



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 58 OF 2011

LESIIT J.

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN MWITI.....ACCUSED.

JUDGEMENT

1. The accused **STEPHEN MWITI** 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 5th day of October, 2011 at Antombociou Location in Igembe South District within Meru County murdered Peter Gitonga.
2. The prosecution called four witnesses. The facts of the prosecution case are that the deceased left his house after eating supper at 8 pm the material evening. Soon after he closed the door behind him his wife PW4 Pamela Mwakithi heard her husband calling her “Pamela I have been stabbed by Mwiti” PW4 took a torch and when outside and on flashing she saw Mwiti the accused standing near her husband with a blooded sword in his hands. PW4 said that the accused person ran away that she screamed and neighbours went to her help. They took the deceased to hospital and after he was admitted he called his wife. The deceased told PW4 again “**my wife, it is Mwiti who has stabbed me**”. According to the doctor the deceased had a stab wound on the left side of the neck which lacerated the lung and the stomach. The spleen was removed surgically due to the same injury. The cause of death was hypovolemic shock with blood in plural cavity due to stab wound involving the spleen and left lung.
3. The accused person gave a sworn defence in which he did not deny stabbing somebody on the material night. He said however that he was on his way home after leaving Mbaabu’s home where he used to work when he was stopped by 5 people. He said that he was asked for money and told them that he had 130/- which were his wages for the day. They all started beating him and all of them took his money and a radio. He said 4 of the attackers walked away leaving him wrestling with one of them who had monkey face. The accused stated that he wrestled with the man and was able to disarm the knife he had and that he stabbed him with it. He said that both he and the man he stabbed left the scene. He said that he went to report to the police the next day only to be placed in the cells. He said that he learnt later that he had stabbed Gitonga who is the deceased in this case.
4. The accused person is facing a case of murder contrary to section 203 of the Penal Code. The burden lies with the prosecution to prove the case against the accused beyond any reasonable doubt. The prosecution must adduce evidence to prove that the accused person with malice aforethought caused the deceased death by unlawful act. Malice aforethought is defined 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.”

5. The prosecution has adduced evidence which places the accused person and the scene of crime. The accused was seen by the wife of the deceased soon after the deceased called her from the house and implicated the accused of stabbing him. According to PW4 this incident took place at 8 pm. PW4 did not witness the deceased being stabbed she however told the court that soon after the husband went out after suppers as was his custom he heard him calling her and on going out she found the accused standing with a blooded sword and the deceased lying on the ground. There was no one else at the scene.
6. The accused has not denied stabbing the deceased. He put forward self defence as his defence in this case. His defence was that the deceased was in a group of 4 others pausing as police officers. That they demanded money from him before beating him up and taking the money he had in his pocket for themselves. He said that the deceased was left behind wrestling with him and that he disarmed him and used the same weapon to stab the deceased.
7. Since the accused person does not deny stabbing the deceased the question is whether self defence is available to him. PW4's evidence was to the effect that no sooner had the deceased walked out of their home and closed the door behind him. She heard him calling her saying that the accused had stabbed him. Indeed when she went out she found the deceased lying on the ground and bleeding profusely from the ribs. There was no one else at the scene. PW4's evidence that the scene of the attack was near the home of the deceased is corroborated by PW4 the deceased brother. PW2 told the court that he was called by a friend and told to go to his brother's place because he had been stabbed. Indeed he found his brother lying on the ground outside his place and PW4 was among others at the scene.
8. The accused defence that he met the deceased and that he was attacked on the way cannot be true. First of all the deceased had just had supper. Secondly, the attack was near his house. According to PW4 it was 4 meters from the door to their house. PW4's evidence is corroborated by PW2. The accused person was lying in regard to the scene of stabbing.
9. The deceased implicated the accused person of having stabbed him. Following that implication PW2 went to look for the accused after taking the deceased to hospital. PW2 testified that he found the accused at Erastus Mbaabu's place where the accused used to work. PW2 testified that the accused was hiding in the toilet. The fact that the accused was found at Mbaabu's place where he used to work is prove that the accused also lied that he was going home from Mbaabu's home where he used to work when he was attacked. If he was going home from work, there is no way that PW2 could have apprehended him the same night at his employer's place.
10. In **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990**, the Court of Appeal observed:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made

some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive exculpatory effect”.

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available”.

11. The prosecution has been able to adduce evidence to prove that the accused person lied about where he was allegedly going when he stabbed the deceased, and also lied about the place where the attack took place. It is clear the attack was outside the deceased house, just 4 meters from his door. That was consistent with PW4’s evidence that the deceased just stepped outside when she heard him saying that the accused had stabbed him. The accused was found same night in his employer’s place, the same place he claimed in his defence that he had left to go home when he met the deceased and others. I find that the proven false statements of the accused are of substantive exculpatory effect to the case.

12. The accused raised self defence as his defence in this case. Section 17 of the Penal Code provides for the defence of person or property. That section stipulates as follows:

“17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”

12. Regarding self defence the court in MORRIS MUNGATHIA VS REPUBLIC CRIMINAL APPEAL NO. 212 OF 2006 COURT OF APPEAL AT NYERI, held:

“The law on self-defence was succinctly stated in the privy council case of CHAN KAU V. R(2) (1955) W.L.R.192 as follows:

In cases where the evidence discloses a possible defence of self defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence apart from that insanity. It would appear to us that the duty of an accused person facing a murder charge who relies on the defence of self defence is to lay before the court facts upon which the defence is based. The whole purpose of doing so is to enable the court and the prosecution to understand the basis of such a defence. He assumes no responsibility of establishing that defence. The prosecution, however, has the onus of showing that the appellant was not acting in self-defence and that there was time and opportunity before the fatal blow to retreat (see Manzi Mengi v. R [1964] EA.289”

13. The basis upon which the self defence has been claimed by the accused is the fact he had been attacked by a group of five people who he later learnt included the deceased. Those facts have been proven to be a lie because the prosecution has shown that the deceased had just had supper and had just stepped outside his house when the accused attacked him. I also considered the evidence of PW4, the wife of the deceased to the effect that the accused and deceased had been doing some business for about one week just before this attack. I also considered PW4’s evidence that it was the deceased habit to go out after having supper. The fact of some business going on for one week with the accused gives the possibility of a deal gone sour.

14. The fact the deceased was attacked the moment he stepped outside his house as he normally did

establishes the fact the accused had come outside deceased house armed for the attack. It was not a coincidence that the accused was outside the deceased house at the time the deceased went out that night. I find that the accused had formed the malice aforethought to attack the deceased. He waited for him outside his house while armed with a sword. The accused acting in self defence is ruled out. The defence is not available to the accused.

15. Having carefully considered this case, I am satisfied that the prosecution has proved its case against the accused person beyond any reasonable doubt. I find the accused person guilty as charged and convict him accordingly.

DATED AND DELIVERED THIS 5TH DAY OF JUNE 2014

LESIIT J.

JUDGE.