



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

HIGH COURT CRIMINAL CASE NO. 17 OF 2015.

REPUBLIC.....PROSECUTOR

VERSUS

TIMOTHY MUKHWANA NYUNDO.....ACCUSED

J U D G E M E N T

TIMOTHY MUKHWANA NYUNDO the accused is charged with offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code.

The particulars of the offence are on the 5th day of July, 2015 at Mwiya village Mungore sub-Location in Bumula Sub-County within Bungoma County murdered **JOSEPHAT BARASA MUKHWANA**.

The case from the prosecution is that the deceased was the father of the accused. On 4.7.2015 PW 5 Beatrice Naroso Barasa, the wife of the deceased and mother of the accused was in her kitchen house cooking at 6 p.m. While there the deceased came and sat on the verandah. She gave him ugali which he ate. He then went to sleep. She also joined him on the bed but he told her to leave. The deceased then stood up and took the children who were in the house to the house of accused and locked them

there. He came back and chased her away. She slept on the verandah up to 10 p.m , when she decided to go to the kitchen house to sleep. Deceased went there and removed her and intended to hit her with a piece of wood but she evaded it. He went away and came back with a jembe at 11. P.m . She locked the door. Accused then came from outside and held the deceased. She advised the accused to leave the deceased alone as he had appeared drunk. She ran away and shortly heard the deceased screaming for help. She ran there and saw accused pushing the deceased with his foot while deceased was lying down. She saw deceased was lying on a tree stump and was bleeding from the nose, legs and back of the head.

She went and called the brother of deceased Protus who came at 4 p.m and took him to hospital where he was admitted. While at the hospital the deceased asked for milk, on checking she found he had Kshs.7,000/= in his pocket. He told her to keep it and take care of his children and then died.

PW2 Protus Simiyu Nyundo the brother of the deceased was in his house at 10 pm when he heard deceased screaming. "Timothy if I die you will die a bad death" He went to the deceased house which was about 100 metres away. On arrival he found the accused, his mother (PW 5) and young children. He saw the deceased lying down bleeding from the right ear. He arranged and took him to Khasoko hospital and then to Bungoma hospital where he was admitted.

PW 1 Jairus Simiyu Nyudo was in his house when Protus (PW 2) informed him that deceased had been beaten. He went to deceased house and arranged for him to be taken to Bungoma hospital where he was admitted. He had injuries on his head and was bleeding from left ear.

PW4 NO.52069 CPL. Kasili Wafula then attached to Khasoko patrol base was on patrol when he received a report of murder at Nomungare area. He went there and found the members of public had arrested a suspect. He rearrested the accused who was the suspect and recovered a stick from the Chief which was alleged to have been used in the murder.". He produced the piece of wood but it had no blood stains.

PW 3 Dr. Harun Ombongi produced a post-mortem report prepared by Dr. Kosgei who performed the post-mortem . Dr. Kosgei found that the deceased had a depression on right side of head, lacerated wound near the left ear. Upon opening the body he found that there was occipital skull fracture with swelling. There was also a fracture of right bone behind the ear. He formed opinion that the cause of death was due to shock secondary to severe head injury.

The accused on being placed on his defence gave sworn evidence. He testified that on the material day he went home at 10 pm after taking alcohol at Meeting point bar. On arrival he found the door of his house open. He went to his mother (PW 1) house to look for food. He

found the father who is the deceased lying down bleeding. Shortly after his mother PW 5 came from the maize farm. She informed him that deceased had come back home and chased her and that he had fallen on a tree stump. He was taken to hospital where he died. On being cross-examined by M/S. Nyakibia he denied that he found deceased and the mother fighting and tried to save the mother.

Mr. Watangah for the accused filed written submission. Counsel submitted that it is upon the prosecution to prove by evidence all the ingredients of the offence of murder. Counsel submits that there are gaps in the prosecution evidence which leave a reasonable doubt as to whether it is the accused who killed the deceased or whether he fell down. He submits that none of the witnesses saw accused injure the deceased and that accused is only a victim of circumstances. He urged the court to find accused not guilty of the offence.

The accused is charged with the offence of murder contrary Section 203 of the Penal Code. Section 203 of the Penal Code provides;

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

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

- 1. The fact and cause of death.***
- 2. The unlawful act or omission that caused the death***
- 3. That it is accused who committed the unlawful act or omission that led to the death of deceased.***
- 4. That there was in existence the malice aforethought on the part of accused.***

That Josphat Barasa Mukhwana the deceased died is not contested. Indeed both the wife (PW 5) and the accused confirm that the deceased died while undergoing treatment at Bungoma hospital. PW3 Dr. Harun Ombongi produced a post-mortem report prepared by Dr. Kosgei who confirmed the death and issued death certificate NO.260873. The doctor also found that deceased sustained occipital skull fracture and fracture of right bone behind the ear. He formed opinion that cause of death was due to severe head injury. The only witness who gave evidence as to how the deceased sustained the injuries is his wife PW 5. She stated:

“At 11 pm he came back armed with a jembe and firewood. I locked the door. Accused came outside and held the firewood. I told accused to leave the father as he was drunk. I ran away. I then heard deceased screaming help me. I went there where deceased was. I saw accused pushing deceased with his foot, while lying down. I saw the deceased lying on a tree stump. He looked weak”.

PW 2 Protus Simiyu while in his house heard the deceased screaming. "Timothy if I die you will die a bad death". On going to the scene he found accused and his mother and siblings present.

The accused defence is that he only went to the scene and found the deceased already lying down. From the evidence of PW 5 his mother, this is not true. Indeed PW 5 Beatrice confirms in her evidence that the accused did appear to intervene but the mother advised him not to. She ran away leaving the accused and deceased. She then heard deceased screaming for help. When she came back she found deceased lying down with injuries and accused pushing the deceased with his foot.

From the evidence the deceased sustained injuries when he was left with only accused person. The injuries sustained were as a result of trauma inflicted by force.

From the evidence of PW 5 Beatrice the mother of the accused and wife of the deceased, accused came in and intervened when the deceased was assaulting Beatrice. She advised accused to leave the deceased alone as he was drunk. When the fight became fierce she escaped leaving accused and deceased in the house. The accused inflicted the injuries on deceased, when he found deceased assaulting the mother PW5. Was there provocation?

Section 208 defines provocation as (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.

From this provision, if it's the test of murder or passion a person strikes another person when provoked to a degree which would deprive an ordinary person the power of self-control. The act of the killing resulting from such striking would amount to manslaughter the murder. There was no doubt that Beatrice (PW 5) who was being assaulted by the deceased is the mother of accused and therefore was in "parental filial or fraternal relationship.

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 death provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only”.

From the evidence adduced I am satisfied that the accused did inflict the injuries on the deceased upon witnessing an act of provocation by deceased on the mother of accused.

I find that the prosecution has proved the offence of manslaughter against accused.

I therefore find accused Timothy Mukhwana Nyundo guilty of the offence of manslaughter C/S 202 of the Penal Code and convict him accordingly.

DATED, DELIVERED AND SIGNED THIS 29TH DAY OF OCTOBER, 2021.

S.N RIECHI

JUDGE