



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 64 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

MWENDWA MBITI.....ACCUSED

JUDGMENT

1. **Mwendwa Mbiti**, the accused is charged with the offence of **murder** contrary to **Section 203** of the **Penal Code**. Particulars of the offence being that on **20th day of October, 2009** at around **8.00pm** at **Majengo Estate**, within **Kitui Township, Kitui District** of the **Eastern Province**, murdered **Wambua Manzi** (Deceased).

2. According to the prosecution's case the accused and the deceased were ardent friends. On the **20th October 2009** they rendered cleaning services of a car for an individual who paid them **Kshs. 50/=**. They disagreed over the sum of money. The accused who was aggrieved stabbed the deceased with an object. The deceased went to report to the police while bleeding. He was referred to hospital. Thereafter he succumbed to injuries sustained.

3. To prove the case the prosecution called 7 witnesses. **PW1, Asha Abuu**, a shopkeeper was at her shop when she heard noise outside. She went outside only to find the accused and deceased quarrelling. She knew them very well. It was at 8.00pm but there was electric power that enabled her to see them. She heard the accused tell the deceased in Kikamba language:-

“If you play with me I will kill you”.

The deceased did not answer. She called out the deceased. He (deceased) moved to the door of the shop. He was injured on the shoulder. He had stab wounds. She advised him to go to his grandmother so that she would take him to hospital. The accused followed him. She screamed asking him if he intended to stab him again. People went to the scene and the accused disappeared.

4. **PW2, Issa Mului** an Administrator was tasked to arrest the accused. He did so and handed over to the police who re-arrested him and caused him to be charged.

5. **PW3, Makau Wambua** an uncle to the deceased got information on **20th October, 2009** that his nephew had been injured. He found him already admitted in hospital. He was treated and discharged on the **22nd October, 2009**. On the **23rd October, 2009** the deceased developed complications. He took him to hospital. By the time they reached hospital he was pronounced dead.

6. PW4, **Dr. Joel Maina Kagoi** performed a postmortem on the body of the deceased. He formed an opinion that the cause of death was internal bleeding from the lungs. The deceased had sustained multiple cut wounds on the mid sternum, the left shoulder joint and on the left index finger.

7. PW5, **Kamene Wambua** the grandmother to the deceased saw him when he was already injured. He told him that he had been stabbed by the accused after they disagreed over Kshs. 50/=.

8. PW6, **Paul Mukunga** an uncle to the deceased was at the club, his place of duty when the deceased ran towards him at about 7.45pm saying he had been stabbed by the accused. He was bleeding from the wound that was on the left hand side near the sternum. He then saw the accused pursuing the deceased. On seeing him he ran away. He requested **Mutua Maingi** to take the deceased to hospital. As a watchman he could not leave his place of work.

9. PW7, No. 55691 CPL **Joel Koskei** was at the Police Station when he received a report from **Wambua Manzi** (deceased) that he had been injured by **Mwendwa Mbiti**. He stated that the deceased said that the accused had stabbed him with a knife. He was bleeding. He booked the report and referred him to hospital. The deceased also told him that they had disagreed over Kshs. 50/= that they had been paid after washing a car. He had an injury on the left hand side of the chest and the big finger. He visited him in hospital and visited the scene of the incident which was identified by PW1.

10. In his defence the accused stated that the deceased was well known to him. He was a pupil at **Ithokwe Primary School**. On the fateful date he returned from school at 6.30pm. Then he went to purchase soap from the shop. On his way to the shop he encountered the deceased who was running. He held his shirt from behind and showed him some young men that he said had beaten him. His hands were stained with blood. He advised the deceased to run and tell his uncle who worked within the market at the club. He denied having disagreed with the deceased or having stabbed him.

11. I have considered evidence adduced and rival submissions by the prosecution and defence.

12. The burden was upon the prosecution to prove beyond any reasonable doubt that the deceased by an unlawful act or omission caused the death of the deceased with malice aforethought. (**See Section 203 of the Penal Code**). According to the **Section 206 of the Criminal Procedure Code**, Malice aforethought is deemed to be established by evidence proving one or 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 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 wish that it may not be caused.

c. An intent to commit a felony.

13. Evidence adduced of the altercation that happened between the deceased and the accused was of a single witness. In the case of **Ogeto versus Republic[2004] KLR 14** it was held that:-

“it is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such witnesses especially when it is shown that conditions favouring a correct identification are difficult”.

14. I do caution myself of the need to test the evidence with great care.

15. The incident occurred at about 8.00pm. It was her evidence that she was able to see them because there was electric light. They were outside the shop and the security lights were on. She stated that she knew both the accused and deceased very well. The accused was known to her since his childhood and

she had known the deceased for several months. This was therefore a case of recognition. As held in the case of **Anjononi versus Republic [1980] KLR 59** identification by recognition in law is found to be more reliable than identification of a mere stranger.

16. It was further stated that the nature of identification in the circumstances was not only visual identification but also voice identification. PW1 heard the accused address the deceased. She heard him say:-

“ If you play with me I will kill you.”

17. The Court of Appeal addressing the issue of voice identification in the case of **Karani versus Republic [1985] at Page 293** had this to state:-

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice that he recognized and that there were conditions in existence favouring safe identification.”

18. PW1 having known the accused since his childhood would not have been mistaken about his voice. There was security light that was on which enabled the witness to see him. Circumstances that prevailed favoured correct identification.

19. In his defence the accused does not deny having encountered the deceased on the fateful night at the hour stated. He however, alleges that the deceased was already injured at the time of their encounter. The deceased allegedly told him that he had been injured by another lad.

20. According to PW1, the deceased went to her shop and she used a hurricane lamp to see where exactly he was wounded. The deceased asked her to see where the accused had stabbed him. She confirmed that the deceased had fresh stab wounds on the upper chest area. He was bleeding. She advised him to go home so as to be taken to hospital. He heeded to her advice only to be followed by the accused. This prompted the witness to scream telling him that:-

“You have already stabbed your colleague and now you are following him to stab him again.”
One of the persons who responded was the deceased’s uncle PW6.

21. Upon their encounter the deceased told PW6 that he had been stabbed by the accused. He held him and he also saw the accused who was still pursuing him. He demanded to know why he wanted to stab him again.

22. It is submitted by the defence that the alleged dying declaration by the deceased cannot be believed on the grounds that the same may be premised on mere guess work, delusions or mistaken identity. **Section 33(a)** of the **Evidenced Act** provides:-

“Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases–

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;”

23. In the case of **Pius Jasunga s/o Akumu versus Republic [1954]21 EACA 333** it was stated:

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in a number of cases ... it is not a rule of law that in order to support conviction there must be corroboration of a dying declaration (Republic versus Eligu s/o Odel & Another [1943] 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused... but it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”

24. The cause of death of the deceased herein was ascertained. He died as a result of haemothorax/pericardial effusion secondary to the stab wound on the chest. According to the statement made by the deceased as to the circumstances that resulted into his death, the stab wound was occasioned upon his person by the accused. This evidence is confirmed by circumstantial evidence. There was evidence of PW1 who witnessed the altercation between the two and soon thereafter the deceased was wounded. When PW1 saw the two (2) they were the only ones. There was no third party. In the case of *Abouga alias Onyango versus Republic Criminal Case No. 32 of 1990(UR)* it was stated:-

“It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests;-

i. The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established.

ii. Those circumstances should be of definite tendency unerringly pointing towards guilty of the accused.

iii. The circumstances taken cumulatively should form a chain so complete that there is no scope from the conclusion that within all human probability the crime was committed by the accused and no one else.”

25. Considering evidence adduced, I am satisfied that circumstances that prevailed pointed to the accused as the perpetrator of the offence, there is nothing to suggest that it was done by somebody else.

26. I therefore find that he is the one who caused the death of the deceased.

27. Evidence adduced was that the two (2) disagreed over Kshs. 50/= that they had been paid for work done. The question to be posed is whether he could have been provoked?

28. Provocation is defined by **Section 208 (1)** of the **Penal Code** as :-

“The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered”.

29. At the time of commission of the offence the accused was a juvenile and had to be remanded at the Juvenile Remand Home. In his evidence the accused stated by then that he was a primary school pupil. Per the age assessment carried out he was aged 16 years or thereabout. Both the accused and deceased were children who were raised by their grandmother. Looking at the background of the case all they were allude to poverty. Having cleaned a car for an individual they were paid Kshs. 50/=. Being denied a share of that money to an individual of his caliber was a recipe of provocation. To him it was an unlawful act. At the time of his arrest, he was informed that the deceased had died. He was shocked.

30. There is nothing to suggest that he acted intentionally. He caused the death of the deceased in the heat

of passion. (*Vide Section 207 of the Penal Code*).

31. Guided by law, I find that the accused killed the deceased by an unlawful act. I therefore reduce the charge to one of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. Accordingly I find him guilty of the same.

DATED, SIGNED and DELIVERED at **MACHAKOS** this **6TH** day of **NOVEMBER, 2014**.

L.N. MUTENDE

JUDGE