



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE (MURDER) NO. 24 OF 2015**

*(Formerly Nakuru Criminal Case (Murder) 89 of 2013)*

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**EMMANUEL KIPKOECH NGETICH.....ACCUSED**

**J U D G M E N T**

1. **Emmanuel Kipkoech Ngetich**, the Accused herein was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 12<sup>th</sup> day of September, 2013 at Kwaforty Trading Centre in Narok North District within Narok County, he murdered **Julius Wambua Mulwa**. He was represented by Mr. Kiptoo during the trial.
2. The prosecution case was as follows. **Dominic Yenku** (PW2) operated a hotel at Kau a place called Kauforty or Kwaforty (so called because sometimes previously 40 cows had died there). On the early evening of 12/9/2013 **PW2** was at the hotel serving customers, including **Geoffrey Nyomanga** (PW3) and the deceased **Julius Wambua Mulwa**. Presently, the Accused came to the hotel. He was drunk. He sought to introduce a discussion concerning an incident which had occurred at the centre earlier, between some women residents.
3. He was rebuked by the patrons and the hotel owner asked him to leave as they thought the “matter of women” did not concern them. Some angry words were exchanged particularly between the deceased and the Accused, and the latter issued threats before leaving the hotel which, from all description was really a kiosk. A few minutes later the deceased rose and left.
4. It is the prosecution case that the deceased waylaid and stabbed the deceased on the neck, killing him instantly and running away to Oloropa. He was traced there on the next day by among others **Patrick Ng’ang’a Gitau** (PW1) a boda boda operator at Kwaforty centre. Because a gathered mob evinced an intention to lynch the suspect, **PW1** and another man sandwiched the Accused on his motor cycle and drove him to the Chief’s camp, with the mob hot in pursuit.
5. On the way there, the Accused informed his captors that he had a knife on him but **PW1** fearing the mob would catch up with them did not stop. The Accused was handed over to **Samson Kahare** (PW4) Chief Enaibelbel to whom he also surrendered a dagger, concealed in his trouser. He was re-arrested by **APC Kipruto Tanui** (PW5) of Enaibelbel Police Post. Eventually he was handed over, alongside the dagger (Exhibit 1) to the police at Narok Police station.
6. A post mortem examination carried out on the body of the deceased on 20<sup>th</sup> September 2013

revealed that he died of a single stab wound to the right neck that severed the neck vessels leading to massive blood loss.

7. In his unsworn defence statement the Accused testified that he resided at Kwaforty. That he did casual jobs and was engaged as such during the day time on 12/9/2013. Later in the evening he settled in with others to enjoy drinks at Kwaforty Centre, at the end of which friends invited him to join them for the night at Oloropa. He was arrested in the course of the next day by a mob. He admitted that the dagger Exhibit 1 was his property, but as a tool of trade. That he surrendered to Chief but that he was framed up with the offence.
8. I have considered the evidence tendered at the trial and submissions by the defence. The fact that the deceased was stabbed on the neck, dying almost immediately on the material night is not in dispute. Equally there is no dispute that the stabbing occurred at Kwaforty Centre and that the Accused himself was at the said centre for the better part of the evening of the 12<sup>th</sup> September, 2013.
9. As correctly submitted by Mr. Yienko on behalf of the Accused, the two issues to be determined herein are whether the Accused committed unlawful act that cause the death of the deceased, and, secondly whether the action was accompanied by malice aforethought. There was no eye witness to the stabbing incident, and the prosecution has relied entirely on three strands of circumstantial evidence namely:-
  - a. The altercation between the deceased and the Accused at PW2's hotel some minutes before the murder.
  - b. The Accused's disappearance from his house at Kwaforty to Oloropa on the material night.
  - c. The recovery of a dagger from the Accused on the day of arrest.
10. In dealing with circumstantial evidence, this court is enjoined to apply the tests set out by the Court of Appeal in **Republic -Vs- Kipkering Arap Koskei [1949] 16EACA 135:**

**“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”**

and in **Simoni Musoke -Vs- Uganda (1958) EA 715** where the court citing the decision in **Teper -Vs- Republic [1952] 2 ALLER 447** added that:

**“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”**

These tests were reiterated in **Mwangi -Vs- Republic (1983) KLR 327.**

11. Two witnesses, namely PW2 and 3 narrated to the court the incident at the former's hotel involving the deceased (and others) on the one hand, and Accused on the other hand, prior to the murder. Although the precise words exchanged by the witnesses appear to have slight variations, the gist of their evidence was that the Accused came to PW2's premises while drunk. He wanted to be served but from the start made remarks concerning an earlier disagreement, seemingly among women traders at the centre.
12. The present witnesses did not wish to be drawn into the discussions and somewhat derisively told

- the Accused not to drag them into “**women issues.**” He was offended and more so after he was ordered to leave the hotel, resisting at first and boasting about his prowess at fighting, but leaving the hotel just moments before the deceased rose to leave.
13. What happened next was not witnessed by any of the witnesses but they were drawn out by screams. Outside the hotel the deceased lay on the ground with a stab to the neck and a trail of blood behind him. It seems that the Accused was the prime suspect and a group of people including **PW3** mobilised quickly and went in search of the Accused. He could not be traced until the next day when he was traced at the home of one Koikai in Oloropa, where his sister worked. He confessed possession of a dagger to **PW1** and handed it over to **PW4** on arrest.
14. **PW2** and **3** were keenly cross-examined at the trial. It is believable that there was lighting as the operator of the hotel was serving customers. There was some period of argument between **PW2**, the deceased and the Accused all who knew one another after they rejected rather bluntly, the Accused’s intention to discuss the women’s fight. **PW1** stated that the Accused addressed the deceased who had reiterated **PW1**’s order to leave by saying: “**Ero, what are you pursuing with me. Ero, I will kill you!**”
15. **PW3** said in his evidence in chief that the Accused was angered by the rebuff of his subject debate and stated words to the effect that he was capable of putting up a fight, and was even more angry when **PW2** firmly ejected him. Although **PW3** said in cross-examination that he did not hear specific words uttered to the deceased by the Accused that he would kill him, his narration of the events at **PW2**’s hotel is consistent with **PW2**’s version.
16. The deceased, it appears, left the hotel before **PW2** and **PW3**. As argued, the deceased may have had other enemies within the centre, but the proximity in time and place between the incident of altercation and stabbing appears to suggest they were related. The deceased was attacked only metres away from the hotel and fell at the door where **PW2** and **3** found him after hearing screams. The Accused in his defence admits he was at the centre in question but seemingly did not hear the commotion caused by the attack on the deceased, which even attracted **PW1** from the stage where he picked passengers.
17. The Accused was well known to **PW2** and **3** prior to the fateful night. They conversed with him at length (according to **PW3** for 15 minutes) until he left. The Accused for his part states that he was in venue at the centre with friends but if he was in a different venue from **PW2**’s this was not put to the prosecution witnesses in cross-examination. At any rate that he was in a different venue at the centre does not exclude a brief visit to **PW2**’s hotel.
18. I am satisfied on reviewing the evidence by **PW2** and **3** that the Accused did patronize **PW2**’s hotel on the material night and engaged the patrons, including the deceased in an angry conversation when his “women” topic was rejected. **PW2** and **PW3** said that upon finding the body of the deceased they went directly in search of the Accused. They knew his rented room at the centre as he lived at the same plot as **PW3**. He was not there and according to **PW3** did not return. Evidently members of public mobilized to search for the Accused and found him at the homestead of one Koikai, where according to **PW1**, his sister worked.
19. **PW1** gave a description of the scene of arrest saying there many people who had surrounded the home, forcing the owners of the home to plead that they take him away to avoid chaos at the home. **PW1** called **PW4**, and was responsible for removing the Accused from the danger of lynching by pleading with the mob.
20. He said that it was while he and his companion were escorting the Accused to Chief that he confessed to having a knife. This matter was revisited during cross-examination, and **PW1** stated interalia:

“.....after we had travelled about 1 kilometer the Accused said he had a knife. I had

**not asked him for the knife. But I had asked: where is the knife you used? He replied that he had the knife on him. At the scene where I rescued him he had told me the knife was where had spent the night. But after we left the mob he volunteered that he had the knife. He eventually gave it to the chief when we arrived.”**

21. It is true that the knife which is a dagger presented in court as Exhibit 1 was not subjected to forensic analysis. However evidence of the possession thereof by the Accused does not stand alone. The Accused lived at the centre where the murder occurred and was at the centre on the material night. It is evident that Oloropa was some distance from the centre. The Accused claims that friends invited him to spend the night there, hence his absence on the material night from his home.
22. None of the friends testified in court, but also the fact that he was according to **PW1 “hiding”** in the worker’s quarters at Koikai’s house at Oloropa strongly suggests a guilty mind. His possession of the dagger in those circumstances and the surrender thereof when questioned directly by **PW1** points to Accused’s involvement in the murder of the deceased. More so because the deceased suffered not a slash or cut but a stab wound measuring 50 x 30 mm on the neck, which severed neck vessels, and no other injuries.
23. In his submissions the defence counsel attempted to play down the argument at **PW2’s** and to assert that the Accused was too inebriated to appreciate the consequences of his actions. Finally, it was argued that the element of malice aforethought not established.
24. On the first issue, it is apparent that the Accused was inebriated when he was at the center, and particularly during the episode at **PW2’s**. **PW2** said after the arguments he left the hotel staggering. In his own evidence, the Accused only said he took drinks while at the centre without elaboration. The defence was not particularly canvassed with **PW2** and **PW3** despite references in their evidence to fact of the Accused being drunk.
25. In order for intoxication to be a defence the specific situation must come within Section 13 of the Penal Code which provides:-
- “(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 (Cap. 75) 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.**
26. There is nothing in the evidence of the prosecution or defence to bring this case under Section 13. With regard to the Subsection 4, the Accused was clearly incensed by the fact that the deceased

and others had rejected the topic of conversation he tried to introduce. And more upset that he was ejected from the hotel.

27.It would appear that thereafter the Accused armed himself with a dagger and from the circumstances proven herein, likely positioned himself in wait to exact revenge on those who had humiliated him. It is unfortunate that the deceased was the first person to leave the hotel and to fall victim to the revenge mission. And after the offence, the Accused had the presence of mind not only to conceal himself but also his weapon in a different location. These actions are inconsistent with the conduct of a man too drunk to form an intention to commit the offence.

28.Malice aforethought is defined in Section 206 of the Penal Code in the following terms:-

**“Malice aforethought shall be deemed to be established by evidence proving any one 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.”**

29.The fact that the Accused was a friend to, and worked with the deceased, as stated in submissions does not rule out malice aforethought. For a murder charge, motive is not an ingredient of the offence and need not exist. (See **Libambula -Vs- Republic (2003) KLR 683**).

30.In this case, malice aforethought is directly proved by the viciousness of the stab and the location thereof. The intention was clearly to inflict maximum harm on the deceased, if not kill him. As I have indicated the circumstances of this case suggest that the Accused, while armed with a dagger, and not a maasai *simi*, as submitted by the defence, waylaid his victim and struck with such viciousness that the victim died almost instantly. The Accused even though drunk must have known that such a stab would result in maiming or death, and aware of the unlawful act he had committed chose to flee and hide at Kokai’s home.

31.The proved facts consistently point to the Accused’s guilt and are inconsistent with his innocence. There are no intervening factors tending to weaken or destroy the inference. Taken cumulatively, the facts proven by the prosecution evidence dislodge the defence offered by the Accused person, and establish beyond doubt that Accused is the person who, of malice aforethought inflicted the fatal stab on the deceased. I do find him guilty as charged and convict him.

Delivered and Signed at Narok this **1<sup>st</sup>** day of **July, 2016**.

In the presence of:

For the DPP : Mr. Koima

For the Accused : Mr.Kiptoo

Accused : Present

CC : Barasa

**C. MEOLI**

**JUDGE**