



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 72 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MWITI M'TURUCHIU.....ACCUSED

JUDGEMENT

1. The Accused person, David Mwitim'turuchiu was charged with Murder Contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya. Particulars of the offence were that; the accused on 13th October, 2008 at Kaa Village, Amwathi Sublocation. Kabachi Location, Meru North District within Eastern province, Murdered Martin Murungi M'Mario. The Prosecution called five (5) witnesses. The defence called only the accused.

Their testimonies were recorded verbatim and are part of the record

Elements of Murder

2. To secure a conviction for murder, the prosecution must prove beyond reasonable doubt the following:-

- 1. The death of the accused and the cause of death;***
- 2. That the accused caused the unlawful act or omission which caused the death; and***
- 3. That the accused had malice aforethought as defined under section 206 of the Penal Code***

3. Instances of malice aforethought are stated in 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 of any person who has committed or attempted to commit a felony

The death of the Deceased and cause of death

4. The deceased died on 16th October 2008, 3 days after the day of the confrontation between him and the accused. According to the post-mortem report prepared by Dr. I. Macharia the cause of death was Hypovolemic shock to haemorrhage caused by damage to the right femur. Pw5, Dr. Paul Wambugu works at Meru Teaching and Referral Hospital produced the report on behalf of Dr. I. Macharia. He knew his signature and handwriting. Accordingly the death of the deceased and cause of death has been proved beyond any doubt.

Did the accused cause the unlawful Act of omission which cause the death?

5. PW1, Jeremiah Murungi, Pw2, Gerald Kaingi and Pw3, Pius Mugambi all testified that they were at the scene of the crime when the accused were embroiled in a confrontation with the deceased. They all testified to knowing the accused and the deceased before the incident.

6. It was their testimonies that the accused and the deceased were at Pw1's miraa canteen at Thanganine town when a confrontation ensued between the accused and the Deceased.

7. It was Pw1's testimony that the deceased had told the accused that he had no business doing there since they had previously quarrelled many times. That the accused got hold of the deceased and he tried to separate them but after 6- 10 mins the accused removed a knife from his coat (Inner pocket) and chased the deceased with the knife wanting to stab him. That the deceased fell on the ground and was stabbed at the thigh with the accused.

8. After he had stabbed the deceased, the accused ran with the knife as if to stab somebody. By then PW2 AND PW3 were present. He later on sent for the accused brother and gave him Kshs. 1000/= with which he took the deceased to Hospital, by then the accused had ran off, they reported the matter to the police station together with Pw2 AND Pw3.

9. On cross-examination he testified that the knife was about 6 inches (15cm) and that it took 10 mins to take the accused to the hospital and that it is the deceased brother who took the deceased to the Hospital. The deceased died 2 Days later.

10. Pw1 however did not know whether the accused had an I.D. card at that time.

11. Pw2 restated what pw1 had testified. He also confirmed that he was the one who tied a wound to try and stop the bleeding. However on cross-examination he stated that the accused was not 18 years at the time of the incident and this he could confirm because he had known the deceased since he was young.

12. Pw3 reaffirmed the statements of Pw1 and Pw2. He equally stated that it was David, brother to the deceased who took the deceased Hospital.

13. PW4 Eric Luchechi testified that he was the Investigating officer in the matter. That on 13/10/2008 an assault report was made toby the brother of the deceased. He testified that he visited the scene of the incident ant interviewed about 30 people. That at the time there were blood stains but it had drizzled and the blood had spread out. He visited the deceased in Hospital but was unable to talk to him because he was in pain. He was later informed by George Mutuma and Isiah Muriuki that the deceased had died. He attended to the post-mortem conducted on 5/11/2008.

14. He testified that he had learnt that the accused had insulted the deceased 4 times and that the deceased was preparing his miraa for sale and appeared drunk. A fight broke out witnesses intervned but accused had a knife with which he stabbed the deceased. He identified the deceased in the dock.

15. On cross examination he testified that he is unable to ascertain whether an age assessment of the accused person was done. He averred that the p3 form age assessment was than he is less than 18 yrs.

16. The accused person also testified that was 15yrs old at the time and that he was not I n school because he lacked school fees. That on the material day he had bought miraa and placed it at a particular place but the deceased informed him to remove the same. A struggle ensued and the knife he had been using fell down and stabbed the deceased. He ran home and informed his brothers who later took the deceased to the Hospital. He was later to be informed by his brother that the deceased had died out of the stab wound.

17. He averred that he had not differed with the accused and that he did not stab him intentionally.

18. The Testimonies of Pw1 to Pw4 were consistent that the accused stabbed the deceased on the thigh. The accused also confirmed that he did not intentionally stab the deceased. The post-mortem report presented by Pw3 shows the cause of death as hypovolemic shock severely to bleeding caused by damage to the left femoral vein. In cross examination he testified that the cause of death was bleeding due to a cut in the vein. He noted that there were effects at intervention but he could not categorically say it was negligence on the part of the medical team. The injuries therefore were inflicted by the accused. Therefore there is proof beyond reasonable doubt that the accused caused the unlawful act

Did he do it with Malice aforethought?

19. In the offence of murder, malice aforethought is taken to be the mental element or *mensrea* of the offence; ordinarily, it takes the form of an intention unlawfully to kill which is the express malice or an intention unlawfully to cause grievous bodily harm which is the implied malice.

20. In **Republic v Stephen SilaWambua Matheka [2017] eKLR** it was held;

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. In the Ogelo v Republic [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held interalia that by dint of section 206 (1) an intention to cause death or grievous harm malice

aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of Ernest Bwire Abanga Onyango v Republic [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.

See also Republic v Martin Kinyua Nancy [2016] eKLR

21. Beginning from the point that the accused was a minor and just dropped out of school for the lack of school fees the accused was eager to fend for his own in a tough economic environment.

22. Prior to the incident the accused were friends with the deceased. This can be ascertained from the pre-bail report in which the family of the deceased confirms that they know the accused prior to the incident. The same is confirmed by Pw1 to Pw4.

23. It is not equally ascertained that the accused used the knife with the intent of killing the deceased. He clearly stabbed him in the thigh. The medical officer did not wholly prescribe the stabbing as the proximal cause of the deceased demise he also apportioned blame to hypovolemic shock which may be a resultant cause of the Injury sustained.

24. Again from the evidence the accused was engaged in a struggle with the deceased and both of them prior to the fatal stab were determined to injure each other. It is also clear from the record that the accused had been provoked by the deceased on numerous occasions prior to the material date and equally on the material date the deceased had provoked him by asking him to leave the market space they commonly shared.

25. Lastly the accused though accosted by members of the public presented himself to the police upon learning of the demise of the deceased.

26. In view of the foregoing, I find that the charge of murder cannot be sustained against the accused. He is acquitted of offence of murder.

27. I find the accused guilty of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

28. It is hereby so ordered.

HON. A.ONG'INJO

JUDGE

6.12.2018

Before Adwera J

Kinoti – C/A

Mrs Mwathi for state

Mr Kaumbi Advocate for accused.

Accused – Present in person

Court

Judgement delivered, dated and signed in court on this 6th Day of December 2018

HON A. ONG'INJO

JUDGE

Mrs Mwathi

I have no records. Accused maybe treated as 1st offender.

Mr Kaumbi

Accused is remorseful that a life was lost in scuffle. He has reflected on the issue and apologised to the family of the deceased. He has grown up to be a responsible young adult. He has a wife and a young child and he provides for them. Unfortunately the child has cardiac complications which require expensive medication. The child underwent surgery on 3.11.2018. We pray that a non custodial sentence be meted out. Accused spend 5 years in custody and that period should be taken as punishment. We have discharge summary for the child as well as certificate of birth and interim bill.

Order

Mention 24.1.2019 for victim Impact statement. Copies of the documents to be made by accused and placed in the file.

Accused Bond extended.

HON. A. ONG'INJO

JUDGE