REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 17 OF 2019

THE REPUBLIC..PROSECUTOR

VERSUS

KEVIN ABOKI ONSOM...ACCUSED

JUDGEMENT

The accused is charged with the offence of **murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on 17th July at Kebuko village, Kegogi sub-location in Nyamira County the accused murdered **THOMAS AMINGA ORINA,** deceased. The accused pleaded not guilty to the charge and the case went to trial.

The prosecution called a total of three witnesses. Briefly the facts of the case are that the accused and the deceased were both labourers who made bricks for a living. On the material day they met at a chang'aa den belonging to one Kerubo. The accused was the first to arrive and when the deceased got there he ordered for a glass of chang'aa and sat a few metres from the accused. Soon thereafter the deceased approached the accused and when the accused demanded to be paid Kshs. 200/= which he owed him the deceased insulted the accused calling him a fool. This triggered an altercation between them and it was then that the deceased picked a stool and hurled it at the accused. The stool missed the accused by inches. The accused left the den but the deceased followed him spoiling for a fight but they were separated. The accused started walking home but the deceased followed him and started hitting him with a stick. This angered the accused and taking hold of the same stick he gave the deceased several blows on the head until he fell to the ground. He then fled the scene. The deceased was rushed to hospital in a critical condition. On 18th July 2019 he succumbed to the injuries. A post mortem performed on the body of the deceased on 24th July 2019 revealed that the cause of death was severe head injury leading to cardio pulmonary arrest. The doctor opined that the said head injury was caused by a blunt object.

When this court put the accused on his defence he admitted that he inflicted the injuries that led to the death of the deceased. He however pleaded self-defence. He testified that the genesis of the occurrence was his demand for payment of Kshs. 200/= which the deceased owed him. He stated that when he demanded the money the deceased picked a stool and hurled it at him but missed. He stated that when he left the den the deceased followed him and started beating him with a stick. He stated that he fled but the deceased followed him and continued beating him with the stick and that is when he took the stick and hit the deceased and left him lying on the ground and went home. He stated that both he and the deceased were drunk.

In her closing arguments Miss Gogi, Learned Advocate for the accused, submitted that the prosecution was required to prove the following elements: -

1. **The death of the deceased.**

2. **That the death of the deceased was unlawful.**

3. **That in causing the death of the deceased the accused had malice aforethought.**

4. **That it was the accused who killed the deceased.**

Counsel submitted that the deceased died hours after he fought with the accused and that it is not in doubt that he died as proved by Pw2. She submitted that the deceased had constantly provoked the accused who lost his cool and hit the deceased. She contended that while the prosecution proved the death of the deceased it failed to prove the death was unlawful. Counsel submitted that the law is very clear that every homicide is unlawful unless authorized by law or is excusable under the law. In support of this submission she cited the cases of **Sharm Pal Singh v R [1962] EA 13** and **Guzambizi Wesonga v Republic [1948] 15 EACA** where the court held: -

> ***"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."

Counsel also submitted that the case of the accused falls squarely under **Section 207 and Section 208 (1) of the Penal Code** as the deceased kept pestering the accused and the accused was temporarily deprived of the power of self-control and therefore had no malice aforethought. For this submission Counsel cited several decisions among them **Republic v Hussein s/o Mohamed [1942] EACA 66** where the Eastern Court of Appeal held: -

> ***"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."***

Counsel also cited the case of **Peter Kingori Mwangi & 2 others v Republic [2014] eKLR** where 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.**
>
> **2. The objective condition that a reasonable man would have been so provoked."**

Counsel cited the case of **Elphas Fwambatok v Republic [2009] eKLR** where it was held: -

> ***"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 severe injury 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……"***

Counsel also relied on the case of **Mabanga v Republic [1974] EA 176** where the court held inter alia: -

> ***"The judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the court was in the particular circumstances of this case provocation sufficient to have rendered the offence of murder to manslaughter……***
>
> ***We have on our own revisited the content of Section 208 of the Penal Code and construed it. To us content of provocation means any wrongful act or insult of such a nature as to be likely when done to an ordinary person.…..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."***

Counsel contended that the constant provocation by the deceased triggered the accused person to lose self-control by grave provocation and in the heat of passion. Borrowing from **H. Gross, a Theory of Criminal Justice (New York Oxford University Press 1979 at 69)** Counsel submitted that passion here means any of the human emotions known as anger, rage, sudden resentment or terror which renders the mind incapable of cooling down in reflection. Counsel submitted that the accused's action of procuring a piece of stick which he used as a weapon to assault the deceased is persuasive that his passion had not cooled. Counsel contended that the defence of provocation is available to the accused sufficiently to reduce the offence herein to manslaughter.

Counsel further submitted that the general principle of law is that it is lawful to act in self-defence or defence of property and that self-defence is a complete defence to criminal liability. Counsel contended that the burden to negate self-defence lies upon the prosecution. Counsel cited Section 17 of the Penal Code and the case of **Palmer v Republic [1971] AC 814** where the court stated: -

> ***"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."***

She also cited the decision of the Court of Appeal in the case of **Mokua v Republic [1976 – 80] 1 KLR 1337** 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."***

Counsel urged this court to find that the accused acted in self defence and acquit him. Counsel reiterated her submission that as malice

aforethought was not established the offence of murder has not been proved beyond reasonable doubt and the accused should be acquitted and set free forthwith as was the case in **Ahmed Mohammed Omar & 5 others v Republic [2014] eKLR**.

There were no closing arguments on the part of prosecution Counsel.

The ingredients of the offence of murder as provided in Section 203 of the Penal Code and which therefore the prosecution is in this case required to prove beyond reasonable doubt are: -

(a) The death of the deceased and the cause of that death.

(b) That the death was as a result of an unlawful act.

(c) That the accused was the perpetrator of the unlawful act.

(d) That the accused had malice aforethought.

(See also the case of Antony Ndegwa Ngari v Republic [2014] eKLR).

The death of the deceased and the cause of that death are not disputed. It is a fact that the deceased died and that the cause of his death was severe head injury leading to cardio pulmonary arrest. It is also a fact that the head injury was inflicted with a blunt object. The accused having admitted that he inflicted the injury that culminated in the death of the deceased the only issues for determination are whether the act by which he caused the death of the deceased was an unlawful act and whether he had malice aforethought.

In the case of **Sharm Pal Singh v R [1962] EA 13** the court held: -

> ***"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 the excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property."***

In his defence the accused claimed to have acted in defence of self. He stated that he assaulted the deceased after the deceased followed him and started hitting him with a stick. He as a matter of fact stated that he struck the deceased with the same stick he (the deceased) had used to hit him. He stated that the deceased became angry when he (the accused) demanded that he pay some Kshs. 200/= he owed him. He stated that the deceased after insulting him hurled a stool at him but it missed the target and when he walked out the deceased followed him and started a fight but people separated them. He alleged that he started walking home but the deceased followed him and started beating him with a stick. By this the accused raised provocation and self-defence as defences to this offence. The defence of self-defence is provided for in **Section 17** of the **Penal Code** which states: -

> **"Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."**

The said common law principles were spelt out in the case of **Palmer v Republic [1971] AC 814** in which it was held: -

> ***"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."***
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> Here in Kenya the Court of Appeal in the case of **Mokwa v Republic [1976 – 80] 1 KLR 1337** held that: -
>
> ***"Self-defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force."***

In the case of **Mungai v Republic [1984] KLR 85** the same Court held: -

> "1. **It is a doctrine recognized in East Africa that the excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter – R v Ngolaile s/o Lenjaro (1951) 18 EACA 164; R v Shaushi (1951) 18 EACA 198.**
>
> **2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there**

> **are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered – Palmer v Reginam [1971] 1 ALL ER 1077."**

Under **Section 207** of the **Penal Code** provocation is a defence to murder. That Section provides that: -

> **"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, is guilty of manslaughter only."**

As correctly submitted by Counsel for the accused unlike self-defence, provocation is not an absolute defence. Counsel submitted that both defences apply to the accused person in that the accused was provoked to act in defence of self and that therefore the act he committed was lawful. I agree with Counsel's submission that the deceased indeed pushed the accused to the wall. The deceased's conduct of following the accused even when he had walked away and striking him with a stick amounted to a wrongful act which when done to an ordinary person could induce him to commit an assault such as was committed by the accused person. The accused used the same stick the deceased had used to assault him even as he tried to talk away from him. It cannot however be said that the act he committed was lawful. This is because after striking the deceased he fell and this should have given the accused opportunity to walk away. He did not do so but instead he continued hitting the deceased on the head with the stick hence inflicting severe injuries on the deceased's head. The post mortem report indicates that the deceased sustained a fractured frontal bone. The doctor who performed the post mortem classified the injury as severe. The nature and extent of the injury betrays excessive force and self-defence which is an absolute defence does not lie. I am however satisfied that the accused did not act with malice aforethought and that his case falls within the defence of provocation. I accordingly find him guilty of the offence of **manslaughter** contrary to **Section 202 as read with Section 205 of the Penal Code** and convict him accordingly.

Signed, dated and delivered at Nyamira this 18th day of March 2021.

E. N. MAINA

JUDGE