



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HCR 5 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS MUGAMBI MUTUA.....ACCUSED

JUDGMENT

Julius Mugambi Mutua 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 13/1/2011 at Makanyaga Village, Makanyaga Sub-Location, Kanjuki Location of Igambang'ombe, in Meru, murdered **Julius Kathure Manene**. The case proceeded to full trial with the prosecution calling a total of 7 witnesses. When called upon to enter his defence, accused testified on oath but did not call any other witness.

PW1 Evangeline Mbaru Julius, is the wife of the deceased Julius Manene. She testified that on 13/1/2011 she was at Makanyaga market at about 6.00 p.m. at their stall where she sells bananas. She was with her husband who had come so that they could go home together; that the accused person who she has known since childhood came there and asked the deceased to give him KShs.20/=. PW1 did not know whether accused was requesting or asking to be paid back. When the deceased said he did not have money, accused left but came back after about 30 minutes, while armed with a plastic whip with which he struck at the deceased twice but missed him and the 3rd time he hit the deceased. As deceased tried to stand up, accused then drew a knife from the waist of the trouser and stabbed the deceased at the center of the chest. PW1 denied that accused and deceased fought before deceased was stabbed. PW1 screamed and called her brother-in-law; that accused then asked that PW1 give him the money he wanted and she give him KShS.100/= and he left and entered a nearby bush. PW1 said that many people gathered and went in search of the accused and brought him back to the scene after a few minutes; that the police were called by the Chief who came and took away the deceased's body and accused. PW1 denied having known of any dispute between accused and deceased before this incident.

PW2 Ntabiu Nyaga Mithega, a businessmen at Makanyaga Market, testified that on 13/1/2011 about 6.30 p.m., he was at the market. He was the chairperson of the 'Nyumba Kumi'; that Julius Kathure, the deceased, went to his kiosk and informed him that Julius Mugambi (accused) had gone to demand money from him which he did not have and he feared going home; that PW2 offered to escort him home. As they walked to deceased's Kiosk, PW2 was called back to attend a customer and after he finished, he was going to deceased's Kiosk when he heard screams and somebody said he had killed one and was left with one more. On arrival at the said Kiosk, he found deceased lying on the ground facing upwards and PW1 and one **Gladys Kamba (PW6)** were at the scene. PW6 informed him that it is Julius Mugambi who had stabbed the deceased and he called the Assistant Chief. He further told the court that when he heard screams, he saw the accused Mugambi walking away with a knife in his right hand and crossed the road

and entered a bush. They followed him to the bush as it was about 8.30 p.m. and they found him about 10.30 p.m. where he had climbed a tree.

PW3 Patricio Mbogo, a cousin to the deceased identified the deceased's body to the Doctor on 21/1/2011, before postmortem was done. PW3 was accompanied by **PW4 Mutuanjuki Manene**.

PW5 Dr. Justus Kitili, performed the post mortem on the deceased on 21/1/2011 and found that he suffered a stab wound to the abdomen at the epigastric area – upper abdomen 4 cm long, that had pierced the liver and a lot of blood was in the peritoneal cavity. The Doctor formed the opinion that the cause of death was pulmonary arrest due to a penetrating abdominal injury (PEX.NO 2).

PW6 Gladys Kamba, sells fruits at Makanyaga market. She recalled that on 13/1/2011 while at her place of business at Julius Kathure's (deceased) Kiosk, she saw deceased come and he asked the deceased for KShs.20/= which the deceased denied having; that he hit the deceased with a whip twice; that Kathure was then sitting outside his Kiosk and she was about 2 metres away; that when accused hit the deceased with a whip, the deceased tried to stand up but accused stabbed him on the chest next to the stomach. She went to call Ntabiu Nyaga (PW2); that accused then demanded money from PW1 and PW1 gave him KShS.100/=. PW6 denied that accused and deceased had quarreled prior to the attack, nor did they fight.

PW7 Chief Inspector Wafula Ngao testified that he was Deputy OCS, Chuka Police Station. On 13/1/2011 about 8.00 p.m., he received a report of a murder at Makanyaga Market. He proceeded to the scene, found the deceased and accused had been arrested. He was informed where accused was arrested; he went to the tree where accused was arrested and recovered a knife on the ground at the tree.

In his defence, accused told the court that on 13/1/2011, he went to his place of business at Makanyaga Market where he sells bananas and fruits and about 2.00 p.m., he went to wash his clothes in the river. He passed by a place where he drunk alcohol and he left when it was dark. On his way, he met people who got hold of him and alleged he had killed somebody; that one of those who beat him is PW2; they took him where the body of deceased was; he denied having had the knife; he said that the deceased was his friend; that in 2010, he had found PW1, 2 and 6 beating the deceased and he intervened and from then, they told him he would die just like Kithure (deceased). He denied that the deceased owed him any money but that PW1 used to complain that he sells his bananas cheaply.

Miss Nyaga who held brief for Mr. Murithi, accused's Counsel, submitted that the prosecution failed to prove the ingredients of murder; *actus reus* and malice aforethought. Mr. Mulochi, Counsel for the State on the other hand urged that there was overwhelming evidence that implicates the accused; that PW1 and 6 witnessed the attack; that PW1 and 2's evidence is materially corroborated by that of PW2.

The three ingredients of an offence of murder which the prosecution must prove beyond any reasonable doubt are:

1. **Death of a person;**
2. **That the accused caused the death through an unlawful act or omission;**
3. **That the accused had malice aforethought.**

PW5 Dr. Kitili of Chuka District Hospital performed the postmortem on the body of the deceased after it was identified by PW3 and 4. PW1 and 2's evidence did corroborate the findings by PW5, that the deceased sustained one stab wound on the upper abdomen. The Doctor was of the opinion that the deceased died due to cardiopulmonary arrest due to hypovolemic shock due to a penetrating abdominal injury. The death is not in dispute.

PW1 and 6's evidence was consistent that indeed, it is the accused who went to the deceased's stall and attacked the deceased after the deceased failed to give him KShs.20/= to go and take local brew. It was not clear from the evidence, whether the deceased owed the accused the said KShs.20/=. PW7 said that from his investigations, he found that the deceased had already paid the accused his KShs.20/= and did not owe him any money. Indeed, accused denied being owed any money by the deceased. Both PW1 and

6 who were at PW1's kiosk said they first saw accused strike the deceased with a whip and when the deceased tried to stand is when he was stabbed. They denied that there was no quarrel or fight or scuffle between them prior to the stabbing. PW2 also told the court that before the attack, the deceased had just complained to him about accused demanding money from him and he feared for his life and needed an escort home. PW1 told the court that accused first caned and asked deceased for the money and went away for about 30 minutes. I believe it is within the 30 minutes that the deceased informed PW2 of his fears. PW2 added that he saw accused walking away from the scene as PW6 called him. This incident occurred about 6.30 p.m. PW1, 2 and 6 all knew accused there before and I have no doubt that they witnessed the incident. In his defence, the accused attempted to raise the issue of business rivalry between him and PW1, that PW1 used to complain that he sells his bananas cheaply. However, at no time during the hearing of the prosecution case was it put to PW1, 2 or 6 that there existed any rivalry or the fact that accused had seen PW1, 2 and 6 beating the deceased in 2010 and he intervened and the three witnesses threatened him. The defence is a total afterthought. I am satisfied beyond any doubt that the accused was properly identified as the person who attacked and stabbed the deceased.

Accused seemed to be raising the defence of intoxication. Under **Section 13 of the PC**, intoxication is not a defence in any criminal charge. However, there are instances when it can avail as a defence. The section reads:

“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 (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.”

Though the defence is available under **Section 13 (2)**, its application is very narrow as it must fall within the confines of **Section 13 (2) (3) and 4**. Accused did not admit that he killed the deceased but he claimed to have come from washing his clothes and passed a place where he drunk alcohol but on the way was accosted by people who started to assault him and alleged that he had killed somebody. He seemed to be alert as regards the events of the evening leading to his arrest. He could only avail himself this defence of intoxication **under Section 13 (2) (a)** if he proved that the intoxication was caused without his consent which he did not allude to.

Secondly, accused did not avail himself the defence Under **Section 13 (2) (b)** because he did not prove that by reason of the intoxication, he was temporarily insane so that he did not know what he was doing or that it was wrong. In ***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”.

Whether malice aforethought has been proved: Malice aforethought is defined under **Section 206 of the Penal Code** as hereunder:

“Section 206 PC. Malice aforethought shall be deemed to 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”.*

PW1 told the court that at first, accused came at their stall and demanded KShs.20/= from the deceased but deceased denied having his money and that he went away. As earlier observed, when accused first accosted deceased and left, it must be the time the deceased ran to seek help from PW2, that he feared for his life. Accused went away and came back armed. There is evidence that there was no quarrel or fight between them before accused attacked and stabbed the deceased. If the accused had no ill intention against the deceased when the deceased denied him money and he went away, there is no application why he came back to attack the deceased. The deceased had not provoked him. In my view, accused had formed the intention, he went and armed himself and came back to do harm to the deceased. Apart from the allegation he was armed with a knife which was recovered where he was arrested – at the tree he had climbed. Accused’s action of going away, arming himself and returning where deceased was is proof of malice aforethought. It is something that he planned and had time to reflect upon before he executed it.

I have already considered part of accused’s defence whereby he alleged that PW1 and 6 were business rivals. I have dismissed it as an afterthought. The other allegation that accused raised is that he had found PW1 and 6 beating the deceased and he intervened, whereby they threatened him is also a total afterthought. His defence that he was just arrested while walking on the road is most unbelievable and I dismiss the whole defence as a sham.

I am satisfied that the prosecution has proved beyond any doubt, that it is accused who stabbed the deceased and caused his death and he had the intention to do grievous harm to the deceased. He is hereby found guilty as charged and convicted as charged under **Section 322 of CPC**.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF APRIL, 2016.

R.P.V. WENDOH

JUDGE

7/4/2016

PRESENT

Mr. Mulochi for State

Mr. Muthama holding brief for Mr. Muriithi for Accused

Peninah/Ibrahim, Court Assistants

Present, Accused