



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL (MURDER) CASE NO.26 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MICHAEL MUTISO MUNYOKI.....ACCUSED**

**JUDGEMENT**

**1. MICHAEL MUTISO MUNYOKI** hereinafter referred as the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the charge are that the accused on the 27<sup>th</sup> day of July 2012 at Mlolongo Township in Athi River District within Machakos, murdered Alex Musyoki hereinafter referred to as the deceased.

2. The accused pleaded not guilty to the charge. He was represented at the trial by Mr. J.N. Kimeu and the prosecution was conducted by Mr. Machogu. The prosecution called a total of nine (9) witnesses in support of its case and to prove the ingredients of the offence beyond reasonable doubt constituting the following:

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

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

**3. That in causing death there was malice aforethought on the part of the accused.**

**4. That the accused was positively identified as the one who caused or participated in the killing of the deceased.**

3. The evidence adduced by the prosecution witnesses can be summarized as follows: Pw1 was Stephen Kioko Luo who testified that on 27.7.12 at around 11 am, he was at work at Ujamaa Mission Hospital when the deceased was brought by three persons and who was neither breathing nor his heart beating; he concluded that the deceased was dead. He was informed that the deceased had been stabbed. He then called the police.

**4. Pw2 was Dominic Mbithi Thuru** who testified that on 27.7.12 he received a call that someone had been stabbed at Mlolongo Pent House. He and Pw3 went to the police station and on being referred to the City Mortuary, he identified the deceased as his niece's son.

**5. Pw3 was Justus Kioko** who testified that on 3.8.12 he accompanied his uncle (Pw2) to the city mortuary where he found the body of the deceased.

**6. Pw4, Anthony Kimani** testified that on 27.7.2012 the accused and the deceased who were both drunk were fighting over a woman called Mwendu and in the process of the fight, the accused used a knife to hurt the deceased and threw away the knife. The deceased died and that the accused was taken to the police station. On cross-examination, he testified that the deceased and the accused shared a girlfriend and in addition the police recovered a knife that he could not tell was used to harm the deceased.

**7. Pw5 Chief Inspector Boniface Krop Lomuk**, testified that on 27.7.2012 at 1300h he received a call from Pw6 that a young man had been stabbed in Mlolongo and had died. He rushed to the Immaculate Hospital and saw the body of the deceased. He was then taken to the scene by Pw4 and Pw6 and he recovered a knife from the roof of the house and handed it over to the CID. On cross-examination, he testified that he could not tell if the knife he recovered was the one that was used to stab the deceased. He also testified that he was not the investigating officer in this case.

**8. PW6, Robinson Kerosi Onchoki** testified that on 27.7.12 at about 1130h he was walking when he met two men quarrelling and later he

heard that they had stabbed each other so he went to the scene and found one of the men bleeding. He reported the matter to the police post nearby and later learnt that the said man had died. He identified the other man who was in the brawl in court as one of the protagonists.

**9. Pw7** was **Caroline Njoki Wamae** who testified that she has worked at the government chemist from 2011 to 2014 and testified that on 23.8.12 samples were submitted by Pw9 for examination and which comprised blood samples from the accused and deceased, a knife and a coat. She testified that she examined the items and prepared a report and signed it on 3.4.14. In the said report she concluded that the blood on the knife matched the one on the coat.

**10. Pw8** was **Dr. Peter Muriuki** who testified that he is a consultant pathologist who has practiced from 2005 at the Ministry of Health. He testified that on 3.8.12 a post-mortem was conducted on the deceased and noted that the body had a penetrating stab wound on the left chest and that the heart had been perforated on the left ventricle and that there was blood. An opinion was formed that the cause of death was hemorrhage due to chest injury due to a penetrating stab wound. He produced the post-mortem report as an exhibit.

**11. Pw9** was **Ahmed Haji**, who testified that on 27.7.12, he was at CID Mlolongo when he received a report that there had been an incident wherein he was instructed to accompany the OCS to the scene. He testified that by then the accused had been arrested by members of the public and handed over to the police, wherein he visited the scene that was known as Mlolongo Mulevi Street or Madharau Street and recovered the knife that he referred to as a murder weapon. On cross-examination, he testified that he was informed from the scene that the accused and the deceased differed over a certain woman and that the incident occurred on the night of 26<sup>th</sup> and 27<sup>th</sup> July, 2012. With regard to the difference in names in the request for post mortem and the actual post mortem report, he testified that the initial names are the ones that were given by the members of the public whereas during the post mortem, he was given names by the family members of the deceased.

12. The court found that the accused had a case to answer and placed him on his defence. Dw1 testified that on 27.7.2012 he woke up to supply milk at 5.00 am and finished at 9.00 am where he went to Madharau Street. It was his testimony that at 10.30 upon receiving a missed call from his mother he left the bar to get some airtime when he met the deceased whereupon a scuffle ensued and they punched each other but were separated. He testified that the deceased warned him that he would follow him and that the deceased made true his promise and hit him from the back and he fell down. He testified that the deceased brandished a knife towards him but he was able to ward it off but was cut on his hand. He testified that he tried to get hold of the knife but the deceased got hold of him so he stabbed the deceased on the left side of his chest. He told the court that he was arrested and that he had no intention to kill the deceased as the deceased was out to injure him. He added that he and the deceased were drunk. The defence closed its case and the parties canvassed the case vide submissions.

13. There are no submissions on record.

14. The burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all save a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R 372**. In discharging the burden cast upon it by the Law, the Prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

15. The four ingredients that the prosecution is required to prove in a charge of murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person. The postmortem report on the examination of the body of the deceased has not been objected to nor controverted. This ingredient of the offence was duly proved by the Prosecution.

16. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by Law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held :

**“Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”**

17. The deceased in this case was found to have died from hemorrhage due to chest injury due to a penetrating stab wound. It was upon the prosecution to ensure that the allegation that the accused attacked the deceased was with malice aforethought and not excusable. I cannot at this stage presume that the death was unlawful, as the circumstances leading to the death will determine this fact.

18. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. In this regard the accused stated that he was accosted by the deceased who brandished a knife towards him; he averted the knife and used the same knife to stab the deceased and this set up the defence of self defence and created doubt in the prosecution case.

**19. In Black's Law Dictionary, 9<sup>th</sup> Edition at Page 1481:-** self defence is "The use of force to protect oneself, one's family or one's property from a real or threatened attack: Generally a person is justified in using a reasonable amount of force in self-defence, if he or she reasonably believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger".

20. The defence of self defence derives from section 17 of The Penal Code Act. Lawful self-defence exists when (1) the accused reasonably believes that he or she is in imminent danger of an attack which causes reasonable apprehension of death or grievous hurt; (2) the accused reasonably believes that the immediate use of force is necessary to defend against that danger, and (3) the accused uses no more force than is reasonably necessary to defend against that danger. In no case does it justify the inflicting of more harm than it is necessary to inflict for the purpose of defence. An accused person raising this defence is not expected to prove, beyond reasonable doubt, the facts alleged to constitute

the defence. Once some evidence is adduced as to make the defence available to the accused, it is up to the prosecution to disprove it. The defence succeeds if it raises some reasonable doubt in the mind of the court as to whether there is a right of self defence. **see Selemani v. Republic [1963] E.A., at p. 446.**

21. From the evidence on record, every human being is wired to prevail over an attacker or to repel an attack or using reasonable force even if it may lead to death of the attacker. It is alleged by the accused that the deceased attacked him and that he had been injured. However no evidence has been produced by the accused to prove that he was injured.

22. The fact of danger to the accused person was proved by both the defence and the prosecution evidence of Pw4 that he saw them fighting and that there was no other evidence of actual bodily injuries inflicted on the accused person. However I am satisfied that the accused and the deceased were in combat mode. In **Oloo S/o Gai v R (1969) EA 86 EACA** adopted the holding in **Chan Kau (alias Chan Kai) v R [1955] AC 206, [1955] 1 All ER 266, [1955] 2 WLR 192, 99** on the burden of proof of self defence that:- "In cases where the evidence discloses a possible defence of self-defence, the onus remains upon the prosecution to establish that the accused is guilty of the crime of murder and the onus never shifts to the accused person to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity".

23. Considering the fact that the confrontation and engagement in a fight between the accused and the deceased was after what the accused testified was in fulfillment of a warning that the accused earned from the deceased, I am satisfied that the accused was entitled to defend himself and in giving the accused the benefit of doubt I find that self-defence, as a defence is available to him.

24. In the circumstances of this particular case, I have found, a part from self- defence, there were circumstances that amounted to provocation;-

- a. The deceased warned the accused.**
- b. The deceased and the accused had earlier been fighting.**
- c. The deceased continued fighting after being separated.**

The combination of the above amount to provocation that negative malice aforethought.

25. Section 207 of the Penal Code Act deals with killing on provocation and it states: - "When a person who unlawfully kills another under circumstances which but for this section would constitute murder, does the act, which causes death in the heat of passion caused by sudden provocation as hereinafter defined (in Section 208), and before there is time for his or her passion to cool, he or she commits manslaughter only".

26. The requirements for provocation to reduce murder to manslaughter:-

- a. The death must have been caused in the heat of passion before there is time to cool.**
- b. The provocation must be sudden.**
- c. The provocation must be caused by a wrongful act or insult.**
- d. The wrongful act or insult must be of such a nature as would be likely to deprive an ordinary person of the class to which the accused belongs of power of self-control.**
- e. The provocation must be such as to induce the person provoked to assault the person by whom the act or insult was done or offered.**

**(See R v Andrew Mueche Omwenga (2009) eKLR)**

27. Both provocation and self-defence are available in the instant case and the final effect of these defences is that the allegation of malice aforethought has been successfully rebutted.

28. In final analysis, this is a typical case where a finding of self-defence in favour of the accused person combined with a finding of provocation as I have done would entitle the accused person to acquittal. He is absolved of killing with malice aforethought and found guilty of manslaughter Contrary to Section 203 as read with Section 205 of the Penal Code and I so convict. It transpired that the accused and the deceased were reported to have scuffled over a disagreement relating to a certain woman who happened to be the object of their desire. It also transpired that the two had been dating the said woman who probably had been playing the two men and the secret seems to have burst into the open. Under those circumstance it cannot be safely concluded that there was malice aforethought.

29. In the final analysis it is my finding that the prosecution has not proved the offence of murder beyond reasonable doubt. However the evidence tendered proves a lesser charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code. Consequently I find the accused guilty of the said charge of manslaughter and is thereby convicted accordingly.

It is so ordered.

Dated and delivered at Machakos this 29<sup>th</sup> day of January, 2020.

D. K. Kemei

Judge