



**Director of Public Prosecution v Gituma (Criminal Case E064 of 2021)
[2023] KEHC 22969 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE E064 OF 2021
TW CHERERE, J
SEPTEMBER 28, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION PROSECUTOR

AND

JOSEPH LAIBUNI GITUMA ACCUSED

JUDGMENT

1. Joseph Laibuni Gituma (Accused) is charged with the offence of Murder of Leonard Karani that was committed on 01st October, 2021.

Prosecution case

2. The prosecution case as stated by APC Njue is that on 01st October, 2021, I saw a crowd pursuing a man that was armed with a knife along Meru-Makutano road. That the man that was being chased sought refuge at Imenti North AP Camp staff quarters and hid himself in a toilet from where he subsequently surrendered to APC Francis Muchiri who also recovered a knife in a bucket of water that was inside the toilet.
3. Henry Njogu stated that on 01st October, 2021 between 07.00 am and 08.00 am, he saw a man pursuing Accused and at some point, the Accused stopped, turned and stabbed the one that was pursuing him with a knife on the chest.
4. The man that was stabbed and who was identified as Leonard Karani succumbed to the injuries. The doctor that conducted the autopsy found that Karani died of haemothorax due to stab wound on the chest and hypovolemic shock due to excessive bleeding from the stab wound. After investigations, Accused was charged.
5. Accused denied the offence. He stated that on the material date, some people who had previously attacked and injured him in 2016 pursue him and fearing for his life ran away and was rescued by a



police officer. He denied stabbing any of his pursuers. He similarly denied he was armed with a knife and said that he was only armed with a rungu.

Analysis and determination

6. Section 203 of the Penal Code under which Accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought.
7. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the death and that he was actuated by malice.

a.The death of the deceased

8. That Karani died was confirmed by way of a postmortem form which revealed that he died of haemothorax due to stab wound on the chest and hypovolemic shock due to excessive bleeding from the stab wound.

Proof that accused person committed the unlawful act which caused the death of the deceased

9. The prosecution has a duty to prove beyond reasonable doubt that the person accused is guilty of the offence charged. (See *Woolmington vs. DPP* 1935 A C 462 and *Bakare vs. State* 1985 2NWLR).
10. Concerning whether the fatal injuries were inflicted by Accused, Henry Njogu stated that Accused who was being pursued by another had stabbed the pursuer and escaped. Accused does not deny that he was at the scene of crime but denied stabbing his pursuer. The incident happened between 07.00 am and 08.00 am and the possibility that Accused was mistaken for another person does not arise especially considering that Accused was known to Njogu who used to operate a business at Makutano shopping centre where Accused conceded he spent most of his time knew Accused before the material date.
11. From the foregoing, I find that Accused was positively identified as the person that inflicted fatal injuries on Karani.
12. Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property. (See *Sharm Pal Singh* [1962] EA 13 and *Guzambizi Wesonga v Republic* [1948] 15 EACA 63).
13. The real point of this case turns up whether or not legal provocation as defined under section 208 (1) of the Penal Code was disclosed to trigger the actions taken by the accused. In order to answer this question, it is appropriate at this stage to set out the law relating to provocation. Section 207 of the Penal Code provides:

“When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool he is guilty of manslaughter.”

14. Section 208 (1) of the Penal Code defines the term provocation as follows:

“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 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.”

15. The question on provocation and provisions of section 208 (1) of the Penal Code have been a subject of interpretation and discussion in our courts in several decisions. In *Republic v Hussein S/O Mohamed* [1942] EACA at pg 66 the Eastern Court of Appeal held as follows:

“When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation.”

16. In the case of *Peter Kingori Mwangi & 2 Others v Republic* [2014] eKLR the court stated that, “for provocation to exist the following two conditions must be established:

- (1) The subjective condition that the accused was actually provoked so as to lose his self-control and
- (2) The objective condition that a reasonable man would have been so provoked.”

17. In deciding a similar case on provocation, the Court of Appeal in the case of *Elphas Fwambatok v Republic* [2009] eKLR held thus:

“In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injuries can be inflicted within a very short time particularly if one has a panga – we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims.....”

18. I have considered the evidence by Henry Njogu and I am persuaded that Accused was provoked by his pursuers and must have been deprived of the power of self-control and induced to defend himself.

Malice aforethought

19. The general principle of law that it is lawful to act in self-defence or to property and does act as a complete defence to criminal liability. (See *Republic v Daniel Okello Rapuch* [2017] eKLR). In *Mokwa v Republic* [1976-80] 1KLR 1337 the Court of Appeal held that:

“Self-defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applies excessive force.”

20. The question to be answered is whether the force used by the Accused was reasonable and necessary in the circumstances. The prosecution medical evidence as to the cause of death is a testimony to the fact that Accused targeted the sensitive and vulnerable part of the body herein the chest. The



stabbing of Karani thrice on the chest was in my considered view disproportionate and the unlawful acts inadvertently caused the death of the Karani.

21. The charge of murder under section 203 requires all of the key integral elements more specifically that of malice aforethought. Accused is consequently discharge of the offence of murder contrary to section 203 of the Penal Code and found guilty of manslaughter contrary to section 202 of the Penal Code which provides that any person who by unlawful act or omission causes the death of another person is guilty of the felony termed as manslaughter.

DELIVERED AT MERU THIS 28TH DAY OF SEPTEMBER 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused - Present

For Accused - Mr. Ngentu for Mr. Kirimi Advocate

For DPP - Ms. Rita (PC-1)

