



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 27 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

DANIEL FUNDI MURIITHI.....ACCUSED

J U D G M E N T

A. Introduction

1. The accused is charged with murder, contrary to **Section 203** as read with **Section 204 of the Penal code**.
2. The particulars of the offence are that on the night of 21st and 22nd November 2013, at Kathundiri village, Kevote Sub- location, Makengi Location within Embu County, he murdered **Cyrus Munyi Ndagara**.
3. The accused pleaded not guilty to the charge. The prosecution called a total of 9 witnesses in support of their case. The ingredients of the offence of murder are proof of the offence.
4. At the close of the prosecution case the court ruled that the accused had a case to answer and the accused was put on his defence.

B. Prosecution Case

5. **PW-1**, a girlfriend of the accused for two months before the incident stated that the accused had become violent after she asked him to pay her Kshs. 100= which he owed her. The accused was in a habit of coming home drunk and PW1 did not take this well. A quarrel ensued that led PW1 to seek refuge in a neighbour's house around 4.00 pm on 21.04/2015. The accused followed her to the neighbour and told her to come home but PW1 left for another neighbour's house as she feared for her life.
6. PW1 further testified that she returned home at 10.00 pm when she noticed that her house had been broken into and her clothes torn. She also noticed that her late husband's jacket was missing. She reported the matter at Kevote Police Station where she was directed to look for the accused and inform the police when she got him.
7. She further testified that she noticed the deceased outside the bar and enquired from him of the accused whereabouts to which the deceased answered in the negative. They then left together as they were going in the same direction. The deceased stopped at PW4's home whereas PW1 proceeded to her place where she found the accused in her bed.
8. An argument ensued between PW1 and the accused, which drew the attention of the deceased who was in the neighbouring PW4's house. The deceased confronted the accused as to his behaviour prompting the accused to leave the house and go to the back of the house while the deceased followed him.
9. PW1 testified that he subsequently heard the deceased proclaim "Fundi, ni mimi umegonga hivyo?" Fundi, is it me that you have hit like that? PW1 sensed danger and ran to PW4's house to seek for help. Further PW1 testified that she and PW4 in the company of PW3, a brother to the deceased went to the scene behind PW1's house and found the deceased lying on the ground unable to talk but was responsive to the call of his name. The accused was not at the scene and PW1 testified that she was able to see since there was moonlight.
10. PW1 testified that the deceased had fresh injuries in the middle of the head and was bleeding profusely and that they moved him to one Martin's house. PW1 testified that she reported the matter at Kevote Police Station the following day where she arrived to find PW4 and others already there. PW1 further noted that the deceased was not armed when he arrived at her house.
11. **PW2** identified the body the deceased who was her late brother, to the doctor performing post-mortem. PW3 testified that he did not witness the incident but was in the company of PW1 and PW4 when they found the deceased lying on the ground at the back of PW1's

house. It was his testimony that he together with PW1 and PW4 took the deceased's body to his house when they found him lying on the ground and further that the accused went into hiding until 3 months later when he identified him at Kevote area.

12. **PW4** did not witness the death of the deceased but corroborated the testimony of PW3 in that he went to the scene immediately after the deceased screamed for help. He found him with a fresh injury on the head.

13. **PW5** a police officer at Kevote Police Patrol Base on the 27th July 2014 identified the accused and testified that PW3 and other members public had brought the accused to the police station and alleged that he had a murder case at Manyatta Police Station.

14. **PW6**, Dr. Thuo testified that the accused was mentally fit to stand trial. PW7 carried out the post-mortem on the deceased which stated the cause of death as cardio-pulmonary arrest due to severe head injury. PW8 carried out investigations into the deceased's murder. He testified that he could not locate the accused for he had fled from home for a period of about eight (8) months until the 27/7/2014 when he was arrested by the members of the public and taken to Manyatta Police Station. PW9 was the officer who received the initial report of the deceased's death from PW3 and PW4.

C. Defence Case

15. The accused testified that he was not at home in Kevote on the 21st Novemebr 2013 and only returned on the 27th November 2014 as he had been away at Karima in Sagana since February 2013 growing tomatoes.

16. He further testified that upon his return on the 27/11/2014 he stayed with his friends including PW1 who told him that someone had been murdered a year ago. He was later taken to Kevote Police Station and subsequently charged with the deceased's death.

D. Accused's Submissions

17. The defence counsel submitted that the prosecution had not discharged its duty of proving the case to the required standard as there was no eye witness to the offence and as such the court should acquit the accused.

18. He further submitted that the testimony by PW1 had numerous contradictions of time and suggested that the deceased died somewhere else and was placed at the scene. Further, it was the submission of counsel for the deceased that PW1 had murdered the deceased, as there was no explanation why the accused could fight with the deceased.

19. Counsel further submitted that according to PW8 no murder weapon was recovered and that PW1 was wife to the deceased and had an affair with the accused leading to the fight.

20. Counsel for the accused submitted that there was no evidence to connect the accused to the commission of the offence in fact prosecution evidence had gaps and as such the same ought to go to the benefit of the accused and as such should be acquitted.

E. Issues for Determination

21. After a careful analysis of all the evidence on record, the issues that arise for determination are the following: -

a) Whether the deceased died and what the cause of death was;

b) Whether the death was caused by the unlawful act or omission on the part of the accused.

c) Whether, the prosecution has proved that he accused had the necessary malice aforethought.

F. Analysis and Determination

22. Section 203 of the Penal Code, Cap 63 Laws of Kenya provides that anyone who unlawfully and with malice aforethought causes death of another is guilty of the offence termed murder.

23. **Section 206 of the Penal Code** defines what constitutes malice aforethought. What the provisions of Section 206 mean is that once it is confirmed from the evidence on record that the death of the deceased resulted from the unlawful act or omission of the accused person, and that such act or omission falls within the ambit of the provisions of the said under Section 206, the court need not go further and should make a finding that the accused person is guilty as charged.

a. Whether the deceased died and what caused the death

24. The evidence on record clearly shows that the death of the deceased in this case was established by the evidence of PW7 who performed the post mortem. The deceased had several deep cuts on the head with a depressed skull fracture which lacerated the brain. The deceased died from severe head injuries caused by a sharp object.

b. Whether the deceased died as a result of the unlawful act or omission of the accused

25. There was no direct evidence in this case and the prosecution relied on circumstantial evidence. Circumstantial evidence must pass the

test set in decided cases.

26. In the case of **Nduruya -vs- Republic [2005] KLR 135**, the court held, inter alias, that

“circumstantial evidence was often the best evidence as it was evidence of `surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary before drawing the inference of the accused person’s guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference”

27. In the case of **Mwathi –vs- Republic [2007] 2EA 334**, the court held the view that “in the absence of eye witnesses, the court must consider whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt.

28. It is imperative to determine the inculpatory facts that have been put forward by the prosecution in this case before posing the question: Do those facts form an unbroken chain of evidence that would go to prove that it is the accused person and him alone who can explain how the deceased died?

29. In **Chogo V. Republic 1985 KLR 1**, the Court of Appeal held:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

30. In this case, there is evidence that the deceased was attacked by the accused and subsequently remarked, “*Fundi, ni mimi umegonga hivyo*”. This has not been controverted by the accused. It is my opinion that this statement by the deceased was a dying declaration as he never recovered again.

31. The principle applicable regarding dying declarations is that such evidence should generally be treated with caution where it was made in the absence of an accused. In this case, the deceased was addressing the accused by calling his name “Fundi”. This means, the accused was present when the dying declaration was made. It was heard by PW1.

32. PW4, PW3 and PW4 immediately moved to the scene which was next to their houses and found the deceased lying on the ground in a critical condition. In these circumstances, the deceased must have been in great pain from the injuries which resulted in his death soon thereafter. From the post-mortem report, it is clear that the deceased did not recover from the injurie inflicted.

33. I am satisfied that in the circumstances in which PW1, PW3 and PW4 found the deceased, and in view of the serious injuries testified to by PW7, the deceased made the statement at the point of extremity, and therefore the statement qualifies to be a dying declaration.

34. The accused denied killing the deceased. He claimed that he was not at home in Kevote on the 21st November 2013 and only returned on the 27th November 2014 as he had been away at Karima in Sagana since February 2013 growing tomatoes.

35. I find that it was no co-incidence that the deceased was found injured behind PW1’s home where the accused stayed with PW1 soon after he confronted him and they were seen heading to the back of the house.

36. The inculpatory facts from the evidence of PW1 may be briefly stated: -

- i. The accused was a boyfriend of PW1 and that they visited each other often or stayed together as PW1 admitted in cross-examination.***
- ii. On the material evening around 4.00pm the accused and PW1 quarrelled after the accused went to the house drunk.***
- iii. That PW1 told the deceased that she had disagreed with the accused and asked him to intervene and he assured her that he would look or the accused.***
- iv. That the deceased escorted PW1 to the house of his sister Purity where she took refuge.***
- v. That PW1 later left for her house and was surprised to find the accused there in her bed.***
- vi. That PW1 asked the accused to leave the house and that the deceased who was in his sister’s house next door heard it and moved to PW1’s house.***
- vii. That the deceased intervened and the accused agreed to leave the house of PW1.***
- viii. That the deceased followed the accused outside and after a short while PW1 heard the deceased in a distress call accusing the accused of hitting him.***

ix. That PW1 called PW2 and PW4 who accompanied her to the rear of her house where the distress call had emanated and found the deceased critically injured.

37. I have already stated that the deceased made a dying declaration which PW1 heard from her house. In cross-examination, PW1 confirmed that the scene was about three (3) steps behind her house where she led PW2 and W4 after hearing the deceased raise a distress call the accused had disappeared from the scene but the deceased lay there helpless and unable to talk.

38. I am of the considered opinion that the facts point guilt to the accused in exclusion of any other person in relation to the death of the deceased. The defence of the accused that he was not present at the scene is dislodged by the evidence of PW1, PW2 and PW4 who were involved or intervened in the squabble between him and PW1 in one way or another. This was clear from the evidence of the said witnesses and renders incredible the defence of the accused.

39. I find that the circumstantial evidence coupled with the dying declaration as well as the evidence of other witnesses establishes that the accused caused the death of the deceased through an unlawful act.

c. Whether the perpetrator had malice aforethought:

40. Malice aforethought is defined under section 206 of the Penal Code. Under section 206 it 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

41. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a-e) malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case at the trial.

42. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

43. While giving directions on the matter the Court of Appeal in the case of ***Nebart Ekaita v Republic [1994] eKLR*** stated as follows:

“It remained a matter of questioning whether or not the appellant knew that there was a serious risk that death or grievous bodily harm would ensue from his sustained assault on the deceased. The possibility therefore that the appellant killed the deceased by a sustained unlawful assault but without the intent necessary to constitute legal malice requisite to the proof of the offence of murder contrary to section 204 of the Penal Code cannot be excused. In the circumstances we are unable to uphold the appellant’s conviction for murder.”

44. This was also anchored in the case of ***Nzuki v Republic [1993] KLR 191*** where the court stated as follows:

“Malice aforethought is a term of art and emphasized that:

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i. The intention to cause death.

ii. The intention to cause grievous bodily harm.

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert homicide into a crime of murder. (See also Hyman v DPP [1975] EA 55).”

45. It is not in dispute that there was confrontation between PW1 and the accused that related to their relationship and a debt the accused had failed to pay. The evidence on record is that the deceased who was a close neighbor and cousin of PW1 intervened in two instances to the extent that the accused had to leave PW1’s house.

46. The accused being a boyfriend of PW1 who sometimes stayed in the house must have been provoked by the act of the deceased to drive him out of the house of his lover. It is not in dispute that he was found in bed which may have raised his emotions as he was ordered to leave

because PW1 had expressed herself that she did not want him there.

47. It is on record that immediately the accused left the house and the deceased followed him, the accused hit the deceased. He was found only about one (1) meter from the rear of PW1's house. This means that the attack was so sudden that the deceased did not even manage to defend himself.

48. I find that malice aforethought was not established on part of the accused.

49. In my considered opinion, the evidence establishes a lesser offence of manslaughter contrary to **Section 205 of the Penal Code**.

50. **Section 205 provides: -**

Any person who commits the felony of manslaughter is liable to imprisonment for life.

51. I find that the prosecution have proved the offence of manslaughter contrary to **Section 205 of the Penal Code** and he is hereby convicted.

52. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Momanyi for accused

Ms. Nandwa for State