



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 3 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

PETER WANJALA MASA.....ACCUSED

J U D G M E N T

The accused **PETER WANJALA MASA** is charged with offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence were; on the 13<sup>th</sup> day of January 2019 at Milima village Makhanga Sub-location in Bungoma North Sub-County within Bungoma County murdered **PAUL WAFULA WANYAMA**.

The prosecution evidence is that on 13.1.2019 **Kennedy Barasa Wanjala** had been requested by the deceased Paul Wafula Wanyama to go and carry Sugarcane using his handcart. He went. While with deceased on reaching between Milima Primary and Secondary School they met the accused. He was on the left side of the road. The deceased was behind the handcart. Accused passed the handcart and then witness heard deceased scream. He turned and saw he had been stabbed on the right arm. The deceased fell down and accused ran away. He decided to go to the police station on the way he met one Saulo and informed him. Saulo took the deceased to Naitiri Health Centre. He later received information that deceased died.

**Pw2 Joshua Edebe Mukenya** was at the market when he was informed that accused had stabbed the deceased. He went there in a motorcycle. He found deceased lying on a trench and people present. He took him to Naitiri Hospital. He died on arrival. **Pw3 Kevin Kisa** a minor found deceased lying down bleeding and his oxen there. He took the oxen to his home. **Pw4 David Kongo Njuguna** was on material day going towards the secondary school when he met accused walking fast and passed him. When he followed him he found the deceased lying in a trench; bleeding from the left shoulder.

**Pw6 No. 71272 CPL. Dickson Langat** attached to Wapukunyi Patrol Base was at the base at 12p.m. when accused came to him and informed him that the deceased was abusing him when they met on the road. He noticed accused was wearing a white shirt which was stained with blood. He asked accused about the blood stains and accused informed him they had fought with the deceased. He and PC Ruto proceeded to the scene where they found the deceased lying next to a road bleeding. He mobilized people and deceased was taken to Hospital. Later he received information the deceased had died. He stated that he did not observe accused with any injuries.

The accused gave sworn evidence in his defence. He testified that on material day he met the deceased and Edwin driving an oxen-pulled cart. The deceased then told accused that he (Accused/Masa) pay him the debt he owed the deceased. He decided to continue walking. He then felt someone hold him from behind on the neck. He noticed it was the deceased who was holding him. He sensed he was in danger. He had a knife in the pocket which he brought out and cut the deceased. The deceased then released him. He ran to the police station where he reported the matter.

Mr. Maloba Counsel for the accused filed written submissions. Counsel submitted that for accused to be found guilty, the prosecution must prove all the ingredients of the offence of Murder. In this case he submitted that fact and cause of death was proved by evidence of **Pw5 Dr. Nancy Kegode** who performed the Post Mortem. He submitted that the accused in his evidence stated that he stabbed the deceased as an act of self - defence. He therefore urged this court to find that accused stabbed deceased in self defence and acquit him of the charge.

The accused was charged with offence of Murder. What the prosecutor must establish is that the accused unlawfully killed the deceased with malice aforethought in **Republic -Vs - Andrew Omwenga [2009] eKLR** the court said;

***“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission - there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b) That the accused committed the unlawful act which caused the death of the deceased and (c) That***

*the accused had the male aforethought.”*

On Death and cause of death, **Pw5 Dr. Nancy Kegode** who performed the Post Mortem on body of deceased on 17.1.2018 testified that Upon examination, she found that deceased had stab wound on left shoulder and back, deep cut wound on toes and bones exposed; she formed opinion that cause of death was due to severe bleeding secondary to stab wound.

Who inflicted the injuries on the deceased? On this, the accused in his evidence in defence stated;

***“I then felt somebody hold me from the back. He was trying to strangle me. It is the deceased who held me. Edwin came and started hitting me with an Iron rod on the front part. I sensed there was danger. I had a knife in the pocket. I removed it and used it. I then cut Paul deceased who then released me. I then ran to the police station and reported the matter.”***

From the accused’s own evidence, it is accused who stabbed the deceased on the arm which injuries led to bleeding and death of the deceased. The last element the prosecution has to prove is whether there was malice aforethought.

Malice aforethought describes the *mens rea* or the mental element required for a conviction for the offence of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If malice aforethought is lacking the unlawful homicide will not be murder but manslaughter. In our laws Section 206 of the penal code provides for circumstances which if manifested in any particular case malice aforethought is deemed to be established:

- i. *An intention to cause death of or to do grievous harm to any person whether that person is the person actually netted or not*
- ii. *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 netted 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.*
- iii. *An intent to commit a felony*
- iv. *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 breaking down malice aforethought, our courts have articulated key principles in determining what it takes for an offender be held culpable for the offence of murder. In the cases of ***Ernest Asami Bwire Abang alias Onyango Versus Republic Ndumbe CACKA No. 32 of 1990 Karani and three others Versus Republic 1991 KLR 622, Republic Versus Godfrey Ngotho Mutiso 2008 eKLR James Masomo Mbacha Versus Republic 2015 eKLR*** the courts have sufficiently inferred malice aforethought from the nature and type of weapon used and presence multiple severe bodily injuries to the victims.

From the evidence the accused was around with a knife, an offensive weapon, he inflicted several injuries on the deceased. He knew and intended to inflict the injuries. He knew he would cause grievous harm or death to the deceased. In my view the prosecution adduced evidence which a court when evaluating the existence of the circumstances could infer the existence of intention to kill or cause grievous harm to the deceased. Counsel for the accused Mr. Maloba submits that the accused stabbed the deceased to get himself of imminent danger. He therefore submits that the accused committed the offence in an act of self defence. Section 17 of the Penal Code provides;

***“Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”***

The principle was explained in the case of the people **A.G. Versus DWYER 1972 IR 416** provides good authority in this case. The court stated: -

***“When the evidence discloses a question of self defence and where it is sought by the prosecution to show that the accused used excessive force, that is to say more than will be regarded as objectively reasonable, the prosecution must establish that the accused knew that he was using more force than he was reasonably necessary. Therefore, it follows, if the accused honestly believed that the force that he did use was necessary, then he is not guilty of murder. The onus of course is upon the prosecution to prove beyond reasonable doubt that he knew that the force was excessive or that he did not believe that it was necessary. If the prosecution does not do so it has failed to establish the necessary malice.”***

It is now convenient to turn into the various cases within which the principles on self defence in relation to necessity of the use of force as stated in section 17 of the Penal Code. The celebrated landmark case by the **Privy Council in Palmer v. Republic 1971 1 ALL ER** lays the foundation of our jurisprudence in this respect as can be seen from this passage:

***“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but he may only do, what is reasonably necessary. If there has been an attack so that the defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety, the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that will be most potent evidence that only reasonable defensive action has been taken. But everything will depend on the particular facts and circumstances it may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous others may not be.”***

The English Court also in the case of **Beck Ford Vs. Republic 1987 3 ALL ER** stated as below:

***“A man who is attacked in circumstances where he reasonably believes his life to be in danger of that is in danger or serious bodily harm may use such force as on reasonable grounds he thinks necessary in order to resist the attack and if in using such force he kills his assassin he is not guilty of any crime even if the killings is intentional.”***

Did the accused have any reason to perceive any danger? Bearing in mind all the circumstances that existed proven by the evidence, the prevailing conditions that all accused found himself, was he justified to use the knife? I would adopt the test laid down in the case of **Republic Vs Joseph Chege Njora 2007 eKLR** where the court of Appeal said:

***“A killing of a person and excusable where the accused action which causes the death was in the course of overtaking felonious attack and no more force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger particularly arising from a sudden and serious attack by his victim it must also be shown that reasonable force was used to avert or forestall the attack.”***

There are several reasons underlying this jurisprudential approach as can be assessed from the following elements of self defence in our law:

- (a) That the accused must have had reasonable ground to believe that there was apparent imminent or immediate danger of death or immediate danger of death or serious bodily harm from his attacker,***
- (b) The accused must have in fact a reasonable belief that his life is in danger or a third person or his property or other person’s property,***
- (c) He must not be the person who triggered the conflict or the assault,***
- (d) The use of force must have been reasonable and not excessive.***

In the present case, the accused testified that the deceased told him he (accused) had to repay the debts he owed to the deceased. He stated that when accused ignored the deceased request, the deceased held his neck. That is when he took the knife and stabbed the deceased. The evidence of the doctor is that the deceased had several stab wounds on the left shoulder, back and deep cut wound on toes and the bones were exposed. From the injuries, it is apparent that there were not a single but multiple stab wounds.

The alleged acts of self-defence by stabbing the deceased severally was not intended to ward off an attack but intended to inflict serious injuries. From the injuries sustained, it appears the attack was vicious and injuries sustained were serious and a lethal weapon, a knife was used.

In **Robert Kinuthia Mungai Vs Republic (1982 – 88) IKAR 611** the Court of Appeal held: -

***“We think in view of earlier East African cases, we have considered and the more recent English decision in Republic Vs Shammon Criminal LR. 438, 1980 that the true interpretation of the judgment of the Privy Council in Palmer Vs Republic is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where the result is a proper one in the circumstances and on the facts of the case being considered.”***

In the circumstances of this case, I find that the attack on the deceased was vicious and the accused used excessive force in the circumstance leading to the death of the deceased,

I, therefore, find accused guilty of manslaughter under Section 205 of the Penal Code and Convict him accordingly.

**Dated, signed and delivered at Bungoma this 29<sup>th</sup> day of May, 2020.**

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**S N RIECHI**

**JUDGE**

**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL CASE NO. 3 OF 2019.**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER WANJALA MASA.....ACCUSED**

**SENTENCE**

**29/5/2020**

Before S N Riechi

Thuo for State Counsel

M/s Barasa – court clerk

Olonyi Holding Brief for Maloba for accused

Accused present in Bungoma Prison Via Skype.

**Court:** Due to Covid 19 Pandemic and the Government Restrictions on Human Interactions. I propose to deliver this judgment/ruling via Skype and same to be emailed to you.

Do you have any objections?

**Advocate:** I have no objection.

**Court:** Upon your consent this judgment will be delivered via SKYPE.

**S N RIECHI**

**JUDGE**

**Court:** Judgment is read over and delivered in Court via **SKYPE** to the accused and counsel this 29<sup>th</sup> May, 2020.

**S N RIECHI**

**JUDGE**

**Mr. Thuo:** Accused may be treated as first offender.

**Accused in Mitigation:** the accused is a first offender. The offence was committed in self-defence. The accused has been in custody. He is remorseful. He took himself to the police station. Pray for non-custodial sentence.

**Court:** the court has taken into account the fact that the accused is first offender and what has been stated in mitigation. However, the offence led to a loss of life. Accused is sentenced to serve **Ten (10)** years imprisonment. Right of appeal in 14 days.

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**S N RIECHI**

**JUDGE**

**29/5/2020**