



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CRIMINAL CASE NO. 2 OF 2018**

**REPUBLIC .....PROSECUTION**

**VERSUS**

**DAVIS KIMUTAI RONO.....ACCUSED**

**JUDGMENT**

1. The accused is charged with the murder of Peter Kamwana Ruho on 7<sup>th</sup> January, 2018 at the Place Club in Gilgil Sub County. He had gone to the bar for drinks with his friend PW2 Anthony Munene. It was just after 11.00pm and he sat alone as PW2 had moved to a corner to talk to some ladies. After a while he saw the accused hold someone by the hand. There was an altercation and some people began roughing up the accused.
2. PW2 went up to the accused tried to pull him forward, but a crowd of about 10 people had built up and started beating the accused. The mob also grabbed PW2 and started beating him. He rushed to the counter; the counter man opened the door. He grabbed the accused and they got out, with the crowd in pursuit. PW2 fell into a ditch and crawled into a culvert. Some people in the crowd said they had a knife and others tried to stone him, saying the two had killed their buddy. The accused had been badly beaten. He however did not see the accused with a knife.
3. The events as narrated by PW1, Daniel Mwangi who was a security guard at the club, are slightly different. He said that as the customers were drinking, one of them alleged that his beer had been drunk. An argument ensued involving at first, about five people. One of them, who he identified as the accused, then took a knife and stabbed the deceased in the stomach. On seeing this, PW1 opened the front gate so that the customers could leave and they got out of the pub.
4. He took the deceased to Gilgil Hospital. When they got there, they were given an ambulance to take the deceased to Nakuru Provincial Hospital where they left him. PW1 was with a friend at the time. According to PW1 he saw the accused stab the deceased. The lights were on in the club at the time and he clearly saw what occurred.
5. In cross-examination, PW1 denied he was called from outside when the incident happened; he asserted that he did not see the accused seeking to protect the deceased from being beaten; that he did not hear anyone speak of a stolen wallet; that the accused was the one who said his drink had been taken and drunk; that the accused was in the kitchen eating miraa; that he saw the accused retracting the knife after the stabbing and that he heard the deceased say he had been stabbed.
6. In re-examination, PW1 said the deceased was eating miraa and drinking coffee, that he was working as a security man on the inside of the pub, and that he saw the accused removing the knife after stabbing the deceased.
7. Dr. Titus Ngulungu a pathologist at Nakuru General Hospital performed the post mortem on the deceased's body on 15<sup>th</sup> January, 2018. Whilst he found professional incisions and stitches on the stomach and intestines which he attributed to a surgeon's action, he also saw sharp cuts on the stomach, guts, intestines and vessels. The injuries had caused the spillage of fecal matter into the stomach cavity causing peritonitis and septicemia due to toxins and shock. He concluded that the cause of death was internal bleeding, peritonitis and septicemia. The injuries were caused by sharp instrument cuts or sharp force trauma to the abdomen in keeping with fatal assault. The post mortem is not disputed.
8. In cross-examination, Dr. Ngulungu was shown a P3 Form DMFI 1 (D. Exhibit 1) showing injuries sustained by the accused. It was stamped at Gilgil Hospital on 5<sup>th</sup> February, 2018. It showed head and neck injuries, black eyes, swelling of scalp, bruises on scapular region and defensive marks on the right wrist. The injuries were by blunt force and classified as grievous harm. He stated that not having examined the accused, he could not comment on them.

9. PW4 Inspector Rita Wanekaya was the investigating officer. On 7<sup>th</sup> January, 2018 at about 7.00am she was called to attend to people who had brought a suspect they had arrested for stabbing another person. An OB report No. 7/1/2018 had been written alleging that Davis Rono an Army Officer, had stabbed Peter Kamwana at a Club. She produced the OB report as Exhibit 2. She then went to Nakuru Provincial Hospital where the victim had been taken and found him admitted there.

10. She recorded statements from PW1 and PW2, but was unable to trace two other persons of interest. She got a knife which had been availed at the report office and produced it as P. Exhibit 3. She interviewed the accused and he alleged that a customer sitting opposite him in the club had stolen his wallet. A brawl ensued and the accused jumped over the table to accost the customer.

11. In cross-examination, PW4 admitted that the first report did not indicate receipt of a knife. The knife was, however, given to her on 7<sup>th</sup> January, 2018 at about 10.00am and had blood stains. It was not taken for analysis to the Government Chemist because it had a lot of mud. She confirmed that PW2 was one of the people arrested; that the accused had sustained injuries; and was taken to Gilgil Hospital under police escort. Shown the P3 form DMFI D1 she said it showed the accused had suffered grievous harm. He told her he was beaten by a mob at the club; he told her the knife was from the military; and that he was injured as he tried to get back his wallet.

12. In his defence the accused gave a sworn statement. He testified that on the material date he was with PW2 at Place Pub Club accompanied by two ladies. PW2 sat with the two ladies at one table and, while he sat at another one from midnight to about 5.00am. At some stage four men came to his table and sat. One of them pulled the accused's wallet out of his back pocket, and he stood up; then another of the men grabbed the accused's beer and drunk it.

13. Irrked, the accused instinctively grabbed the hand of the man who had taken his wallet. The man slapped him. Seeing all this, PW2 came to the table and told he accused they should leave. Suddenly, there were about ten people surrounding them and hitting them. It was dim and the accused did not see what weapons the men had, but he saw something like knives. Under the barrage of blows he fell under the table. In the confusion, he heard someone say "ameumia". PW2 pulled him out and they went towards the counter, where the attendant told them to escape through the back door.

14. The two got out and ran. He went towards Kenyatta Barracks about 1 kilometre away. Some people chased him and caught up with him. He was bleeding as he was taken to the police station, then to hospital. When he was taken back to the police station he was given a P3 Form marked DMFI 1.

15. The accused denied the charge that he assaulted and killed the deceased. He denied having a knife. He denied that the knife produced in court was a military issue knife.

16. In cross-examination he re-asserted that his wallet was stolen in the pub; he denied telling the police that the knife was his; he said the person who grabbed his wallet and whose had he grabbed, was being called Kamwana by his colleagues; he denied using a knife.

17. In cross-examination he said he did not know why PW1 had said the accused had a knife. He denied having or using a knife. Shown the statement of PW2 where PW2 said the accused had a knife he said:

***"PW2 Anthony Munene said the knife was mine. He is my friend. Maybe he was in cahoots with those other people in the pub."***

As for PW1, the security officer, the accused said he was operating from outside the pub conducting searches so he could not have seen what was going on inside.

18. DW2, Dr. David Kuria Samson, a medical officer at Gilgil Sub-County Hospital produced the P3 Form for the accused as D. Exhibit 1. He confirmed the injuries stated in the form sustained by the accused. He pointed out that the examination was done on 5<sup>th</sup> February, 2018 about one month after the injuries had been inflicted.

19. The state did not make any closing submissions and chose to rely on the court record.

20. On their part, the defence submitted a defence of self-defence. During cross-examination of each of the four prosecution witnesses, the accused consistently questioned whether the prosecution witnesses saw him (the accused) being attacked and injured by the mob; whether they saw or were aware that the accused's wallet had been stolen off him and that when he requested it back, the crowd around him beat him up. In essence he asserted that all he did was, he tried to defend himself.

21. In addition, the accused produced a P3 Form D. Exhibit 1 which showed that he had reported being injured on the material day. Although the form was filled in about a month after the incident, none of the witnesses denied that the accused had been beaten by the mob in the pub. Nevertheless, the accused denied having, or using, a knife on the material day.

22. The ingredients of a murder charge were well stated in the case of **Republic v Andrew Mueche Omwenga [2009] eKLR** as follows:

***"It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought."***

(Emphasis added)

23. How does the evidence availed in this case pan out in light of the ingredients requiring proof? The death of the deceased is not in dispute at all. The post mortem report states that the deceased died on the material night due to loss of blood arising from stab wounds.

24. The next question is whether the death of the deceased was unlawfully caused. **Article 26 (1)** of the **Constitution** protects the right to life of every person. A person cannot be deprived of life intentionally except to the extent authorized by the Constitution or any other law. In the present case, there can be no dispute that the deceased's life was terminated unlawfully, and the question whether or not the death was unlawful is not even raised by any of the parties.

25. The final ingredient which must be proved is malice aforethought: Whether the prosecution has proved that the death was caused by the accused through an intentional act of culpability. **Section 206** of the **Penal Code** defines malice aforethought as follows:

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

26. In this case, the accused has strenuously argued that his wallet was stolen from him at the pub by the deceased, supported by the people who were around him; that when he demanded it back the deceased and his gang beat him up; that he had to defend himself from the beatings; and that he eventually was helped by PW2 to escape the brawl and ran away, before being arrested.

27. PW1 testified that he clearly saw the accused with a knife and saw him withdrawing it from the deceased after the stabbing. There was adequate light in the pub. No other eyewitness testified to the accused having a knife. The only other reference to the accused having a knife is brought out in his cross-examination when he was asked why his friend PW2, Antony Munene, said in his statement that the knife was the accused's. The exchange in cross-examination is telling where the accused said:

***“PW2 Anthony Munene said in his statement the knife was mine. He is my friend. Maybe he was in cahoots with those other people in the pub.”***

28. In his oral evidence-in-chief PW2 did not state that the knife belonged to the accused. Although in oral cross-examination PW2 said:

***“I did not see the accused with a knife”,***

It is clear that in his statement to the police he made reference to the knife as belonging to the accused.

29. I find that, given that the accused admitted that he held the deceased during the brawl after the deceased took his wallet, the accused was provoked by the deceased. I also find that the evidence of the PW1 that the accused stabbed the deceased to be credible and supported by the written statement of PW2 who notwithstanding the fact that he later denied that the accused had a knife, originally stated in his witness statement that the knife was the accused's.

30. During the fight, blows were raining every which way. The accused gave as much as he got. The protagonists were initially the accused and the deceased, with the deceased's buddies coming to support or rescue their friend. I accept that the stabbing that led to the deceased's death was occasioned by the accused; and I so hold.

31. The defence cited the case of **Ahmed Mohammed Omar & 5 others v Republic [2014] eKLR** to stress the point that the accused was provoked and took self-defensive action because his life was in danger. In that case, according to the defence, the Court of Appeal held that there was no rule of law; which requires that a man must wait until he is struck before he strikes in self-defence. Further, that if an accused person believed or may have reasonably believed that he was being attacked and defended himself upon that belief, there is no proof of malice aforethought.

32. I have carefully perused the evidence and reviewed it in light of the principles in the **Ahmed Omar** case. I cite at fair length from the **Ahmed case** as follows:

***“The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v Morgan [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v Morgan (Supra) it was held that:***

*“...if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants’ belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”*

*In Beckford v R (Supra) it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.*

*In R v Williams [1987] 3 ALL ER 411, Lord Lane, C.J. held:*

*“In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant’s alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”*

*It is acknowledged that the case of DPP v Morgan (Supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also Smith and Hogan’s Criminal Law, 13<sup>th</sup> Edition, Page 331.*

*Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants’ defence because it applied an objective test.”*

33. No submission based on the facts of this case was made that the accused had an intention to murder the deceased; no evidence was laid out that suggests an intent on his part. The evidence shows that his wallet was stolen from him; that he held and engaged the deceased in an attempt to retrieve it; that a fight broke out as he was repeatedly assaulted; and that he fought back and it was then that he stabbed the deceased; and that he was himself seriously injured.

34. According to PW1 the accused’s beer was drunk by the deceased but the accused’s wallet was not taken leading to the fight. If the deceased took the accused’s beer, that would amount to provocation. According to PW2 and the accused, the deceased took the accused’s beer. That too, is provocation. **Section 208 (i) of the Penal Code** defines 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 a 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.”*

#### **Disposition**

35. In light of the foregoing, I accept the accused’s defence of self defence arising from provocation. Accordingly, I hereby convict him for Manslaughter contrary to **Section 207** as read with **Section 205** of the **Penal Code**.

36. Ahearing on the sentence shall be held on a date to be agreed with the counsel, when the accused shall tender his mitigating circumstances.

37. In the meantime, the Probation Officer shall avail a pre-sentence report on the accused.

38. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 27<sup>th</sup> Day of April, 2021.**

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**R. MWONGO**

**JUDGE**

In the presence of:

1. Ms Maingi for the DPP
2. Mr. Gichuki for the Accused

3. Davis Kimutai Rono - Present in Court

4. Court Assistant - Quinter Ogutu