



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 88 OF 2012

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

WILLIAM MUIRURI NJOROGE.....ACCUSED

JUDGMENT

1. The accused person WILLIAM MUIRURI NJOROGE 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 5th day of January, 2011 at Dandora Phase Three Estate, Njiru District within Nairobi County murdered KEPHA KARUGU GATHARIA.”

2. The prosecution called a total of eight witnesses. Seven of the prosecution witnesses were heard by Hon. Muchemi, J before proceeding on transfer. I took over the case under **section 201 (1)** and **section 200** of the **Criminal Procedure Code**. In exercise of his right under those sections the accused opted to have the case heard from where the previous judge left off.

3. The facts of the prosecution are that on the 5th January 2011, PW1 who was a neighbour of the accused testified that she heard Wairimu, the sister of the accused screaming. She came out of the bathroom to find the accused and his sister Wairimu fighting. As the two fought the deceased came to the plot from the neighbouring plot to fetch water and found the two still fighting. PW1 testified that the deceased took the accused outside the gate and locked it to end the fight and proceeded to draw water. As the deceased was drawing the water, PW1 and Wairimu opened the gate for the accused person. According to Wairimu she heard the accused person calling the deceased to go outside to where he was. Soon after, the deceased went to where the accused was, PW1 saw the deceased on the ground struggling to stand up. On going to where he was, PW1 and Wairimu saw that the deceased had been stabbed. PW1 called the mother of the deceased PW2 before taking the deceased to a nearby clinic where he was given first aid. The mother of the deceased and other family members transferred the deceased to Kenyatta Hospital where he was admitted for two months after which he died.

4. According to Dr. Ndegwa who performed the post-mortem on the deceased on 11th March 2011, the cause of death was peritonitis due to infection in the abdominal cavity due to an early penetrating stabbed wound. The report was exhibit 3.

5. The accused person was placed on his defence where he opted to give a sworn statement. In that statement the accused person stated that he was quarrelling with the sister Wairimu who had taken

KShs.500/- from his house without his permission when the deceased walked into the compound to fetch water. The accused stated that the deceased was unhappy that he was quarrelling and almost beating up his sister and he tried to intervene. The accused stated that in the process he and the deceased fought and as they did the deceased fell over utensils which Wairimu had washed and he was stabbed. He said that he saw the deceased stand up and go to the gate where he collapsed. The accused stated that he called his sister Wairimu who by then had entered PW1's house and told her to come out because he had stabbed the deceased. He said that he asked her to assist him to take the deceased to Kwa Mwangi dispensary. Eventually he said he ran away on the advice of Wairimu who thought he might be subjected to mob justice. He said he followed the progress of the deceased treatment but was not able to visit him because his family advised against it. He said that in October 2012 he was arrested for stealing property and it is thereafter while in the police station that he learnt that the deceased passed away. He was then charged with murder.

6. I have carefully considered the evidenced which is adduced by the prosecution and also the accused defence. Mrs. Omung'ala acted for the accused person in this case. I have considered the submissions made on behalf of the accused. The defence counsel urged the court to find at the time of the incident the accused person was intoxicated. She also urged the court to find that the accused person acted out of provocation and that there was never an intention to harm the deceased as the two were friends.

7. Ms. Maari was the prosecution counsel in this case. I have considered her submissions. The learned prosecution counsel urged the court to find that there was an intention to commit the offence and that it was proved by the fact that the accused person did not try to assist the deceased after he was stabbed, the accused person then run away from the scene and remained in hiding for a long time, the accused person did not report the matter to the police and that finally the accused person never visited the deceased in hospital.

8. The accused person faces a charge of murder contrary to **section 203** of the **Penal Code** which provides:

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

9. The prosecution should prove that the accused person committed the act that caused the deceased death and at the time that committed the said act the accused person had formed an intention to either cause death or grievous harm to the deceased. That intention is malice aforethought. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought 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.

10. In this case, there is no dispute that the deceased died. There is an issue whether the accused stabbed the deceased or whether the deceased fell on a basin of utensils where a knife was and which stabbed him. There is however no dispute that after he was stabbed the deceased was admitted at Kenyatta National

Hospital for two months before he succumbed to his injuries. The issue before the court is whether the prosecution has proved that the accused stabbed the deceased and that at the time the accused person stabbed the deceased he had formed the necessary malice aforethought to either cause death or grievous harm to the deceased.

11. The accused person in his sworn statement in defence while admitting that he was involved in a quarrel with the sister when the deceased walked in the compound where they were and tried to intervene to separate the two, gives a contradictory statement as to how the deceased was stabbed. The accused person started by saying that the deceased was wrestling with him and that the deceased fell on a basin with utensils and that is how he got stabbed. The accused then later said that he called his sister Wairimu and asked her to go and assist him to take the deceased to the hospital because he, the accused had stabbed him. The accused defence in regard to the issue whether he stabbed the deceased or not was contentious.

12. The prosecution called the evidence of only one eye witness to the incident. The other eye witness was Wairimu, a sister of the accused and she was not called to testify. PW1, I noted from the record in her testimony stated very clearly that the deceased person locked the accused outside the gate to the compound where the accused lived in order to separate him from his sister. PW1 testified that soon thereafter she and Wairimu opened that gate and let the accused in. PW1 is hazy in her testimony from that point up to the point she testifies to seeing the deceased collapse outside the gate. From the moment they opened the gate for the accused, PW1 does not say where the accused went. She then says that she heard the accused call the deceased to him and that when the deceased went to where the accused was she saw him collapse. Upon checking him both PW1 and Wairimu confirmed that the deceased had suffered stab wounds. Given the circumstances at the scene of the incident it is very clear to the court that the accused was the only person who was closest to the deceased just before he suffered the stab wounds. I am satisfied beyond any reasonable doubt that the accused had the sole opportunity and time to inflict the stab wounds on the deceased

13. The evidence of PW1 is not clear whether the accused person already had the knife in his possession before he stabbed the deceased or whether he armed himself in between the time he quarrelled with the deceased and the time he stabbed him. As I observed herein above that part of PW1's evidence is hazy. I am unable to tell whether the reason for the unclear evidence was fear given the fact the issue at hand was a confrontation between two men in the presence of two women thus causing a feeling of vulnerability; or whether there was momentary lapse in the train of following the events. Whatever the case may be I have no doubt that PW1 was a truthful witness and that her evidence is credible.

14. Whatever the cause may have been, I am satisfied that the evidence adduced leaves no room for doubt in my mind that it was the accused that stabbed the deceased. The issue of whether he was armed prior to or in the course of the altercation with Wairimu, or after the deceased came to the scene is an issue to be considered when dealing with the issue whether the accused had malice afore thought at the time he stabbed the deceased. I find that the accused denial that he was the one who stabbed the deceased, together with his controversial statement in defence that the deceased was stabbed accidentally when he fell on a basin of kitchen utensils was untrue, a bare denial. In his defence the accused did state that he admitted to his sister Wairimu that he had stabbed the deceased and that he was persuading her to help him take the deceased to hospital. I reject in its entirety the accused defence that the deceased was stabbed due to inadvertence.

15. From the evidence of the Doctor PW8, at the time he performed the post-mortem on the body of the deceased, the deceased had undergone surgery. The Doctor testified that he could not tell how many stab wounds the deceased had suffered during the attack because of the surgical intervention. From the evidence of PW1 she testified that the deceased was stabbed in the abdomen but did not say how many stab wounds she saw. PW3 a brother of the deceased said that he saw his brother the deceased at the Kenyatta National Hospital the same day after the incident and noted that he had two stab wounds on the chest and one stab wound on the abdomen. The weapon used in this case was recovered and produced in court as exhibit 2.

16. The issue of how many times the accused stabbed the deceased goes to the issue of malice aforethought, just as the issue whether he armed himself purposely to stab the deceased. The prosecution has not adduced evidence to establish at what stage during the incident the accused armed himself. That issue is therefore of no assistance to the prosecution.

17. Regarding the number of stab wounds, in the court of appeal case of **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, BOSIRE, O’KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

18. On the question of malice aforethought, in **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 ensue 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.”

19. In this case the prosecution has adduced sufficient evidence to show that the accused was not just quarrelling his elder sister but was also beating her, and that the deceased was saving the said sister from a beating and humiliation when the accused turned against him. The accused attack against the deceased was clearly aimed at the deceased. The choice of the weapon the accused used together with the part of the body he stabbed establishes clearly that the accused had formed an intention to cause death or grievous harm to the deceased, and further that he knew there was a serious risk that his actions could cause grievous injury or death and he deliberately proceeded to stab the deceased.

20. I find that the prosecution has proved that the accused had formed the necessary malice aforethought to cause death or grievous harm to the deceased. Malice as stipulated under section 206 of the Penal Code was proved.

21. Having come to the conclusion I have of this case I find that the prosecution has proved its case against the accused person for the offence of murder contrary to section 203 of the Penal Code beyond any reasonable doubt. Accordingly I find the accused person guilty of murder as charged and convict him accordingly under section 322 of the CPC.

DATED AT NAIROBI THIS 1ST DAY OF OCTOBER, 2015

LESIIT, J.

JUDGE.