



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO.18 OF 2011

LESIIT, J

REPUBLIC.....PROSECUTOR

V E R S U S

ANTHONY MUCUI RIUNGU.....ACCUSED

JUDGEMENT

1. The Accused 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 22nd day of March, 2011 at Katangamoo Village Kithare Sub location, Murugi Location in Tharaka Nithi County within Eastern Province murdered Patrick Riungu Nyaga.
2. The prosecution called 7 witnesses. The facts of the prosecution case were that on the 22nd March 2011 the deceased who is the father of the accused went home to his wife. The wife is PW6 who gave her supper. As he ate PW6 said that she heard the deceased saying that after he finished his food he will decide whether to kill somebody or what to do. Then when the accused finished eating he stated asking for his hammer and saw. He then staggered around because he was drunk looking for a panga. PW6 testified that on seeing that, she went outside the house and announced loudly so that her son the accused, may hear, that his father was not planning good things. PW 6 testified that she proceeded to the sub area where she reported the matter however the sub area referred her to her father in law and told her that if he did not help her she should go to the police.
3. PW2 the father of the deceased person said that on the material evening he heard screams coming from his son, the deceased's house. PW2 stated that he went towards the house where he saw his grandchild who is the accused, cutting his father i.e. the deceased on the face the throat and the stomach. PW2 stated when he asked the accused what he was doing the accused jumped up and walked towards him menacingly minus the panga. He stated that he managed to dodge the accused and ran away from him and as he did he saw his wife PW3 also walking towards the scene. PW3 said that she was hit on the back and head by the accused person with the sword he was holding causing her to start bleeding.
4. Pw4 was a nephew of the deceased and therefore a cousin of the accused. PW4 used to live with the accused in his house. He said that on the material day he went home to find the accused and his mother PW6 talking. PW6 was telling the accused that his father was looking for a panga and that she told the accused that she wondered how they would continue living like that. PW4 said that because it was obvious that PW6 did not want to hear their conversation he went away upon going back home he found the deceased lying down on the ground with cuts on the neck ears and stomach.
5. PW5 was a brother of the deceased. He received the information of the attack from their father

- PW2. He then proceeded to his brother's home where he found him lying on the ground with wounds on the mouth neck the stomach and the back. He said when he went to Ntumu Police Station he found that the accused had surrendered himself to the Police Station.
6. The accused person in his defence put forward an alibi and stated that he had been drinking with his father on that day after they had spent the day cutting trees in their shamba. He said that they entered a bar with his father at 1.30 pm and they drunk until 4 when his father sent him to deliver money to his mother. At 6 pm he returned to the bar and found his father. He said that the father gave him 200 shillings and told him he had gone home. He said that he returned home at 7.30 pm where upon he met his grandparent who chased him away saying he never wanted to see him again because he and the deceased were cutting his trees and then drinking the money. He said that he ran to the police because his grandfather started chasing. He said that when he arrived at the police station he was beaten up and locked up in the cells.
 7. The accused person is facing a charge of murder. The burden lies with the prosecution to prove their case against the accused beyond any reasonable doubt. The prosecution has to prove that the accused by an action and in this case cutting with a sharp object inflicted the injury that led to the death of the deceased. The prosecution should also prove that the accused was motivated by malice aforethought at the time he cut the deceased causing his death.
 8. The prosecution has one eye witness the grandfather of the accused person who was also the father of the deceased. He was PW2 in the case. He said that he came out of his house after hearing screams from the direction of his son's house. On coming out and going towards the son's house he found the accused in the process of cutting his father. He saw the accused cut the deceased on the nose the throat and the stomach. He said that when he asked the accused what he was doing the accused also turned against him but he was able to dodge and escape but that his wife PW3 and who had come to the scene behind him did not escape. PW3 came to the scene after the deceased was injured but she was able to see the accused person going towards her with a sword. She said that at the time she saw him she was already screaming. She turned back on seeing the accused turning against her and he cut her with a sword on the back of the head.
 9. This incident took place at 8 pm. The witnesses say there was moonlight that night. The eye witness PW2 and the supporting witness PW3 who came to the scene soon after the attack on the deceased all said they were able to recognize the accused who is their grandson. I consider the accused defence and noted that he did not deny being at the scene but only said that his grandfather who is PW2 chased him away accusing him and his father the deceased of cutting down his trees for sale. As a result of PW2 chasing him away he went to the police station for his security. The Police Officer who received the accused at the Police Station did not testify however, the deputy OCS who investigated this case said that the accused person had already been placed in cells by his officers by the time he came to know about the case.
 10. There was other important evidence in my view and that is the evidence of PW4 who is a cousin to the accused and also the person who lived with the accused in his house. The other witness was PW6 the mother of the accused. According to PW4 when he returned to the home of the accused at 5 pm that evening he met the accused in deep discussion with his mother PW6. PW4 said that the mother did not want him to hear their conversation. He entered the house to change from his uniform and as he was retuning towards them from the house he heard the mother (PW6) telling her son (the accused) that his father was looking for a panga and that she wondered how they would continue living like that. PW4 walked away and left the two in deep discussion.
 11. PW6 on the other hand said that earlier that day the accused gave Ksh.320/- and told her it was from the deceased and also asked her to top it up to Ksh.400/-. Thereafter, according to PW6 she heard the deceased say that he would kill someone that day. PW6 testified that she left the deceased looking for a panga after he ate his food and she went outside their house and said loudly so that the accused may hear that his father was not planning good things.
 12. The investigating officer in this case PW7 told the court that he learnt that during his investigations that the deceased had just returned home from Tigania where he had lived continuously for a period of 8 years. According to the Investigating Officer the deceased had been home for only two weeks before his death. He also said that the cause of the attack in his opinion was a dispute of Ksh 450/- which were the proceeds of sale of wood.
 13. I have evaluated and analyzed the evidence of the prosecution and especially that of PW4, 6, and 7. I have no doubt in my mind that the cause of attack on the deceased was not about money even

though that may have triggered the attack on the day in question. The reason for this attack was the return of the deceased to his home and concerns it raised to his wife PW6. It is clear from the evidence of PW4 and 6 that earlier that day the accused was seen in deep discussions with his mother PW6. From the little PW4 heard it was very clear that PW6 was stirring up in her son to do something about his father's sudden reappearance at home just because PW6 was uncomfortable about it. From the words PW4 heard, PW6 was inciting her son to take an action because "she wondered how they will continue living like that" PW6 herself admits that just before the attack she spoke loudly in order for the son to hear that the father was not planning good things because he was looking for a panga. In my view PW6 counselled the accused person to commit this offence within the meaning of section 20 and 22 of the Penal Code. the sections provide as follows.

"20. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence;

and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

22. (1) When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

(2) In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him."

14. In line with section 20 of the penal code, PW6 is a principal offender and should have been charged with counseling the accused to commit the offence. PW6 was not only a principal offender through counselling the accused to commit the offence but in my view applied coercion on the accused person to attack his father. The coercion is established by the fact PW6 repeatedly uttered provocative words in order to move the accused to take an action against his father. I also believe that there was coercion on the part of PW6 considering the fact that at the time the offence was committed the accused may have been a teenager and easily manipulated by coercive words.

15 I noted that throughout the trial the accused person appeared to be withdrawn and kept delaying the finalization of his case. I am convinced that the reason for this was that the accused person was not in his right mind when he committed the offence and to the extent that I believe he may have suffered from temporary insanity or mental lapse.

16 The other fact is there was no eye witness of how the attack was executed. There is the evidence that the deceased was looking for a panga in order to harm someone. The deceased was also drunk at the time of this incident according to PW6. PW2 who was the first to go to the scene found the accused already cutting the deceased. He could not explain what transpired immediately before the attack. That was critical given the prosecution evidence that it was the deceased who was looking for a murder weapon immediately before this attack.

17. I have considered the accused defence in which he has put forward an alibi that he only came to the scene after the attack on the deceased. That defence has been shaken by the evidence of the prosecution against the accused. There are two eye witnesses that the accused was seen cutting the deceased and had a weapon immediately after the attack on the deceased. There is also the evidence that he presented himself to the police soon after the attack. The accused allegation that he went to the police because PW2 chased him away from home is not plausible. I therefore reject his defence and find he was placed at the scene of attack and was seen cutting the deceased with a sword on various parts of the body. The evidence of PW2 as to the parts of the body where the deceased was cut tallies with the post mortem findings by Doctor Nkonge as per the report Exhibit 1.

18 Having carefully considered the entire evidence before the court. I have come to the conclusion that even though the prosecution established that the accused inflicted the injuries and the deceased which caused his death, it was unable to establish malice aforethought. There was a gap in the prosecution evidence regarding what transpired immediately before the accused was seen cutting the deceased. From the evidence of PW4 and 6 the deceased was looking for a weapon specifically a panga and in the circumstances the prosecution evidence does not rule out the possibility that it was the deceased who first attacked the accused and therefore in the circumstances the accused may have been acting in self defence. Furthermore the murder weapon was not recovered the same day of the incident and the blood analysis on it contradicts the evidence of PW2 and 3 for reason the two were positive that the accused also cut PW3 with the same panga. Yet the results of DNA profiles on the pang revealed that only the deceased was injured with that panga. Those DNA results contradict the prosecution evidence and raise doubt as to the reliability of the same.

19 Having come to the conclusions I have of this case I find that the prosecution did not prove the charge of murder contrary to section 203 of the Penal Code for lack of evidence to establish malice aforethought. I therefore substitute the charge against him from murder contrary to section 203 of the Penal Code with that of manslaughter contrary to section 202 of the Penal Code. I find the 1st accused guilty of the substituted charge of manslaughter and convict him accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 13th DAY OF FEBRUARY 2014.

J. LESIIT

JUDGE