



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 18 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

VICTOR IRERI NDWIGA.....ACCUSED

J U D G M E N T

A. Introduction

1. The accused was 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 21/4/2015, at Kigaa Village, Kigaa Sub-Location, Embu East division within Embu County the accused murdered one **Patrick Mugendi**.
3. The accused pleaded not guilty to the charge. The prosecution called a total of ten (10) witnesses in this case.

B. Prosecution Case

4. **PW1**, testified that on 21/04/2015 around 7.00pm he heard screams from the deceased's home in the neighbourhood and went there. He found the deceased lying in a pool of blood in the company of two other men. PW1 rushed him to hospital passing through Runyenjes Police Station, where the deceased informed them that he had been attacked by one Victor Ileri.
5. PW2 learnt of the deceased's attack at 8pm on the material night and later met up with the deceased at St. Michael Nursing Home where he was receiving treatment. He further testified that on the 8/2/2015, the accused visited his home looking for the deceased. The accused was armed with stones and stated that he had come to kill her and the deceased. The accused destroyed property upon missing the deceased.
6. PW3 testified that on the material day he heard screams from the deceased's home and proceeded there where he found the deceased lying on a pool of blood. In the company of others, they placed the deceased on a motorbike and supported him, then rushed to Runyenjes Police Station to pick a p3 before moving to St. Michael Nursing Home. He further testified that at the Police Station the deceased named the accused as his attacker.
7. PW4, a brother to the deceased testified that on the material day he received news of the deceased's attack and when in the company of the deceased, asked him who had attacked him, the deceased

responded that the accused had done so. He further corroborated PW2 testimony of the accused prior attack at her home.

8. PW5, another brother to the deceased testified that he received news of the deceased's attack on the material day and met him at St. Michael Nursing Home who was able to identify him by his nickname "Kianda" and later told him, "Ngima", "mutu", "maji" and "victor". This translated as "ugali", "flour", "water" and "victor." He later accompanied the I.O to the hospital in Embu where the I.O recorded the deceased's statement.

9. PW6 testified that on the 8/02/2015 at around 9am he and another officer P.C. Purity Karimi arrested the accused for damaging property at the home of the deceased. He further testified that on the date of the deceased's death, he and APC Douglas Kamangu received information that the deceased had been cut and proceeded to the deceased's home where they found the deceased lying in a pool of blood. He further testified that they later on went to the accused's home where they conducted a search for the murder weapon but did not find anything. On the 24/04/2015 he received warrant of arrest for the accused and proceeded to effect it.

10. PW7 testified that the accused was fit to stand trial. PW8, the government pathologist testified that the cause of death died due to severe brain injuries caused by sharp object trauma. PW9, the government analyst produced a report matching the bloodstains belonging to the deceased to those found on his trousers.

11. PW10, the I.O. testified that he interviewed the deceased in hospital on the 22/4/2015 to the effect that the accused had attacked the deceased on the 21/4/2015 with a panga, cutting him on the head and back severally and then ran away

C. Defence Case

12. The accused testified as DW1 and that he knew the deceased and further that the deceased sodomised him in March 1999 when he was a standard three (3) pupil. He further testified that he had not reported to the police or visited hospital as the deceased had threatened him. He further testified that he did not know who killed the deceased.

13. DW2, a mother to the accused testified that in February 2015 the accused alleged that he had been sodomised by the deceased in 1999 which had led him to become stressed forcing him to take him for counselling at Embu Level 5 Hospital. She testified that she did not know who had killed the deceased.

14. DW3, father to the accused testified that the accused revealed to him and dw2 that the deceased had sodomised him back in 1999. He further testified that he did not know who had killed the deceased.

D. Accused's Submissions

15. Counsel for the accused submitted that there was no evidence, forensic or otherwise that connected the accused to the injuries that led to the deceased's death.

16. Counsel for the accused further submitted that Prosecution Exhibit 4, the deceased's statement was not authentic as it had the name Patrick Muthee instead of Patrick Mugendi which is also on the Information and as such the prosecution was relying on circumstantial evidence. Consequently, counsel for the accused submitted that the ingredients of murder and culpability had not been proved. He relied on the case of **Court of Appeal in Nairobi in Criminal Appeal No. 30 of 2013 Musili Tulo v Republic and Raphael Isolo & Anor v Republic.**

17. Counsel further submitted that there were no witnesses to the deceased's death and that no one had heard the accused threaten to kill the deceased.

E. Prosecution Submission

18. The prosecution submitted that the deceased had made a dying declaration implicating the accused, which was valid as the deceased had a clear mind when making it and recognised his attacker and that this evidence was valid proof of their case. The prosecution relied on the case of Stephen Mutoria Kinganga v Republic (2013) eKLR as well as Section 33 (a) of the Evidence Act.

19. It was further submitted that they had established the death of the deceased beyond reasonable doubt. They relied on the case of Republic v Cleya & Another (1973) EA 500. The prosecution further submitted that the death of the deceased was unlawful and that they had proved the same.

20. The prosecution argued that the accused was a man on a mission to kill the deceased as was evidenced from testimony of PW6 and further by the testimony of the accused on the 8/2/2015. As such it was their submission that they had proved malice aforethought.

21. It was further submitted that it was the accused who had caused the death of the deceased and that they had proved this beyond reasonable doubt.

F. Issues for determination

22. 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 deceased died because of the unlawful acts or omissions on the part of the accused person

c) Whether, the prosecution has proved that he accused had the necessary malice aforethought in killing the deceased, if the answer to(b) above is in the positive.

G. Analysis and Determination

23. 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. Section 206 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 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 the cause of her death was

24. The evidence on record clearly shows that the deceased in this case died. All the prosecution witnesses have testified to this fact. From the above evidence, the issue of whether or not the deceased died is settled in the affirmative. The medical evidence adduced by PW8 who performed post mortem examination on the body of the deceased. According to the post mortem made by PW8, the deceased died from to severe brain injuries caused by sharp object trauma. It is my view that cause of death was proved.

b. Whether the deceased died as a result of the unlawful acts or omissions of the accused person

25. It is not in doubt that there was no eye witness to the death of the deceased. What remains for his court to consider is circumstantial evidence. Though circumstantial evidence has been known to prove a crime with the precision of mathematics courts are cautioned to observe certain basic minimum standards before such evidence can form the basis of a conviction. In the case of Ndurya- 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" (emphasis is mine)

26. 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.

27. The question here is what inculpatory facts have been put forward by the prosecution and whether they 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?

28. In this case, it is in evidence that the deceased gave a statement to the police implicating the accused prior to his death. The accused has disputed the authenticity of this statement on the ground that it has a different name, Patrick Muthee, from the signing name, “Patrick Mugendi”, which is also contained in the information.

29. I have perused the deceased's statement recorded on 22/04/2015 at Embu General Hospital by PW10 the investigating officer. The name of the deceased was indicated on the top right hand corner as “Patrick Mugendi” c/o Kigaa village and two mobile phone numbers including one of his brother are given.

30. At the place of thumbprint/signature the name of the deceased appears correctly as “Patrick Mugendi”. The statement in the court file is a photocopy. On the photocopy, the name of “Mugendi” is cancelled using blue ink and replaced with that of “Muthee”. It is not known who made the cancellation and the purported correction.

31. From the top right hand corner and at the place where the thumbprint was fixed, the name of the deceased is correctly written. PW10 in his testimony confirmed that that was the statement he recorded from the deceased.

32. In my considered view, the statement is therefore that of the deceased Patrick Mugendi and not of any other person.

33. The accused denied the offence and stated that he did not know who killed the deceased. However, he admitted that he and the deceased had disagreed after the deceased sodomised him when he was a young standard 3 pupil.

34. The accused called the evidence of two witnesses who supported his evidence that there were attempts to settle their differences by their parents and the area Assistant Chief.

35. It was submitted by the defence that the circumstantial evidence relied on by the prosecution was inconsistent and unreliable.

36. In the dying declaration which was made one day after the assault, the deceased explained how the accused whom he knew for many years came and forcefully entered the deceased's house and found the deceased preparing super. Armed with a panga he severally cut him on the head and on the back before escaping from the scene. By the time the neighbours who heard the deceased's screams came, they found the accused gone.

37. The evidence is corroborated by that of PW1, PW3 PW4 who answered the distress calls of he deceased. They found him injured critically and took him to hospital.

38. The doctor PW8 testified that the cause of death was severe brain injury due to a sharp object trauma

to the head and that blood loss was contributory. The evidence of PW8 corroborates the dying declaration that the attacker used a panga to inflict the deep and severe cuts.

39. Although it is not a legal requirement to prove motive, in a case of murder, I find the evidence of PW2 the mother of the deceased very crucial. She told the court that about one year before the incident, the accused went to their home looking for the deceased. When he could not find him, he entered PW2's house and destroyed household items.

40. It was confirmed by PW6 a police officer that PW2 reported the incident to the police. The parties opted to settle the matter out of court. The accused in his defence admitted the issue of having been sodomised by the deceased. He said that the matter was sorted out through reconciliation. His two defence witnesses also confirmed the evidence of the accused.

41. The sodomization seems to have affected the accused who was a young boy at the time of the incident. Despite the attempts to resolve the issue through reconciliation initiated by their parents, the accused seems to have carried a grudge against the deceased.

42. It is my considered opinion that this evidence of the unbecoming conduct of the deceased which is not denied led the accused to keep hunting for him with a lot of bitterness. The motive of killing is founded on this old history of the relationship between the two young men.

43. In **Choge 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.”

44. I find that the dying declaration satisfies the legal requirement and has been well corroborated by the evidence of PW1, PW3, PW4, PW6 and PW10.

45. The deceased was attacked in his house as he prepared dinner after the accused forcibly entered into to his house. This presented the deceased with an opportunity to see and recognise the accused.

46. The facts drawn in the above analysis even in the absence of the dying declaration point the guilty to none other but the accused person.

47. I find that the prosecution have proved that the accused was responsible of the unlawful act that led to the death of the deceased.

c. Whether malice aforethought has been proved:

48. 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.

c. An intention to commit a felony.

49. The accused found the deceased in his house around 8.00pm when he or any other visitor was least expected. He was armed with a panga and immediately set on the deceased inflicting very severe cuts on the head and back. It is the cut on the head and the loss of blood that caused the death of the deceased according to PW8 the doctor. The deceased had no chance of defending himself in the circumstances.

50. It was held in the case of Nzuki v Republic [1993] KLR 191 that: -

“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).”

51. The attack on the deceased and the serious injuries inflicted on him demonstrate that the accused had knowledge that his act would cause the death or grievous harm to the deceased as described in Section 206 of the Penal Code.

52. I find that malice aforethought has been established on part of the accused.

53. It is my finding that the prosecution have proved beyond any reasonable doubt the offence of murder contrary to **Section 203** as read with **204 of the Penal Code**.

54. I convict him accordingly.

55. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nandwa for State

Mr. Ithiga for accused

Accused present