



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 25 OF 2013

REPUBLIC STATE

V E R S U S

KELVIN MURITANI KAIBIACCUSED

JUDGMENT

Kelvin Muritani Kaibi (the accused) 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 1/3/2013 at Amugaa Location, Choorio Sub-location, Tigania East, Meru County, he murdered Lazarus Kinyua. The accused denied the offence and in support of their case, the prosecution called a total of 7 witnesses. The accused was called upon to enter his defence. He testified on oath and called a total of 5 witnesses.

When the accused came for plea, his age was assessed and he was found to be aged between 17½-18 years. The case therefore proceeded in camera in accordance with the Provisions of the Children's Act.

PW1, Karimi Abraham testified that on 1/3/2013 at 8.00 p.m., he was at Mwiti's Hotel at Amugaa, when a lorry KAV 325Z arrived and stopped outside the hotel. The vehicle had maize which was being offloaded and that Lazarus was assisting Mwiti in offloading it; that a Prado vehicle arrived and stopped there and Kelvin, the accused alighted from the Prado, went and pulled Lazarus from the land rover and stabbed him on the left side. Lazarus fell and Kelvin ran off. PW1 said that Lazarus's relatives who included Elijah Mwiti, PW2 organized for a vehicle to take Lazarus to Hospital. The second day, he heard that Lazarus had died. He further told the court that he had seen both Lazarus and accused well and that there were security lights in and outside the Hotel.

PW2, Titus Muathi recalled that on 1/3/2013, he was in the land rover with many other people and when they reached Mikinduri, Lazarus, the deceased, boarded the vehicle in the front cabin. On reaching Amugaa, there were campaigners singing; that the land rover was a campaign vehicle of Councillor James Murungi and on reaching Amugaa, a Prado of the opponent followed them. At Amugaa, PW2, Maurice Mungatha, James Kimathi and Lazarus started offloading the maize from the land rover. It is then Kelvin came from the Prado, pulled Lazarus out of the vehicle and stabbed him and ran off; that Kelvin left the knife stuck in Lazarus' left upper chest and they called his brother, PW3 Elijah Mwiti Mbaabu who took him to hospital.

Elijah Mwiti, (PW3), a brother to Lazarus recalled that on 1/3/2013 he was at a bar when he heard people saying that his brother Lazarus, had been stabbed by Kelvin. He went to the scene and found Lazarus lying on the ground facing up; he got a vehicle and took him to Mikinduri Police Station, reported, then took him to Kiirua Hospital and he died as he was undergoing treatment. He observed that Lazarus had

sustained a stab wound on left side of the chest.

PW4, Dr. Koome Guantai of Meru Level 5 Hospital testified on behalf of Dr. Mbere who performed the post mortem on Lazarus and he found that externally, the deceased had a penetrating injury on the left anterior axillary region, with severe oozing of blood and internally, there was massive left haematoma and injury of the subclavian vessels. The Doctor was of the opinion that the cause of death was massive haemorrhage due to penetrating chest injury and injury to the subclavian vessels. The post mortem was produced in evidence (PEXNo.1).

PW5, Moses Mwiti Mungathia reiterated PW2's evidence that Lazarus boarded the land rover at Mikinduri and when they reached Amugaa, he was helping to offload the maize and taking to Jerusalem Hotel when another vehicle came, Kelvin came out of the vehicle, held Lazarus and pulled him out and stabbed him on left chest area. Lazarus's brother was called, got a vehicle and took him to hospital and he learnt next day that Lazarus had died. PW5 said the knife that accused used to stab Lazarus was left behind and he handed it over to the police. He said that there were security lights both in the hotel and outside.

PW6, Jim Kimathi Joshua recalled that on 1/3/2013, he was at Mwiti's hotel taking tea when a vehicle loaded with maize stopped outside and people started off loading the maize and taking it into the hotel. Lazarus was carrying the maize into the hotel when a vehicle belonging to a campaigner, Kingori, stopped near the one with maize; that Kelvin came out, went where the vehicle with maize was, pulled Lazarus down and stabbed him. He said that there were security lights at the scene.

The Investigating Officer, PW7 PC Humphrey Koskei recalled that he was at work on 1/3/2013 about 9.00 p.m. when Lazarus and his brother went and reported that Lazarus had been stabbed and Lazarus was referred to Kiirua Hospital. He went to the scene and recovered a knife which was the weapon used to assault Lazarus and next day, he learnt that the deceased had died. On 7/3/2013, he witnessed the post mortem being done; that on 9/3/2013, the accused went to the station, saying he was feared for his life due to the death of a person. Together with one PC Korir they arrested accused and placed him in cells.

The accused, Kelvin Muritani testified on oath, that he had looked after cattle on that day, went home about 5.00 p.m. He went to the place he used to sleep and found that one Boniface had worn his shoes to church and went to look for him at Kathankume Market. It was 6.00 p.m. and being an SDA because Saturday was approaching, he left for home at 6.00 p.m. and on reaching there, heard people crying saying that he had killed Lazarus; the crowd pelted stones at their house and that is when he decided to go and spend the night at his friend Mwiti's home. His parents were taken away to the police station. He said that on 2nd he went to the police station with his parents. He denied murdering the deceased and being involved in the campaigns that were ongoing.

DW2 Salomon Baario told the court that on 1/3/2013 he was the driver of the motor vehicle KAV 325Z. He had been hired to transport maize from Mikinduri and the deceased boarded the vehicle. He noticed another campaign vehicle behind his as they reached Kathankume market where he stopped to offload the maize; that deceased alighted from the vehicle and crossed the road, went where people were singing and that after a few minutes he came back and fell near where his vehicle was. He denied seeing the person who stabbed the deceased but he observed the deceased and noticed that he was bleeding. He denied having seen accused at the scene.

DW3, Juda Mutwiri Kaiga who attends the same SDA Church with accused and deceased's family was involved in the negotiations trying to reconcile accused's family and deceased's family because the deceased's family wanted to revenge the death of deceased. He said that Mwiti recovered the knife that accused allegedly used in the murder of the deceased. He said he is one of the people who took the knife to the police station.

DW4 Japehth Mitheutold the court that accused hails from his village and the accused's parents referred this case to Njuri Ncheke elders; that the parties took an oath but he did not know who murdered the deceased. The accused requested for the OB report for Minkinduri Police Station, OB 37 of 1/3/2013;

when the parents of the accused reported that they had been attacked by the crowds from the campaigns who were looking for Kelvin who had allegedly murdered another; that they had been threatened by the crowds and feared for their lives.

After the close of the defence case, Mr. Wamache, Counsel for the accused submitted that the evidence of the prosecution witnesses was contradictory; that there was a big crowd at the scene and that accused would not have managed to sneak through and escape; that the witnesses are all related and were not independent and that the court should find the defence to have been plausible.

The Learned Counsel for the State relied on the evidence adduced by the 6 witnesses.

Having heard all the evidence on record it is not disputed that this incident that resulted in the death of the deceased occurred during the campaign period. It seems the deceased and his attacker belonged to two rival groups.

There is also no doubt that the scene of incident was outside some hotel at Amugaa market and the incident took place at night when it was dark, at about 8.00 p.m. The case therefore turns on the issue of identification, that is, whether the accused was properly identified as the assailant.

PW1, 2, 5 and even DW2 the driver of KAV 325Z all agreed on how the scene was. KAV 325Z arrived at the scene and it had on board maize which was to be offloaded and taken to the hotel. It was soon followed by a Prado which had campaigners on board and there was singing and a crowd at the scene.

PW1, 2, 5, 6 told the court that there were electric lights in the hotel where the maize was being offloaded to and even outside where the vehicle was parked, there were electric lights and that this enabled them to see the accused attack the deceased. To the contrary the accused said the electric lights were only inside the hotel. DW2 confirmed that there were indeed electric lights in the hotel. It was, however, never put to DW2 whether or not there were electric lights outside the hotel. However, from his evidence, he was able to see the deceased get out of the land rover, cross the road towards the crowd and come back where he was, is evidence that there was sufficient light outside the hotel, where the land rover was parked. I am satisfied beyond any doubt that apart from there being electric lights in the hotel where the vehicle was parked, there were electric lights even on the outside that enabled the witnesses see what was happening.

PW1, 2, 5 and 6 were consistent in their evidence that they saw the accused get out of the motor vehicle Prado that arrived after motor vehicle KAV had stopped and that the accused came and pulled the deceased out, who was helping in offloading the maize and stabbed him before he fled. When PW1, 2, 5 and 6 testified their testimony was never shaken or dislodged by the defence evidence. It was never suggested by the defence during hearing of prosecution case that the deceased ran to the crowd that was singing and came back immediately after being injured. In fact the crowd's reaction seems to have been spontaneous. The crowd went to accused's home on the same night in search for the accused. Accused admitted that he went to spend the night at his friend Mwit's home. It is not something that that was thought about later and that is the reason why the accused's parents went to seek refuge at the police station at about 2000 hours (8.00 p.m.) soon after the incident. This was confirmed by the OB report produced at the behest of accused by DW5 CPL Leiborke.

I find the evidence adduced by the prosecution witnesses to be overwhelming, that, it is the accused who stabbed the deceased and ran away. Their evidence was corroborated by the findings of the Doctor that the deceased received one penetrating wound to the left chest and injury to the subclavian vessels. The accused's defence is a mere denial and not plausible. The evidence of DW3 and 4 was not at all helpful. If the accused's family were seeking reconciliation with deceased's family, did it mean he was admitting the offence? The evidence of DW2 who claimed to have been present at the scene did not dislodge the evidence of PW1, 2, 5 and 6. As earlier observed, it was never suggested by the defence, during the hearing of the prosecution case that the deceased had run to the crowd where he was injured. I prefer the evidence of PW1, 2, 5 and 6. In the end, I dismiss the defence as untrue.

To prove an offence of murder, the prosecution must establish that the accused committed the act, causing

the death (*actus reus*) and that he possessed the necessary malice aforethought (*mens rea*). Malice aforethought is defined in Section 206 PC as an intention to kill or do grievous harm.

From the evidence, it is clear that the accused must have planned the attack on the deceased, he ran to the unsuspecting deceased while armed and inflicted the one fatal blow that caused his death. I am satisfied that both the ingredients are proved against accused and I will find accused guilty as charged and convict him of the offence of murder under Section 302 of the IPC.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF JUNE, 2015.

R.P.V. WENDOH

JUDGE

PRESENT

Mr. Mulochi for State

Mr. Wamecha for Accused

Faith, Court Assistant

Accused, Present