



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 31 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD WAMALWA CHAI.....ACCUSED

JUDGMENT

The accused **BERNARD WAMALWA CHAI** is charged with the offence of Murder contrary to Section 203 as read with section 204 of the Penal Code.

Particulars of the offence are **BERNARD WAMALWA CHAI** on the 5th day of October, 2018 at Namirembe village in Bungoma South within Bungoma County murdered **LUKAS WABWIRE CHAI**.

The prosecution case is that the accused and deceased are brothers. On 4.10.2018 PW4 Boniface Wabwaba Masinde the village elder was asked by the deceased to go to their home on 5.10.2018 to witness them demarcating their parents land, among the brothers. On 5.10.2018 he went there. He found other people including the mother of the accused. The deceased went to accused's house to call him for the meeting. The accused went to his house and came out with a sword and stick. Accused hit the deceased with a stick who then fell down. The deceased rose up picked a stone and hit the accused. The accused then took the sword and stabbed the deceased on the throat. Peter Wanyama went to assist and accused cut him on the neck. He went there and disarmed the accused. The deceased who had sustained injuries was taken to hospital where he was pronounced dead on arrival.

PW1 APC Mahindu Rafuna was at Ekitala AP Camp when accused went there and reported that he had fought with the deceased. They arrested him and later visited the scene where he saw blood stains. He also received the sworn alleged to be the murder weapon from the village elder PW4. At time accused came to the police station he noticed he had a bandage on his head.

PW5 Jackson Makokha Chai the brother of accused and deceased attended the meeting where he found deceased arranging chairs. While he was there accused came and said there was not going to be any meeting. The accused was armed with a jembe stick. PW5 then went to his house and was later informed that accused had stabbed the deceased. He went there and found deceased had been taken to hospital.

PW6 Peter Wanyama Chai testified that he attended the meeting and while deceased was arranging chairs accused came and said there was not going to be any meeting. He left the scene and later heard screams and on going there found deceased had been cut on the throat. He assisted deceased to be taken to hospital. He however recorded his statement to police that he saw accused cut the deceased on the throat.

PW3 Dr. Nyongesa Ikere who performed the post mortem on body of the deceased found that the deceased had a cut wound measuring 1 cm long and 2cm wide and 2 ½ cm deep on the left side of the neck. He formed opinion that cause of death was due to severe bleeding as a result of a penetrating injury caused by a sword or knife.

Upon the accused being placed on his defence, he elected to give sworn evidence. He testified that on the material day he had visitors from the County who wanted murrum. He then saw deceased and the brothers and clan members including the clan elder set up a meeting at his farm. The village elder sent one Tobias to call him to go to the meeting. He told Tobias that he was not going to attend. Lukas, the deceased then came and asked him why he had refused to attend the meeting. Deceased then hit him with a fist and accused hit deceased also with a fist. Tobias and other brothers threw stones at him. He ran to his house and took a stick and came out. They started beating him. He ran into the house and took a sword. He came out with it and deceased held him. Accused and deceased started struggling over the sword and the sword injured deceased on the neck and he fell down. Deceased was taken to hospital. He also went to hospital where the injury he sustained was stitched. He later learnt that deceased had died. He went to police and made the report where upon he was arrested. He stated that he did not intentionally stab the deceased.

Mr. Otsula for the accused filed submission. Counsel submitted that from the evidence advanced by the prosecution, it is clear that the accused was acting under provocation. He submitted that the accused having been attacked and pursued upto the house was acting in self defence and therefore there was no ill motive or intention on the part of accused to kill the deceased. He therefore submitted that the

prosecution failed to establish malice aforethought which is an important ingredient of the offence of murder. He referred the court to the decision of Miller –vs- Ministry of Pensions 1947 2 ALLER 372, Republic –vs- Stanely Muthike Tiire (2018) eKLR and Republic –vs- Morris Okoth Oloo (2018) eKLR.

The accused is charged with the offence of murder contrary to section 203 of the Penal Code.

Section 203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. 203 provides.

The elements of the offence of murder which the prosecution must prove beyond reasonable doubt are:

- a) **The fact of death of deceased.**
- b) **The unlawful act or omission causing the death; or the actus reus.**
- c) **The existence of Malice aforethought or the mens rea.**
- d) **That the unlawful act or omission was committed by the accused.**

The prosecution bears the burden of proof in all criminal cases. The standard of proof is beyond reasonable doubt. This standard was expounded in Miller –vs- Ministry of Pensions 1947 2Aller 372 as follows:

“that degree is well settled. It need not reach certainty but it must carry a high degree of probability proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is too strong against a man as to leave only a remote possibility in favour which can be dismissed with the sentence of course it is possible, but in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

The prosecution must therefore prove to the above standard all the ingredients of the offence. In Joseph Kimani Njau –vs- Republic 2014 eKLR the Court of Appeal stated.

In all criminal trials both the actus reus and the mens rea are required for the offence charged. They must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard.”

PW3 Dr. Nyongesa Ikere who performed the post-mortem on body of deceased found that the deceased had torn tissues on the left side of the neck which connected heart and brain, cut wound on neck which caused severe bleeding leading to death. He formed opinion that cause of death was bleeding secondary to a penetrating wound. He therefore confirmed the fact and cause of death of the deceased. By the evidence of the doctor the prosecution established this element of the offence.

From the evidence of the doctor, the penetrating injury was caused by a sharp object which would be a sword or knife. The unlawful act was therefore the stabbing using a sharp object.

Did the accused commit the unlawful act that caused the death of the deceased?

PW4 Boniface Wabwoba Masinde the village elder testified that the deceased had called him to witness the demarcation of boundary among the brothers. He went there. The deceased was sent to call accused to come to the meeting. The accused who was unhappy about the meeting went into his house and came out armed with a stick and sword. He then hit the deceased with a stick and then stabbed him on the throat. Peter Wanyama came and held the accused and accused cut Peter also. Peter hit accused with a stone. He went there and disarmed the accused of the sword which he kept and produced it as exhibit. The deceased sustained serious injuries and died while being taken to hospital.

The accused in his defence explained the event as follows:

“ They were at my farm where my cattle stays. I went to collect grass for the cattle. Lukas and Rusto were seated on the grass. Lucas then asked me why I had refused to go to the meeting. I told him to take the meeting to his home. I started to collect grass. Lucas then hit me with a fist. I blocked it. I also hit him with a fist. He hit me and Tobias, David, Rustus and Dickson took stones. It is Dickson and Rustus who took stones. They threw stones and hit me on the head. I found chance and ran to my house. I entered my house. Rustus followed me. They stood at my door. They were Rustus, Lucas and Boniface. I took a stick and came out with it. They started beating me. Lucas hit me. I went back into the house. I took a sword which was on the table. I came out and Boniface held the sword. I started struggling with him. The others then held me. We started struggling over the sword. Lucas was behind me. As we were struggling the sword injured him on the neck and he fell down. The child came and Lucas was taken to hospital at Kitale Health Centre. I went to hospital where I was stitched. I reported the matter to Kitale police station. While there the Boniface the clan elder came and police arrested me.”

From the accused defence it is clear that he was the one in possession of the sword which he had picked from his house. He admits; that is the sword that injured the deceased on the neck inflicting an injury. It is from this injury that the deceased bled and died while being taken to

hospital. His explanation is that he and deceased were struggling over the sword when it cut deceased on the neck and he feel down. The injury sustained on the left side of the neck measuring 1cm long by 2cm width by 2 ½ cm deep was one that was inflicted by use of force. It cannot be as the accused asserts as a result of struggle but deliberate use of force.

I therefore find that accused did unlawfully inflict the injury on the deceased, from which the deceased died. The prosecution has therefore proved the actus reus.

The other element of the offence of murder which the prosecution must prove is the existence of malice aforethought or mensrea. Section 206 of the Penal Code defines malice aforethought as;

206. "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

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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."

In the case of **John Matuma Gatobu vs- Republic (2015) eKLR** the Court of Appeal stated:

" Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal Code.

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought."

Judicial decisions have interpreted Section 206 and given directions to court in circumstances where malice aforethought can be inferred. In **Republic vs- Tubare S/o Ochien 12 EACA 63**. The court stated that malice aforethought can be inferred by considering:

- a) The nature of the weapon used.
- b) The part of the body targeted.
- c) The manner in which the weapon is used.
- d) The conduct of the accused before during and after the attack.

In the present case there is evidence that and indeed the accused admits that when he saw the group wanted to attack him, he went into the house and armed himself with a sword which was on the table and came out. He knew or ought to have known that a sword is a lethal weapon, he attacked the deceased on the neck or throat a vulnerable part of the body. He viciously stabbed him on the neck causing the injuries. This attack was aimed at not repulsing the deceased but to cause grievous harm or death as it occurred. Taking all this circumstances cumulatively, it proves an intention to cause death or grievous harm and therefore demonstrate or proves malice aforethought.

PW4 Boniface the village elder testified that there was a fight between the accused and deceased as the accused was angered by the meeting which he thought had been convened by the deceased. He confirmed that as a result the deceased hit the accused with a stone. PW5 Jackton Makokha the brother of both accused and deceased and PW6 stated that they did not witness the fight. The accused however in a detailed defence stated that he was hit with stones prompting him to go to his house and arm himself with a sword. In cross examination he stated that he did not intentionally stab the deceased but was trying to defend himself and escape. From the evidence the accused in stabbing the deceased was responding to the provocation caused by the stones thrown at him. Section 207 of the Penal Code on provocation 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, is guilty of manslaughter only".....

For the reasons that the accused committed the unlawful act under provocation, in pursuance to Section 207 of the Penal Code, I find that the prosecution has proved the offence of manslaughter. I therefore find accused guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict him accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF JUNE, 2021

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S.N RIECHI

JUDGE