



REPUBLIC OF KENYA

High Court at Embu

Criminal Case 34 of 2010

REPUBLICPROSECUTOR

VERSUS

SIMON KIRAGU KAMBWITU.... ACCUSED

J U D G M E N T

SIMON KIRAGU KAMBWITU hereinafter referred to as the accused stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars as stated in the information is as follows;

SIMON KIRAGU KAMBWITU: On the 30th day of September 2010 at Karie Trading Centre in Kirinyaga South District of the Central Province murdered MUCHIRA NDAMBERI.

The Prosecution case is that on 30/9/2010 at 2am PW7 was from a bar with the deceased and they were going home. They parted as he went to Shem's and the deceased went to escort somebody. As he left for home after assisting Shem, he met the deceased who said he was going to sleep. They parted. After a few metres he heard the deceased screaming for help. He went back to check and found him with Kiragu the accused. The two wanted to fight as they abused each other. There was security light at the scene. He left and was called again by the deceased who told him the accused had stabbed him and he was bleeding from the left side ribs. PW7 tied the place with the deceased's shirt (EXB3). The deceased told him he was going to hospital, but sent him to the bar owner who never responded when called. The deceased released PW7 to go. The next morning PW7 learnt that the deceased had died. He explained to the assistant chief (PW5) what he knew. PW5 went to the accused's place of work and arrested him and hid him at his office as the members of the public were baying for his blood. The police were notified and they came. Later PW5, PW8 and others went with the accused to his house. APC Muriithi lifted the mattress and and a knife was recovered thereunder. The knife had blood stains.

Dr. Nderitu (PW6) carried out the Post Mortem on the deceased's body. He found him to have a stab wound on the right lower chest back which wound penetrated to the back causing massive bleeding in the chest cavity. This led to death (EXB6). Investigations commenced and several items with the deceased's blood, the knife and blood samples were taken to the Government chemist for examination. PW4 the Government analyst produced a report (EXB5) which showed the following;

- 1. The deceased's blood was group B while of the accused was group O.**
- 2. The blood stains on the shirt (EXB3), cloth (EXB2) and knife (EXB4) matched that in group B.**
- 3. The accused's blood was not found in any of the items availed.**

Dr. Thuo (PW3) found the accused to be mentally fit to stand trial as indicated in his report (EXB1).

The accused in his sworn defence denied the charges. He testified that on 29/9/2010 he went on duty and worked upto 8pm when he went home and slept. He was taking care of his children as his wife left. The next morning he was at his place of work when he was arrested and taken to the chief's office. He denied even being taken to his house. He denied knowing the deceased, nor PW7.

Mr. Kariithi for the deceased submitted that there was no evidence linking the accused to the charge. And that the attempt by PW7 to do so was not successful. He asked the Court to see that the accused had been arrested on 30/9/2010 and was arraigned in Court for plea on 2/11/2010. I would wish to start with the last submission. The record shows that indeed the accused was arrested on 30/9/2010. He was first arraigned in Court on 13/10/2010 when he was remanded at the G.K. Prison for appearance before the High Court on 2/11/2010, by which date a Counsel would have been appointed for him. It is not therefore true that he was appearing in Court for the 1st time on 2/11/2010 since his arrest. Murder is defined under section 203 Penal Code as follows;

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

There are therefore two ingredients of this offence i.e.

1. ***Unlawful act or omission (actus reus)***
2. ***Malice aforethought (Mens rea).***

The fact of death was established by PW1, PW2, PW5-PW8. PW1 identified the body to the Doctor for a Post Mortem. The Doctor (PW6) established the cause of death as massive bleeding into the chest cavity. This was as a result of the penetrating stab wound (EXB6) which caused massive bleeding. This was therefore not a natural cause of death.

The 1st issue for determination is whether the accused is the person who killed the deceased person. There is no one who came out to state that he/she saw the actual killing of the deceased. What is before the Court is circumstantial evidence.

PW7 states that he had been with the deceased twice that material night. After bidding him bye as they each went to his home and just a few metres from where they had been, he heard the deceased screaming and he went back. He found the deceased and accused insulting each other and just about to fight. There were security lights at the scene. He then left. The deceased again called him and he went. He found him to have been stabbed by the accused, and he was bleeding from the ribs. He tied him with a shirt and later left after he told him he would go to hospital. The defence was asking why PW7 left the deceased unattended and that he did not report to anyone until he was looked for. The next morning PW7 gave the assistant chief (PW5) information on what had transpired and accused was arrested. PW7 said him and the deceased had come from a bar/club those wee hours of morning, when this incident occurred. PW7 may not have known the seriousness of the injury as the deceased told him he was not in pain but just needed rest. He had tiled the deceased's shirt on the wound and left it at that.

PW7 did not disappear. He was able to tell the administration what he knew. This was early morning of 30/9/2010. Infact PW5 told the Court that PW7 was in great shock when he heard of the deceased's death the next morning. Following the mentioning of the accused by PW7 the accused was arrested that early morning.

PW5, PW8, APC Muriithi and others went with the accused to his house. And a blood stained knife was recovered from under the mattress from his single roomed house. PW5 and PW8 testified to his. The accused person said he was never taken to his house and even said he did not know anything about the charge until he was brought to Court. It was the evidence of PW5 that members of the public were aware of what had happened and wanted to kill the accused. PW5 had to act fast by hiding him in

his office and calling APs from Kiangai to take him away. The crowd baying for his blood threw stones at the accused as the APs left with him. The accused cannot therefore pretend that with all these happenings he did not know that he was a murder suspect. Accused even denied knowing PW7 and the deceased. My assessment of his demeanor is that he chose to deny everything just to save his neck.

The Government analyst (PW4) found the blood on the knife to be of similar origin as that on the shirt (EXB3) and cloth (EXB2) which was found to be of blood group **B** and similar to the deceased's blood group.

It is true that there was no eye witness to the stabbing of the deceased. But PW7 has given evidence which is circumstantial. He had responded to the deceased's screams and found him with the accused abusing each other and even fighting. He asked them to stop. After leaving and doing a short distance he found the deceased wounded. The deceased told him it was the accused who had stabbed him. This evidence is corroborated by the finding of a blood stained knife in the accused's house under his mattress. The Government chemist confirmed the blood on it to be of the same blood group as that of the deceased.

The evidence to prove circumstantial evidence is enunciated in the case of **REPUBLIC -V- KIPKERING ARAP KOSKE [1949]EACA 135 at 136.**

“In order to justify the inference of guilt, the exculpatory facts must be incompatible with innocence of the accused, 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 the case of **JOSEPH NJARAMBA KARURA -V- REPUBLIC [1982-1988]1 KAR 1165** the Court held;

“That the retracted and repudiated confession of the Appellant required independent corroboration which in this case could not be provided by the circumstantial evidence of blood stains alleged to have been found on the Appellant's shirt and which was in several respects conflicting”.

The Karura case can be distinguished from the present case as the evidence of the blood stains herein is very clear. The blood stains on the knife recovered from the accused's house in his presence matched that of the deceased. In the Karura case it was not explained how the blood stains were found at the back lower part of the Appellant shirt. This evidence of blood stains in this case has given credence to the whole evidence of PW7. When the accused was examined on 12/10/2010 by the late Dr. Owino, he was found to have healed bruises on the right side of the head. He told the doctor that the bruises were as a result of fight with the deceased (EXB1 & PW3).

I am therefore convinced the circumstantial evidence herein points irresistibly at none other than the accused as the person who killed the deceased. The final issue to determine is the presence of malice aforethought (Mens rea). Was this killing premeditated? PW7 had found the accused and deceased abusing each other. PW7 and deceased had come from the bar/club. The accused had also been seen at the same venue. This time was after 2am. They could not have just been sitting at the bar/club. The chances of them having taken a few bottles of alcohol are high. The accused on 12/10/2010 when examined had bruises which resulted from his fight with the deceased. He did not receive serious injuries himself. He stabbed the deceased just once in the chest. After evaluating all these circumstances as was in the case of **SIMEON MBELLE -V- REPUBLIC [1982-88]KAR 578**, I do find that the killing was not premeditated. I therefore under the provisions of section 179(2) Criminal Procedure Code reduce the charge of Murder to that of Manslaughter contrary to section 202 as read with section 205 Penal Code.

I accordingly convict the accused of the charge of manslaughter.

DATED AND DELIVERED AT EMBU THIS 10TH DAY OF MAY 2013.

**H.I. ONG'UDI
J U D G E**

In the presence of;
M/s Ingahizu for Statements

Accused

Mr. Okwaro for Kariithi for accused
Njue – C/c

M/s Ing'ahizu

We have no records on accused

Mr. Okwaro for accused in mitigation

May accused be treated with leniency. He is a 1st offender. He has a family which depends on him. He is young and requires a reformatory sentence. He regrets this unfortunate incident. He has undergone trial and seen the need to lead a straight life. May he be given a non custodial sentence.

Court

I have heard and considered the accused's plea in mitigation. I have also considered that he has been in custody since 13/10/2010. By his actions the deceased lost his light to life. He will serve six (6) years imprisonment.

Right of appeal explained.

**H.I. ONG'UDI
JUDGE
10/5/2013**

Mr. Okwaro

We apply for certified copy of proceedings and Judgment.

Court

As prayed.

**H.I. ONG'UDI
JUDGE
10/5/2013**