



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.110 OF 2014

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

DANIEL OMUSULA MUYALE.....ACCUSED

JUDGMENT.

1. The accused **DANIEL OMUSULA MUYALE** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.
2. The particulars of the offence are:

“That on the 20th day of November 2014 at Kariobangi South Estate within Nairobi County murdered FRANCIS NDUNGU MWANIKI.”

3. The prosecution called a total of 9 witnesses.
4. The case for the prosecution was that the accused and deceased were acquaintances. On the material day there was a party in the home of Leon, PW4 in the case. It is not clear what was being celebrated. What was clear is that the accused had been invited to the party by a friend of PW4, one Apollo, who had been invited by PW4. The accused went to the party and ate some food. He then went out where he met deceased.
5. The deceased had gone to the floor where the party was in the company of PW3 and 5. Except for PW3, none of them had been invited. When accused saw the deceased, there was an exchange between the two of them then a fight broke out between the two. The accused was then seen pulling out a knife from his waist with which he stabbed the deceased on the chest.
6. One Peter Okuthe, a friend of the accused tried to snatch the knife from the accused but he was too late. By the time Peter intervened, deceased had already gotten stabbed. The knife fell from accused hands. All the attention went towards the deceased. In an attempt to save his life, PW3 and PW5 carried him to a nearby clinic.
7. PW1 deceased mother saw her son being carried by 2 youths and she followed them to a nearby clinic. He had a stab wound in the chest. The doctor at the clinic could not treat him
8. But he accompanied the deceased and PW1 in a taxi to Jambaa Hospital in Uhuru Estate. He was pronounced dead at that hospital.
9. The Post Mortem Report P.Exh.3 shows that the deceased had a stab wound on the left chest with hemopericardium with 400 cc blood in the cardio-vascular system with incised myocardium, left ventricle posteriorly. He also had hemoperitoneum with 800 cc blood in the digestive system due to incised liver and superior aspect of the left lobe. The cause of death was given as chest and abdominal injuries due to penetrating sharp force trauma (stab).
10. The accused in his sworn defence admitted that he attended the party at Leon's home (PW3) and

- said that it was on the invitation of PW3 himself. The accused stated that the deceased found him at Leon's place and asked him why, he, accused, had spoken badly against him, deceased, on another occasion. The accused said that when he denied what the deceased had alleged against him, the deceased became furious and pushed him. The accused said that he pushed the deceased back as a result of which the deceased fell down. The deceased then stood up with a knife in hand. He said that they both struggled as a result of which the knife fell down.
11. The accused stated that he quickly picked the knife. He said that the deceased walked towards him as if to beat him and that he, accused pushed the deceased and that the deceased accidentally got stabbed.
 12. Mrs. Kinyori defended the accused in this matter. In her submissions Counsel raised two defences, that of self-defence and that of provocation. Counsel submitted that the deceased was the one that was armed with a knife and that he threatened the accused with it before the accused took the knife from him and stabbed him.
 13. In regard to the defence of provocation, Mrs. Kinyori submitted that even though the reason is unknown, the accused and deceased quarrelled and then fought. Counsel urged that the accused stabbed the deceased due to a threat on his life and at the heat of passion.
 14. Ms Tumaini Wafula, Learned Prosecution Counsel represented the State in this case. In her submissions the Learned Counsel submitted that PW3 and 4 were eye witnesses of the incident. Counsel urged that both clearly saw that it was the accused who had the knife and not the deceased. That according to PW4, the accused had taken the knife from his home earlier during the party and that despite being told to return it, he kept it. Ms Wafula submitted that the defence of provocation did not apply as there was no provocation and therefore no occasion for passion. Ms Wafula urged the court to find that the prosecution had proved the charge of murder and convict the accused accordingly.
 15. I have considered the evidence adduced in this case by both sides. The charge against the accused is that of murder contrary to **section 203** of the **Penal Code**. That section stipulates as follows:

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

16. The prosecution must show that it is the accused that attacked the deceased and stabbed him once in the chest; that the deceased succumbed and died as a result of the injuries inflicted on him by the accused. The prosecution must adduce evidence to establish that at the time the accused attacked and injured the deceased, he had formed the necessary malice aforethought or intention to either cause death or grievous harm to the deceased.
17. The issues for determination as I perceive them from the evidence adduced in this case are:

a. Who had the knife, the weapon used in this incident?

b. What was the motive for this attack?

c. Is the defence of self-defence and provocation available to the accused?

d. Has malice aforethought been established?

16. I will consider these issues simultaneously.

18. The accused and the deceased were both young people and at the time, both were below 18 years of age. Due to this factor the case was heard in camera.
19. From the onset I find certain facts are undisputed. It is not in dispute that the accused and the deceased went separately to the 4th floor of a flat where PW4's home was located. There is no dispute that there was a party in PW4's home which started that afternoon. It is not disputed that the deceased together with his friend PW5 and one Joseph who had accompanied him to that floor had not been invited to the party. PW3 who was also in the company of the deceased had been invited. It is not in dispute that the accused, the deceased, PW3, 4 and 5 all knew each other before this incident.

20. There were two eye witnesses of this incident, PW3 and 4. PW5 who had been with the deceased, PW3 and one Joseph had just walked down the stairs before the attack and so he did not witness the attack. Of the two, PW3 and 4, only PW4 witnessed the entire episode. The incident took place at 5pm on an open corridor at the 4th floor of a residential building and therefore in broad daylight.
21. PW3 testified that he entered the house of PW4 leaving PW5, the deceased and Joseph on the corridor, about five meters from him. PW3 testified that the moment he stepped into PW4's home, he got shocked and immediately stepped outside. That was when he saw the accused stabbing the deceased. He did not however see where the knife came from. He did not also hear the words spoken before the attack, nor the fight which took place just before the attack. He identified the knife as P. exh. 1 a saw-like bread knife.
22. PW4 testified that he saw how the incident unfolded because he had just come out of his home into the corridor where the deceased and the accused were. He said that the accused was near the door of his house when he saw the deceased approaching. The accused became aggressive and asked the deceased **"I have now found you. Why don't you bring out that mouth you were giving me earlier?"** PW4 stated that the deceased did not answer, instead he saw the two start to fight. Shortly later he saw the accused produce a knife from his waist and stab the deceased in the chest.
23. The accused in his defence does not deny having had a confrontation with the deceased. What he denies is that he had the knife which injured the deceased. He said that it was the deceased who had the knife. He also contradicts PW3 and 4 by saying that he did not deliberately stab the deceased but that the deceased got stabbed as the two of them wrestled. He also stated that it was the deceased who confronted him and who was aggressive.
24. I have considered that PW3 and 4 were friends to both the deceased and the accused. There is no suggestion from the evidence, or from the accused either in their cross examination or in accused defence that the two lied or had any reason to fabricate the evidence against the accused.
25. As to their credibility, I had the impression that the two did not come out clearly as to what was going on inside PW4's house that afternoon. PW3 did not disclose what made him make one step into the house before retreating immediately. He said he could not tell what made him react that way. PW3 however described the inside of the house to the court. He said that the curtains were drawn, the house was dark, and there were many people inside who were dancing to music.
26. PW4 on the other hand said that the house was dark but explained that it was because the TV was on and people were watching it. He also admitted that there was music but denied there was dancing.
27. Of the two, PW4 was the secretive one as that was his house, he was the host and had been there from the beginning of the party. There is no proper explanation for darkness and a crowd inside the small room from PW4. There is no way that visitors could be kept in darkness, caused by drawn curtains just like that. There must have been something happening inside that house that day.
28. PW3 had just arrived and can be understood when he claims he had entered that house briefly. In regards to their credibility apart from the impression that PW4 was hiding something about his party, I have no doubt that both PW3 and 4 were telling the truth about the events of the day in relation to the incident. These facts are not contested by the accused except those I have mentioned about the knife and the aggressiveness. Apart from the issue of darkness inside the house, I am satisfied PW3 and 4 were truthful witnesses. Besides it is clear the deceased had himself just arrived at the scene, very few minutes indeed before the incident. Whatever was in that house had no connection with him.
29. PW4 in cross examination testified that the accused had taken a knife from his house. PW4 clarified that the knife used to stab the deceased was a different one which he saw the accused pulling out of his waist. PW4 was consistent that it was the accused who first spoke to the deceased and who was also the aggressor and not the reverse as the accused alleged.
30. Having considered the evidence adduced by both sides, I find that the accused was the one who was armed with the knife which was the weapon that caused injuries and later death to the deceased. I also find that the accused and deceased must have met earlier that day given his words to the deceased **"I have now found you. Why don't you bring out that mouth you were giving me earlier?"** The actual meaning of the words is not clear. However they give an impression that the accused was offended by words that the deceased had spoken earlier.

31. As to whether the prosecution had proved malice aforethought, and whether the accused could plead self-defence and provocation? The defence of provocation can be pleaded where it is shown that there was provocation by the deceased against the accused. **Sections 207 and 208 of the Penal Code** provides the defence of provocation and its definition. **Section 207** stipulates as follows:

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.

32. Provocation would be available only where the accused person was provoked and had had no time to cool off. **KATO V UGANDA [2002] 1 E A 92** at page 108 the court stated as follows:

“The former Supreme court has interpreted two sections thereof meaning that before a charge of murder can be reduced to manslaughter on ground of provocation. The following conditions must be satisfied;

- a. **the death must have been caused in the heat of passion before there is time cool;**
- b. **the provocation must be sudden;**
- c. **the provocation must be caused by a wrongful act or insult**
 - a. **The wrongful act or insult must be in such a nature as would likely to deprive an ordinary person of the class to which the Appellant belongs the power of self-control. It is obvious from this that any individual idiosyncrasy, such as for instance as that the accused is a person who is more readily provoked to passion than the ordinary person, is of no avail; and**
 - b. **Finally, the provocation must be such as to induce the person provoked to assault the person by whom the act or insult was done or offered. This last provision in our opinion means (provided, of course, that all the other conditions referred are present) that if the provocation is such as to be likely to induce an assault of any kind, then the accused should be found guilty of manslaughter and not murder irrespective of whether the assault was carried out with a deadly weapon, or by other means calculated to kill. See Rex v Hussein s/o Mohamed 9 EACA 152; Yovan v Uganda [1970 EA 405; Chacha s/o Wamburu v Republic [1953] 20 EACA 339.”**

33. This is a persuasive case as it is a Ugandan case. The principle in that case has been adopted in Kenya and is the law here. The accused defence does not disclose any facts from which the court can find that; the deceased provoked the accused. The prosecution case shows that the accused and deceased had met earlier that day. The mere fact that they had met earlier before the time of this incident removes the case from the application of the defence of provocation since the accused had had time to cool off in between the time they parted and the time of the meeting when the incident occurred. I find that the defence of provocation does not apply to the facts of this case.

34. As for self-defence, that defence is provided under **section 17** of the **Penal Code** which stipulates as follows:

17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

35. In **MORRIS MUNGATHIA VS REPUBLIC CRIMINAL APPEAL NO. 212 OF 2006 COURT OF APPEAL AT NYERI**, the court held:

“The law on self-defence was succinctly stated in the Privy Council case of CHAN KAU V. R(2) (1955) W.L.R.192 as follows:

‘In cases where the evidence discloses a possible defence of self defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of

murder and the onus is never upon the accused to establish this defence apart from that of insanity. It would appear to us that the duty of an accused person facing a murder charge who relies on the defence of self defence is to lay before the court facts upon which the defence is based. The whole purpose of doing so is to enable the court and the prosecution to understand the basis of such a defence. He assumes no responsibility of establishing that defence. The prosecution, however, has the onus of showing that the appellant was not acting in self-defence and that there was time and opportunity before the fatal blow to retreat (see **Manzi Mengi v. R [1964] EA.289**’”

- 36.The accused in his defence stated that he wrestled with the deceased who had a knife, and that when the knife fell down, he took it and stabbed the deceased. That was the basis of the defence submissions that the accused acted in the heat of passion and was defending his life.
- 37.I have already found that even if there may have been provocation, that could only have been at the earlier meeting between the accused and the deceased alluded to in the statement which the accused was heard making by PW4. There was therefore a long lapse between the two meetings which was sufficient time for the accused to cool off. He cannot be heard to say that he was still under provocation. The law does not recognize provocation where it is evident, as in this case that there was an opportune time to cool off and calm down.
- 38.In regard to self-defence, the prosecution evidence is clear the accused was the one who was armed that day. The murder weapon was his and he had it before going to that meeting. He cannot be heard to say that he feared for his life. It was the deceased whose life was in danger as a result of the accused being armed and aggressive at the same time. The defence of self-defence is not available to him.
- 39.I wish to deal with the issue of motive. There is no direct evidence to show what the motive of the attack in this case was. However there is sufficient evidence to show that the accused and deceased had a bone of contention to pick with each other due to what transpired at an earlier meeting that day.
- 40.While motive is a relevant factor in establishing the guilt of the accused, the absence of proof of motive does not defeat the case altogether.
- 41.The court in the case of **Libambula v Republic [2003] KLR 683**reasoned that point thus:

“Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap. 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.” (Emphasis added).

- 42.I am satisfied after a careful consideration of the entire evidence adduced in this case that the accused attacked the deceased, stabbed him in the chest and caused him injuries out of which he died. The accused was armed with a knife which he had hidden in his person. He used it to stab the deceased who at the time was unarmed, and who posed no threat of any kind to the accused. The choice of weapon used and the choice of the part of the body to stab all demonstrate that the accused had formed an intention to cause death or grievous harm to the deceased. The accused action was both deliberate and calculated.
- 43.Having come to the conclusions I have of this case I am satisfied that the prosecution has proved its case against the accused beyond any reasonable doubt. I find the accused guilty of murder contrary to **section 203** of the **Penal Code** and convict him accordingly under **section 322** of the **Criminal Procedure Code**.

DATED AT NAIROBI THIS 13th DAY OF APRIL, 2016.

LESIT, J.

JUDGE.