



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO.14 OF 2010

REPUBLIC PROSECUTOR

VERSUS

M N M ACCUSED

J U D G M E N T

Introduction

1. The accused person herein M N M is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 13th day of June 2010 at about 3.45pm at [Particulars withheld] village Matungu location in Matungu District within Western province he murdered A M S. He denied the charge. The State called 9 witnesses.

The Prosecution Case

2. PW1 L M S testified that on 13/6/2010 after attending church with his wife, his wife went home but returned shortly with his (PW1's) brother C with information that A M his (PW1's) brother in law's son had been stabbed and had been rushed to hospital. On their way to Bungoma hospital they met Zainabu (PW3) who had taken the child to hospital who told them that A had died.
3. He told the Court that he went to the hospital where he saw the body and confirmed that the deceased had died. He noted that the body had an injury on the chest near the heart. He reported the case at Bungoma Police station but he was referred to Harambee Police base where he went to report the incident. He explained to the Court that he knew the accused who is his step brother's son and who had lived with him but because he was truant PW1 had let him go. PW1 also stated that on 19/6/2010 the post mortem examination was done.
4. On cross examination by Mrs Muleshe PW1 told the Court that he did not witness the killing, and that there were no differences between him and the father of the accused whose home was only 50 meters away from where he (PW1) was staying. The incident happened in his (PW1's) home.
5. PW2 Pascal Mando Mapuka told the Court that he attended the post mortem examination of the deceased's body on 19/6/2010 at Bungoma district hospital mortuary. He noted the injury on the left side of the chest. The deceased was known to him.
6. PW3 ZAINABU MOHAMMED testified that on 13/6/2010 as she was going to the market she was told by a child by the name R that a child by the name S had been stabbed and had been taken to hospital. She followed the children and found S who was injured and was lying on the ground. She saw an injury on the left part of his chest she covered him with a leso and took him to Bungoma hospital. He (S) succumbed to the injuries and died at the hospital. She later made a report to the Police station. PW3 stated that some of the children who were with the deceased

- were N, R and A. On cross examination she told the Court that the deceased had two injuries at the front and back of the chest.
7. PW4 Y A 13 years told the Court that on the 13/6/2010 the deceased was with her as she went to tie a cow. The accused then went to their home and started throwing stones at the roof. She told the accused to stop but he continued which prompted her to call out their dog. As she tied the cow she heard screams and when she looked out she saw the accused bending and stabbing the deceased. She spoke to the deceased who told her that he had been stabbed. She then covered the deceased with a blanket and locked the house. The accused ran off into the maize plantation as soon as he saw her. She started screaming and with the help of Khadija they carried the deceased to Lukaka dispensary and on their way mama Sophia (PW3) came and carried the deceased away. Mama Sophia told them to call mama Rose and then they went to the Police station.
 8. On cross examination by Mrs Muleshe she maintained that she saw the accused stab the deceased with his right hand. It was in their compound. She explained that she used to live with A (Deceased) and that the accused had a knife. She further explained that the deceased used to say accused was a thief. She told the Court that there was no fight between accused and the deceased but that the accused picked the deceased undressed him, put him under the mango tree and then stabbed him.
 9. PW5 M M 13 years told the Court after being taken through a voir dire examination that on the 13/06/2010 she heard screams from the home of L (PW1). When she came out she met PW4 carrying the deceased. PW4 told her that the deceased had been stabbed. She started screaming and helped to carry the deceased. On the way they met PW3 and later they went to call PW1 who had gone to church. The Prosecution did not interrogate PW6 EMMNUAEL MBULA for reason that he would repeat the testimonies already given by the other witnesses.
 10. PW7 R N S told the Court that as she went to church on the 13/6/2010 with her husband she passed the accused with his grandmother C while warming themselves by a fire. She explained that she had given PW4 and the deceased work to do before she left home. After church A told her that the accused had stabbed the deceased. They went to the clinic and found that the deceased had been taken to hospital. She informed her husband and on their way to hospital they met PW3 who told them that the child had died. She saw his body and saw the stab wound. She then reported to the Police. The deceased was her nephew. She told the Court that she knew the accused was a son to her brother-in law. Though PW7 had stayed with the accused, she said that he was a thief and played truant in school.
 11. PW8 Dr. MULI DENNIS a medical Doctor at Bungoma level 4 Referral Hospital produced the post mortem report on behalf of Doctor Richard Olunga. He explained the contents of the post mortem report. In the opinion of Doctor Richard Olunga the cause of death was cardiopulmonary arrest secondary to excessive haemorrhage secondary to a stab wound secondary to assault. PW8 produced the post mortem report which was marked as "PEXh 1."
 12. PW9 No.65405 Sgt Benjamin Chelanga formerly of Mumias Police station testified that on 13/06/2010 PW1 reported a case of assault at Harambee patrol Base that the accused had stabbed Arnold (the deceased) on the chest and he (deceased) had been rushed to Bungoma hospital for treatment. That shortly thereafter they received news that Arnold had died. They visited the scene at [Particulars withheld] village where they met PW4. They found a lot of blood at the scene between the kitchen and the main house. PW4 told them that accused had stabbed the deceased using a knife. She (PW4) had screamed for help and was assisted by PW3 who helped them take deceased to hospital. His investigations included looking for the accused and the murder weapon though he did not recover the murder weapon. He also testified that on 14/06/2010 members of the public found accused who was hiding in the sugarcane plantation and arrested him and handed him over to Corporal Ochieng at Harambee Patrol Base.
 13. That Corporal Munywoki interviewed the suspect about the incident. The accused took the Police to where he had kept the murder weapon and the same was recovered and kept as an exhibit. It had blood stains. He told the Court that the Doctor found that the deceased's death was due to the injury. The murder weapon was taken to the Government Chemist for analysis but the same had not been returned by the date of the hearing nor did they have results. On cross examination by Mrs. Muleshe PW9 explained that he did not establish whether somebody saw what happened and that it took him 48 hours to trace the accused. He added that they did not take any photos at the scene.

The Defence Case

14. The accused was put on his defence and he gave a sworn statement. He told the Court that on 13/06/2010 he went to his neighbour's home to harvest mangoes at about 3.45p.m. While he was harvesting mangoes A S (deceased) approached him with a knife and asked him for mangoes. He told the Court that the deceased (A) was thirteen (13) years of age. He climbed down the tree but was not aware that A (the deceased) wanted to stab him. As he tried to take the knife from A, A fell down and the knife pierced him in the chest. He told the Court that they were not fighting with the deceased but he was only trying to take the knife in order to save himself. He explained that the deceased was standing and the sharp side of the knife was facing down and it pierced the deceased just once. He further testified that the knife was in both their hands when it stabbed the deceased. Both their families had no grudge between them. He testified that when the knife stabbed the deceased he (accused) did not fall on him but took the knife and threw it down. He also told the Court that A lived with PW1 and A had warned him against harvesting their mangoes. He maintained that there was no other person at the scene. After the incident he ran to their home for fear that people would say that he killed A. He concluded by saying that he had no plan to kill the deceased and denied that he planned to kill him.
15. Upon cross examination by Mr. Ngetich for the State he confirmed that he knew PW1 and that he lived in his home at one time but later left voluntarily. He explained that he left PW1's home because they did not want him to live there and they did not give him food yet they gave him a lot of work. He denied that he was truant. He further explained that he knew PW4 who used to work at the home of PW1 and who he claimed lied when he said that he went to their home and started throwing stones. He maintained that PW4 was not at the scene and she never asked them to stop fighting. He also stated that A had a knife and he went to him and asked for mangoes and he gave him three. He claimed that A commanded him to come down from the mango tree and he only saw the knife after he had come down from the tree and he (A) wanted to stab him. He wanted to take away the knife from Arnold because Arnold moved close to him. They never quarreled nor did the deceased talk to him angrily. He denied that he stabbed the deceased.
16. The Court examined the accused who said that he had known the deceased for about one (1) year and that the deceased was not a child of PW1. He further testified that PW1 treated the deceased in a preferential manner and as a result, he left PW1's to their home which was about 60 meters. He told the Court that he had no relation with PW1.
17. The accused was further re-examined by Mrs. Muleshe. He testified that he could not say why PW1 treated the deceased preferentially. He also said that PW7 was an aunty to the deceased though he did not know the relationship between PW1 and PW4. He told the Court that in 2010 he was 15 years while the deceased was 13 years. He also said he had no personal relationship with PW4 that did not know whether deceased was related to PW4.
18. The Defence closed their case and filed submissions. The defence submitted that the Prosecution had not proved its case beyond reasonable doubt to attract a conviction against the accused. That the ingredients of murder had not been proved as there was no eye witness. On the other hand, Counsel submitted that the deceased died out of the struggle between himself and the accused the accused as he defended himself from being injured by the deceased. It was submitted further that the knife belonged to the deceased and that at the time of the incident the deceased and the accused were both minors.

Analysis of the Evidence

19. The age of the deceased person as per the post mortem report (PEx 1) was seven (7) years. Accused in his defence has maintained that the deceased was 13 years and that he himself was 15 years old when the incident occurred. No other witness mentioned the age of the deceased in this case. PW4 in her evidence told the Court that she saw the accused stabbing the deceased. PW4 was 13 years of age at the time of giving her evidence. The Court took her through a voir dire examination and found that she understood the meaning of an oath and the consequences of telling a lie. She gave sworn evidence. Her evidence corroborated that of PW7. PW3 and PW5 assisted her in taking the deceased to hospital. The incident happened in their compound. What comes out clearly from the evidence is that PW4 was a house help in the house of PW1 and PW7. The

- deceased was a nephew to PW1 and PW7 and it was PW4 who was left with the deceased in the homestead on the day of the incident. PW7 told the Court that she and her husband PW1 went to church leaving behind the deceased with PW4 the house help.
20. Why I started by examining or questioning the age of the deceased was because the accused insisted that the deceased was 13 years at the time of the incident whereas the post mortem report indicated the deceased's age as 7 years. I do not believe the assertion by the accused person that the deceased was 13 years old at the time of the incident. My reservations are informed about by the fact that PW4 who was 13 years old at the time was able to carry the deceased after the incident only to be assisted by PW5 also 13 years old a few minutes later. Accused therefore was not candid by insisting that the deceased age was 13 years. The deceased was aged seven (7) years when he met his death by being stabbed.
 21. PW5 who assisted PW4 responded immediately she heard the screams from PW4 who was her neighbour. She did not see the accused stabbing the deceased but saw the deceased being carried by PW4 immediately she responded to the screams. That is was PW4 who told her that the deceased was stabbed by the accused and that was immediately after the incident. PW1, PW2, PW3, PW5 and PW7 did not see what actually happened. They relied on what was told to them by PW4 and what they saw thereafter. The accused confirmed that on the day of the incident he was at PW1's compound. He told the Court that the deceased had a knife and that when he tried to take the knife away from the deceased he (deceased) fell on the knife which then pierced him. In his statement he said that he never quarreled nor did the deceased talk to him angrily. This contradicts the defence submissions which state that the deceased died out of a struggle with the accused as he (accused) defended himself.
 22. The accused in his defence explained that the deceased was standing while the sharp side of the knife was facing down and that is how it pierced the deceased. This contradicts his statement where he said that the knife was in both their hands when it stabbed the deceased. He also contradicts himself when he testified that when the knife stabbed the deceased he (accused) did not fall on the deceased. PW4 on the other hand told the Court that he saw the accused bending and stabbing the deceased which to me means that the deceased was either shorter than the accused or the deceased was lying down. The injury was on the chest and not on any other part.
 23. Accused claims to have wrestled the knife from the deceased and thrown it down. PW9 visited the scene where they found a lot of blood between the kitchen and the main house. On interrogating PW4, they told them that the deceased was stabbed by the accused using a knife although they did not find the knife at the scene.
 24. PW9 who was the investigating officer told the Court that the accused took them to the place where he (accused) had kept the murder weapon and the same was recovered and taken to the Government Chemist for analysis but by the time he was giving his testimony the report had not yet been received. The alleged murder weapon was therefore not produced in evidence. PW4 said she saw the accused running into a maize plantation. PW9 testified that members of the public found the accused hiding in the sugar plantation. The accused on his part told the Court that after the incident he ran back to their home.
 25. In closing his defence the accused stated that he had no plan to kill the deceased. The only person who says she witnessed the accused stabbing the deceased is PW4. Her testimony was consistent and she took action immediately after the incident. She screamed and her screams attracted the attention of PW5. She also told PW5 of what had happened and gave the name of the accused as the person who stabbed the deceased. I find PW4's testimony credible although she was only a minor at the time. Her testimony is corroborated by that of PW5 who is a neighbour. Accused has not denied having been at the homestead of PW1 at the time the deceased was stabbed. He also has not denied that he was with the deceased in the compound. However, it is the duty of the Prosecution to prove the guilt of the accused person beyond all reasonable doubt.

The Law

26. The accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Section 203 of the Penal Code defines murder in the following terms:-

“Any person who of malice aforethought causes death of another person by any

unlawful act or omission is guilty of murder.”

27. The Prosecution must therefore satisfy this Court that the ingredients as set out in the said Section are met. The main ingredients of murder as defined in the Section are:-

- i) malice forethought and
- ii) an unlawful act or omission

28. Malice aforethought is defined by Section 206 of the Penal Code as follows:-

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

- a. **An intention to cause death or 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 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.”**

Issues for Determination

28. Two issues arise for determination in this case:

- a. whether the Court can rely on the eye witness account of PW4 to make a finding of guilty and
- b. whether the Prosecution has proved the ingredients of Murder as defined under Section 203 of the Penal Code.

As regards the first issue, the law does not provide that a particular set of facts must be proved by any particular number of witnesses. This means that even the evidence a single witness can support a conviction subject to certain limitations. In the well known case of

Abdalla Bin Wendo –vs- R (1953) 20 E.A.C.A 166, the former Court of Appeal for East Africa stated the following at page 168:-

“subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions following a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct pointing to guilt, from which a judge of jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

29. According to PW4, the deceased was with her when the accused came into the compound and that she saw him as he stabbed the deceased before he ran off into the maize plantation. PW4 also stated that it was the accused who held the knife as he stabbed the deceased after undressing him (deceased) and putting him under the mango tree. I am therefore clear in my mind that PW4 told the Court what she saw with her own eyes and I have no reason to doubt her.

30. Now, the second issue is whether the Prosecution proved one or all of the ingredients of murder and particularly whether it has been proved that the accused had malice aforethought. In my

considered view, the Prosecution had discharged its duty in this regard. The accused stabbed the deceased in the chest and knew or ought to have known that by inflicting a deep wound in the chest with a sharp knife, was likely to cause the death of or grievous harm to the deceased. I do not buy the line of defence adopted by the accused that the deceased was the author of his own misfortune. The accused's version of how the deceased allegedly fell on the knife is simply preposterous and is unbelievable. It is the accused who stabbed the deceased for whatever reason. It is likely that the accused was not happy that while PW1 and PW7 had chased him away from their home. The deceased was still enjoying the preferential treatment accorded to him by PW1 and PW7.

Conclusion

31. For the reasons stated above, I make a finding of guilty against the accused person for the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code, and convict her accordingly under Section 322 (1) of the Criminal Procedure Code.

32. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 14th day of October 2015

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Omwenga for the State

Mr. Anziya h/b for Mrs Muleshe for the Accused

Solomon Lagat - Court Assistant