



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NUMBER 29 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

FARIS WAKHUNGU.....ACCUSED

J U D G M E N T

The accused Faris Wakhungu is charged with offence of Murder Contrary to Section 203 as read with Section 204 Penal Code. Particulars of the offence are that on the 21st day of September, 2013 at Nakharira village in Kimilili Sub-county within Bungoma County murdered Robert Wasike.

The case for the prosecution is that on 22nd September, 2013, PW 6 Hezron Wamalwa Onani was going home from Kamukaywa Marker when he heard a person screaming from a sugar farm. He went there and found two people one of them lying down. He hit the person he saw lying down and the person said he should not kill him and introduced himself as Wakhunga. He then heard a person say Wakhungu has killed me. He checked and saw it was deceased Robert Wasike. He went to where he was and felt deceased had injuries on the abdomen. He then saw Faris Wakhungu who is the accused ran away. He ran after him together with one Boyi. They apprehended him and brought him where the deceased was. They took the deceased to Kimilili Hospital where he was later referred to Bungoma Hospital where he died while undergoing treatment.

PW 2 Antony Ndombi Wanyonyi a security guard at St. Peters Nakasila Secondary School received a telephone information from one Emmanuel that deceased had been stabbed at the shamba. He went there and found deceased who informed him he had been stabbed by accused. He had stab wounds on leg, neck, and abdomen. They took the deceased to hospital. The deceased while at the scene also told PW 3 James Wekesa Saini that it is accused who had stabbed him.

PW 7 Martin Wafula Wanyonyi was with one Robert and Emmanuel where they were drinking busaa when accused came and he abused them. Later at 7 p.m. Martin and Hezron were going home when they met accused on the road who hit Martin with a fist and Martin fell down. Robert came and rescued him from accused. The deceased who was present asked why and was beating Martin. Accused then ran into sugarcane farm and deceased followed him. He later saw Hezron holding accused, saying that accused had stabbed deceased.

PW 8 Emmanuel Sikuku Wafula was with Robert and Martin going home at 7.00 p.m. when a person hit Martin (PW 7) and Martin fell down. The deceased then followed the people who had injured Martin. The deceased then was stabbed by the accused in the abdomen and vital body organs came out. He screamed and people came and took the deceased to hospital.

PW 1 Dr. Hezron Ombongi who performed the post-mortem on body of the deceased testified that the deceased had stab-wound at abdomen at midline ruptured spleen and fractured duodenum. He formed opinion that cause of death was due to cardio-vascular arrest secondary to abdominal injury.

The accused upon being placed on his defence gave sworn evidence. He testified that on 22nd September, 2013 he was at Wabuchoyi market when at 7.00 p.m. he started going home. On reaching near Ruhore Primary School he saw a group of people arguing. On reaching there they separated into two. He passed them and one person in one of the groups' asked him why he did not respond when they greeted him. He noticed that the person who was asking him was 'Martin' alias 'Boy'. Another person came from the back and held him by the neck. He fell down. The removed his clothes and shoes and started running away. He was released and also started running away. He noticed another person was running after him. He stopped and they started struggling with the person. He was then cut on the head left hand and arm bit. He then heard a person screaming. "You have stabbed me on the abdomen". He then said Martin came and held him and then released him. He went away and reported to his mother, who administered first aid. He then went back to Naivasha and was arrested on 9th August, 2018 after 5 years.

M/s Wakoli for the accused filed written submission. Counsel submitted that it is only when accused realized he was being killed when he decided to fight back by pushing the attacker who in turn was fatally injured. Counsel, therefore, pleads the defence of provocation and self-defence. Counsel referred the court to the decision Palmer Vs R 1971 AC 814 and urged the court to find that the accused acted in self

defence, which fact has not been disapproved by the prosecution.

The accused is charged with the offence of Murder Contrary to Section 203 as read with Section 2014 of the Penal Code.

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

204. Any person convicted of murder shall be sentenced to death.

For the prosecution to prove the offence of Murder against the accused, it must prove: -

- a) The fact and cause of death.
- b) The unlawful act or omission
- c) Existence of malice aforethought
- d) That it is accused who did the unlawful act or omission.

In this case the fact and cause of death was proved by the evidence of PW 1 to be due to injuries sustained on the abdomen leading to rupture of spleen and duodenum. This led to bleeding leading to cardio-vascular arrest which was the cause of death. He also formed opinion that the injuries were inflicted by a person on the abdomen at the midline.

Were the injuries inflicted by the accused? PW 1 Antony Ndombi when he arrived at the scene, the deceased told him it is accused who had stabbed him. This is the same information he gave PW 3, James Wekesa Saini. PW 5 Hezron Wamalwa Onani when he arrived at the scene found both the accused and deceased in the sugarcane farm. He found both accused and deceased lying down and the deceased told him that it is accused who had assaulted him, he ran to the sugar cane farm when deceased followed him. Shortly later, he was informed accused had stabbed deceased.

The accused in his defence testified that they after meeting on the road and having arguments, he was running away when he saw a person running after him. He stopped and they started struggling with the person. He was then cut on the head, his left hand and armpit. He fell down and then heard a person screaming saying "you have stabbed me on the abdomen" he was then apprehended by Hezron (PW 5).

The accused in his evidence admits that they had a struggle with the deceased on the material night and he then heard deceased scream "you have stabbed me on the abdomen." There was no other person struggling with the deceased. The deceased screaming about the injury inflicted on the abdomen was in relation to accused inflicting them. He maintained this some information to all the witnesses who came to the scene. Indeed, Martin (PW 5) found both accused and the deceased on the farm, with no other person. I am satisfied that the injuries were inflicted by the accused and no one else.

The prosecution must in a charge of murder prove the *mens rea*. The *mens rea* is the malice aforethought provided for in Section 203 of the penal Code. Section 203 provides: -

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

Malice aforethought is deemed to be established by evidence proving any one of the following circumstances: -

- a) Section 206(a) an intention to cause the death of or to do grievous harm any person, whether that person is the person actually killed or not.**
- b). Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied indifference whether death or grievous bodily harm is caused or not, or by wish that it may not happen.**
- c) An intent to commit a felony.**
- d) An intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit felony.**

The court can discern malice aforethought or intention to cause death or grievous harm from the circumstances surrounding the inflicting of the injury.

These factors include the nature of weapon used, the position of injury inflicted and the conduct of the accused after the event.

Counsel for the accused submits that the accused's actions were in defence of his person. The defence of self-defence is provided in Section 17 of the Penal Code which provides: -

"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."

The common law principles relating to self defence referred to under Section 17 of penal Code above are contained in 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 Board, 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.”

Where a plea of self defence has been raised, the burden of proof does not shift from the prosecution. It is for the prosecution to prove that the accused is guilty of the crime of murder. They duty of the accused is to lay before the court facts upon which the defence of self-defence is based in order to enable the court and the prosecution to understand the basis of such defence. The prosecution has not attempted to disapprove that the accused in the matter did not act in self-defence.

In the **Republic Vs Joseph Macharia Waweru**, High Court Criminal Case No. 58 of 2010 reported in (2015) eKLR, the court citing with approval **Mungai Vs Republic (1984) KLR 85** stated that: -

“No doubt this element of self-defence may, and, in most cases will in practice merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress of provocation. The essence of crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.”

From the evidence the injuries inflicted by the accused on the deceased were vicious, aimed at vital parts of the body and severally with the intention of not to repulse or it immobilize deceased but to inflict grievous harm. Even if the court were to accept that the accused acted in self-defence, the force used from the evidence was disproportionate to the danger posed and was excessive in the circumstances, even if the court were to take the subjections viewed from the point of accused. I am, therefore, satisfied that the evidence adduced prove the offence of manslaughter. I, therefore, find the accused Faris Wakhungu guilty of the offence of Manslaughter Contrary to Section 2020 as read with Section 205 of the Penal code and convict him accordingly.

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 Wakoli for accused

Accused in Bungoma prison

Court: The court has received the Victim Family Impact Report. This court has taken into account fact that accused is first offender and what he has stated in mitigation, offence is serious as it led to a loss of life of deceased. Accused sentenced to serve **Ten (10)** years imprisonment. Right of appeal within 14 days.

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S N RIECHI

JUDGE

27/8/2020