



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 37 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

JOHN MBURU KAIRA.....ACCUSED

JUDGEMENT

The accused **JOHN MBURU KAIRA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge are that

“On the 7th day of April 2013 at Gilgil Township within Nakuru County murdered FREDRICK KIPKEMOI”

The accused entered a plea of ‘**Not Guilty**’ to the charge and his trial commenced on 14/5/2014 before **Hon. Lady Justice Roseline Wendoh** who heard the first four (4) witnesses. Upon the transfer of Justice Wendoh to the Meru High Court. **Hon. Lady Justice Abigael Mshila** took over the hearing and recorded the evidence of the 5th, 6th and 7th witnesses. She too was transferred to Nyeri High Court during the pendency of the trial upon which I took over the case and heard the final witness.

The brief facts of the case were that the accused and deceased both worked at a butchery/restaurant in Gilgil Township. On 7/4/2013 the two were at work, when they both began to quarrel. The quarrel degenerated into a physical fight. **PW1 PAUL MAKUMI KABUGA** who was a chef at the hotel (and a son to the accused) told the court that he heard a commotion and upon going to check he found the deceased lying on top of the accused. **PW1** intervened and separated the two. The accused then ran into the kitchen picked up a knife and then ran back towards the deceased brandishing a knife. **PW1** fearing for his own life ran away. The accused then stabbed the deceased in the chest.

PW1 and the other workers in the hotel made efforts to rush the deceased to a nearby clinic where he unfortunately succumbed to his injury whilst undergoing treatment. The matter was reported to police who came and arrested the accused. Upon the conclusion of police investigations the accused was arraigned in court and charged with the offence of murder.

At the close of the prosecution case, the accused was found to have a case to answer and he was placed onto his defence. The accused admitted having been involved in an altercation with the deceased, but he denied having stabbed the deceased. The accused insisted that it was the deceased who attacked him with

the knife.

This court now had the duty to examine the evidence on record in order to determine whether the charge of murder has been proved beyond reasonable doubt as required by law.

The offence of murder is defined by Section 203 of the Penal Code, Cap 63 Laws of Kenya as follows:

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

The prosecution must adduce evidence to prove the following crucial ingredients of the charge of murder beyond reasonable doubt

- (i) Proof of the fact and cause of death of the deceased.
- (ii) Proof that the deceased met his death due to an unlawful act or omission on the part of the accused
- (iii) Proof that said unlawful act or omission was committed with malice aforethought

Regarding the fact and cause of death of the deceased there can be no controversy. **PW1, PW2 NYABUKE THOMAS** and **PW3 SIMON MANGI KURIA** all co-workers of the deceased and accused and all of whom were present on duty in the hotel at the material time testified the deceased was stabbed in the chest and later died while undergoing treatment at a nearby clinic. **PW4 REDEMPTA CHEBET JUMA** was the mother of the deceased. She told the court that upon receiving the news she rushed to the hospital but found that her son had already died. All these witnesses who knew the deceased well gave his name as ‘**Fredrick Kipkemoi**’

Evidence regarding the cause of death was adduced by **DR. TITUS NGULUNGU PW8** a consultant pathologist based at the PGH – Nakuru, who produced the post mortem report **P. Exb 1. PW8** confirmed that the autopsy examination revealed that the deceased had a stab wound on the left side of his chest accompanied by a fracture of the third rib. The cause of death was opined to be ‘**severe haemorrhage due to a stab wound to the chest by a sharp object causing cardiac shock**’. This was expert medical evidence which was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased met his untimely death as a result of having been stabbed in the chest.

Having proved the fact and cause of death the prosecution must go further and tender evidence to prove that it was the accused who so fatally stabbed the deceased. In this regard evidence was called by the witnesses who were present when the stabbing incident occurred.

PW1, PW2 and **PW3** were all present when the incident occurred. All the three witnesses identify the accused as the man who stabbed the deceased in the chest. The incident occurred at about 9.00am. It was broad daylight and visibility was good. The accused was well known to all the three witnesses since he was their co-worker. There could have been no possibility of a mistaken identity. I find that the eyewitnesses gave consistent evidence regarding the events of that day. They all remained unshaken under cross-examination by defence counsel. I have no doubt that they were being truthful.

All the eyewitnesses state that they saw a knife in the hand of the accused. The said knife was produced as an exhibit **P. Exb 1** and was properly identified by all these witnesses.

PW7 HENRY KIPTOO was a Government Chemist who also testified in this case. He told the court that he received from the police blood samples taken from the accused and the deceased as well as a kitchen knife for comparison and analysis. **PW7** examined the items. His conclusion contained in his report dated 25/10/2014 was that the knife was ‘**moderately stained with human blood**’ Further DNA analysis revealed that the DNA profiles generated from the blood stains on the knife matched the DNA profiles generated from the blood sample taken from the deceased. This provides conclusive proof that

this was the very knife used to stab the deceased. **PW7** did produce his report as an exhibit **P. Exb 3**.

From the above I am satisfied that it has been proved beyond reasonable doubt that it was the accused who fatally stabbed the deceased thereby causing his death.

The next question is whether the accused committed this act with malice aforethought *ie* was he possessed of the *mens rea* requisite for proof of a murder charge. From the evidence it is apparent that the accused did not launch an unprovoked attack on the deceased. The two had been engaged in a quarrel which degenerated into a fight. According to the eyewitnesses the accused and deceased had struggled. The deceased had felled the accused and at some point lay on top of him. When the accused broke free he rushed into the kitchen (it must be remembered that they were inside a hotel) picked up a knife and ran back to the deceased **PW1** in his evidence stated that:-

“John (accused) came running brandishing it (the knife) and I escaped and jumped out of the way. John passed. He tried to get hold of Fred from the back. Fred turned and tried to hold the knife and John stabbed Fred in the chest”

Thus there was clearly a continuation of the fight between the two men including a struggle over the knife.

From the evidence it can be discerned that the accused acted in the heat of the moment. He had no time to formulate a pre-meditation to kill the deceased. It is my considered view that the accused acted whilst under provocation. The deceased was fighting with him and at some point had floored him. The accused reacted by picking up the nearest item and using it to lash out at the deceased. In these circumstances the element of malice aforethought cannot be said to have been present.

Section 207 of the Criminal Procedure Code provides:-

“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”

I find that the accused here acted in the heat of passion, before his temper had time to cool. The *mens rea* for the offence of murder is not proved. Therefore I acquit the accused of the charge of murder and instead I convict him of the lesser offence of manslaughter contrary to Section 202 (1) of the Penal code.

Dated in Nakuru this 7th day of October, 2016

Ms Yebei holding brief for Mr. Mongeri

Mr. Chigiti for State

M. A. Odera

Judge

7/10/2016