at all times and that, therefore, the correct test is whether it can be said that the Defence narrative is so improbable that it cannot reasonably possibly be true, (See **S v Shackell (4) SA 1 (SCA)**), in my view, it is not possible to say that the Accused's Person's version of events has *any* reasonable inherent probability that it is true. It is my view that in this case it properly be said that the "inculpatory fact is incompatible with the innocence of the Accused, and is incapable of explanation upon any other reasonable hypothesis than that of his guilt." See **R v Kipkering Arap Koske & Another 16 EACA 135**. This series of events put together lead an unmistakable inference: it was the Accused Person who stabbed the Deceased

29. What about malice aforethought? Malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or

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; or

c. Intent to commit a felony; or

d. 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.

30. Did the Prosecution prove any of these elements? Looking at the evidence presented in this case in totality, I am not persuaded that the Prosecution established malice aforethought. Evidence from both the Prosecution and the Defence shows that it was the Deceased who attacked the Accused Person first by slapping him. It is not clear why the Deceased so attacked the Accused Person. The physical altercation ensued shortly thereafter. While PW1 saw the Accused Person with the knife, he also saw the Deceased leave the Butchery to confront the Accused Person. The circumstances show that the two protagonists engaged in a physical duel during which the Accused Person stabbed the Deceased. That physical duel was provoked by the Deceased. Evidence establishes that the Deceased was drunk at the time. These circumstances clearly point to incomplete self-defence. The circumstances here do not inconclusively point to an intention by the Accused Person to either kill or cause grievous harm to the Deceased.

31. In the **Joseph Kimani Njau v R [2014] eKLR; Nzuki v R (1993) KLR 171**, the Court of Appeal remarked as follows:

There was a complete absence of motive and there was absolutely nothing on the record from which it can implied that the Appellant had any of the intentions outlined with the fatal consequences. Other than observing that the Appellant viciously stabbed the Deceased and in so doing intended to kill or cause him grievous harm, the Trial Court did not direct itself that the onus of proof of that necessary intent was throughout on the Prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the Appellant beyond reasonable doubt. In the absence of proof of malice aforethought to the required standard, the Appellant's conviction for the offence of murder is unsustainable. His killing of the Deceased amounted only to manslaughter.

32. The remarks by the Court of Appeal in the **Nzuki Case** apply, in my view, to the present case. Clear and uncontroverted evidence in this case shows that it was the Deceased who first attacked the Accused Person.

33. To sustain a murder charge, the Prosecution would have had to prove beyond reasonable doubt that at the point at which the Accused

Person stabbed the Deceased, the Accused Person had the requisite malice aforethought. In my view, this was not proved.

34. What was proved was that the Accused Person and the Deceased were involved in a violent physical duel provoked by the Deceased. The act of stabbing was committed in the midst of this physical duel and in the absence of premeditation or contemporaneous commission of another felony. It was also committed in the act of self-defence since the Accused Person was under attack by the Deceased. However, it is clear that the Accused Person responded with excessive force. There is no evidence at all that the Accused Person faced imminent death or risk of serious injury and there has been no suggestion or evidence that the Accused Person held an honest even if mistaken belief that it was only by repelling the Deceased using the knife that he would have preserved his life.

35. Consequently, even though the Deceased was the unlawful aggressor, it was unjustifiable for the Accused Person to respond with deadly force. The Defence of self-defence, though suggested by the circumstances, is “imperfect” in this case since the Accused did not hold a reasonable belief that it was necessary for him to repel the attack with deadly force to avert an imminent infliction of death or serious bodily harm to himself.

36. Consequently, my conclusion is that the Prosecution has not proved the third necessary element to establish the offence of murder against the Accused Person: malice aforethought. Murder cannot be established in the absence of the third element of premeditation. Instead, the Prosecution has established all the elements for the lesser but cognate offence of manslaughter: the unlawful killing of a human being. Consequently, this Court finds the Accused Person guilty of the lesser but cognate offence of manslaughter contrary to section 202 as read together section 205 of the Penal Code and is so convicted.

Dated and delivered at Kiambu this 22nd Day of November, 2018.

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JOEL NGUGI

JUDGE