



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 21 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY KIMATHI MATI.....ACCUSED

JUDGMENT

Murder

[1] The accused person was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya. The particulars were that on 28th March 2010, at Laare Market, Antuambui location, in Igembe District within Eastern Province he murdered James Mutwiri. The question that falls for determination before this court is whether the prosecution has proved the commission of the offence by the accused beyond any reasonable doubt.

ANALYSIS AND DETERMINATION

[2] I will be careful to evaluate the evidence adduced with judicious alertness in order not to miss the grace and power of the testimony of witnesses and the applicable law. Such is my duty. The evidence is already recorded and is part of the record. But what exactly should the prosecution prove to secure a conviction on a murder charge?

Elements of murder charge

[3] The accused is facing a charge of murder under Section 203 of the Penal Code which defines the offence as follows:-

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

[4] As a matter of law and arising from the above section, the prosecution must prove the following specific elements beyond any reasonable doubt:

- 1. The fact of the death of the deceased**
- 2. The cause of such death**
- 3. That the deceased met his death as a result of an unlawful act or omission on the part of the accused person and**
- 4. That the said unlawful act or omission was committed with malice aforethought.**

Of fact of death of deceased

[5] DR. Timothy Riungu testified as PW3. He produced the Postmortem Form (PEXB 1) on examination carried out on the body of James Mutwiri by Dr. Mutuku. The body was identified by Ernest Kirongo and Grugino Mputhia to be that of James Mutwiri. The report also confirmed that James Mutwiri died. A certificate of death No 094914 in respect of the death of James Mutwiri was issued. Accordingly, the prosecution proved the death of the deceased.

Of cause of death

[6] As a result of the examination of the body of the deceased, the doctor who performed the postmortem formed the opinion that the cause of death was: "PENETRATING CHEST INJURY PIERCING THE HEART TRAUMA". The question then becomes...

Was the death as a result of an unlawful act or omission by the accused person?

[7] According to PW4, NO. 77477 PC Sammy Otuoma, testified that the Investigation Officer (CPL Benard Komen) in his statement stated that the accused stabbed and killed the deceased. He gave details that the accused was at one time in an intimate relationship with a lady called Penina Gakuri. The said Penina broke up with him and found new relationship with the deceased. The break up did not go well with the accused and so he attacked the deceased inside the house where the deceased and Penina lived. Penina was however not called as a witness. M/S Nelima, legal counsel for the accused submitted that the evidence by PW4 was pure hearsay as it was not corroborated by first hand evidence. She also submitted that the evidence by PW1 & 2 was also hearsay and none claimed to witness the commission of the offence herein. I should now seek to find out whether there could be any or more evidence to corroborate what PW4 stated?

[8] PW1, Peter Koome only stated that he was awakened by his wife at about 1.00pm and she informed him that the deceased had been stabbed by Anthony Kimathi. His wife was not called as a witness to substantiate the claim by her husband that the accused stabbed the deceased. Back to what PW1 stated; that he went to the scene and found the deceased lying down in the house and bleeding heavily. Although he had a torch he did not see the body well. He did not also recognize most of the many people gathered in the compound. They later reported matter to the police. While at the station, people brought Anthony Kimathi. He did not know Anthony before then. PW2, Timothy Mwirigi also testified. He said that he received a call from Kennedy Kithinji who informed him that a person had stabbed another in his plot. He rushed to find out what this was. He found people gathered at the gate. He entered the plot. Kithinji told him that the person who had stabbed another was hiding in room 4. He went to room 4 and found the accused therein. He did not know the accused before that night. They took him to the police station.

Circumstantial evidence

[9] In this case, no one claimed to have seen the accused stab the deceased. The foregoing pieces of evidence speak circumstantial. Therefore lead me to the law on circumstantial evidence the principle of which was aptly stated in **TEPER vs. R [1952] 2 All ER. 447** and as was restated by the Court of Appeal at Kampala in **SIMON MUSOKE vs. R [1958] EA 715**, that:-

...in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis that that of guilt.

See also the Court of Appeal in **Dorcas Jebet Ketter (supra)** referring to their predecessor court in the case **Kipkering Arap Koske vs. Republic (1949) 16 EACA, 135** that:-

“that in order for a court to convict an accused person based solely on circumstantial evidence;

(a) The inculpatory facts must be incompatible with the innocence of the accused,

(b) The facts must be capable of no other conclusion or explanation except the guilt of the accused.”

[10] In light thereof, has the prosecution proved beyond any reasonable doubt that the death of the deceased was as a result of an unlawful act or omission by the accused person? The evidence by PW4 made serious claims of love triangle involving Penina, the accused and the deceased. Unfortunately, this vital aspect of the investigations lacked any corroboration. Notably, the said Penina was never called as a witness. I note that PW4 stated that they made efforts to trace the said Penina but in vain. The evidence of PW1 and PW2 is relevant but does by itself sufficient as to enable the court to:

...find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis that that of guilt.

[11] In the circumstances, the prosecution has not proved beyond any reasonable doubt that the death of the deceased was as a result of unlawful act by the accused.

Was act done with malice aforethought?

[12] In the circumstances of this case, did the accused have the necessary malice aforethought? **Section 206 of the Penal Code** defines 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)”

[13] Rarely will a court find malice aforethought where it has come to the conclusion that the death of the deceased was not as a result of the unlawful act of the accused. I have nothing on which to found a finding of guilt. Accordingly, I acquit the accused of the charges of murder herein. The accused shall be released unless otherwise lawfully held. It is so ordered.

Dated, signed and delivered in open court at Meru this 13th day of November 2018

F. GIKONYO

JUDGE

In presence of

Kiarie for state

M/s Nelima for accused

Accused – present

F. GIKONYO

JUDGE

13/11/2018