



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 64 OF 2010

REPUBLIC.....PROSECUTOR

-Versus-

MOSES GITONGA ATHIMA.....ACCUSED

JUDGMENT

[1] The accused person Moses Gitonga Aithima 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 of the offence were that on the 7th day of January 2010. At K.K Kiula village, Nkanda sub-location, Antuambui Location in Laare Division, Igembe North District within Eastern Province murdered Julius Kobia. The accused person denied the charge with the prosecution calling a total of 5 witnesses.

[2] PW1 was Paul Ntongai Murega. It was his evidence that on 7th January 2009, at about 8PM, he had just closed his shop and went around his *shamba* when he heard some people quarrelling on the road where his uncle (deceased), used to light fire. It was his evidence that he met two people Moses Gitonga Ithima (accused) and Isaac Ithima who were telling Julis to move away and his uncle seemed insane as he would light fire there and stay there throughout the night. That, he flashed a torch and went near his uncle to find out what was the problem and that Moses and Isaac both held the deceased and he tried to run but the deceased fell down and he saw the accused stab the deceased on the neck. He then screamed for help and the accused and Isaac ran away. It was his further evidence he did not know why they were quarrelling. He later learnt that the accused was arrested and recorded his statement.

[3] PW2 was Saberina Kaimathiri. It was her evidence that on the material day at about 8PM, she was going to the canteen to buy salt and on her way back, she found Moses Gitonga with Isaack Ithima struggling with the deceased. The deceased was lying down and they told him that he would no longer stay there. It was her further evidence that the deceased was insane and that she flashed a torch at them and Moses (accused) raised a sword and stabbed the deceased on the chest. The deceased rose up and started to run and after a few steps he fell down. She stated further that she knew both Isaac and the accused as they hailed from the same village as she.

[4] PW3 was Ibrahim Mungania. It was his evidence that on the material day at about 8PM, he received a call and was told that Julius had been killed. He went to the scene, observed him and saw that he had been injured on the chest and was already dead. He later went to Meru to witness the post mortem. It was his further evidence that he did not find the accused at the scene but was only told that he had committed the offence.

[5] PW4 was Dr. Charles Njeru a doctor at Meru Teaching and Referral Hospital. He produced a postmortem report in respect of the deceased prepared by doctor Macharia. According to the post mortem report, the cause of death was penetrating chest injury.

[6] After close of the prosecution's case, the accused was placed on his defence and opted to give a sworn statement. In his defence, he put up the defence of alibi. He stated that on the material day he was in Nairobi and that he would go and come back. He also stated that PW2 had told a lie as they had a land dispute. It was his further evidence that he did not have any quarrel with the deceased as he did not work with him.

ANALYSIS AND DETERMINATION

[7] I have carefully considered the evidence which was adduced by the prosecution and also the defence. The prosecution's case was heard by Wendoh J save for the doctors evidence and the defence case. I took over the case and complied with section 200 of CPC. The issues for determination are whether the accused, of malice aforethought, caused the death of the deceased by an unlawful act or omission.

Elements of offence of murder

[8] The accused person is facing a charge of murder. Section 203 of the Penal Code defines the offence of murder in the following terms:-

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

[9] Arising from this definition, the prosecution must prove beyond any reasonable doubt the following:-

a. The fact of and cause of death;

b. That the death was as a result of an unlawful act or omission by the accused; and

c. That of malice aforethought he caused the death of the deceased.

Of fact and cause of death

[10] PW3, Ibrahim Mungania on the material day went to the scene, observed him and saw that he had been injured on the chest and was already dead. He later went to Meru and witnessed the post mortem. PW4 was Dr. Charles Njeru a doctor at Meru Teaching and Referral Hospital. He produced a postmortem report in respect of the deceased prepared by doctor Macharia. According to the post mortem report, the deceased died due to penetrating chest injury. The prosecution has therefore proved the fact and cause of death of the deceased.

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

[11] The burden lies with the prosecution to prove its case against the accused on the standard of proof of beyond any reasonable doubt that the accused caused the death of the deceased by an unlawful act or omission. PW1 and 2 were eye witnesses to this incident. PW1's evidence was that both the accused and Isaac held the deceased and as he tried to run, he fell down and the accused stabbed him on the neck. It was his evidence that he saw the accused stab the deceased. His evidence in this respect remained unchallenged throughout the trial. In cross examination he stated that each (accused and Isaac) had a long knife a fact which he reiterated in re-examination.

[12] PW2 corroborated PW1 when she stated she saw Isaac and the accused struggling with the deceased who was lying down and that when she flashed a torch towards them, the accused raised a sword and stabbed the deceased on the chest. Similarly, the evidence of this witness remained unchallenged throughout the trial. PW3 testified of having been told that the deceased had been killed and that he was told that accused had committed the offence.

[13] I am alive to the fact that and I should warn myself that the incident happened at night and conditions might not be favourable for positive recognition/identification. PW1 and 2 who were eye witnesses to this incident however testified that they had torches and that when they flashed their torches towards the direction of where the accused and the deceased were, they saw the accused stab the deceased. It is not in dispute that at the time, the accused was in the company of one Isaac. They were however categorical that it was the accused and no one else who stabbed the deceased. In cross examination they were even able to state how the accused was dressed and stated that he was dressed in a black jacket and their evidence towards this respect was never challenged. In any event, PW1 stated in his evidence that the accused and his accomplice were brothers and were neighbours whom he had known for long. PW2 similarly stated that the accused was neighbor a fact which is corroborated by the accused when he stated in his defence that they had a land dispute with PW2. This was therefore a case of positive recognition as opposed to identification of a stranger. In the circumstances of this case I am satisfied that the case is free from possibility of any error.

[14] Accordingly, I am satisfied the prosecution proved beyond reasonable doubt that it was the accused who caused the death of the deceased by stabbing him on the chest. He latter succumbed to the injuries. The post mortem report confirmed that the deceased died as a result of a penetrating chest injury. The death of the deceased therefore was caused by the accused and no one else.

[15] **I will tackle the** defence of alibi raised by the accused person; that he was away in Nairobi at the time. The defence was only raised at the defence hearing and was never raised in cross examination. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In the case of **R.V SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6 EACA 145**, the former Court of Appeal for Eastern Africa upheld the decision of the High Court in which it was stated;

“If a person accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval and secondly if he brings it forward at the earliest possible moment, it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings must be stopped.”

[16] In the case of **ATHUMAN SALIM ATHUMAN V REPUBLIC (2016) eKLR**, the Court of Appeal sitting in Mombasa stated as follows:-

“Although the applicant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defense must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed in GANZI & 2 OTHERS V REPUBLIC (2005) 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellants defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence. In the circumstance of this Appeal we are satisfied that when weighed against the evidence of his identification at the scene which we now turn to consider, the appellants alibi was

completely displaced.”

[17] In the instant case the evidence of the prosecution witnesses and especially PW1 and 2 clearly dislodged the accused’s defence of alibi as the evidence of these two witnesses squarely placed him at the scene and this evidence was never challenged. Indeed when cross examined by Learned State Counsel for the State Mr. Kiarie, the accused person’s answer was unsatisfactory as he simply stated that he had no time to question the witnesses or let them know that he was in Nairobi at the time of the commission of this offence. Accordingly I reject the accused person’s defence of alibi as an afterthought.

Of malice aforethought

[18] Having found that the accused caused the death of the deceased and no one else, the next question for determination is whether he had the necessary malice aforethought at the time of the commission of the offence to support a charge of murder. The circumstances which constitute malice aforethought are set out under Section 206 of the Penal Code as follows:

“206. 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.”

[19] See also the case of **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, the Court of Appeal while considering what constitutes malice aforethought, stated thus;

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

[20] The same reasoning was adopted by the Court of Appeal in the case of **Joseph Mwongera Rukaria v Republic [2013] eKLR** where the court stated;

“We are cognizant of the statement by the learned Justices of Appeal made in the Daniel Muthee case. In the instant case, when the appellant cut the deceased at the back side of the neck, he must have known that the act of cutting the deceased on the neck would cause death or grievous harm”

[21] In the instant case, accused person stabbed the deceased with a knife on the chest when he was already down on the ground. The deceased was said to have been of unsound mind and he was not even armed. The attack on the deceased person was unnecessary and unwarranted. The accused person continued attacking the deceased who was helpless even after he fell down. The deceased person died immediately of a single stab wound; by the time neighbours came he was already dead. The accused person must have been aware that his actions of stabbing the deceased would lead to death or cause grievous bodily harm to the deceased person. The accused person therefore had the intention of killing the deceased.

[22] Taking into totality all the circumstances in this case, I find that the prosecution proved malice aforethought within the meaning of Section 206 (a) of the Penal Code CAP 63 of the Laws of Kenya and that the accused person had the requisite malice aforethought in killing the deceased. They proved the charge of murder against the accused beyond any reasonable doubt.

Accused guilty

[23] I therefore find the accused, Moses Gitonga Aithima guilty of the murder of Julius Kobia and convict him accordingly under Section 322 of the Criminal Procedure Code CAP 75 of the Laws of Kenya. Right of appeal 14 days.

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

F. GIKONYO

JUDGE.

IN PRESENCE OF

Wamache Holding brief for Otieno C for accused

Chelule for Namiti for state

F. GIKONYO

JUDGE.