



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO 14 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

SAMMY MULAI.....ACCUSED

JUDGEMENT

Background

Sammy Mulai, referred to as the accused in this judgement, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of this charge are that on 9th February 2012 at Nzalae Sub-location of Migwani District within Kitui County murdered Mwanzia Nyeki (referred to in this judgement as the deceased).

The accused was presented in court on 28th February 2012 but it took a while before the plea could be taken due to the delay in tabling the medical report on the accused. The plea was taken on 28th May 2012 and following a plea of not guilty the case was subjected to full trial. The prosecution called a total of twelve (12) witnesses. The accused was the sole witness for the defence.

Prosecution case

The accused and the deceased were entertaining themselves with alcoholic drinks in a bar known as House Club at Nzalae Shopping Centre situated in Nzalae sub-location of Migwani Location, Migwani District in Kitui County. The date was 9th February 2012. The deceased had arrived at the bar in the company of a friend known as Peter Sila Musengo, PW4 (Peter). They found one Munyoki Nyeki, PW3, (Munyoki) at the bar. Munyoki is brother to the deceased. Munyoki has arrived at the bar in company of a friend called Paul. The four sat on one table and were drinking Allsopps beer. They were being served by Mbithe Kitonyi, PW2, (Mbithe). The accused entered the bar after the four and sat on a stool near the counter. He too was served Allsopps beer by Mbithe.

Evidence shows that the accused stood up and approached the table where the four were seated. He proceeded to pour beer on Paul's face. Munyoki sought to know why the accused had done this. Munyoki held the accused and both started struggling. They wrestled each other before they were separated. The accused went outside the bar. The deceased also went outside. They confronted each other at the corridor of the bar. The accused stabbed the deceased on the chest with a knife. The deceased shouted in pain and this noise attracted the people in the bar including Munyoki, Peter and Mbithe. On arrival at the scene they found the deceased having been stabbed and lying down. Munyoki asked the accused why he had stabbed the deceased. The accused attacked Munyoki and stabbed him on the right hand inflicting injuries on it. The accused ran away.

Further evidence shows that the accused went to Kakululo Chiefs Camp but found the office closed. He surrendered to Simeon Kavive, PW1, (Simeon) the following morning (10th February 2012). He was arrested and later handed over to the OCS Migwani Police Station. He was charged with this offence.

Accused's defence

The accused gave a sworn testimony. The accused said he knew he had killed someone. He went on to testify that on 9th February 2012 he was drinking alcoholic drinks with the deceased, Munyoki, Peter, Paul and Kambu and all were seated on the same table. At 9.00pm he and the deceased disagreed over alcohol when deceased asked him why he had not bought him beer. He went out for the short call and as he was returning to the bar he met the deceased at the corridor of the bar. The deceased asked him why he did not buy him beer. He told the deceased that he did not have money. The deceased held his shirt and they started fighting using fists. They struggled and both fell down. They rolled on the ground still struggling. He sustained an injury. He stood up and ran away. He went towards the bar. He heard that the deceased had been injured. This surprised him because they had not fought to an extent of injuring each other. He said the deceased had no weapon and he denied stabbing him. He said the blood on his clothes came from his face after he had been injured.

Issues for determination

Murder is defined under section 203 of the Penal Code which provides as follows:

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

This definition raises the issues which this court is under duty to determine whether the prosecution has proved beyond reasonable doubt. These issues are:

- i. Who the offender is.
- ii. The unlawful act or omission causing the death.
- iii. The guilty state of the mind of the offender.

Determination of the issues

Act causing the death

The victim is Mwanzia Nyeki. The witnesses who arrived at the scene after the stabbing, Mbithe, Munyoki and Dominic Nzove Ilai, PW6, (Dominic) said the deceased had sustained stab wounds on the chest. Evidence shows that the deceased died at the scene although there was no confirmation of this by a medical doctor.

Dr. Edward Indumwa, PW11, (Dr. Indumwa) testified that he performed the post mortem on the body of the deceased on 17th February 2012. He found a long deep penetrating wound measuring 6cm on the level of 2nd and 3rd ribs on the left side of the chest along the mid clavicular (upper chest). Dr. Indumwa also found a cut wound on the dorsal surface of the wrist measuring 7cm. According to him, the latter wound appeared like a defensive wound. The deceased had bled massively in the lungs where the doctor found a cut on the left upper lung lobe with accumulation of blood leading to collapse of the lungs. He formed the opinion that death was caused by cardio respiratory arrest due to excessive bleeding.

I have no doubt in my mind, after considering this evidence, that Mwanzia Nyeki died as a result of injuries sustained on him on 9th February 2012.

The offender

The circumstances under which the deceased was stabbed to death were narrated by Mbithe, Munyoki

and Peter. All their evidence agrees that none of them saw the accused stab the deceased. The evidence on stabbing is to a great extent circumstantial. In **Rex v. Kipkering Arap Koske & 2 others [1949] 16 EACA 135**, the court stated in respect of circumstantial evidence that:

“As said in Willis on ‘Circumstantial Evidence’ 6th edition P.311, “in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the offender, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.” The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

In **Simon Musoke v. Republic [1985] EA 715** at page 489, the court stated that:

“It is also necessary before drawing the inference of the offender’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

The stabbing occurred along the bar corridor away from where Mbithe, Munyoki and Paul were. All they could state was that the accused went out and was followed by the deceased. It is not clear from the evidence how long the deceased took before he followed the accused. It is also not clear whether the deceased followed the accused to attack him or he was going out to answer a call of nature.

Mbithe testified that the accused poured beer on Paul who is said to be Munyoki’s friend. This caused Munyoki to ask the accused why he did it leading to a scuffle. According to Mbithe the two quarreled and wrestled. After they were separated, the situation became normal. According to Munyoki, he had gone out to buy cigarettes and on coming back he found the accused had poured beer on Paul. Mbithe did not mention that Munyoki had gone out at any time. According to Munyoki, the accused held his shirt first before the struggle ensued.

Peter introduced another angle to the story. He stated that while they were drinking, the accused stood and went to their table. He uttered words to the effect that the men who got employed in the area were conceited. He then took beer from the table and poured it on Paul. According to Peter, he understood the words uttered by the accused to refer to him and Paul who did not come from that area. No other witness said they heard the accused utter those words. However, this notwithstanding, there was a scuffle in the bar between Munyoki and the accused over the incident of accused pouring beer on Paul.

Sometime after this scuffle, the accused walked out. He confirms this in his evidence. He said he was going for a short call. Evidence shows the deceased followed him. The prosecution evidence does not show what happened after the two men went out. The gap is filled by the defence evidence.

The accused said that as he was going back to the bar he met the deceased at the corridor. The deceased asked him why he did not buy him beer and he said he had no money. The deceased got hold of his shirt and a fight broke out between the two. There is absolutely no evidence to tell us what happened since the accused denied any stabbing took place. He called it a fist fight that did not lead to serious injuries.

Accused’s confession

It is relevant at this stage to introduce the confession by the accused. This is how he introduced his testimony under oath in court:

“I am Sammy Mulai from Nzalae sub-location in Kitui County. I am a businessman buying and selling cattle and farming. I am married with children, 5 in number. I am 53 years old. I am aware I killed someone.....”

It is instructive to note that the accused did not, during his evidence in chief, mention anything about surrendering to Simeon, the Assistant Chief of Kakululo sub-location. During cross examination he said

he went home after the fight with the deceased. After being reminded about the evidence of Simeon he said he went to the AP Camp to escape the people who were following him. Simeon told the court that the accused informed him that he had been involved in killing someone and was surrendering himself.

Section 25A (1) of the Evidence Act provides as follows:

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person’s choice.”

Confessions are generally inadmissible unless they are made in the manner specified in the above section. Even where they are made before a judicial officer the court must caution itself and warn the offender of the consequences of such confession. This is meant to satisfy the court that there is no possibility of any inducement or coercion.

Taking into account the behaviour of the accused after the stabbing, his surrendering to the Assistant Chief Simeon and what he told the court under oath, I have no doubt that the accused and the deceased were involved in a physical combat. It is noteworthy that the stabbing occurred in Nzalae sub-location and the accused did not go to report or to surrender to Dominic the Assistant Chief of Nzalae. Kakululo Chiefs Camp where the accused surrendered is 12 kilometres from Nzalae according to Simeon. Evidence shows that the accused stayed at the Kakululo Chief’s Camp overnight because he found the office was closed.

Further evidence shows that accused’s overall, exhibit ‘D1’, T-shirt, exhibit ‘D2’ and boot, exhibit ‘D3’, all which had stains that were confirmed by Mr. Lawrence Kinyua, PW12, from the Government Chemist to be stains of human blood, were profiled and found with DNA matching that in exhibit ‘C’ being the blood sample of Munyoki. Munyoki was assaulted by the accused when he sought to know why accused has stabbed the deceased.

Munyoki explained the circumstances under which he was stabbed by the accused. Munyoki asked the accused why he had stabbed his (Munyoki’s) brother, at which the accused turned on him and stabbed him on the left arm. When Munyoki held the knife being held by the accused using his right hand he was also cut on the thumb.

There is also the evidence of Mbithe who said that when she went out after hearing the deceased shout she found the accused holding a knife going around the deceased. All this evidence confirms one thing, that the accused had a knife and had used it to stab the deceased and Munyoki. Deceased suffered deep wounds and bled excessively internally. From the evidence of the doctor, this court can comfortably draw an inference that the deceased fell down before his blood reached the accused.

All this evidence confirms the accused’s involvement. This gives this court comfort that the confession by the accused when giving his testimony and his surrendering to Simeon was voluntary. The evidence proves without a doubt that the accused inflicted those fatal wounds on the deceased and also on Munyoki. I note however that the P3 form in respect of Munyoki was not produced in evidence. This court can therefore say without doubt that there are no other co-existing circumstances which would weaken or destroy the inference that the accused is the offender.

Guilty state of accused’s mind

There is no evidence to show the motive behind the accused’s action in pouring beer on Paul. Whatever the reason was, a scuffle arose due to accused’s action of pouring beer on Paul. According to the accused, it is the deceased who kept on pestering him to buy him beer. There is no evidence of this pestering from prosecution witnesses.

What is the motive of the stabbing? The accused said he was drunk but he did not use drunkenness as a defence. He attempted to confuse the name of the bar by saying it was called Atlantic. He was reminded on cross examination that it was called House Club and he admitted saying he had confused the names. He also attempted to confuse the beer he was drinking. According to Mbithe all of them were taking Allsopps beer. The accused said he was drinking something he called *Naisu* which he called a spirit. It may be recalled that the accused did not state during examination in chief that he had surrendered to Simeon and admitted that he had killed someone. He also said he and the deceased just fought using fists and no one was injured, yet he claimed he was injured. He said he was surprised when he learned the deceased had been injured.

All this evidence in my view point to one thing that the accused knew of the gravity of what he had done. When found by Mbithe after the stabbing, he was holding a knife and going round the deceased. He attacked Munyoki and injured him.

I find no evidence to show that the accused did not have the capacity, either due to mental infirmity or due to intoxication, to understand the consequences of his actions. The medical report tabled in court prior to taking of the plea showed the accused had no features of mental illness. Though he stated he was drunk, there is no evidence by the defence that he was drunk in a way that his reasoning capacity was impaired.

Section 206 of the Penal Code defines intention as follows:

“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 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 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.
- d.”

The actions of the accused from the time he poured beer on Paul to the time of the fatal attack on the deceased, in my view, are without a doubt, actions of someone who was aware that his actions would either result in death and/or grievous bodily harm to the deceased or any other person. After the scuffle in the bar following his pouring beer on Paul, someone intervened and this ought to have cooled his tempers. Mind you, he was not provoked by anyone in the first instance. He sat quietly alone sipping his beer and without provocation, according to the prosecution evidence, he attacked Paul.

This court does not know what happened outside after the accused went out and was followed by deceased. There is no evidence that the accused was attacked by the deceased and even if he had been, using the knife is rather extreme on the part of the accused.

According to the accused the fight between him and the deceased arose after the deceased insisted that the accused buys him beer. After the accused told him that he did not have money, the deceased held his shirt. The accused did not know the intention of the deceased and a fight ensued. He did not mention any knife during the fight. He said they used fists to fight.

The actions of the accused are actions of someone with an intention of causing death or grievous bodily harm. The evidence portrays the accused as a provocative man who had formed an intention to at least cause grievous bodily harm. There is no justification on his part to use a knife. Even after stabbing the deceased and the deceased falling down, the accused continued holding the knife and also attacking Munyoki and injuring him with the knife. He did not surrender or give himself up at the nearest Chief’s Camp but went to Kakululo in another sub-location to surrender to Simeon. Even if this court were to

believe his evidence that he was pestered by the deceased to buy the deceased beer, he could have left the bar or move away from the deceased.

When all the circumstances of this case are considered, from the time the accused poured beer on Paul without provocation to the time he stabbed the deceased, it is clear that the accused possessed a guilty mind. He was, in my considered view, a man in full control of his mental faculties and conscious of his actions and their repercussions. He could have avoided what he did if he so chose but he failed to do so. I therefore find that the guilty mind of the accused has been proved beyond reasonable doubt.

Conclusion

This court has carefully considered all the evidence presented to it by the prosecution against the accused's defence. This court is alive to the principle that an accused person never assumes the onus of proving a criminal case brought against him. I have considered the accused's defence and I find it evasive given that he told the court that he was aware he killed someone and he surrendered to Simeon and told him he had been involved in killing someone.

My analysis and careful examination of all the evidence leads me to the conclusion that the charge of murder has been proved beyond reasonable doubt. There is therefore no doubt in my mind when I enter a guilty verdict against the accused. I hereby find the accused guilty of the murder of Mwanzia Nyeki and convict him accordingly. I so order.

Dated, signed and delivered this 11th day of March 2014.

S.N.MUTUKU

JUDGE

The accused is sentenced to serve 30 years imprisonment.

S.N.MUTUKU

JUDGE