



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL (MURDER) CASE NO.59 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MORRISON MUTIKA LEIZAR.....ACCUSED

JUDGEMENT

1. **MORRISON MUTIKA LEIZAR** hereinafter referred as the accused is charged before this court 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 on the 9TH day of September 2014 at Mlolongo Township in Athi River District within Machakos Township, murdered David King'oo Nzioki herein after referred to as the deceased.

2. The accused pleaded not guilty to the charge. He was represented at the trial by Mr. Sang and the prosecution was conducted by Mr. Machogu. The prosecution called a total of seven (7) witnesses to prove the ingredients of the offence beyond reasonable doubt constituting the following:

(1) *The death of the deceased.*

9. **Pw7** was **Dr. Andrew Kanyi**, who testified that he is a consultant pathologist who has practiced for the past 22 years. He testified of a post-mortem that was conducted on the deceased and noted that the body had deep lacerations on the right side of the forehead: there was extensive bleeding into the brain and there was raised pressure on the brain. He formed the opinion that the cause of death was severe head injury due to blunt force trauma. He produced the post-mortem report.
10. The court found that the accused had a case to answer and placed him on his defence. Dw1 testified that he came to Kenya from Tanzania in 1999. He testified that on 9.9.2014 he was called to go to a certain hotel and that it was claimed that he owed money to a certain woman and he obliged and met a certain Kingoo whom he briefed that he had no money. He testified that he requested the group members of a certain merry go round to list their names on a sheet of paper that he took and placed it in his pocket. However on his way out of the room ten persons descended on him whereupon he pushed those who were blocking him. He testified that a person called Samson hit him with a piece of timber and he ran towards his home but however Samson followed him and then the deceased hit him on his chest with a stone. He testified that the deceased got hold of his leg and he dislodged himself and ran to the police station to report and found that the matter was booked vide OB 40/9/14. He testified that he went to the hospital and was treated and he tendered the P3 form and treatment card and receipts. He testified that he was arrested and told that Kingoo had passed on. On cross examination he testified that he pulled out of the welfare group and that Samson started the fracas but he managed to floor Samson and the said Samson hit him on the face. He testified that he hit the deceased with a stone and that he was attacked by five persons as he tried to leave the hotel.
11. **Dw2** was **Moses Njeri Ndubai** who testified that he knew the accused as a guard. He testified that on 9.9.2014 at 4.30 pm he saw a large crowd pursuing the accused who was bleeding. He testified that it appeared the accused was assaulted and he was seeking refuge; it was his testimony that he saw someone pelt the accused with a stone and that person later fell down unconscious. On cross examination, he told the court that he saw the accused hit the deceased. The defence closed its case and the parties canvassed the case vide submissions.
12. Prosecution submitted that the defence of self-defence could not be available to the accused as the force used was unreasonable. Prosecution submitted that malice aforethought was proven vide the nature of injuries and the location thereof and added that the action of picking up a stone meant that there was intention to harm the deceased. Prosecution prayed that the court find the accused guilty of murder.
13. Counsel for the accused on the other hand pointed out that no one saw the accused attack the deceased; that the ingredient of malice aforethought was not proven. Counsel submitted that the defence under Section 17 of the Penal Code is available to the appellant and that the accused used reasonable force hence the accused ought to be acquitted. Reliance was placed on the case of **R v Weldon Langat Towet (2017) eKLR**.
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.
16. The postmortem report on the examination of the body of the deceased has not been objected to nor controverted. The pathologist confirmed that the deceased died and that the cause of death was severe head injury due to blunt force trauma. This ingredient of the offence was duly proved by the prosecution.
17. 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.”***
18. The deceased in this case was found to have died from severe head injury due to blunt force trauma. There was a suggestion by Counsel for the accused that there was no evidence adduced to show that the accused was ever seen attacking the deceased. However the accused admitted to have done so. 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.
19. 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 when fleeing and that the group of persons followed him to his house; a fact that was confirmed by Dw3 and this set up the defence of self defence.
20. **In Black's Law Dictionary, 9th 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".
21. 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.**

22. From the evidence on record, every human being is wired right to use force to prevail over an attacker or to repel an attack or using reasonable force even if it may lead to death of the attacker. There is no doubt that the deceased attacked the accused and who sustained injuries that he had been injured.

23. This fact of danger to the accused person was proved by both the defence evidence and specific proof is prosecution Exhibit DEX.3a to C. These were actual bodily injuries inflicted by a great deal of force used by his attackers. The un-challenged defence evidence is that the injuries were inflicted a person called Samson and the company of persons who were with the deceased as well as the deceased and who even pursued him and was in a combative action.

24. The prosecution contended that the accused used unreasonable force and that therefore, self-defence was not available to him. I have not found any other evidence that would prove beyond reasonable doubt that it is not the deceased and Samson who attacked Dw1 to provoke fight.

25. By stating that the defence was not available to the accused, the burden of proof is upon the prosecution to adduce evidence that proves absence of self-defence. 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".

26. Considering the fact that the confrontation and engagement in a fight between the accused and the deceased was after the accused had been accused of owing money that he denied so doing and that after he had been assaulted and injured he ran for safety only to be pursued by the deceased and a group of five persons who remained at the scene of crime in combative action proves that the deceased and his group were the attackers.

27. The type of injuries, visible wounds and bleeding on the face of DW1 as testified by Dw2 as well as the fact that the accused was being pursued by a crowd were sufficient proof of actual harm and apprehension that further attack could be caused or similar or worse injuries. In my view, this justified use of force to prevent occurrence. The accused was entitled to defend himself and I find that self-defence, as a defence was available to him.

28. 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 hit the accused with a stone.

b. The deceased in the company of others pursued the accused who scampered for safety but was unable to get to safety.

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

29. Section 207 of the Penal Code 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".

30. 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)

31. 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.

32. In the 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 202 as read with Section 205 of the Penal Code and convict.

33. The foregoing observations leads me to come to the finding that the prosecution has not proved the charge of murder beyond reasonable doubt. The evidence adduced supports a 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 convicted accordingly.

It is so ordered.

Dated and delivered at **Machakos** this **29th** day of **January, 2020**.

D. K. Kemei

Judge