



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 28 OF 2011
REPUBLICSTATE
VERSUS
SHADRACK KIPRUTO KIPKENERACCUSED
JUDGMENT

The accused **SHADRACK KIPRUTO KIPKENER** has been charged with the offence **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the 15th day of March 2011 at Rusonga Village in Mogotio District within Rift Valley Province murdered KIPKONGEI KIPTOO”

The accused pleaded ‘**Not Guilty**’ to the charge. His trial commenced before **Hon. Justice Anyara Emukule** (retired) on 2/10/2012. The Hon. Judge heard the first five (5) prosecution witnesses. Following his transfer to the Mombasa High Court I took over the case and recorded the evidence of the remaining one (1) witness. A total of six (6) witnesses testified in the case.

The prosecution case is that on 14/3/2011 at about 6.00pm, some villagers had gathered at the home of the accused’s father, where busaa was brewed and sold, to partake in the drink. The accused and the deceased were amongst the group who were there. The two were outside and engaged in a card game.

PW3 BERNARD KIPROTICH YATOR stated that at about 6.30pm he was passing by that home when he saw the accused who was holding a knife raise his hand and stab the deceased. The deceased fell to the ground bleeding from a wound on his left side. The accused ran away. Others came and the deceased was rushed to hospital. He died the next day whilst undergoing treatment at Mercy Mission Hospital in Eldama Ravine.

The matter had been reported to police who carried out investigations. A few days later the accused was found in a neighbouring village and was arrested. He was later taken to court and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he admitted to having stabbed the deceased during the course of an argument.

This court must now analyse the evidence on record and reach a determination on whether the charge of murder has been proved to the legally required standard that is beyond reasonable doubt.

Section 203 of the Penal Code, Cap 63, Laws of Kenya defines the offence of murder thus

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

The prosecution must tender evidence sufficient to prove the following three ingredients of the offence of murder beyond reasonable doubt.

- i. Proof of the fact as well as the cause of death of the deceased.
- ii. Proof that the deceased met his death due to an unlawful act or omission on the part of the deceased.
- iii. Proof that said unlawful act or omission was committed with malice aforethought.

The fact of the death of the deceased is not in any doubt. **PW1 EZEKIEL KIPCHUMBA KIPTOO** told the court that he went to the home of the accused and found the deceased lying in a pool of blood. **PW3** told the court that he witnessed the stabling of deceased. Together with other witnesses they helped to rush the deceased to hospital where he unfortunately succumbed to his injuries.

PW4 JOHN KIPTOO SONGOL was the father to the deceased. He went to the mortuary where he identified the body of the deceased for purposes of the autopsy. All these witnesses who knew the deceased well gave his name as **‘Kipkongei Kiptoo’**.

Evidence regarding the cause of death was adduced by **PW5 DR. JOSEPH KANGOR** who at the material time was working at Mercy Mission Hospital in Eldama Ravine **PW5** told the court that on 21/3/2011 at about 12.00 noon he conducted an autopsy on the body of the deceased. He noted a cut wound on the left side of the abdomen. Based upon his examination **PW5** opined that the cause of death was **“traumatic penetrating abdominal injury with subsequent injury to the mesenteric vessels and injury to the spleen secondary to assault”**. The doctor filled and signed the post-mortem report which he produced as an exhibit in the case **P. Exb 1**. This was an expert medical opinion and was neither challenged nor contravened. I therefore find as a fact that the deceased met his death due to a stab to the abdomen.

Having proved both the fact as well as the cause of death the prosecution must go further and tender evidence to prove that it was the accused who fatally stabbed the deceased *ie* the actus reus for the offence of murder must be proved.

In this case **PW1** told the court that upon his arrival at the homestead of accused’s father he found the deceased lying on the ground bleeding from a stab wound to side. **PW1** questioned the deceased about what had happened to him and the deceased said it was the accused who had stabbed him. Shortly thereafter the deceased died. This statement of the deceased identifying the accused as the one who had stabbed him amounts to a **‘dying declaration’**.

In **DZOMBO CHAI Vs REPUBLIC Criminal Appeal No. 256 of 2006** the court held as follows:

“A statement by a dead person as to the cause of his death or as to the circumstances of the transaction which results in his death in cases in which the cause of death of the person comes in question is admissible under Section 33(a) of the Evidence Act.....”

The deceased’s identification of the accused as the man who stabbed him is admissible in this case.

However a **‘dying declaration’** on its own is not sufficient to prove the identity of the perpetrator. In the **DZOMBO CHAI** Case (Supra) the court went on to hold that

“..... Although the court can in law solely rely on such evidence, there is however a rule of

practice that a dying declaration must be satisfactorily corroborated to justify a conviction”

Therefore a dying declaration must be accompanied by other corroborative evidence in order to justify a conviction.

PW3 BERNARD KIPROTICH YATOR told the court that on the material day he was on his way home with his family’s groceries and he was passing by the homestead of the accused. **PW3** states that he saw the accused stab the deceased. In his evidence **PW3** states

“I saw the accused stab the deceased. I did not ask him why he stabbed the deceased”

Under cross-examination by defence counsel **PW3** goes on to explain that

“I was about 40 metres where I saw the accused stab the deceased. I was on the road. They were near the fence not in the house.....”

The incident occurred at 6.30pm. It was still light and visibility was good so the witness was able to see well. Both accused and deceased were persons whom the witness knew well as they were both his neighbours. There would be no possibility of a mistaken identity.

PW3 stated that after stabbing the deceased the accused ran away **PW3** rushed to the aid of the accused.

Apart from the evidence of the dying declaration and the eyewitness account given by **PW3** the accused in his unsworn defence admitted that he did in fact stab the deceased. In other words the accused readily concedes to having committed the ‘**actus reus**’ for the offence of murder. On the basis of the evidence available including the accused’s own admission of the fact I find that it was the accused who fatally stabbed the deceased.

The final ingredient of the offence of murder is malice aforethought which form the ‘**mens rea**’ for this offence. It must be shown that in stabbing the deceased the accused acted with a pre-meditated intention to kill or cause grievous body harm.

This incident occurred at a busaa drinking den. Both accused and deceased had been drinking. The witness state that the two had gone outside together to play a game of cards.

In his defence the accused told the court that he was playing cards with the deceased when a quarrel erupted between them over 2,000/= he owed deceased. The accused claims that it was the deceased who followed him to his father’s house and attacked him with the knife. The accused stated that he managed to wrest the knife away from the deceased and stabbed him.

The defence of the accused is in my view both a probable and plausible explanation of what happened on the material day. There is no evidence to contradict his version of events. No witness saw what transpired between the two. **PW3** witnessed the stabbing but he had no idea what had occurred minutes prior to the stabbing. He therefore cannot discount what accused has stated in defence. The accused has stated that it was the deceased who first attacked him with a knife. There is nothing to disprove this. No witness saw the accused with a knife and no witness could testify that it was accused who had the knife first. Indeed nobody mentions where this knife came from.

I reiterate that the accused’s defence is plausible and served to negate the existence of premeditation on his part.

The accused and deceased were engaged in a confrontation which degenerated into a fight. The accused acted under provocation and therefore could not be said to have formulated the requisite mens rea for the offence of murder. Section 207 of the Penal Code provides that

“207 when a person who unlawfully kills another under circumstances which but for the

provisions of this Section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only”

For the deceased to attack the accused with a knife amounts to an act of provocation. The accused reacted and wrested the knife from deceased and stabbed him in turn. The accused acted in the heat of the moment. I find that no malice aforethought existed. I therefore convict him of the lesser offence of manslaughter contrary to Section 202 of the Penal Code.

Dated and Delivered in Nakuru this 3rd day of February, 2017.

Ms Njagua for Accused

Maureen A. Odero

Judge