



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 13 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MWANIA NGWILL.....ACCUSED

JUDGMENT

1. **Jackson Mwanja Ngwili** the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the night of 23rd to 24th April, 2018 at Sultan Hamud township in Mukaa sub-county, within Makueni county murdered **Jeremiah Nyaga**.

2. He denied the charge and the case proceeded to full hearing with the prosecution calling eight (8) witnesses. A summary of the prosecution case is that the deceased (*Jeremiah*) and Pw6 **Catherine Mwikali** had been in a marriage relationship between 2012 – 2017 and had one child. They had separated as from January, 2018.

3. Pw6 came to know Jackson (*accused*) and a relationship started between them. The deceased was aware of this relationship she had with the accused as they were living in the same house in Sultan. On 23rd April 2018 at 11:00 pm they were asleep in their house when the deceased came knocking. He introduced himself when asked who he was. Pw6 refused to open and he forced the door open and entered. The electricity light was on.

4. The accused had woken up and was at the door holding something under his long shirt sleeve. On further checking she noted that it was a knife he had picked from the table. The two men then held each other and went outside. Pw6 screamed as the men fought. People came and by then the deceased was on the ground bleeding from the left side of his head. The accused had taken off. She identified the knife which was the murder weapon and was produced in court as EXB2.

5. Pw1 **Ali Kyalo** a bodaboda rider had gone for a customer on 24/4/2018 (12:00 midnight – 1:00 am) and as he drove the customer within the Market he noticed somebody running barefooted. After dropping his customer, he saw the same person run into a club and he identified him as a former hotel employee, whom he knew.

6. He then met a lady holding shoes and crying for help. Moving closer he saw somebody lying down with a head injury. The lady told him the person running had stabbed the one on the ground. Pw1 informed police at a roadblock 70 meters away. The police arrested the man who was running, before going to collect the body of the injured man.

7. Pw2 **Lucia Kamani** and Pw3 **Florence Mulongo** are the caretaker and owner respectively of the plot where the incident occurred. None of them witnessed the incident. Pw4 **No. 92419 PC David Okik** of Sultan Hamud police station was one of the officers at the traffic road block who received the report from Pw1 in respect to this incident. He alerted other officers and they boarded a motor vehicle and were able to trace the suspect whom they arrested. They caught up with him at Riverside petrol station, Sultan Hamud, and took him to the scene. He identified the accused as the suspect they had arrested.

8. At the scene they found the injured person lying down near a toilet while bleeding from the head. They rushed him to hospital. In cross examination he said the accused never tried to escape upon arrest.

9. Pw5 **Dr. Meshack** is the doctor who conducted the postmortem on the deceased's body. He found the deceased to have several injuries on the head, scalp, and loss of blood. The cause of death was severe head injury due to a penetrating deep wound and massive haemorrhage. The injuries on the head were by a sharp object. He produced the postmortem report as (EXB1).

10. In cross examination he said the stab wound was only one but fatal. There was no way he could have survived even if measures had been taken.

11. Pw7 No. 74675 PC **Johnstone Changote** and others received the report. They went to the hospital and saw the victim. They were shown the victim's wife with whom they went to the scene. She showed them the murder knife which was under the bed. He identified the accused as the suspect. He identified the knife given to them by the victim's wife (Pw6) as EXB2.

12. Pw8 No. 66532 **Corporal Phillip Rotich** is the investigating officer in this matter. He confirmed that as they carried out investigations the deceased passed on while undergoing treatment at Sultan Hamud Hospital. The suspect had been arrested on the night of 24th/25th April 2018 as he tried to run away. The murder weapon which was a knife was recovered by Pw7 and team.

13. He produced the knife (EXB2) and six (6) photos of the deceased, (EXB 3a – f) plus the certificate, (EXB3g). At the scene they found blood near the toilet. From Pw6's house to the toilet was ten (10) meters. In cross examination he confirmed that Pw6 and deceased had parted ways and she was living with the accused. The houses in that plot were made of iron sheets. He also confirmed that there was bad blood between the accused and the deceased, but the accused had never threatened the deceased.

14. The accused in his unsworn defence, explained that on 23rd/ 24th April 2018 he went to the house after work. He lived with his wife Catherine and child. They had supper and slept. After half (1/2) an hour he heard a voice from outside saying "**mama Anani open the door.**" His wife asked who it was and he responded "**It's me baba Anani open**"

15. On being asked what he wanted and they had separated he responded saying if she did not open he would break in. He pushed the door from outside as the accused pushed from inside while holding the door. He overpowered the accused and broke the door and entered. The intruder held a stick one (1) meter long and threw it at him but he missed it.

16. He (*accused*) picked a knife. They pushed each other into the dark outside. He hit him (*accused*) twice with the stick he had and on sensing danger he threw the knife at him and pushed him aside. He ran to his place of work for safety. He found the gate locked and ran to Riverside hotel which is close by.

17. It's then that he saw a police car behind him and he was arrested and taken to the police station. He said he had no grudge with the deceased who worked at a carwash near his place of work. He had no intention of stabbing him. He denied knowledge of what happened to the deceased.

18. Mrs. Owenga learned counsel for the prosecution in her written submissions after summarizing the evidence on record submits that it was clear from the evidence that the accused attacked the deceased with a kitchen knife as a result of which the deceased lost his life. That the accused was dishonest in saying that he did not know how the deceased died. His conduct of running was a confirmation of his guilt.

19. Mr. Mathenge for the accused in his written submissions urged the court to acquit the accused on the ground of him having been provoked. That he acted in self defence and the deceased's death occurred in the heat of passion the deceased having provoked him to act. He referred to sections 207 and 208 of the Penal Code.

20. He relied on the evidence of Pw6 to argue his submission on provocation. He submitted that Pw6's action of forsaking her husband (*the deceased*) for the accused must have provoked the deceased to an extreme level. To make matters worse Pw6 and accused's house was on the same plot as that which was formerly occupied by Pw6 and the deceased. To him the deceased must have felt demeaned, disrespected, dejected and emotionally charged and it is not known who between Pw6 and the accused was the target.

21. Counsel submits that there was a fight between the accused and deceased and it was after the fight that the deceased was injured. Further he states that the accused suffered serious injuries calling for the accused's acquittal. He referred to the case of **R –vs- Andrew Mueche Omwenga (2009)** eKLR where Maraga J. (as he then was) stated as follows: -

"The law generally abhors the use of force or violence. There are, however, instances where the use of reasonable force is justified. For instance, an accused charged with an offence may seek to plead that he acted as he did to protect himself, or his property. Since the use of lawful force is not an offence, the accused will be acquitted of the offence as the element of actus reus (the unlawful act) will be missing.

A person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it. This defence therefore turns on two requirements: one, that the force must be necessary and secondly that it must be reasonable.

It is not necessary, however for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it. In Beckford –vs- R (1988) AC 130 Lord Griffiths stated (at p144) that "a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike." The danger the accused apprehends, however, must be sufficiently specific or imminent to justify the actions he takes and must be of a nature which could not reasonably be met by more pacific means."

22. It is therefore his submission that the accused had no intention of causing grievous harm or death to the deceased. That the prosecution had not proved malice aforethought in this case. He also referred the court to the case of **R –vs- Ali Duale (2012)** eKLR where Justice Stella Mutuku said:

"Having found that the crime defined as murder has not been proved by the prosecution and taking into account that the deceased died as a direct consequence of a vicious fight with the accused, and having found that the accused was provoked and also that he acted in self defence without the intention to kill the deceased, I will now consider the provisions of section 207 of the Penal Code which provide as follows: "When a person who unlawfully kills another under circumstance which, but for the provisions for this

section, would constitute a 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.”

23. He further referred to the case of **R –vs- Martin Kinyua Nancy (2016) eKLR** where Justice F. Muchemi said:

“I am of the considered view that the defence of provocation is supported by the evidence on record. The accused has shown that he acted on the heat of passion on being attacked by the deceased. In view of the foregoing, I find that the charge of murder cannot be sustained against the accused”.

24. This is now the case before court for determination.

Analysis and determination

25. The accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 of the penal Code defines murder as follows:

Murder:

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

26. For the offence of murder to be proved three main ingredients must be established by the prosecution. These are:

- i. The fact and cause of death of the deceased.
- ii. That the death of the deceased was due to the unlawful act of omission or commission by the accused person (*actus reus*).
- iii. That the act of omission or commission by the accused was motivated by malice aforethought (*mens rea*).

See the case of **Republic –vs- Andrew Mileche Omwenga (2009) eKLR**.

27. Guided by the above definition and caselaw, I now embark on evaluation of the evidence before this court.

(i) The fact and cause of death of the deceased.

There is no dispute about the fact of death as testified by the witnesses herein. Pw5 **Dr. Meshack** who carried out the postmortem found the cause of death to be a severe head injury due to a penetrating deep wound and massive haemorrhage. This cannot be said to have been a natural cause of death.

(ii) That the death of the deceased was due to the unlawful act of omission or commission by the accused person (*actus reus*).

28. Pw6 and the accused were asleep in their house on the night of 23rd April 2018 at 11:00 pm when the deceased came knocking at their door. He forced the door open and found the accused waiting for him, while armed with a knife. The two men held each other and went out fighting. The deceased was found lying and bleeding from a head injury and the accused had disappeared. He later died from the said injury.

29. The accused has in his defence said he did not know the deceased died but he admits that the two of them fought that night and he threw a knife at the deceased and took off. Pw1 confirmed to the court that as he was ferrying his customer on bodaboda that material night, he saw the accused running barefooted. He again saw him still running on his way back. It was at that point that Pw6 told him that the person running had injured the one lying on the floor.

30. Pw2 informed police at a roadblock who organized themselves and arrested the person who was running who turned out to be the accused herein. The accused could not have been running at that late hour of the night if he had not done anything wrong. His defence of just having thrown the knife at the deceased cannot hold any water. He had fought with the deceased and caused him several injuries. He again stabbed him causing the deep penetrating wound that caused the deceased's death as per the postmortem report (EXB1).

iii. That the act of omission or commission by the accused was motivated by malice aforethought (*mens rea*).

31. The person at the centre of this incident testified as Pw6 (*Catherine Mwikali*). She had been in a marriage relationship with the deceased since 2012 and were blessed with a son. They lived in a house owned by Pw3 and taken care of by Pw2 at Sultan Hamud. She said the marriage ended in January, 2018 and they separated. She got involved with the deceased soon thereafter. In their wisdom or lack of it Pw6 and the accused started staying together in a house on the same plot where Pw6 had left the deceased.

32. On the material night it is the deceased who came to the house occupied by Pw6 and the accused. The houses on this plot were made of iron sheets and he managed to break the door and got in. By then the accused was already armed with a knife waiting for him. It is true they fought and the deceased got injured. There is however no evidence of the accused having been injured.

33. Mr. Mathenge for the accused has urged this court to find that there had been provocation by the deceased to a very high level. Section

207 of the Penal Code defines provocation as:

“when a person who unlawfully kills another under circumstance which, but for the provisions for this section, would constitute a 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”.

34. In the case of **RC –vs- R (2005) KLR 239** the Court of Appeal stated this on the issue of provocation:

1. “Under section 207 of the Penal Code, an unlawful killing in circumstances which would constitute murder would be reduced to manslaughter, but only if the act which causes death is done in the heat of passion caused by sudden provocation. It is a question of fact whether the accused in all the circumstances of the particular case, was acting in the heat of passion caused by grave and sudden provocation when the killing is done”.

35. In this case, the deceased and Pw6 had separated end of January, 2018. From his conduct the deceased still considered Pw6 as his wife and mother of his son. As if to add insult to injury the accused moved in with Pw6 as husband and wife and took a house on the same plot where the deceased was living. The deceased was provoked. In his anger he went to the accused’s and Pw6’s house late in the night and broke into the said house after introducing himself.

36. It is correct to say that no one can tell whether the deceased had come for the accused or Pw6 or rather what his real mission was. It was in his readiness for any confrontation that the accused armed himself with a knife (EXB2) which became the murder weapon. Accused mentioned that the deceased had come armed with a piece of wood one (1) meter long.

37. Pw6 did not mention this anywhere in her evidence before this court. The said piece of wood was also not recovered from the scene. Had he come armed with anything Pw6 would have seen it. I find that there was nothing like a piece of wood which the deceased came with.

38. In as much as he overdid it, I find that the deceased’s unexpected visit to the accused’s house at 11:00 pm and the eventual break in through the door provoked the accused to act and defend himself and his newly acquired wife. Both men were incensed with each other. The deceased was incensed because the accused had taken away his wife while the accused was incensed because the deceased had invaded their privacy late in the night.

39. As a result, the two men fought with each other. The accused who was armed fatally injured the deceased while he remained un injured. Since the deceased was not armed and there was no serious threat of any eminent danger, the accused cannot be said to have acted in the heat of passion. I find that there was some element of provocation but not one to justify the killing.

40. This finding is supported by the case of **Roba Galma Wario –vs- R (2015) eKLR** where the Court of Appeal held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the Appellant, and that he had the required malice aforethought. Without malice aforethought the Appellant would be guilty of manslaughter as it would mean the death of the deceased during the brawl was not intentional.”

41. After analyzing the evidence on record, I find that the intention to kill or premeditated killing has not been proved. I therefore reduce the charge of murder to manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict the accused accordingly.

Delivered, signed & dated this 27 day of May 2020, in open court at Makueni

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H. I. Ong’udi

Judge