



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 27 OF 2012

REPUBLICPROSECUTOR

VERSUS

PETER MWENDA KAMAUACCUSED

JUDGMENT

Peter Mwenda Kamau is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on 21/3/2012 at Nchibine Village, Ntoombo Sub Location, Kimachia Location of Tigania West, he murdered **Isaac Kimathi**. The accused denied the offence. He was represented by Mr. Nyenyire. The prosecution called a total of 6 witnesses in support of their case.

PW1 David Kirema, a resident of Nchibine was in his house about 5.00 a.m., on 21/3/2012 when somebody threw stones on his iron sheet roof. He came out, flashed a torch and saw a person who was shouting that he wanted to enter the home of Selesio. PW1 said that Isaac, a neighbour the deceased, also came out of his house to find out who was shouting. Together, they followed the person who was shouting and he entered Selesio's home. PW1 said that he flashed the torch at the person (now accused) and asked what he wanted; that accused who was armed with an iron bar jumped at Isaac and pierced him with the metal on the left side of the chest and Isaac ran for a few steps and fell near the fence. Accused left and he followed but Kaimuri (PW2), wife of Selesio called him back and he went to attend to Isaack and helped take him to Meru Hospital for treatment. PW1 denied that he knew accused before.

PW2 Jane Kaimuri Selesio, recalled that she was at her home on 21/7/2012 in her kitchen about 5.00 a.m. where she was making tea for her children when she heard Peter Mwenda (accused) screaming saying he wanted to buy *miraa* from her to take to Mombasa; that accused entered her kitchen and that her neighbour who had heard the noises came to her home; PW2 said that the accused was making a lot of noise and that is why neighbours went to her home. On hearing PW2's neighbours, accused went out of the kitchen and it is then she heard Isaack shout that he had been stabbed. PW2 came out, accused ran off and she found Isaac had fallen in a bush. She went to inform Isaac's relatives. PW2 confirmed that David (PW1) was present and he helped support the deceased. PW2 knew the accused before because he used to buy sand from her husband but had earlier bought *miraa* from them. PW2 also told the court that accused was armed with something in his hand.

PW3 Alexander Mwiti, was called by his sister to proceed to PW2's home where the deceased had been injured. He looked for a vehicle to take him to Hospital.

PW4 Steve Kaimanthyo, was also informed that his brother Isaac had been stabbed and was in hospital. He also found Peter Mwenda, accused already arrested by the Chief.

PW5 Mutuma Kickson Mutua, a brother-in-law to the deceased, learnt of the brother having been injured and had died. PW3 also asked him to go and look for the accused Peter Mwenda because he had injured Isaac. PW5 knew Peter Mwenda before; found him at the bus stage and informed the Chief, Mabea to assist in the arrest. The Chief provided Administration Police who arrested accused who was then in possession of a two pronged metal rod which the Police took possession of – Ex. No. 1.

PW6 CPL Peter Wafula then of Nchiru Police Station was also present when the post mortem was conducted by **Dr. Mutuku**. PW6 produced the post mortem report as PEx. No.2. In the report the Doctor was of the opinion that the cause of death was penetrating chest injury and rupture to the heart with sharp object.

In his sworn defence, the accused stated that on 21/3/2012, he was at Kianjai where he had gone to sell his books at 7.00 a.m.; that at 5.30 a.m., he was at home. He denied knowing anything about the murder of the deceased. He also said that he had been sick in that he had a mental problem and cannot tell what happened. Accused also said that his father had a land dispute with PW1. However, he had no dispute with PW2, Jane Kaimuri.

After close of the defence case, Mr. Nyenyire submitted that the prosecution had not proved its case to the required standard because the prosecution was not consistent as to what transpired on the fateful day; that the court should consider accused's alibi that he was not at the scene and the court to consider that accused was not of stable mind.

In reply, Mr. Mulochi submitted that PW1 and 2 placed accused at the scene, he was not a stranger to them and that he was seen stabbing the deceased.

To prove an offence of murder, the prosecution has to establish that the following ingredients exist:

- 1. Proof of the fact and cause of death of deceased;**
- 2. Proof that the death of deceased was the direct consequence of the unlawful act or omission on the part of the accused (*actus reus*).**
- 3. Proof that the said unlawful act or omission was committed with malice aforethought (*mens rea*).**

Malice aforethought is broadly defined under **Section 206 of the Penal Code** as an intention to cause grievous harm or cause the death of a person.

The death of the deceased is not in issue. Post mortem was done on the body by Dr. Mutuku in the presence of PW6 and he found the cause of death to be a penetrating chest injury and rupture to the heart with a sharp object. PW1 who was present when deceased was injured said that indeed, the assailant pierced deceased with a metal on the left side of the chest. The next question then is whether the accused is the perpetrator.

The deceased was injured about 5.00-5.30 a.m. I believe it was still dark because PW1 said that he sued a torch to see accused. I warn myself that the circumstances were not favourable to proper identification. In the case of ***Roria v Rep 1961 EA 583***, the court held that a fact may be proved by the testimony of a single identifying witness but that does not lessen the need for testing with great care the evidence of a single identifying witness in respect of identification of conditions favouring identification are difficult.

After a careful consideration of the evidence on record, though accused denies knowing anything about the murder, the evidence of PW1 and 2 placed him at the scene of the murder. PW1 told the court that he got out of his house and followed accused after he threw stones at his house and was shouting that he wanted Selesio's house. PW1 followed accused to PW2's house. PW1 was with deceased. PW2 confirmed that indeed, accused arrived at her house and found her making tea in her kitchen. She spoke with accused who wanted to buy *mira* from her. She knew him very well as he used to do business with

the husband. This incident occurred at 5.00 a.m.-5.30 a.m. PW1 said he had a torch which he flashed at accused. PW1 denied having known accused before but PW2 knew him well. Even though the prosecution did not lead any evidence on how PW2 was able to see the accused, she told the court that she was making tea in the kitchen which, I believe, could not be in darkness. Accused came in close contact with PW2, she knew him before. Besides, PW2 conversed with accused and I am satisfied that it is accused who was at PW2's home that morning.

Both PW1 and 2 refuted any suggestions that there was a fight between accused and Isaac, the deceased. And if there was a fight between accused and Isaac, then it placed at the scene of the crime.

PW1 stated that when accused came out of PW2's house, he asked him what the problem was and that it is then he jumped at the deceased and stabbed him. By then, PW2 was not present. PW2 confirmed that she did not see accused stab the deceased and that when she came out of the house, accused started to run away. Apart from PW1, deceased and accused, there was nobody else at the scene. PW1 and 2 saw accused armed with a metal rod when PW1 said he asked to stab deceased. At the time of arrest, a metal rod was found with the accused. I am satisfied beyond any doubt that it is accused who stabbed deceased without any provocation. He used the metal rod he was found in possession of.

The accused alleged that he had been suffering from a mental ailment and does not know what happened. Before he took plea, he was certified fit to stand trial by **Dr. Mwenda**. On 23/4/2012, J. Lesiit ordered that another mental assessment to be carried out and another was done by **Dr. Thuo** who also found the accused to be fit to plead. At his defence, accused still alleged that he was not of sound mind and did not know what happened. This court made another order that accused be examined by a psychiatrist and it was done by **Dr. Mwikamba Andrea** of Meru Teaching and Referral Hospital as per the report dated 2/7/2015. He was certified fit to plead. PW2 testified that accused was said to be mentally unstable though he used to do business. Apart from allegation, there is no independent evidence that accused suffered from any mental ailment. Three doctors have certified accused fit to stand trial and this court has not found otherwise than that accused was in his right mind when he committed the offence.

Contrary to accused's contention that he was mentally unstable and did not know what happened, he raised an alibi defence that on the material day and time, 5.00 a.m., he was at his home and that at 7.00 a.m. he went to his place of business at Kianjai. Even when an accused raises a defence of alibi, the duty still rests on the prosecution to prove its case beyond any reasonable doubt and that burden never shifts to the accused person. In the case of *Uganda v Sebyala & Others 1969 EA 204*, the Judge quoted George CJ in *CRA 12D 6B of 1969*, where he observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create a doubt as to the strength of the case of the prosecution. When the prosecution case is thin on alibi which is not particularly strong may very well raise doubts.”

Indeed, by the above persuasive authority, my duty is to analyse the entire evidence on record to determine whether or not the alibi raised by the accused casts any doubt in the prosecution evidence. I have tested the alibi defence against the prosecution case and I find that it has not created any doubt in the prosecution case. Accused was placed at the scene of crime by PW1 and 2. PW1 actually saw accused stab the deceased. The alibi does not dislodge the prosecution case at all and I hereby dismiss it as untrue.

Accused's action was not provoked. Without any reason, he stabbed the deceased with the metal rod that he was carrying which he aimed at the heart. PW1 and deceased had followed him to find out why he was making so much noise. So far, the defence does not raise any plausible explanation and I am satisfied that the nature of the injury inflicted on the deceased is evidence of malice aforethought. I am satisfied that the prosecution proved its case to the required standard, beyond any reasonable doubt. I find the accused guilty as charged and convict him under **Section 322 of CPC**.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF MARCH, 2016.

R.P.V. WENDOH

JUDGE

3/3/2016

PRESENT

Mr. Mulochi for State

Mr. Wamache Holding Brief for Mr. Nyanire for Accused

Peninah/Ibrahim, Court Assistants

Present, Accused