



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Murder Case 99 of 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER KINUTHIA NJOROGE.....ACCUSED**

**JUDGMENT**

By the information dated 9/12/2009, Peter Kinuthia Njoroge (accused) was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The allegation against him is that on 26/11/2009, at Upper Majengo in Narok North District he murdered John Kuria Njoroge. He denied committing the offence and the matter proceeded to full trial with the prosecution calling a total of eight (8) witnesses, while the accused gave unsworn evidence in his defence.

The brief facts of this case are as follows: On the night of 26/11/2009, PW4, Wilson Saitoti alias Mburu who owns a grocery shop at Narok, was in his shop at about 8.30 p.m. The shop was lit with electric lights inside while security lights were outside the shop. He said that two people came chasing each other and one, who is accused, ran into his shop. The other person remained outside the counter. PW4 said that the accused had scratches on the head and face and was bleeding. He saw accused armed with a kitchen knife. The two continued to quarrel over money. He disarmed the accused and the knife was placed on the counter. PW4 said that the two continued to quarrel as accused demanded his Kshs.200/- from the person who was at the counter (deceased). Accused suddenly took the knife from the counter and stabbed the deceased across the counter. PW4 helped arrest accused, reported to the police and he handed over the knife to the police. PW4 said that the deceased was stabbed on the chest and he fell at the door to his shop. A taxi was hired to take him to hospital. PW4 said he knew both the accused and deceased whom he used to see together in Narok.

Peter Ndegwa Kimani (PW5) told the court that the deceased was his cousin while the accused has been a friend for the past 7 years. PW5 owns a hotel at Narok about 100m from Saitoti's (PW4) shop. He recalled that on 26/11/09 about 8.00 p.m. he was at the hotel when he heard noises outside and somebody came to inform him that his brother had been stabbed and was at Silent Bar near PW4's shop. He ran there and found the deceased had fallen at Saitoti's veranda. The deceased was injured at

the ribs and could not talk. At that time, the accused was holed up in PW4's shop as people bayed for his blood. Police on patrol arrived and together with PW4, went to report at the Police Station. PW5 learnt later that deceased had died.

PC Musyimi Munyao of Narok Police Station (PW6) was with PC Maurice Karisa on patrol in Majengo area of Narok when he heard screams at Silent building. They found a taxi in which they were told a person who had been stabbed was being taken to hospital. He found accused in PW4's shop. PW4 explained what had happened and they went to report a case of assault at the Narok Police Station. Later, he learnt that the person who had been stabbed had died.

PC Simei Mokuia (PW1) was at the Narok Police Station on the night of 26/11/09 about 9.00 p.m. when PC Karisa, and PC Munyao (PW6) took the accused there for allegedly stabbing somebody. Later, he received a report that the injured person had passed away. He was given a knife which was allegedly used to commit the crime. He went to Narok District Hospital and confirmed the death. He handed over the knife to PC Makokha (PW8) for further investigations. PC Joseph Makokha went to the scene of crime with Cpl Kiiru on 27/11/09. The body had already been removed but there were blood stains at the scene, which were photographed. He received the knife from PC Munyao (PW6) and a jacket removed from the accused which he forwarded to the Government Analyst for further investigations.

Post mortem was conducted by Dr. Cleophas Wafula (PW3), after the body was identified by the deceased's brother, Joseph Njogu Njoroge (PW2). The Doctor found that the deceased sustained an incision wound on the left side of the chest between the 8<sup>th</sup> and 9<sup>th</sup> ribs, the spleen was perforated from one side to the other and he found 4 litres of blood in the abdomen. He formed the opinion that the cause of death was severe haemorrhage following a penetrating abdominal injury.

PW7, Albert Gathuri Mwaniki, is a Government Analyst. He received Ex.A - blood sample of deceased, Ex.B – knife, Ex.C – navy blue jacket and Ex.D – blood sample of accused. He found stains of blood on both the knife and jacket. The knife was stained with human blood of Group B, deceased was blood Group B, while accused is blood Group A. On the jacket, he found stains of both Group A and B. He came to the conclusion that blood stains on the knife and some of that on the jacket belonged to deceased.

In his unsworn defence, the accused denied having known the deceased before. He recalled that he left the video on 26/11/09 at about 7.00 p.m. On his way home, as he approached a plot under construction, he found two people behind a toilet, deceased and another called Tulele. As the accused passed, the deceased got hold of him, hit him with the head, the other person ransacked his pockets and took Kshs.30/-. He was made to fall and he bit the deceased's finger and he hit him. When people came to intervene, Tulele told them to keep off and it is then the accused managed to run into a shop but he was prevented from entering. He then ran into Saitoti's shop. The deceased followed him, armed with a knife and wanted to pull accused outside. They struggled and both of them fell as accused held the deceased's hand and the deceased fell on the knife. People came, accused ran into Saitoti's shop though he was not there but the wife and child. Accused admitted that the jacket that was taken to Government Analyst was his and that both him and deceased were bleeding during the incident.

Although the accused denied having known the deceased before, PW4 said he knew both accused and deceased very well and they were usually together. Similarly, PW5 said that accused is his friend and that the deceased was his cousin. He knew accused and deceased as very good friends. PW4 heard the accused and deceased quarrel over money. I am satisfied from the above evidence that the accused and deceased were friends and had a quarrel on that day over money.

PW4 who is the only witness to the murder said that he actually saw accused enter his shop followed by the deceased and after an argument over money, accused stabbed the deceased who had remained on the opposite side of the counter. PW5 who was called to the scene found when the deceased had fallen at PW4's veranda (door) not at a bar. PW6, the Police Officer on patrol who arrived at the scene soon after the incident and PW8 who went to the scene the next day all said that the incident occurred outside PW4's shop. Though, during cross examination of the witnesses, the accused seemed to have been suggesting that the incident occurred at the bar, in his defence, he admitted having entered PW4's shop where a scuffle ensued. The scene is therefore not in dispute, it is at PW4's shop.

The accused claimed in his defence that PW4 was not in the shop but PW4's wife and child, that came as an afterthought and I do not believe him. PW4 was cross examined at length and at no time was it ever alleged that PW4 was not in the shop but his wife. Similarly, reference to somebody by name of Tulele who the accused says was with deceased was never referred to at all during the prosecution case. It came as an afterthought in accused's defence. His defence does not flow from the prosecution case yet the accused had counsel who cross examined the witnesses exhaustively. He could not have failed to examine the witnesses on such important evidence if at all it happened as alleged by accused. The defence was not truthful.

PW4 vividly explained what happened before accused injured the deceased. There were electricity lights in the shop. He said that he had helped disarm accused and placed the knife on the counter but the deceased told accused something which seemed to annoy him and it is then accused took the knife and stabbed the deceased. Accused's explanation that they had a struggle outside PW4's shop is not believable. I am inclined to believe PW4's evidence that it is the accused who stabbed the deceased who then fell at the entrance of the shop. PW4's explanation as to where the deceased was stabbed, in the chest is corroborated by the Doctor's evidence. In any event, if indeed the deceased wanted to rob the accused as alleged, I doubt that he would have pursued accused into somebody's shop and even allow people to gather and see him. That evidence is not believable. PW4 is more truthful.

The deceased's blood (Group B) was found on the knife that PW4 identified as having been used to assault the deceased. As respects the blood found on the accused's jacket which was both Group B for the deceased and A for the accused, PW4 said that when accused entered the shop he was bleeding from scratches on the face and head. However, there was no evidence that deceased was bleeding. The deceased's blood must have spilt on the jacket when accused stabbed him. I will be more inclined to believe that the deceased's blood spilt on the jacket when accused stabbed the deceased.

Photographs were taken of the scene on 27/11/09, but were not produced in evidence. The failure to produce the photographs does not prejudice the accused's case because he does admit to having been at PW4's shop anyway, and that that is when the deceased was injured. The photographs were taken when the body of the deceased had been removed and only the blood stains could have been seen.

PW3 opined that the cause of death was severe haemorrhage following the penetrating abdominal injury. That is the wound that was inflicted by the knife that was produced in evidence. I am satisfied beyond any doubt that the accused quarreled with his friend, the deceased, over money. They fought before the accused ran off and entered PW4's shop. PW4 said that the deceased said something which provoked the accused and he stabbed him. The question then is whether the prosecution has proved that the accused possessed necessary malice aforethought to prove an offence of murder. Malice aforethought is defined by **Section 206** of the **Penal Code**. The Section reads as follows:-

**“S.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 or any person who has committed or attempted to commit a felony.”

From a description of what PW4 told the court, it seems the accused did not have the necessary malice aforethought necessary to found an offence of murder. The accused had ran away from the deceased but deceased pursued him. When he entered PW1’s shop, he had scratches on the head and face and was bleeding. This is evidence that they may have been fighting with accused. They continued to quarrel over money and according to PW4, the deceased said something which angered (provoked) the accused that he picked the knife and stabbed the deceased. It is that one stab wound that caused the deceased’s death. In my view, the accused did not intend to kill the deceased and I will find that the evidence discloses an offence of manslaughter contrary to **Section 202** of the **Penal Code**. He is accordingly convicted of the said offence.

**DATED and DELIVERED this 7<sup>th</sup> day of December, 2012.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Mukira for the accused

Mr. Omwenga for the State

Kennedy – Court Clerk



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