



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Case 12 of 1991

REPUBLIC.....PROSECUTOR

-VERSUS-

PHILP MUNYAO MBUVI.....ACCUSED

JUDGMENT

The accuse Philip Munyao Mbuvi is charged with murder contrary to Section 203 as read with S.204 of the Penal Code. The particulars of the offence are that on the 14th of April, 1990 at 9.30 p.m. at Mariwenyi Trading Centre at Voi Location he murdered Nobert Kisaka Mwawasi.

First and foremost I must give a general outline of the case before I attempt any profound analysis of it.

Prior to his death the deceased was a teacher at Mwarenyi Primary School whose standard 8 class of 1990 had excelled in KCPE examination. On 14th April 1991 the teachers including (the deceased) celebrated their remarkable achievement. They had invited a local photographer Jeremiah Nyambe (PW.2) to take snap shots of the occasion. So it was a festive occasion. But no drinks were consumed. The PW. 1 and PW.2 who participated in this celebration said that no drinks were consumed. I believe them. I am satisfied the party ended after 6 p.m. Then PW.1 and the deceased escorted the photographer to the bus stage so that he could catch a bus to return to his home.

It is clear that the bus did not come immediately. So they waited. It became somewhat dark as they waited for one to come by.

But instead an intruder came. According to PW.1 it was around 7.30 p.m. when the intruder came. PW.1 describes the intruder as follows:

He was making noise as if he was drunk; he was flashing a torch and he called the deceased. On this point PW.2 testified in the same vein when he said: "We saw a man shouting and flashing a torch. He called the deceased."

It is the evidence of the PW.1 and PW.2 that the deceased then walked across the road to where the intruder was but shortly afterwards he returned to them saying he had been "struck in the stomach with a knife" PW.1 and PW.2 deposed that they tried to apprehend the intruder but he took to his heels and escaped. It was evidently dark and none of the witnesses PW.1 and PW.2 purported to have seen the intruder well enough as to identify him. The issue of identification of the intruder will recur in various stages of this judgment. It is one of fundamental concern.

Be that as it may be, PW.1 and PW.2 returned to the deceased. He was also screaming due to pain. People came there. One of them was Mwalele (PW.4) who had a torch which enabled PW.1 and PW.2 to observe the injured man. His intestines were showing out through a stab wound on his abdomen. PW.1 and PW.2 had to improvise a method of carrying the injured man to hospital. Now bicycle or for that matter a motor vehicle was available. PW.1, PW.4 and other members of the public carried him on a makeshift stretcher whilst PW.2 went ahead of them in a bid to get to a telephone booth from which he could report the matter to police. It was a terribly arduous task for either group. PW.2 walked for two and a half hours before he arrived at Kariok telephone booth from where he reported the episode to Voi police station. PC. Nelson Alugongo (PW.7) of Voi police station is the one who received the report. He says that this report came to him at 11.45 p.m. He proceeded to the scene but met with the group carrying the injured man on the stretcher and had the injured man transferred to his land rover and was taken to Voi Hospital. But he died later. PW.7 confirmed his death at 9.30 a.m. of the following morning.

After having had the injured man admitted to hospital PW.7 says he was then led to the accused's house by the people who had been carrying the deceased. He says that they were two people but PW.1, PW.2 and PW.4 testified that they all accompanied PW.7 to the accused's house. They arrived there between 1 a.m. and 2 a.m. According to PW.7 the accused was singing but PW.2 said that the accused was drinking some local brew, and that in fact some of the brew was carried from the house together with a piece of cloth, a knife and a torch which the other witnesses also testified about.

The accused was thus arrested a few hours after the assault on the deceased. He was kept in police custody. On the 19th April, 1990 he (the accused) made a cautioned statement under inquiry to Inspector Jonathan Ngila (PW.9). In this trial the admission of the statement was never objected to. In fact in his subsequent statement from the dock the accused reproduced the statement under inquiry almost verbatim. In this statement and indeed in his defence the accused not only admits to have been in possession of the torch and knife both of which the assailant who inflicted the fatal injury on the deceased had, but also, he admits that he was involved in a situation which required him to "push" his knife to wards men who he considered to be his attackers. He also admits that this incident occurred at the very same trading center where the deceased was assaulted. The question is whether all these are mere coincidences.

The statement under inquiry is part of the prosecution case. As I have pointed out it was admitted without objection. So it has to be considered in relation to the other evidence produced to support the prosecution case. Weight has to be placed on it because the accused did not object to its admissibility in trial. Moreover, at any rate, it is virtually the defence of the accused and so it has also to be considered from the accused's stand point.

The evidence of PW.7 as to the items which he recovered from the accused requires some extra scrutiny. In the first place it has to be remembered that one of the witnesses namely PW.2 who, accompanied PW.7 to the accused's house listed the items which were recovered from the accused's house as having included liquor, a cloth which was stained with blood and a torch. The accused himself in the statement said that his coat and pair of trousers. PW.7 wrote an exhibit memo which accompanied the exhibits which he required the government analyst to examine. In the exhibit memo form PW.1 showed that a pair of trousers and a shirt with blood stains which were allegedly on the knife. In this trial PW.7 showed that he had made an error in attributing the pair of trousers and shirt to the accused. On the contrary, he says, these items were removed from the deceased and not from the accused. He repeatedly said that he did not recover any from clothing items from the accused. He said that his intention was to establish whether the blood stains on the knife were of the same group with the ones on the clothing items removed from the deceased. But it is evidently clear that the knife was tampered with before it was examined by the government analyst because his report shows that the knife had no blood stains. In the ultimate, it can be said the report of the government analyst is of no probative value in this case.

Another aspect which must be considered at this stage is the undisputed fact that the deceased died from the injury which was inflicted on him on that fateful evening. The evidence of PW.1 and PW.2 is to the effect that the injury was on the abdomen. The evidence of Sgt. Dan Ehanji (PW.6) shows that the injury was on the "stomach". He produced photographs of the deceased (exhibit 4) showing that the stitched wound was on the abdomen. But the most telling piece of evidence on this point is the post mortem report

which shows the cause of death as shock from penetrating injury into abdomen with multiple perforations of small bowel and hemorrhage into abdomen. The deceased thus died of the injury which was inflicted on him on the occasion described by PW.1 and PW.2.

With regard to the relevant aspects of the law I have to warn myself that the burden of proof in a criminal case is always on the prosecution, and that the standard of proof is one of beyond reasonable doubt.

The offence of murder charged herein is committed where a person of sound mind of malice aforethought unlawfully causes the death of another person. That is what S.206 of the Penal Code says. See also Archbold 1992 vo.2 at paragraph 19-2.

The first main question in this case is one of identification of person who stabbed the deceased. Is there any evidence by which the prosecution have established that the accused caused the death as charged. It must be borne in mind that in the accused's defence as in the statement under inquiry the accused gave a long account of his activities on that day. His main activities begun at 5 p.m. when he went to Marwenyi trading center where the deceased was assaulted for the purpose of buying sugar, milk, and cigarettes but ended up spending much of his time drinking large amounts of pombe at various stages. But of relevance to this case is that when he was finally returning to his home he encountered three people (remember that the deceased was with PW.1 and PW.2) who, according to his defence, molested him and preoccupied him for some time in a physical showdown. In his statement under inquiry he said:

"I had held my torch and knife in one hand and the torch was on. When I saw all of them advancing to me I pushed my knife in their direction and I heard one say " he has a knife." When he said that they all reversed then I woke and started running away towards the camp."

It is therefore clear that the accused was in the spot and at the time where and when the assault was perpetrated on the deceased. So, that although there is some conflict between the evidence of PW.2 and PW. 4 as to how the accused was named as the perpetrator of the assault on the deceased the accused's own statement under inquiry and his defence when considered in the light of the evidence of PW.1 and PW.2 describing the assailant as having been so noisy that he appeared drunk irresistibly identifies the accused as the man who fatally injured the deceased in the act which he himself says involved pushing his "Knife to their direction." In this connection it is relevant to note that both PW.1 and PW.2 said that the knife which was recovered from the accused's house was stained with blood. This evidence was perceived by these witnesses, and PW.7 who tried to create a link between the blood stains on the knife and the blood of the deceased, an exercise which was rendered futile by the inefficient and poor handling of the knife which caused the disappearance of the blood stains from the knife before it was examined by the government analyst. Despite his error in the memo form PW.7 pressed me as a reasonably intelligent police man who could not have embarked on that exercise if there had not been blood stains on the knife.

So, the fact that the accused's knife and blood stains coupled with the way in which, according to his statement, he had used it a few hours before his arrest and recovery of the knife leaves no room for doubting that it is he (the accused) who had stabbed the deceased. It follows that the apparent confusion created by PW.1, PW.2 and PW.4 in their description of the accused, and how he was identified is totally immaterial.

The next question which I must answer is the one, as far as the evidence can show, that of a malice aforethought.

It is plain that the accused and the deceased were unknown to each other prior to the incident.

At any rate, their encounter on the fateful evening was a most momentary one. On this point I believe the evidence of PW.1 and PW.2 that the deceased was stabbed as soon as he reached the spot where the accused was. In those circumstances it cannot be said that the deceased had done anything offensive to the accused. But it is also clearly undisputed that the accused had consumed huge quantities of alcoholic drinks a few moments prior to the incident. He was making drunken noises that he was drunk was quite obvious to the PW.1 and PW.2. He himself says that he was singing and that is the reason for exchanging

words with the deceased's group. It seems clear that the accused is simply an addicted drunkard. He has an uncontrollable lousy craving for drink. But there is no evidence to show that on this occasion the drinking spree was self-induced intoxication for the purpose of committing crimes. However, I hold that the alcohol produced a negative effect on his mental responsibility. He was evidently behaving in a weird manner. I find that he had diminished responsibility. He had a mental abnormality at the time when he stabbed the deceased. S.13 of the Penal Code recognizes this problem and makes intoxication a defence legally available.

S.13 (4) of the Penal Code provides:-

“Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise. In the absence of which he would not be guilty of the offence.”

For all these reasons I hold and find as a fact that the offence which the accused committed against the deceased was manslaughter contrary to S. 202 of the Penal Code. I convict him accordingly.

Dated and delivered on the 21st February, 1994 at Mombasa.

I.C.C. WAMBILYANGAH

JUDGE