



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 65 OF 2013

REPUBLICPROSECUTOR

VERSUS

LABAN MURUNGA MUTSALI.....ACCUSED

J U D G M E N T

Introduction

1. Laban Murunga Mutsali has been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars being that on the 14th day of December, 2013 at Itenyi Village Shinyalu Location within Kakamega County [he] murdered Benson Bahati Mutsali. The accused person took plea on 27.01.2014 during which he denied the charge. Thereafter the case proceeded to hearing before Hon. Mr. Justice Dulu who took the evidence of the first 3 witnesses;- Anne Nanyama PW1, Christopher Munyasa, PW2 and Eunice Naliaka PW3.

2. When Hon. Mr. Justice Dulu was transferred to Garissa High Court, Hon Mr. Justice Mrema took over the case upon due compliance with Section 200(3) of the CPC and heard the evidence of Dr. Dickson Mchana, PW4 and Number 215351 Chief Inspector of Police Benedict Masee.

3. At the close of the prosecution case, the court ruled that the accused person had a case to answer and placed him on his defence. Hon Mr. Justice Mrema was transferred to Migori High Court before the accused person testified, so on 03.02.2016, this court took over the case after due compliance with section 200(3) of the CPC. This court heard the defence case. The accused person testified on oath and called no witnesses.

The Prosecution Case

4. From the evidence on record, the deceased and the accused person are brothers. The prosecution case is as follows; just prior to the unfortunate incident leading to the death of the deceased, the accused person had just been released from prison. At about 5.00pm on 24.12.2013 Anne Nanyama, PW1 (Nanyama) had just finished preparing food for the family when the deceased and the accused person started quarreling. The accused person released a dog on the deceased and when the deceased complained about what the accused person had just done, the accused person assaulted the deceased. Nanyama tried to intervene in the fracas to no avail. The deceased fell down and the accused person stabbed him with a knife on the neck. Nanyama screamed as she also went to the home of the area Sub-Chief to report the incident.

5. On her way from the home of the sub-chief, Nanyama saw the accused person being ferried away by a motor bike rider. She again screamed, telling the motor bike rider that the accused person had killed somebody. On hearing Nanyama's screams and utterances, he let the accused person to disembark from the motorbike. Nanyama also testified that according to the accused person. He got the knife from the deceased, though she could not say where he took them after the attack. Nanyama also testified that the deceased and the accused person had never quarrelled before.

6. Among the people who responded to Nanyama's screams was Christopher Munyasa, PW2 (Christopher). He testified. That he saw the deceased seated in a chair with a knife wound on the right side of the neck. The deceased was dead. When the accused person was asked about what had happened he(accused) told Christopher that it was Nanyama who had stabbed the deceased. On being searched by Christopher, the accused person was found to be carrying a panga on him and as Christopher struggled to wrestle the panga from the accused person, he(accused) got cut on this fingers. When Nanyama got home and saw the panga, she took it and cut the accused person on the head before the accused was tied up beaten and later escorted to Shinyalu Police Station.

7. During cross examination, Christopher testified that the accused person was a person of hot temper and was always quarreling his brothers for no apparent reason.

8. Eunice Naliaka, PW3, a sister to both deceased and accused learnt of the death of the deceased on the same evening on 24.12.2013. when she arrived at their home, she found where the accused person had already been tied with a rope awaiting arrival of the police. She however, confirmed to the court that both the accused and the deceased used to take alcohol.

9. Number 21535` Chief Inspector of police Benedict Masee testified as PW5. During the material time, PW5 was the in charge at Shinyalu police post. He was informed of the incident by the OCPD Kakamega. He went to the scene where she met Nanyama who took her to the house where the deceased was seated on a chair and bleeding from the neck and back. PW5 stated that Nanyama informed him that the accused person and the deceased had come home drunk around 6.00pm and after an argument the accused went into his house and brought out a knife, a panga and a hoe and used the knife to stab the deceased person. PW5 stated that though the panga and the hoe, both of which were produced as PExhibits 2 and 3 respectively, the knife was never recovered. PW5 took the accused person to Kakamega County General Hospital for treatment and after recording witness statements, PW5 charged the accused person with the present offence.

10. From the cross examination, PW5 confirmed that the only eye witness to the incident was Nanyama. Dr. Dickson Mchana, PW4, Produced the post mortem examination report. The autopsy was conducted by Dr. Kamau, a senior medical Officer at Kakamega General Hospital on 28.12.2013. The body of the deceased was identified by Thomas Wekesa and Eunice Naliaka, PW3. The post mortem was done about 3 days after death. so the body was stiff. The body was pale, swollen and with a cut wound on the forehead about 7 X 1 CM. The body had an internal fracture of the forehead bone which exposed brain substance and the brain covering. In Dr. Kamau's opinion, the cause of death was a penetrating wound to the skull following assault. The post mortem report was produced as PExhibit 1

11. In response put to him by defence Counsel, Dr. Mchana admitted that there was Variance between what the police filled on the front page of the post mortem report and the findings by Dr. Kamau, namely that Dr. Kamau found a cut wound on the forehead causing a fracture of the skull. Dr. Machana also testified that something heavier than a knife was not likely to cause such as injury.

The Defence Case.

12. The accused gave sworn evidence after the provisions of section 306(2) of the Criminal Procedure Code were explained to him. He told the court that the deceased was his brother and testified that on the material day he found the deceased and one Christopher Alex Ansimbo fighting and when he tried to separate them the deceased took a panga and cut him on the head and also cut off part of his index finger on the left hand. The court observed a long scar on the left side of the head and a stump of the left index

finger. the accused stated that the deceased tried to cut him a second time, but in order to defend himself, he ran to the dish rack which was situated between their two houses took a kitchen knife and stabbed the deceased, but could not say on which part of the body he had stabbed him.

13. After the stabbing, the accused's mother, Anne Nanyama, PW1 came home. It was the accused's testimony that before the incident his relationship with the deceased was good although the deceased used to drink alcohol. The accused could however not say whether the deceased had taken any alcohol on the material day but he admitted he himself had taken some. During cross examination the accused denied a suggestion by the defence counsel that he unleashed a dog to attack the deceased. He also denied that he was in possession of a jembe on that day. He reiterated that he stabbed the deceased in self defence.

The Law

14. Section 203 defines murder in the following words;- “ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder” from the said provisions the offence of murder is established if;-

- There is a death
- The death must result from an unlawful act or omission.
- The person committing the unlawful act or omission must do so with malice aforethought.

15. Section 206 of the Penal code sets out the circumstances that constitute malice afore thought. The Section reads as follows; “206 Malice aforethought shall be deemed to be established by evidence proving anyone 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.

16. So, for the prosecution case to succeed all the above ingredients must be proved beyond reasonable doubt. It is to be noted that the onus of proving the case against the accused person is always on the prosecution and never shifts. That is why the accused person does not have to say anything in his defence.

Final Submissions

17. At the close of the defence case, M/S Rauto who appeared for the accused submitted that the prosecution had not proved the charge of murder against the accused person beyond any reasonable doubt. Counsel submitted that the death of the deceased resulted from a fight between the two brothers and that in fact the accused attacked the deceased in self defence after the deceased cut the accused with a panga on the head and on the left hand.

18. Secondly, counsel submitted that the evidence on record is so inconsistent that it miserably falls short of proving the case of murder against the accused person to the required standard. Counsel singled out the evidence regarding the injury suffered by the deceased as the various witnesses seemed to see

different injuries. Finally, counsel submitted that even the neck injury which was allegedly caused by the accused was not the cause of the deceased's death. Counsel asked the court to acquit the accused.

19. Counsel for the prosecution relied on the evidence on record.

Analysis and Determination

1) Whether the deceased died and what the cause of death was

20. There is no doubt in this case that the deceased died. Dr. Dickson Mchana Waludindi testified that the autopsy on the body of the deceased was conducted at Kakamega Mortuary on 28.12.2013 after the body was identified by two family members. The post mortem examination revealed a cut wound on the forehead about 7 X 1 CM. internally; there was a fracture on the forehead bone which exposed brain substance and the brain covering. In the opinion of Dr. Kamau who conducted the autopsy the cause of death was severe head injury due to a penetrating wound to the skull following assault. This court is therefore satisfied that the prosecution has proved both the fact and cause of death to the required standard.

2) Whether the deceased's death was caused by the unlawful actions or omission of the accused.

21. The evidence on record on this issue is scanty so it is the word of the accused against Nanyama's but there is no doubt that the accused and the deceased quarreled and fought on the fateful evening. It is alleged the accused released a dog on the deceased and also assaulted him. Nanyama said she tried to intervene but to no avail. She further said when the deceased fell down, the accused stabbed him on the neck, but interestingly the injuries revealed during the post mortem did not include a stab wound on the neck. Did Nanyama really see what was happening between her sons? That evidence reveals some spontaneous fight between two quarreling and unruly brothers who could not stand each other for whatever reason.

22. During his testimony, the accused testified that he was first attacked by the deceased, and that whatever injuries he inflicted on the deceased were in self defence. The accused showed the court huge scars on his head and hands. The cuts on the hands, and especially on the right hand are what doctors call defence injuries. Having acted in self defence, it cannot be said that the accused acted unlawfully in defending himself. His own life was on the line, but as it turned out he used greater force than was necessary to square it out with his brother. The evidence would seem to suggest that both the deceased and the accused were drunk on the material evening. Had they been sober, it is most likely that the deceased would not have died.

Whether the accused acted with malice aforethought

23. Having come to the conclusion. That the accused herein acted in self defence, what occurred between him and the deceased does not constitute malice aforethought. As death lingered in the air that evening, its choice of a victim was between the accused and the deceased, but as it turned out, the deceased was taken as the accused awaits his turn.

24. In short therefore, the prosecution has not proved the charge of murder beyond any reasonable doubt. The evidence only discloses a serious fight between siblings though the fight turned out to be fatal. In the circumstances. I find the accused not guilty of the offence of murder. However, by the powers conferred upon me by the provisions of Section 179 of the Criminal Procedure Code, I find the accused guilty of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code and convict him accordingly.

It is so ordered

Judgment delivered, dated and signed in open court this 9th day of March 2017

RUTH N. SITATI

JUDGE

In the presence of:-

Mr. Ng'etich(present).....for state

Mr. Shifwoka for Rauto.....for Accused

Polycap.....Court Assistant