



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 28 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JUSTINE NAFULA WASIKE.....ACCUSED

J U D G M E N T

The accused **Justine Nafula Wasike** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on 29th day of August, 2018 at Kibabii area in Kanduyi sub-country within Bungoma County murdered Enest Namunabo Wanyela.

The case for the prosecution is that the accused is was the wife of the deceased Ernest Namunabo Wanyaka. PW 1 Jacinta Nabucha Magasi testified on 30th August, 2018 she was at her home when accused went there with a child. The witness left her with one Gladys and went on duty. When she came back in the evening, she found accused had gone back to her house. On 31st August, 2018 the accused came again to her house and asked Jacinta the witness to escort her to the police station to make a report as she had fought with the deceased and hit him with a jembe. She escorted accused to Bungoma police where she left accused.

PW 2 Mathias Ochola Wanyala the father of the deceased testified that on 31st August, 2018 at before in 10-11 a.m. he was informed by his wife that deceased had died at Kibabii where they were staying. He later learnt that police had taken the body to the mortuary. He went there and confirmed deceased was dead. He observed the body and saw he had injuries on head, stab wound on the abdomen and cuts on the neck. He confirmed to court that accused was the wife of deceased and had been married for 1 ½ years, though they had frequent misunderstandings.

PW 3 Timothy Mulungo Wafubwa a student at Kibabii University was at his house when the deceased cooked githeri on 29th August, 2018 and they ate. On 30th August, 2018 the accused took a jiko to him and informed him they were going to the farm. On 31st August, 2018 he saw accused wash clothes and went away. Later police came and opened the house of deceased and they removed deceased's body.

PW 5 Chief Inspector Abdul Waqo testified that on 31st August, 2018 he took a confession statement form the accused who had indicated willingness to do so. She was accompanied with Martin Wekesa Wasike her brother. He explained to the accused her rights under Section 25 (a) of the Evidence Act. She volunteered to make a confession which was reduced in writing and signed by her. The confession statement was produced as Exhibit 3.

PW 7 No. 99251 PC Jairus Marua testified that the accused had come to the police station and reported to OCS that she had killer her husband. She gave the keys to their house to the O.C.S.; the O.C.S. directed him and PC Liu to visit the home of accused. They proceeded to the scene opened the door of the house and on entering found the body of the deceased who had injures. They also recovered a jembe which was the murder weapon. They took the body to the Mortuary where a post-mortem was performed.

PW 8 Dr. Wekesa Nalianya performed the post-mortem on body of deceased. He found the deceased had cut around the left eye, abrasion on upper eye, laceration on left ear, several cut wounds and bruises. He had a stab wound on the lower part of abdomen, a depressed skull fracture on left skull and there was bleeding into the brain. He formed opinion that cause of death was due to head injury due to blunt trauma. He filled the post-mortem form which he produced as exhibit 3.

The accused upon being placed on her defence gave sworn evidence. She testified that the deceased was her husband with whom they had one child. On 29th August, 2018 they were at home when he asked her if she had deleted names in his mobile phonebook. She denied. He went away and came with his cousin at 1 p.m. and they started drinking changaa. He then called her into the house and asked about the phonebook names again. She denied. He told her that if she did not tell him the truth, he will chase her away. He then started throwing her clothes outside. She called her brother and asked him to call the deceased. The brother informed deceased he will come on Saturday. They

stayed till evening when she went to the bed-room and deceased came and dragged her to the sitting room. He then armed himself with a jembe and aimed it at her. She held it and they struggled over it and she hit him with a jembe without intending to do so. He fell on a wheelbarrow and started bleeding. She tried to administer first aid and then escaped with the child. She went to her sister's home who escorted her to police where she reported the matter. In cross-examination by Mr. Thuo for state she admitted that she had killed him without intending to do so.

Mr. Wekesa counsel for the accused filed written submissions. He submitted that for the prosecution to succeed on a charge of murder, it must prove both the *actus reus* and *mens rea*. He submitted that the fact and cause of death is not disputed. Indeed, even the accused in her defence and the confession she made admits that she inflicted the injuries from which the deceased died. Counsel, however, submits that there is no requisite *mens rea* on to make the act unlawful. Counsel submitted that the accused's actions were in self-defence and has therefore pleaded the defence of self-defence. He submitted that the prosecution had not disproved the plea of self-defence and that the accused used reasonable force to defend himself.

From the evidence of the PW 8 Dr. Wekesa Nalianya, who performed the post-mortem and prepared the report, the deceased had several bodily injuries inflicted by both sharp and blunt objects. He sustained among others a fracture of the skull leading to bleeding into the brain. This fracture was caused by blunt trauma. His evidence, therefore, confirmed the fact and cause of death.

On who inflicted the injuries the deceased succumbed to, the accused in her evidence in court and confession statement explained the events as follows: -

***“I do remember on the 29th of August, 2018, my husband left the house at round 7.00 p.m. he did not informed where he was going. He came back at around 9.00 a.m. appearing very drunk and was crying with him a bottle containing some liquid substance which he was occasionally sipping from it. He was also chewing miraa and smoking cigarettes. He appeared very annoyed. He locked the door from inside with a padlock and put the keys in his pocket. This was unusual and I got worried. I offered him food but he kept quiet. I left him at the table room and went to my bedroom to breast feed my child who was crying. I breast fed my child and fell asleep. He came to the bedroom and pulled me out of the bed hurling insults on me. He was complaining why I took his phone and deleted some of his contacts. I denied doing that. He dragged me out of the bed shouting that he is going to commit an act which the whole world will know. At this point he took a jembe which was leaning on the wall and tried to hit me with it. I managed to dodge several times to avoid being hit by him.*”**

***I managed to get hold of the jembe and wrestled it out of his hand. I defended myself with it since my life was in danger by hitting him twice on the head. He fell down bleeding profusely. I removed the key from his pocket and managed to open the door. I wanted to call the neighbours to come to my rescue but it was raining heavily outside.*”**

From the evidence, it is clear from the accused that she is the one who inflicted the injuries the deceased died from. She however, states that she inflicted the injuries on the deceased as an act of self defence, and that, therefore her action was not unlawful.

Section 17 of the Penal code on self defence 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.”

For the plea of self defence to be available, the person who asserts it must show to the satisfaction of the court that the five elements of self-defence were existing. These are

- a) There must be an attack on the accused.
- b) The accused as a result of the attack must believe on reasonable ground that he is in danger.
- c) The accused must have believed that it was necessary to use force to repel the attack.
- d) That he must have only used reasonable force to prevent or repel the attack.
- e) The use of excessive or disproportionate force premised on the circumstances may in avoidable the plea of self defence.

In **Uganda Vs Mbululi (1075) HCB 225**, the Court said on plea of self defence: -

“First there must be an attack on the accused. Secondly, the accused must as a result of the attack believe on reasonable ground that after was imminent danger of death or serious bodily harm. Thirdly, accused must have believed it necessary to use force to repel the attack meant upon him. Fourthly, that the force used by the accused believed on reasonable grounds to have been necessary to prevent or resist the attack. Fifth, the nature of the force used by the accused to repel the attack must be proportionate to the attack.”

In the circumstances, it is the appellants' contention that they acted in self-defence plausible? **Section 17** of the **Penal Code** states that:

“17. 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.”

What are the common law principles relating to self defence? The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in **PALMER v R [1971] A.C. 814**. The decision was approved and followed by the Court of Appeal in **R v McINNES, 55 Cr. App. R. 551**. Lord Morris, delivering the judgment of the court, said:-

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

However, in **Robert Mungai V Republic (1982-88 IKAR 611)** the Court, having reviewed several English and local authorities, delivered itself thus: -

“... we think, in view of the earlier East African cases we have considered, and the more recent English decision in R v SHANNON Crim. LR 438 1980, that, the true interpretation of the judgment of the privy Council in PALMER v R 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 that result is a proper one in the circumstances and on the facts of the case being considered.”

In **Ahmed Mohamed Omar & 5 others Vs Republic (2014) eKLR** the Court of Appeal on self defence stated: -

“The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v MORGAN (Supra) it was held that:

“....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants’ belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

In BECKFORD v R (Supra) it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.

In **R v WILLIAMS [1987] 3 ALL ER 411, Lord Lane, C.J. held:**

“In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant’s alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”

It is acknowledged that the case of DPP v MORGAN (Supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also SMITH AND HOGAN’S CRIMINAL LAW, 13th Edition, Page 331.

Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants’ defence because it applied an objective test.”

The prosecution in a charge of murder must prove that the death of the deceased was as a consequence of unlawful act or omission by the accused person. Where a plea of self-defence has been made by the accused person, the prosecution must show beyond reasonable doubt that what the accused did was not by way of self-defence or he acted beyond the parameters of self-defence.

The accused’s evidence is that the deceased was moody and drunk on that day. He had picked a quarrel over what he suspected was accused deleting phone-numbers form his mobile phone. This led to the fracas in which the deceased wanted to hit her with a jembe. He did not hit her but feared that he was going to do so, held the jembe and hit him severally. This is evidenced by the many and varied injuries the deceased sustained on his body. Evidently they were not inflicted once but severally on various parts of his body. To me the nature of weapon used, number of injuries inflicted on several parts of the body does not support the accused’s contention that she only hit him in self defence and that she only did what was reasonably necessary. If the accused aim was to defence herself, she would not have cut him on the left eye, inflicted lacerations on left cheek, left ear, cut-wound on scalp, bruises on left shoulder, chest, right arm, stab wound on lower part of

abdomen and fracture of the skull. These injuries were not aimed at immobilizing him but aimed to cause grieves harm or death as it happened.

In **Robert Kinuthia Mungai Vs Republic 1982-1988 KAR 611** the Court held: -

“It is a doctrine recognized in East Africa that excessive use of force in the defence of a person or property whether or not there is an external provocation, pressure may be sufficient for the court to regard the offence not as murder but manslaughter.”

Upon considering the evidence and submissions, I find that the accused in this case in hitting the deceased with a jembe on the head went beyond the parameters of self-defence. The attack was viscous and repeated and not aimed at preventing or repulsing an attack on the accused but to cause grievous harm to the deceased. In the premises, therefore, I find that the accused did as she rightly stated in her defence killed the deceased without intending to do so. I, therefore find the accused guilty of the lesser offence of Manslaughter contrary to Section 202 (1) as read with Section 205 of the Penal Code Cap 63 Laws of Kenya.

Dated, signed and delivered at Bungoma this 30th day of July, 2020.

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S N RIECHI

JUDGE

SENTENCE

27/8/2020

Before S N Riechi

Wilkister – court Assistant

Nyakibia for State

M/s Wekesi for accused

Accused in Bungoma prison

Court: I have received the victim Family Impact Report. The court has taken into account fact that accused is first offender and what she has stated in mitigation. However, the offence is serious as it caused the death of the deceased. Accuse dis hereby sentenced to serve **Ten (10) Years Imprisonment**. Right of Appeal within 14 days.

S N RIECHI

JUDGE