



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL CASE NO. 21 OF 2013 (MURDER)
REPUBLIC.....PROSECUTION
VERSUS
FRANCIS KINYUA MAMIKA..... ACCUSED

J U D G M E N T

1. The accused faces the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the night of 18/10/2013 at Karingari Trading Centre in Embu West District, Embu County, he murdered one Martin Mugambi. The accused pleaded not guilty to the charge.
2. The evidence of the ten (10) prosecution witnesses maybe summarized as briefly. On the 18/10/2013 at around 10.00 p.m., PW1 a former wife of the accused was accompanied by the deceased as she walked back to her kiosk to pick some cigarettes which the deceased had requested for. On the way, they met the accused who was holding an object which PW1 did not identify. The accused immediately attacked the deceased by hitting him with the object.
3. PW1 escaped and went to the plot where she was staying as she called for help. She then returned to the scene where she found the deceased on the ground and the accused sitting on him as the two struggled with each other.
4. When the accused saw PW1, he ran after her but was not able to catch up. With the aid of security lights from a bar across the road opposite the scene, PW1 said she was able to identify the accused person who had been her spouse for a period of eight (8) years.
5. PW7 the chief of Gatari South location received the report of the incident and was given the name of the accused as the suspect. A short while later, he was called by PW3 and PW4 members of the Kathigiri community policing group who informed him that they had arrested a man who looked suspicious and wore blood stained clothes.
6. Police including PW5, visited the scene and removed the body and took it to the mortuary the same night. The accused was re-arrested by police and taken to Manyatta police station. The following morning, he led PW5 to a place near a stream where he had hidden the murder weapon, namely a knife. It was recovered and taken as an exhibit but the accused had already cleaned it of the blood.
7. In defence, the accused in his sworn statement said that he spent the material day 18/10/2013 at Karurumo at a construction site. He returned home at around 8.00 p.m. and was informed by his son DW2 that there were people who had come to his house twice looking for him. He then left his house to go to the shop to buy phone credit.

8. The accused stated further that he had separated with his wife PW1 since 2009 and that she had returned to her parents. On his way back to the house, the accused found two men accompanied by PW1 outside the gate of the plot where he stayed. He said PW1 gave one of the men a knife and told him to do as she had instructed him.
9. The accused was then attacked with the knife after being dragged to the road away from his plot. One of his attackers slipped and fell down and was injured by the knife. He went to hide at a bush near the stream and was to return to his house later. The accused said he sustained some injuries on the left side of the stomach and the shoulder.
10. The accused said he was arrested by three men the same night as he proceeded to Manyatta police station to report the matter. Police came for body of a dead man was inside and that PW1 was in the vehicle. He was then charged with the offence while PW1 was locked in overnight and released in the morning.
11. The accused called his 14 year old son DW2 as a witness. He testified that he was at home in the evening of the 18/10/2013 when two men came to their home twice around 7.00 p.m. and 7.30 p.m. asking for the accused. The accused came home around 8.00 p.m. and went to the shops to buy phone credit but did not return home that night.
12. The only witness who witnessed the incident is PW1 a former wife of the accused with whom he had separated for about five years before the incident. It is important to note that DW2 who is a son to the accused was aged 14 years when he testified. The couple said they had been married for 6-8 years before separating in the year 2009. It was not clear whether DW2 was a son of PW1 or from another union.
13. In their testimonies, PW3 and PW4 said they arrested the accused around 11.00 p.m. which was about one hour after the incident. They said the accused looked suspicious. He was carrying a bag containing dusty clothes. The clothes that the accused wore were blood-stained and dusty.
14. PW3 and PW4 were on their usual duties of patrol in groups of community policing members. They did not know anyone that had committed a crime at Karingari which about 4 kilometers from Kathigiri where the accused was arrested. The accused had a fresh cut on the fore face and was bleeding. He defied the orders of PW3 and PW4 to stop.
15. The way the accused was arrested and the state in which he was as well the luggage he was carrying does not support his claim that he was going to report the incident at Manyatta police station as he said in his defence. PW3 said the accused was in a panic mood and was breathing heavily. This supposes that he had either been running or walking very fast before he met with PW3 and PW4.
16. The clothes he wore and the ones in the bag were dusty suggesting that his body had earlier on come in contact with the ground, probably as he struggled with the deceased. PW1 said she saw him sitting on the deceased when she returned to the scene. On being questioned, the accused said he was a mason (fundi) and was going to work. This is also contradicted by his defence that he was going to report the incident.
17. When PW7 received the report of the murder of the deceased, he was given the name of the accused as the suspect. The accused was arrested a short while later in a nearby village probably trying to escape. The accused lied to the community policing members that he was going to work and could not explain the cause of the fresh injury on his forehead. In normal circumstances, the accused should have treated the need for treatment more urgently and sought help from a friend or a neighbour to escort him to hospital through the police station.
18. The court did not believe the defence of the accused that he was seized outside his gate and dragged towards the shops where he was attacked. Neither did he convince he court that PW1 is the one who confronted him armed with a knife. From the interview by PW3 and PW4, the accused did not tell the truth of what he was doing at the place of arrest.

19. The truth came out later from PW1 who had witnessed the incident. The evidence of PW1 that the accused is the one who attacked the deceased at the shopping centre was credible and consistent. It placed the accused at the scene of crime and suggests that the motive of the attack could have been the fact that the deceased and his former wife were close friends or in a love affair given the time of the night he saw them walk together to and from PW1's place of business. For him to have been armed with a knife during the attack, means that he must have seen them earlier and armed himself. PW1 said that she had already closed the kiosk and was returning there to pick some cigarettes needed by the deceased.

20. The question for this court to consider is whether it is safe to rely on the identification of a single witness. I warn myself that there is need to test such evidence with the greatest care and to examine the conditions favouring positive identification.

21. It was held in the Court of Appeal in the case of **OGETO VS REPUBLIC 2KLR [2004] 15** that:-

It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.

22. The scene was at a lighted area of the shopping centre. The security light of a hotel opposite the road aided PW1 to identify the accused and even notice that he was holding an object. The accused was the estranged husband of PW1 and she knew him well so as to easily recognize him. The issue of mistaken identity does not arise in the circumstances.

23. It was held in the Court of Appeal case of **KIRIUNGI VS REPUBLIC [2009] KLR 638** that:-

(1) The complainant, who was the star witness, was not only honest but truthful. He gave no reason to the two courts to doubt his credibility hence the appellate court had no reason to depart from that assessment of the witness.

(2) The fact that the appellant held a knife to the complainant's throat after recognizing him meant the appellant was at arms length from the complainant and was clearly visible. The complainant had hence visually and positively identified the appellant at the scene.

24. The evidence of PW1 was corroborated by that of PW3 and PW4 who arrested the accused about an hour later with a fresh and bleeding injury on the head, wearing and carrying dusty clothes and the lies told by him as to what he was doing and where he was going. If the accused had not been involved in the incident, he would have been able to explain his whereabouts at that time of the night and give the right destination of his night trip.

25. PW5 testified that the accused led him to a bush near a stream where where he had hidden the knife. PW10 found that the deceased died of a stab wound caused by a knife or a sharp objection.

26. The facts of the case before me are more relevant to the Kiriungi case because PW1's evidence did not "stand alone". It was corroborated by that of PW3, PW4, PW5 and PW7. I come to the conclusion that the accused was positively identified and recognized by the witness.

27. I find that the prosecution have proved that the accused is the one who inflicted the injury which caused the death of the deceased.

28. The prosecution requires to prove malice aforethought in addition to the *actus reas* in order to establish the offence of murder.

29. Section 206 of the Penal Code defines malice aforethought as follows:-

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.

30. The prosecution have shown that the accused was not provoked. It is him who attacked the deceased without any provocation. There was no evidence of any exchange of harsh words between the two.

31. The injury was that of a stab wound, using a knife. This is a very grave injury and the accused must have known that by inflicting the said injury, it would cause grievous harm or end the life of the deceased. The gravity of the injury is evidence of malice aforethought as provided under Section 206(a) of the Penal Code.

32. It was held in the case of ***OGETO VS REPUBLIC (supra)*** that Section 206 (a) of the Penal code, malice aforethought is deemed to have been established by evidence showing an intention to cause death.

33. I find that the prosecution have established malice aforethought against the accused person.

34. The prosecution have established all the ingredients of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. I find the accused guilty and convict him of the offence accordingly.

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF MARCH, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Kariithi for accused

Ms. Nandwa for State

Accused present