



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 33 OF 2014**

**LESIT, J.**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**DAVID MWEHA WAWERU.....ACCUSED**

**JUDGMENT**

1. **The accused person DAVID MWEHA WAWERU is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are;**

**“That on 30<sup>th</sup> day of June, 2013 at Kariobangi North location within Nairobi County, murdered SAMSON NJOROGÉ.”**

2. The prosecution called seven witnesses. The facts of the prosecution case were that the accused and the deceased were seen and heard by PW1 and PW2 arguing outside RB Pub at about 8 p.m. on the 30<sup>th</sup> of June 2013. According to PW1 and 2 the accused person was with his friend called Nkiri and the deceased was with his friend John at the time of the said argument. They heard the accused demanding of deceased to either buy alcohol for himself or for the accused. They then heard the deceased say that he cannot be forced to buy alcohol as he had no money. Both PW1 and 2 then saw the accused person draw a kitchen knife from his waist with which he stabbed the deceased once in the stomach. When the deceased bent over the accused stabbed him on the shoulder.
3. The two witnesses, PW1 and 2 then saw the accused person wipe the knife on the soil and then he straightened it out with his feet as it had curved after stabbing the deceased. They then heard the accused say words to the effect **“I have stabbed him but you will take me nowhere”**.
4. The prosecution case is that the accused person was not seen again in that area until 20<sup>th</sup> of April 2014, nine months later when he entered RP Pub. PW1 who was at the pub at the time alerted the Manager of the club. At the same time PW6 Sgt. Noor who was in-charge of the Police Mobile patrols in the area was driving within the area with his fellow police officers when members of the public beckoned them to the pub. As they drove towards the pub, the 99 controller called directing him to go to RB Pub. When they reached the Pub, the accused was identified to PW6 and he arrested him inside the Pub. PW6 was informed at the scene that the accused had stabbed a person who later died.
5. The cause of death of the deceased was penetrating abdominal injury due to stab wound by a sharp object according to Dr. Zuriel who performed the postmortem on the body of the deceased on the 5<sup>th</sup> July 2014. His report is Exh. 1.
6. The accused person in his sworn defence put forward an alibi as his defence. The accused started

- by saying that on the 20<sup>th</sup> April 2014 he was at his place of work as usual and at around 1.30 p.m. he went for lunch. He said he was arrested by police officers who approached him from the direction of RB Bar. He said that the Police informed him that he had a gun and they arrested him. At the police station the accused said he was informed that he had murdered someone but he told the police that he did not recognize the name of the deceased they stated to him.
7. The accused stated that on the 30<sup>th</sup> June, 2013 the day of the alleged offence he woke up as usual and went to work as usual until 6 p.m. He denied committing any offence on that date. He also said that he never carried any knife, that he never quarreled with anyone and he did not demand any beer from anyone on that day. He said that the case was a fabrication.
  8. When the defence counsel Mr. Amutala gave his final submissions he made an issue out of the fact that even though the accused was not denying that he was subjected to Mental Assessment the prosecution did not produce the report to the court. As a result of that submission the court invoked **section 150** of the **Criminal Procedure Code** and called P.C. Gatembu who escorted the accused to Dr. Shako who carried out the Mental Assessment of the accused. P.C. Gatembu also took the P3 Form from Dr. Shako after the assessment and entry of the findings on the P3 Form. The P3 Form was then produced as an exhibit of the court. According to P3 Form the accused person was found Fit to Stand Trial.
  9. The prosecution case was prosecuted by Ms. Onunga Prosecution Counsel. On the other hand Mr. Amutala defended the accused person in this case.
  10. The accused faces a charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. Murder is defined under **section 203** as follows:

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

11. The prosecution case is that the accused person stabbed the deceased twice and that it is from those injuries that the deceased succumbed and died. The prosecution must adduce evidence to prove beyond any reasonable doubt that it was the accused person who stabbed the deceased. The prosecution must also adduce evidence to prove that at the time the accused stabbed the deceased he had formed an intention to cause death or grievous harm to the deceased. That intention is malice aforethought which is described under **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 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.**

12. Mr. Amutala for the accused in his submissions urged that the prosecution did not adduce any evidence to prove that it was the accused person who stabbed the deceased. In response Ms. Onunga Learned Prosecution Counsel submitted PW1 and 2 in their evidence stated that they knew the accused person before the incident. Counsel urged that these two witnesses were working in a nearby workshop when both saw the accused person draw a kitchen knife stab the deceased twice then wiped the blood with the soil and walked away.
13. The incident took place at night. Being at night it is very important that the evidence of identification be taken cautiously and carefully in order to prevent a miscarriage of justice. I am

guided by the holding in the case of Paul Etole and Another vs Republic CA 24 of 2000(UR)

**“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made”.**

14. The prosecution adduced the evidence of two eye witnesses to the incident, PW1 and 2. Both were welders in a workshop which was five meters from the RB Pub outside which the incident occurred. Both testified that the incident was at 8.30 p.m. and therefore after dark. Both stated that they were outside the workshop when the accused and deceased had the altercation. They both stated that they knew the four men before the incident for some time, the deceased for being a fellow welder, and accused for living in the area. PW1 stated that he even moved nearer to the group to see the two accused and the deceased as they fought.
15. PW1 and 2 described the light used to enable the identification of the four as a bright light. The brightness of this light was described by PW2 as very bright. PW1 said it was a security light and very bright. Both witnesses are corroborative that the light was located on a ceiling immediately above where the four of them were standing, and that they watched them from a distance of five meters. The distance between the accused, the deceased, John and Nkiri to where PW1 and 2's workshops were was given as five meters.
16. I have also considered the description of the events as they unfolded according to the evidence of these two witnesses. I found variation in their evidence. The variation was in regard to the persons who were involved in the fight. PW1 said only the accused and deceased fought. He also said that the fight took five minutes before the accused stabbed the deceased. PW2 on the other hand stated that all four men, John, Nkiri, the accused and the deceased were involved.
17. I have considered the entire evidence of the two eye witnesses and their demeanour as they gave evidence before me. Their evidence was clear, their demeanour forthright and good. They impressed me as credible witnesses who were telling the truth and whose evidence was worthy of belief. The variation in their evidence in regard to the number of people who fought was expected of witnesses. People have different levels of perception and degree of absorbing detail. Some people have an eye for detail others have.
18. There was another variation which was in regard to the number of stab wounds inflicted on the deceased. I am satisfied that PW 1 and 2 saw clearly as the accused stabbed the deceased on two parts of the body, a matter PW3 and 4 in their evidence also confirmed. The doctor noted only the injury to the abdomen and concluded that after the examination the substantive cause of death was the deep penetrating injury to the abdomen. He made no mention of the injury to the shoulder. The difference in the prosecution evidence in regard to the injury the deceased suffered is not material and neither does it affect the prosecution case. This is because PW1 and 2 witnessed the attack and saw the accused inflict both injuries on the abdomen and the shoulder. PW3 and 4 who saw the deceased the day after the incident noted two stab wounds, one on shoulder and the other on the stomach. The doctor concentrated on the cause of death and explained at length what the cause of death was. I am satisfied that the cause of death was the stab to the abdomen which PW1 and 2 saw the accused inflict on the deceased, and which PW3 and 4 later saw as deceased underwent treatment. The variation in the evidence on this issue does not go to the substance of the prosecution case.
19. In regard to the number of people fighting I find it not of material importance since from the eye witness account it is clear that the accused and the deceased are the ones who engaged with each

- other and the evidence is clear that it is the accused alone who was armed with a knife and who had the opportunity and time to stab the deceased.
20. Having considered the eye witness account of PW1 and 2 I am satisfied that the two were near enough to the scene of the incident to see the events unfold. I am also satisfied that there was sufficient light at the scene to enable them clearly see and identify the persons at the scene and the role they played as well. The distance at which they saw the attack was very close and the duration of the incident given as five minutes was long enough to enable a correct and positive identification of the accused person as the one who committed this offence.
  21. Mr. Amutala submitted that the murder weapon was not produced as an exhibit. The evidence is clear that the accused left the scene with the knife used in the attack soon after the incident. The accused never returned until nine months later when he was arrested. I am satisfied that the accused had sufficient time to dispose of the weapon. Nothing turns on this point.
  22. Mr. Amutala urged that the first report in this case was made by the father of the deceased several days after the incident and that it was proof that PW1 and 2 did not know the accused person. It is true and the evidence of the Investigating Officer of the case, PW5 is clear that the first report of the case was made on the 4<sup>th</sup> July, 2013 by the father of the deceased, PW4. That was four days after the incident. PW1 and 2 said that they saw John assist the deceased to walk away from the scene after the incident and they did not follow up the matter. Apparently from the evidence of PW3 a cousin of the deceased, he was the first to get the report of the attack. It was the day after the incident. His first reaction was to call the deceased father and take the deceased to hospital which he did. From the circumstances of this case, it is clear that the delay to report the matter was caused by circumstances beyond control. Nothing turns on this point.
  23. In regard to *mens rea* Ms. Onunga submitted that the prosecution had proved that the accused had formed the intention to cause death or injury to the deceased by the fact that he stabbed the deceased in the stomach where the vital organs of the body are located. Counsel also submitted that there was sufficient light at the scene where the incident occurred. Ms. Onunga urged the court to find that the accused person conduct of disappearing from the pub he frequented before the incident for a period of ten months was conduct of a person with a guilty mind.
  24. I have found that it is the accused that stabbed the deceased in this case and consequently his death as a result of the injuries he suffered was caused by the accused acts. The question is whether the accused had malice aforethought at the time he inflicted the injuries on the deceased? In the case of Nzuki V Rep [1993] KLR 171 the learned judges of Appeal set out the principles of determining whether intention to commit murder is proved as follows:

**“ 1. Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.**

2. **Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions**
  - a. **To cause death;**
  - b. **Cause grievous bodily harm; and**
  - c. **Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits these acts deliberately.**
3. **Without an intention of one of these three types, the mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.**
4. ...
5. **The offence with which the appellant was charged and convicted was committed in an environment of beer drinking and dancing, and except for the appellants bare statement in his unsworn testimony, there was absolutely nothing on the record of the superior court from which it could be implied that the appellant had any of the intentions when the unlawfully assaulted the deceased.”**

25. I am guided by the above case. As stated in the case before an act can be murder, it must be aimed at someone and must be an act committed with an intention to cause death; to cause grievous bodily harm; and where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately. The evidence of PW1 and 2 is a clear demonstration that the accused actions were aimed at the deceased, were intended to cause death or grievous harm and were deliberately carried out even though the accused knew they could cause death. The accused had armed himself before the altercation with the deceased. Further he stabbed him in the abdomen where, as Ms Onunga correctly put it, vital organs of the body are situated. To crown it all the accused made a contemptuous statement that he had stabbed the deceased and he would not be taken anywhere after which he disappeared from the area for nine months. That contemptuous statement was made out of malice. I find that all these factors taken together are proof beyond any doubt that the accused had formed the necessary malice aforethought to cause the accused death.
26. Mr. Amutala urged that the accused person never left the area in question until the date of his arrest and questioned the failure to arrest him earlier. In response Ms. Onunga submitted that PW1, 2 and 6 confirmed that the accused was arrested one year later.
27. Regarding alibi defence in the case of **UGANDA v. SEBYALA & OTHERS [1969] EA 204**, the learned Judge deciding the case quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

**“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”**

28. The above *ratio decidendi* of the above case is the law applicable in Kenya. An accused person who puts forward an alibi as his defence bears no burden to prove that his alibi is correct. It is sufficient if his alibi creates a doubt in the veracity of the prosecution case.
29. The accused stated that he did not know the deceased and that he was nowhere near the scene of the incident and that the entire case is a fabrication. The eye witnesses knew the accused very well by his nick name. They said he lived in the Area near their workshops. The accused admits he was within that area when he was arrested even though he implies he was not inside the Pub where PW1, 2 and 6 said he was arrested from. I have no doubt that the accused was the one who committed this offence, and that he was positively identified under sufficient light by both witnesses. I find his defence a bare denial and dismiss it in its entirety.
30. Having carefully the entire evidence adduced by both sides in this case, I am satisfied beyond any reasonable doubt that the accused caused the accused death and that he had formed the malice aforethought to commit the same. I find that accused guilty of the offence of murder contrary to section 203 of the Penal Code and convict him accordingly.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF OCTOBER, 2015**

**LESIIT, J**

**JUDGE**