



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL CASE NO. 10 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MESHACK KIRUI MOCHOMU.....ACCUSED**

**JUDGMENT**

The accused **MESHACK KIRUI MOCHOMU** 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 that **MESHACK KIRUI MOCHOMU** on the 21<sup>st</sup> day of March 2018 in Namorio location of Mt. Elgon Sub-county within Bungoma County murdered **MARTIN KIRUI**.

The case of the prosecution is that on 21.3.2018, **PW1 Emily Chebein Kirui** was at her parents home. Both the accused and deceased are her brothers. On material day she met both accused and deceased. The accused had planted tree seedlings and fenced the area. The deceased went and removed the fence of the accused. The accused then ran there and pushed the deceased who fell down. Accused then took a stone and hit him. He stepped on him and went to the deceased's house where he took a knife and used it to stab the deceased 3 times. He then told the witness that he had killed him. She screamed. People came and accused ran away. The knife was also recovered.

**PW4 Moses Muchomo Kirui** the father of the accused and deceased was at home on 22.3.2019 with his wife, accused and deceased. The deceased and removed a fence he (witnesses) had erected. The accused went and returned it. The deceased came from the house with a knife intending to stab accused but he missed and fell down on the knife, and stabbed himself once. He took deceased to Kitale Nursing home where he was referred to Eldoret but as he did not have money they took him to Kapsokwony hospital where he died.

**PW2 Stanley Muli Cherop** the Chief of Namai Location received information that accused had assaulted his brother the deceased. He sent youths who went and arrested him at the home of one Tabu where alcohol was being sold. They took him to the Ap Post. PW3 No. 255807 APC Lewis Ochieng received the accused on allegation of injuring his brother using a knife. He asked accused where the knife was. Accused led him and APC Chemase to the home of one Chosunga, near a river where accused retrieved the knife.-

**PW6 No. 67699 Pc Paul Kirui** received information of the incident and visited the scene. He was shown where the offence had occurred form where he recovered a stone. He also received a blood stained knife form APC Ochieng which was taken to Government Analyst Kisumu.

**PW7 Polycarp Lutta Kweyu** a Government analyst received a blood sample from the deceased and a knife which was blood stained. He was requested to establish whether the blood form the blood stained knife matched that of the deceased. He generated DNA profiles which confirmed the blood from the blood stained knife matched that of the deceased. He produced and report Exh. 4.

**PW5 Dr. Nancy Kegode** produced a post mortem form filed by Sr. Simiyu who performed the post moterm on body of deceased. He found deceased had a deep cut wound on left side of the head and back of head. He also had a cut wound on right wrist joint. Upon opening the body he found here was a cut wound in the skull to the brain. He assessed the cause of death to be due to brain injury secondary to a cut wound.

The accused gave sworn evidence. He testified that on 21.3.2018 in the morning he and deceased had tea. The deceased then left for his house. Accused noticed the deceased was pulling off the barbed wire of the fence he had erected. He went there and asked him why he was doing so. He accused then restored the fence. Suddenly he saw deceased armed with a knife, he avoided being stabbed and the deceased fell into a quarry. The knife then pierced the deceased who also fell on stones. Accused went home and explained to the parents who took the deceased to hospital. He denied leading the members of public to where the knife was recovered. **DW2 Linet Chemayen Kirui** the mother of both accused and deceased testified that she saw what happened and that the deceased who had a knife fell down and the knife pierced

him.

The accused is charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal code. The elements of the offence that the prosecution must prove are:

**(a) The fact and cause of death.**

**(b) The unlawful act or omission that caused the death.**

**(c) The existence of malice aforethought or mens rea.**

**(d) That it is accused who committed the unlawful act or inflicted the injury on the deceased that caused his death.**

As to fact and cause of death, PW5 Dr. Nancy Kegode produced a post mortem report prepared by Dr. Simiyu. The report shows that the deceased had a deep cut wound on left parietal region involving skull and back, cut wound on back of the head, cut wound on right wrist joint. The cut wound on the head led to the injury of brain matter, which caused the death of deceased. The fact that deceased died and that his cause of his death was due to injury to the brain was established.

Did the accused inflict the injury that caused the death of deceased?

PW1 Emily Kirui the sister of the accused testified that she was at home when she saw the accused and deceased fighting over the deceased's decision to remove the fence accused had erected. She then testified:

***“The accused had fenced his trees. The deceased removed the fence. The accused then ran there. The accused then pushed the deceased and he fell down. The accused then took a stone and hit him on the back of the head. He then stepped at him. Accused entered the deceased house and picked a knife and stabbed him 3 times. Accused then told me he has killed him. I screamed and people came. Accused then waved the knife at the people and he ran away. The deceased was injured on the head and was bleeding. This is the knife accused used to stab him – Mfi 1. The deceased then died.”***

PW4 Moses Muchomo Kirui in his evidence testified that while he admits he saw the deceased and accused struggling, he stated that the deceased was the one who armed himself with a knife and intended to stab the accused but missed and the deceased fell down on the knife and injured himself. This is the version adopted by both the accused and his witness., DW2 Linet Chingemen Kirui the mother.

PW4 Stanley Muli Cherop the assistant chief however testified how upon receipt of the report he caused accused to be arrested. The accused was taken to the AP camp. He was received by PW3 NO. 255807 APC Levis Ochieng. The accused was interrogated about the incident. He was asked about the knife alleged to have been used. Accused led APC Ochieng and AP Chemase to the home of Chesanga and from near a river, he retrieved the knife alleged to have been the murder weapon. The knife which as blood stained was subjected to DNA analysis of the blood and the report Exh. 4 confirmed that the blood stains on knife matched that of the blood sample of the deceased. It therefore confirmed that the knife was the murder weapon. This is the knife which was produced by the accused who retrieved it from a place near the river in presence of PW3 APC Lewis Ochieng.

The accused was seen by PW1 Emily fighting with deceased and armed with a knife. The deceased sustained stab wounds on the head which caused his death. The accused even in his evidence admitted that there was a fracas with the deceased. The accused upon being arrested led police to where he had hidden the knife which was blood stained. On analysis of the blood stains, the DNA analysis confirmed the blood on the knife to match that of deceased. These facts establish that it is accused who inflicted the injuries on deceased.

The accused and his witnesses contention that deceased fell on the knife cannot be true because why then would the accused take the knife and hide it near a river?

It is common ground that the deceased and accused fought over the removal of the fence by the deceased. It is the accused who had erected the fence with barbed wire to protect his crops from animals. The deceased was unhappy and removed the barbed wire fence. This angered the accused who confronted him and a fight ensued. There was therefore an act which he considered provocation by the deceased. Provocation is defined in Section 208 of the Penal Code as:

***208. Provocation defined (1) 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. CAP. 63 Penal Code [Rev. 2012] [Issue 1] P6-70 (2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault. (3) A lawful act is not provocation to any person for an assault. (4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault. (5) An arrest which is unlawful is not necessarily provocation for an assault,***

Where a court on a charge of murder established that the accused acted under provocation Section 207 provides as follows:

***207. 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.*

Considering all the evidences, I am satisfied that the though charged with murder, he committed the same under provocation and under the provision of Section 207 of the Penal Code find him guilty of manslaughter contrary to section 202 of the Penal Code. I therefore find the accused Meshack Kirui Mochomu 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 23<sup>rd</sup> day of June, 2021.

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**S.N.RIECHI**

**JUDGE**