



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 77 OF 2012

REPUBLIC.....PROSECUTOR

V E R S U S

DENNIS MUTWIRI KIBWI.....ACCUSED

JUDGMENT

Dennis Mutwiri Kibwi is charged with the offence of murder contrary to **Section 203 as read with Section 204 of Penal Code**. The Particulars of the charge are that on 6/11/2012 at Karemamuthwa Village, Kambereu Sub-Location, Giaki Location in Imenti North, Meru County, he murdered **Nathan Kathurima Mugambi**. The accused was represented by Mr. Igweta, Advocate while the State was represented by Mr. Mungai and Mr. Mulochi.

The prosecution called a total of eight witnesses while the accused testified in his defence. He did not call any other witness.

PW1 Francis Mutegi Karekethi a *matatu* driver, testified that on 5/11/2012 he was from work and was walking home from Giaki market in company of Dennis, the accused and Nathan, the deceased; PW1 knew both the accused and deceased very well and all of them were *matatu* drivers; that accused told the deceased that he is the one who had taken Dennis' wife back to her parents home and they started to quarrel; that he saw accused bend down and at one time he saw accused and deceased facing each other as he continued to walk ahead of them. He then heard the deceased say that Mutwiri (accused) had stabbed him. By then, he was about 2 metres away from accused and the deceased; that though it was night, there was moonlight; that when PW1 went to check what had happened to deceased, accused threatened him and asked PW1 whether he wanted to find out how the deceased had felt; accused chased him. PW1 said that accused also accused him of having assisted his wife to return to her parents. PW1 ran to a nearby home to seek help. He went back to the scene with other people but did not get the accused. PW1 denied that accused and deceased had disagreed before this fateful day and he also denied that they had drunk any alcohol together that day. PW1 later observed the deceased and noticed that he had been stabbed on the neck. He called the Chief, **PW2 Japheth Kibui Jonathan**, who is the father of the accused so that he could take deceased to Hospital in his vehicle; that PW2 informed him that accused had already called him. PW1 waited at the scene till PW2 arrived and they went to report at Giaki Police Station.

PW2 told the court that the deceased was his nephew, his brother's son and that he had lived with both accused and deceased; that both accused, his son and the deceased were his drivers in his pro box vehicle which he used as a taxi. PW2 confirmed having been called by PW1 and informed of accused having injured the deceased; that before he left home, the accused arrived and told him to go and take the deceased to Hospital because they had fought. He went to the scene with his other son Festus Mukindia,

found PW1 with other people and noticed that Nathan was already dead. He reported to Giaki Police Station. He went back to the scene; police from Meru came and took photographs of the scene. He said that accused had ran away after accused found out from a Police Officer that Nathan had died; that accused was arrested by another Assistant Chief in Kimongoro PW6 Japheth Kameria. Police were informed and the Police collected him from there. PW2 testified that he was not aware of any dispute between accused and deceased save that they used to drink alcohol together.

PW3 Joyce Mugambi the mother of the deceased, was only informed of the murder of the deceased and went to the scene and later attended the post mortem at Meru Hospital mortuary where she identified the body to the Doctor and observed that the deceased had injuries to the neck, chest and thighs. She denied knowing of any dispute between accused and deceased.

PW4 Edwin Munene Mutua, a cousin to the deceased also identified the deceased body to the Doctor before post mortem was done.

PW5 Dr. James Kihumba of Meru Level 5 Hospital produced a post mortem prepared by Dr. Njuguna who performed the post mortem in the deceased. The Doctor found that the deceased had sustained a stab wound on the anterior neck 6 cms deep; another on the epigastric region; multiple stab wounds on the right thigh. Internally, he found that the carotid artery had been punctured and the intra abdominal stomach. The Doctor formed the opinion that the cause of death was severe haemorrhage due to stab wounds to the abdomen and punctured carotid artery (PEX No.1).

PW6 Japhet Kaiberia Mathiu, the Chief of Kanuni Location Igembe South District recalled that he received a report that there was a suspect in his area and on 17/11/2012, they arrested him at 5.30 a.m. and took him to the AP Camp.

PW7 CIP Samuel Ndung'u was the investigation officer in this case. He testified that on 6/11/2012 about 1.40 a.m., he received a call from the Chief of Giaki Location (PW2) who informed him that his son had killed his cousin; that the Chief went to the Police Station, the report was booked. He called for scenes of crime personnel from Meru to proceed to the scene. He also went to the scene at 6.30 a.m., observed that the body had stab wounds. They observed the scene but it had no evidence of a struggle; that the suspect fled and he was arrested in Maua later on. PW6 said that he learned from his investigations that accused and deceased had been drinking in a bar that day and quarreled and it resulted in the death of Nathan.

PW8 PC John Munyi of Scenes of Crime, Meru produced photographs taken by PC Cleophas Musinga who was unavailable to testify - photographs of the scene and injuries on the deceased's body PEX No.2)

When the accused was called upon to defend himself, he testified on oath that he was at work at Giaki on 5/11/2012; went to the bar at 5.30 p.m. till 8.00 p.m., and went to the lower part of Giaki market when Nathan the deceased, called him into a bar where he found the the deceased with Francis Mutegi (PW1). He joined them to drink till 9.30 p.m. when the three of them left for home. On the way home, they bought some more alcohol to carry home; that after walking for about 1½ kilometres, Nathan (deceased) told him that he owed him KShs.500/= which he spent when he escorted accused's wife back to her home; that he said he would not pay the debt and that the deceased got hold of him and insisted that accused had money; that deceased also told him not to hurry home because his wife had left and only his mother could give him food; that PW1 also told him that he escorted accused's wife to her home; that he struggled to free himself from deceased; that he had a torch and keys in his hands which had a nail cutter; that they fell down three times and it is then he heard Nathan say he had been stabbed. He said that it is during the scuffle that he stabbed deceased with the knife on the nail cutter; that he went back where Nathan fell, tied the neck with his vest; that he stabbed him once when he wanted to slap deceased; that he removed the deceased from the road where he had fallen and went to call his father (PW2). He slept outside his house and next day, he went to see one Mugendi, who owed him money; that he called his father to enquire about the condition of Nathan and that he talked to a Police Officer who informed him to take care because the members of public were unhappy with him. He went to Kimongoro to inform his friend what happened and was arrested while there. He said that Nathan was his cousin and friend and

that it is because of the alcohol that he got upset with Nathan when Nathan told him that his mother would give him whatever he (accused) needed because his wife had left. He denied having planned to kill the deceased. He denied having gone into hiding after he killed Nathan.

After the close of the defence case, Mr. Igweta submitted that accused admitted having stabbed the deceased but that malice aforethought had not been proved because the evidence disclosed that accused and deceased were cousins and lived in harmony and that this incident occurred after an argument whereby the deceased provoked the accused.

On the other hand, Mr. Mulochi submitted that malice afore thought was proved because the accused even threatened PW1 after stabbing the deceased; that accused went into hiding after the offence and if he was remorseful, he would have surrendered himself to the police.

To prove an offence of murder, the Prosecution must establish the following ingredients:

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

The postmortem was conducted by a Doctor Njuguna, who found that the deceased sustained several stab wounds which led to excessive haemorrhage and resultant death. His evidence was corroborated by that of PW2, PW3 and 7 who observed the deceased's body. PW1 seemed to have only noticed the injury to the neck.

The accused told the court that he was involved in a scuffle with the deceased after the deceased got hold of him and told him to pay him his KShs.500/= and not to be in a hurry to go home. To the contrary, PW1 said that indeed, a quarrel erupted between accused and deceased but that it is the accused who accused the deceased of having escorted accused's wife back to her home. PW1 denied that there was any scuffle or fight between accused and the deceased before deceased was stabbed. Indeed, the Investigation Officer, PW7 said that though he was informed that accused and the deceased fought, when he visited the scene at 6.30 a.m. next morning, he observed that the scene was not disturbed and there was no evidence of a struggle. There is evidence that on that night, it had rained heavily as can be confirmed from the photograph. If there was a fight, the scene would have been obviously disturbed. I am inclined to find that accused and the deceased did not fight between accused and deceased.

I have considered the accused's testimony as to how the deceased got injured and I am convinced beyond any doubt that accused did not tell the court the whole truth. He only mentioned having stabbed the deceased on the neck when trying to slap him but made no mention of the other injuries that the deceased sustained. I find that accused did not only stab the deceased on the neck but also stabbed him on the stomach and other multiple stab wounds on the right thigh. I also doubt that the injuries were inflicted during a scuffle but must have been deliberately inflicted. Accused did not receive any injuries.

The accused alleged that he had a nail cutter in his hand and the knife in the nail cutter must have inflicted the injuries. From the post mortem findings, the injuries were as deep as 6 cms and I doubt that a nail cutter-knife could have pierced 6 cms deep and 3 cms wide. I will prefer the testimony of PW1 that he saw accused bend and remove a knife from his socks. That must be the weapon that the accused used to stab the deceased.

All the prosecution witnesses who knew the accused and deceased knew not of any dispute or disagreement between them before this incident. They were said to be friends and have lived together most of their lives. It seems however, that accused had not been happy with the deceased for having helped accused's wife to go back to her parent's home. He also accused PW1 of having assisted his wife

to go back to her home and also threatened him. It is possible that accused had kept a grudge against the deceased.

Accused seemed to raise two defences, that of provocation and intoxication. PW1 denied that they had drunk alcohol on that evening, although they used to take alcohol there before. Accused claims to have been drunk and that he committed the offence under the influence of alcohol. Under **Section 13 of the penal Code** intoxication is not a defence in any criminal charge but there are exceptions under the said section. The Section reads as follows:

“13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs”.

Though the defence is available in law, it is very narrow in its application and must fall within the confines of **Sections 13 (2) (3) and (4)**. This defence cannot be availed to accused under **Section 13 (2) (a)** because he did not tell the court that the intoxication had been caused without his consent. He said that he was invited into the bar and went ahead to take the alcohol and even bought some more so that they could drink on their way home. Under **Section 13 (2) (b)**, the accused has to demonstrate that he was so drunk that he was driven to temporary insanity or that he did not know what he was doing or that it was wrong.

When considering a defence of intoxication in the case of ***Cheminingwa v Rep, EACA CR 450/1955*** the East African Court of Appeal stated as follows:

“It is of course correct that if the accused sets up a defence of insanity by reason of intoxication, the burden of establishing the defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court vary the onus of establishing this upon the accused”.

In another case, ***Kupele ole Kitaiga v Rep (2009) KLR CRC 26/2007*** the court stated:

“A clear message must also go out to these of the appellant’s ilk who deliberately induce drunkenness as a cover up for criminal acts. Unless a plea of intoxication accords with the provisions of Section 13 of the PC, it will not avail an accused and does not avail the appellant in

this particular case.”

In the instant case, the accused related in detail what transpired between him and the deceased on the fateful night; that the deceased had annoyed him by what he told him; that a scuffle ensued and without intending it, he stabbed deceased with a knife and after that, accused went and reported the incident to the father, then fled. From a careful analysis of accused’s testimony, if at all he had drunk alcohol that day, he was not drunk at all leave alone being intoxicated. He was very conscious and alert as to what went on and he cannot avail himself the defence of intoxication under **Section 13 of PC**.

Accused also claimed to have been provoked by the utterances made by the deceased to him. **Section 207 of the PC** avails an accused the said defence. It states:

“S. 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.”

Section 208 defines provocation as:

“208. (1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) an act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality”.

For the defence of provocation to stand, the court must consider the defence evidence, that the accused did the act which caused the death of deceased in the heat of passion caused by sudden provocation which is any wrongful act or insult done by an ordinary person to another ordinary person.

Not every provocation will lead to reduction of the charge of murder to manslaughter. The provocation must have the effect of temporarily depriving the person provoked of the power of self control as a result of which he causes the death. In the case of ***Rep v Chivatsi (1989) KLR 333*** and ***Inthithio v Rep (1988) KLR 796***, the courts held that an unusually excitable or pugnacious person is not entitled to rely on the said defence of provocation as an ordinary person would not have acted as he did.

The accused alleged that the deceased told him that when he goes home, he would be given food by the mother and anything else that that a woman would give. He went on to say that he had a lot of stress then because his wife had left him. If indeed the deceased uttered the said words which the court cannot confirm, they were indeed offensive and the accused must have been provoked taking into account that deceased was a cousin to the accused who they related closely. However, unlike what accused alleged

that the deceased told him that he escorted the wife back to her home, PW1 said it is the accused who alleged that both deceased and PW1 escorted his wife back to her home; that accused even chased PW1 threatening him.. As observed earlier, it seems accused held a grudge against the deceased for allegedly helping accused's wife to go back to her parent's home. I say so because this incident happened when they were walking along the road, yet accused was armed with a knife which was tucked away in his socks which he used to attack and stab the deceased. Further, accused did not stab the deceased once but many times aiming at the very vital organs i.e. punctured the carotid artery and the stomach. If indeed accused had been provoked, when he stabbed deceased once, the anger would have melted away. After inflicting the injuries on the deceased, there is ample evidence which I believe to be true, that accused left the deceased on the road, went and reported to his father about what he had done, and he ran away. His own father PW2 testified that accused was traced on 17/11/2012 – over a week after the incident (from 6/11/2012) by PW6. Accused went into hiding. Accused's conduct is not consistent with that of one who acted in the heat of the moment nor does it resonate with his innocence.

In the end, I am satisfied that accused possessed malice aforethought because he blamed the deceased for having helped his wife return to her home. He admitted that he was very stressed because his wife had left him. I find that the prosecution has proved beyond doubt that accused committed the act that caused the deceased's death and from his conduct, I am satisfied that he had the intention to commit the murder. I find him guilty as charged and convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF APRIL, 2016.

R.P.V. WENDOH

JUDGE

13/4/2016

PRESENT

Mr. Mulochi for State

Mr. Igwweta for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused