



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL CASE NO.32 OF 2011**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**GODFREY MUYALE ..... ACCUSED**

**JUDGMENT**

The accused, *Godfrey Muyale*, is charged with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. Particulars of the information are that on the 13<sup>th</sup> day of May 2011 at *Mironje Village Etanyi Sub-location, Murhanda Location, Kakamega East District* within Western Province he murdered *Japheth Lijoodi*. The accused pleaded not guilty to the information. The prosecution called five witnesses in an attempt to prove its case against the accused.

*PW1, Boniface Muyale Mukanga* a brother to the deceased testified that on 13<sup>th</sup> May, 2011 in the evening he was called to the scene where his brother had been stabbed with a knife. On arriving at the scene, he found the deceased on the ground with a stab wound on the neck and already dead. He also found many people at the scene. The body was taken to the mortuary and he was informed that *Godfrey Muyale* (the accused) was the person who had stabbed his brother. He later attended a post-mortem examination on 16<sup>th</sup> May 2011 and identified the body for purposes of the post-mortem, after which the body was released to them for burial.

*PW2, Pauline Mukanzi Ongai*, a student at Murhanda Secondary School testified that on 13<sup>th</sup> May 2011 at about 5 p.m, she was going home from school when she met her cousin, the deceased, at the shops. They walked together going home and on the way they met the accused standing on the right side of the road near bushes. She knew the accused because they were neighbours. The deceased asked the accused what he (accused) had told one *Imbukwa*. The accused responded by telling the deceased that if he (deceased) wanted to beat him he could as well do it. The deceased told the accused that he would not beat him but would inform his (accused's) parents. At that point the deceased started walking towards the accused's home and the accused followed from behind. The accused pulled out a knife tore his clothes and stabbed the deceased on the neck. The witness told the court that she was 10 away. The accused ran away after stabbing the deceased. The deceased walked back to the road where *PW2* was and told her that the accused had killed him. He asked her to call a motorcyclist to take him to hospital. The deceased called a motorcyclist who was nearby known as *Junior*. The deceased fell down and started bleeding profusely. With the help of the cyclist, *PW2* bandaged the wound but the victim passed on. They screamed attracting the attention of more people to the scene of crime. She later recorded a statement with the police.

*PW3 Chiorato Muganda*, testified that on 13<sup>th</sup> May, 2011, at about 5.45 p.m. he was at home when he received a report from a person known as '*Junior*' that his son *Japheth Lijoodi* had been stabbed with a

knife and had died as a result. He rushed to the scene and found the body of the deceased on the roadside, with an injury on the neck. There were many people at the scene including the Area chief. He was informed that the accused, *Godfrey Muyale* was the person who had stabbed his son and had disappeared. The accused was known to him since he was a neighbour. The Area chief had called the police. A post-mortem was later conducted at Kakamega Provincial Hospital mortuary where he identified the body to the Doctor for post-mortem purposes.

*PW4, Dr Dickson Muchana*, a pathologist testified that he conducted an autopsy on 16<sup>th</sup> May, 2011, on the body of an African male in his mid 20's after witnesses identified the body, and later filled a report. According to the pathologist, the deceased's trouser was soiled with dried blood, the long sleeve T-shirt had a tear on the right side, external peripheries appeared bluish and there was a stab wound on the neck above the right collarbone measuring 1 cm x 1cm near the middle of the neck. There was a huge clot, the long muscle of the neck was cut and there was bleeding into the right chest. All the lobes of the right lung had also collapsed. He formed the opinion that the cause of death was failure of breath following a stab wound. He filled the burial permit and signed the post-mortem form on 16<sup>th</sup> May, 2011, which he produced as EXh.1

*PW5, Inspector Stephen Kingori*, who at the time of the incident was attached to Kakamega Police Station, testified that on 13<sup>th</sup> May, 2011, at about 6.40 p.m. while at the station, he was called by the then OCS, *Chief Inspector of Police Joseph Musyoka* who informed him that the Chief of Murhanda Area had called to inform the OCS that someone had been killed between Murhanda and Shinyalu road. *PW5* together with his colleagues *PC Gakuo* and *PC Mutuma*, proceeded to the scene in the station vehicle. At the scene he found a body on the road. On examination he found that the body was bleeding from the neck through a stab wound. The man was already dead. He checked around and saw an escape route into the bush with disturbed maize. He prepared a sketch plan of the scene. He also said that he did not recover any exhibits. He collected the body and took it to Kakamega Provincial Hospital mortuary and on 16<sup>th</sup> May, 2011, a post-mortem was conducted on the body. On 14<sup>th</sup> May, 2011, the accused was arrested and after recording statements from witnesses, the accused was charged in court. He produced the sketch plan showing the position of the body at the scene. Fair sketch plan was produced as PExhibit 2a and the rough sketch plan as PExhibit 2b.

At the close of the prosecution's case, the accused was put on his defence and elected to give a sworn statement. He testified that on 13<sup>th</sup> May, 2011, at about 5 p.m. he was on his way from school. He met the deceased at Shisembe village, which has a kiosk and a hotel in the same building. The deceased threatened to beat him. He knew the deceased who was older than him because they were neighbours. The accused further testified that he did not see the deceased hold any object at that time and he, just like the accused, did not have any object either. When the deceased threatened to beat him he ran away towards his home and entered the hotel and went out on the other side while the deceased followed him. The accused said that he followed a narrow path with tall grass but tripped and fell down. The deceased jumped over him and fell in the maize farm that was around the area. The accused rose up and that is the time he realised that the deceased had stabbed himself with a knife he was holding. He ran away and went home. The accused denied having seen *PW2 (Pauline Mukenzi)* at the scene saying that he only saw the deceased. He also denied causing the death of the deceased.

Having heard the evidence of both the prosecution and the defence, the court is obliged to examine and analyse the evidence on record in order to determine whether the offence of murder has been proved to the legally required standard. The offence of murder is defined under *section 203* of the Penal code as follows:-

*“any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”*

From the definition of murder above, the following ingredients must exist for purposes of establishing the offence of murder, namely; the fact of death and the cause of such death, proof that the deceased met his death as a result of some unlawful act or omission on the part of accused person, and proof that the said

unlawful act or omission was committed with malice aforethought.

### ***The fact of death and cause of such death.***

PW1 and PW3 went by the scene and found the body of the deceased there. They also identified the body of Japheth Lijoodi, the deceased, for purposes of an autopsy. PW4, Dr Dickson Muchana carried out an autopsy and produced the autopsy report (Post-mortem report) as PExhibit 1. He testified that when he performed the autopsy on the body of the deceased, he found a stab wound on the neck above the collar bone and concluded that the injuries to the deceased's neck caused shortage of breath leading to death. The first ingredient of murder has thus been proved that indeed there was death caused by shortage of breath due to a stab wound.

### ***Whether the accused caused the death of the deceased through an unlawful act or omission***

PW2 testified that the deceased met his death in the hands of the accused person. She told the court that she was with the deceased on the material day at about 5 p.m. when the deceased questioned the accused on some unknown allegations saying he would report the accused to his (accused's) father and walked towards the accused's home. The accused followed the deceased, removed a knife and stabbed the deceased on the neck./ The deceased turned back saying the accused had killed him and required to be assisted to go to hospital. He fell down and died shortly after, in full view of PW2. Thereafter the accused ran away. PW5, the investigating officer who went to the scene that same day confirmed PW2's evidence that the deceased had been stabbed on the neck. He also saw an escape route into a maize farm which the accused is said he escaped through.

When put to his defence, the accused denied stabbing the deceased. His version was that the deceased chased him around and when he got tripped by grass and fell down, the deceased jumped over him fell down and stabbed himself with a knife he was holding. The accused said he stood up and went home. He does not appear to have informed anyone about the deceased's injuries or death. He was later arrested by members of the public and handed over the police. According to the evidence of the accused, the deceased accidentally stabbed himself with his own knife. On the other hand PW2 who said she was with both the deceased and the accused persons says she saw the accused stab the deceased although she had not seen the knife earlier.

In this case, there are only two people who say were present when the deceased was stabbed, PW2 and the accused. However both PW2's and the accused's account on what happened are different. Whereas PW2 says that the accused stabbed the deceased, the accused says that the deceased stabbed himself when he fell down. PW2 says she saw the accused stab the deceased but that she had not seen the knife before. The accused also says that he had not seen the deceased with a knife before he was stabbed. Who had the knife? Was it the accused or the deceased? From the assessment of the evidence on record, PW2 says she was about ten metres away from the point where the deceased was stabbed, and that she saw the accused remove the knife and stab the deceased causing him a serious bodily harm from which the deceased succumbed to death. PW2 also says that after the incident the accused ran away, while the accused says that he went home after the deceased fell and stabbed himself. Both agree in their evidence that there was some unknown issue between the accused and the deceased. PW2 also described the injury she saw being inflicted on the deceased that it was on the neck which was also confirmed by the other witnesses. I find PW2 a credible witness. I therefore find and hold that it was the accused who stabbed the deceased causing him injuries that led to his death. That was an unlawful act committed by the accused against the deceased.

### ***Whether there was malice aforethought***

The third and most important ingredient in cases of murder is malice aforethought. Section 206 of the Penal Code defines malice aforethought as follows:-

*“S.26 Malice aforethought shall be deemed to be established by evidence proving anyone of the following circumstances –*

- a) *an intention to cause 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 persons. 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 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.”*

From the reading of *section 206* it is clear that in order to prove malice aforethought, the prosecution must tender evidence to prove that the accused had an intention to cause death or do serious harm to the deceased whether the deceased be the one who is actually killed or suffers grievous harm or not and the accused must be possessed of knowledge that his act or omission was likely to cause death or grievous harm, which means the accused had *mens rea* and *malice aforethought*.

An accused person is not, in a criminal trial, bound to prove his innocence and the burden is always on the prosecution to prove its case beyond reasonable doubt. *Section 107* of the evidence provides:-

- “1.) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
- 2.) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”*

This means that it is the duty of the prosecution to prove the offence of murder beyond reasonable doubt by showing the existence of malice aforethought. In the case of *Isaack Kimanathi Kanua Chovi vs Republic*[2013] eKLR the Court of Appeal held:-

*“For the offence of murder to be proved, there are three essential elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-*

- a) *the death of the deceased and the cause of death,*
- b) *that the accused committed the unlawful act which caused the death of the deceased and*
- c) *that the accused had malice aforethought*

From the evidence adduced in this case, it has been established that the deceased died out of injuries caused by the accused thus the first two ingredients of murder have been proved. The next question is whether there was malice aforethought.

In the case of *James Mwaniki Gathangu vs Republic* [2014] eKLR the Court of Appeal stated that it is the duty of the trial court to evaluate the entire evidence on record and satisfy itself if the ingredients of the offence of murder have been established and proved, and more importantly the prosecution must prove malice aforethought for it to be secure a conviction.

In the case of *Nzuki vs Republic* [1993] KLR the Court of Appeal also held:-

*“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) *where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as a 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 these 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's 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 a homicide into a crime of murder." (emphasis)*

Also in the case of *Joseph Kimani Njau vs Republic* [2014] eKLR where the appellant beat the deceased repeatedly causing her death, the Court of Appeal held; that malice aforethought was not proved to the required standard. However the court found that the killing was unlawful and reduced the conviction for murder to manslaughter.

And in the case of *Patrick Kailikia M'Kaibi vs Republic* [2015] eKLR where the appellant had fought with the deceased and later stabbed the deceased causing his death, the Court of Appeal held that malice aforethought on the part of the appellant had not been proved as there was no evidence on what caused the fight or who instigated it and further that there was no evidence where the weapon came from, that is whether it was with the appellant, the accused or if it was at the scene. The conviction for murder was reduced to manslaughter.

In the present case, the circumstances that led to the altercation between the accused and the deceased remain unclear. The motive or reason for the disagreement also remains uncertain. The incident took a short time and it has not been established that the accused had pre-meditated his actions. There is no evidence to show that the accused intended to attack the deceased and that he was armed for that mission. The only evidence in this matter as to what happened is that of PW2 that she saw the accused stab the deceased. All evidence show that it was a single stab wound. The act of the accused to stab the deceased was unlawful and the evidence of the prosecution proves beyond reasonable doubt that indeed it was the accused who stabbed the deceased causing his death. However, I do not find that malice aforethought has been proved in this regard as required by law.

From the evidence on record, I am of the considered view that the prosecution has not proved that the accused killed the deceased with malice aforethought. The offence of murder has therefore not been proved. However the evidenced has proved the offence of manslaughter. I therefore convict the accused for the offence of manslaughter under *section 202* as read with *section 205* of the Penal Code.

**Dated and delivered at Kakamega this 5<sup>th</sup> day of February, 2016.**

E.C. MWITA

JUDGE