



**REPUBLIC OF KENYA**

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

**HCCRC NO. 126 OF 2017**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**NDOLO NZYUKO ..... ACCUSED**

**JUDGMENT**

1. **Ndolo Nzyuko** the accused is facing a charge 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 7<sup>th</sup> and 8<sup>th</sup> day of October, 2017 at Malili village, Malili location, Mukaa county within Makueni county with others not before court jointly murdered **January Maweu Mutuse**.

2. He denied the charge and the prosecution presented six (6) witnesses to prove its case.

3. Pw1 (**SMN**) is a daughter to the accused. She testified that she lived with her mother **AK** and her sister (**FNN**). Their father was not living with them but the deceased **JM** lived with them as a father.

4. It was her evidence that on 7<sup>th</sup> October 2017 at 8:30 pm they were in the house i.e. Pw1, her sister, their mother and the deceased. Pw1 was cooking her sister was washing their mother's kikoyi, while the deceased and their mother (Pw2) were just relaxing on the bed. A lantern was on in the house so there was sufficient light.

5. When her sister opened the door to go out to air their mother's kikoyi, they saw the accused at the door. Pw2 and her sister tried to push back the door but the accused overpowered them and entered. This made Pw2 and her sister to run out.

6. Pw1 saw the accused hold the deceased and place him under his legs. He then stabbed him on his back. Pw1 was hiding under the bed when the deceased was stabbed. Their room was about 3 metres by 10 metres wide.

7. Pw1 further stated that the deceased ran out followed by the accused. She waited for things to cool before going outside where she found the accused at their neighbour's gate. She heard him saying how their mother (Pw2) was lucky because he had wanted to finish all of them and he left. Pw2 and her sister appeared from the neighbour's place. Neighbours had also gathered and she told them what she had seen. Its then that Pw2 went to Salama police station to report and returned at 10:00pm.

8. It was her evidence that the accused went away with the murder weapon which was a knife. There was a lot of blood at the door and floor of the house. The reason Pw2 and her sister pushed the door was because the accused had all along been threatening Pw2 with death. They therefore knew he was not out for anything good.

9. When they saw the body the next morning it was lying behind their plot. The shirt had stabs and he was bleeding. The police came and took photos before taking away the body. The accused was later arrested.

10. In cross examination she said that was the first time the accused was entering their house. She explained that she went under the bed when the accused held the deceased. She never saw the deceased stab the accused. She confirmed that the deceased had paid her school fees when the accused had refused to. That was a different day from the date of incident.

11. Pw2 **Agnes Kanini Nzulu** is the mother of Pw1 and wife of the accused. She gave similar evidence to that of Pw2. She said she had been receiving threats of death from the accused prior to this incident. She confirmed living separately from the accused for eight months prior to this incident. Upon her return from the neighbours she heard the accused say how he wanted to finish her and the deceased and would never allow her to live with another man. He thereafter left.

12. She later learnt from Pw1 what the accused had done to the deceased and that's when she went to report to the police.

13. In cross examination, she said the accused brought himself to the police station. She denied knowledge of any misfortune to the deceased after he ran out of the house. She had reported the accused's threats to her area chief.

14. Pw4 No. 232951 C.P Nephath Mandu was the DCIO Mukaa. He testified of having received a report in respect to this incident. He went to the scene in Malili with other officers. In an open field they found the deceased's body which had a fresh stab wound on the back. He took photos of the scene and the body which he produced as (EXB1a – h) by consent of the prosecution and defence.

15. In cross examination he denied having been told that the knife belonged to the deceased nor that he acted in self defence. The postmortem report (EXB2) was produced under section 77 Evidence Act by consent of the prosecution and the defence. The cause of death was penetrating injuries to the back causing massive blood loss from IVC (*inferior vena cava*) secondary to 2<sup>0</sup> stab wounds.

16. In his unsworn defence the accused denied the charge. He said he used to be a cobbler and on 7<sup>th</sup> and 8<sup>th</sup> October 2017 3:00 pm he was at work, when his wife (Pw2) sent his daughter Susan (Pw1) to him. At 5:00 pm another daughter (Cynthia) was sent. When he closed he decided to go and see what Pw2 wanted. He at the same time took money for fees to them.

17. Upon arrival, he found Pw2 with her boyfriend who was the age of her daughter. On inquiring as to why she had sent the children, Pw2 stood up on the left while the boyfriend stood on the right. The latter boxed him and threw a knife at him twice. On sensing danger, he caught his leg and he fell on a sufuria.

18. He left for the shops to buy tealeaves to put on his injuries. He reported the matter to the nyumba kumi and the police station. H was issued with a P3 form that got lost. The next morning, he went to Salama police station where he was again given a P3 form and then arrested. He did not call any witness.

19. Mr. Hassan for the accused filed written submissions after the defence closed its case. He submitted that the deceased may have been killed by somebody else after running away from Pw2's house. Further that Pw1 may not have been able to clearly see what had happened since she was under the bed. He argues that it's the deceased who had attacked the accused who pushed him and he fell on utensils. It is possible that the knives there injured him.

20. Citing the case of **Republic –vs- Nicholas Onyango Nyolo (2014) eKLR** he submitted that the critical elements of the offence of murder are:

- a) Proof of the fact and the cause of death of the deceased.
- b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the *actus reus* of the offence.
- c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the *mens rea* of the offence.

21. Its counsel's submission that the prosecution has failed to prove its case against the accused. The prosecution relied on the evidence adduced and so did not file any submissions. This is now the case before this court for determination.

### **Analysis and determination**

22. The offence of murder is defined under section 203 of the Penal Code as follows:

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

Section 206 of the Penal Code defines the meaning of malice aforethought as:

- a) An intention to cause the death of or to do grievous harm to 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 of or grievous harm to some person, whether that person is the person actually killed 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;***
- c) An intent to commit a felony;***

23. The above definitions bring out three (3) ingredients which must be established to prove a charge of murder. These are:

- a) The fact and cause of death of the deceased.
- b) That the death of the deceased was as a result of an unlawful act or omission on the part of the accused person (*actus reus*)
- c) That such unlawful act or omission was committed with malice aforethought (*mens rea/intention*).

## **The fact and cause of death**

24. From the evidence on record there is no dispute about the death of the deceased person. Pw1 – Pw4 all confirmed to having seen the deceased's body lying on a field behind some plot. The body had an injury. Pw3 **Pascal Kioko Kiandiko** is an uncle to the deceased. It is him who identified the body to the doctor for postmortem.

25. On the cause of death Pw1 said she saw the accused with a knife. Pw2, Pw3 and Pw4 saw injuries on the deceased person's back. The postmortem report (EXB2) showed the cause of death as:

*“Penetrating injuries to the back causing massive blood loss from IVC (inferior vena – cava) secondary to stab wound”*

I find that the cause of death was established.

## **Whether the accused person's act of commission or omission caused the deceased's death.**

26. The prosecution may prove this by either direct or circumstantial evidence. Pw1 is a daughter while Pw2 is a wife of the accused person. Pw2 and the accused had been married for ten years but had separated due to marital problems. They had three (3) children between them. The accused was not living far from where Pw2 and the children stayed. The deceased was a manfriend of Pw2 and he was in Pw2's house on the fateful night of 7<sup>th</sup> and 8<sup>th</sup> October 2018 around 8:30 pm.

27. Pw1 and Pw2 testified that while in the house the accused person came there. In spite of Pw2 and her other daughter pushing the door handle to stop him from entering the house he over powered them and entered. Pw1 further testified that there was light from the lantern which had been lit at 6:00 pm.

28. The accused in his defence does not deny having gone to Pw2's house but says it was on a very peaceful mission of finding out why Pw2 had sent the children to him during the day. That he had even taken school fees to them though he does not say how much money it was and whether he had presented it to them.

29. While in the house according to Pw1 the accused held the deceased under his legs and stabbed him on the back. The deceased ran out followed by the accused person. Pw1 went outside the house after a while and found the accused at a neighbour's gate saying how Pw2 was lucky as he had wanted to finish all of them.

30. In his defence the accused claims to be the one who had been attacked by the deceased. He stated that when he sensed danger he caught the deceased's leg and he fell on a sufuria. According to him, it was him (accused) who was injured and was issued with a P3 form twice by the police before his arrest. He did not produce any of these P3 forms to the court to show his sincerity. There is no evidence of him having gone for any treatment. His claim of having been injured is unsubstantiated.

31. The deceased's body was found the next morning behind the plot where they used to live. The postmortem found the deceased to have died of massive blood loss secondary to a stab wound. EXB2 also shows that externally the deceased had the following injuries:

- i. Body was severely pale.
- ii. Penetrating injuries (two) identified on the back.
  - a) On the right side approximately 2-3<sup>rd</sup> rib measured 4 cm width and approximately 9 cm deep.
  - b) On the midsection of the back 6<sup>th</sup> – 7<sup>th</sup> rib 6 cm approximately 5cm deep.
- iii. Swelling on the left wrist.

The body was severely pale due to massive bleeding.

32. Pw1's evidence is that the accused stabbed the deceased on the back more than once though she did not witness the real stabbing. The photos (EXB1) show two stabs on the back. The postmortem (EXB2) confirms that there were two penetrating injuries on the back. The evidence of Pw1 on the part of the body which was injured is supported by the evidence of Pw2, Pw4, the photos (EXB1) and postmortem report (EXB2).

33. It is the accused's defence that he only caught the deceased's leg when he sensed danger and the deceased fell on a sufuria and he left for the shops. He does not mention anything more about the sufuria. A fall on a sufuria **cannot** cause stab wounds in one's body. He also claims to have been boxed by the deceased and he was injured. He does not state which part of his body was injured and how he was treated.

34. Considering all that I have pointed out above, it is clear that the accused is the person who stabbed the deceased on the back. It is the stabs that led to massive bleeding which caused the deceased's death.

## **Whether the accused acted with malice aforethought**

35. Having found that it is the accused's stabbing that led to the deceased's death, this court must go further to determine whether the stabbing was intentional or not. The background to this case is that the accused and Pw2 had been married and had three children but had separated not for long. The house where this incident took place was where Pw2, the deceased and children were staying. What took the accused there? He claims that Pw2 had sent the daughters (*Pw1 and another*) to him twice that day so he came to find out what it was all about.

36. Both Pw1 and Pw2 testified. The defence in cross examination never asked them about this supposed to have been trips to him during the day. He also said he had taken school fees to them that evening. He did not say how much it was and whom he gave the money, if at all. Pw1 testified that the accused had refused to pay her fees which was paid by the deceased. The accused never said anything about this statement by Pw1.

37. It was also his defence that he was attacked by Pw2 and the deceased with the latter boxing him and hurling a knife at him. In other words, he is saying he acted in self defence. Is this contention by the accused person plausible?

38. 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.”***

39. The issue of self defence was dealt with in the case of **Ahmed Mohammed Omar & 5 Others –v- Republic (2014) eKLR** where the Court of Appeal stated thus:

“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 Republic [1971] A.C. 814**. The decision was approved and followed by the Court of Appeal in **Republic 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.”***

40. At common law the defence of self defence allows a person to use reasonable force to:

- (i) Defend himself
- (ii) Prevent attack of another person
- (iii) Defend his property

If successful, the defence of self defence will accord an accused person an acquittal. The court in considering the circumstances of each case must first determine if any force was used. Secondly if force was used whether it was reasonable.

41. In the case of **Njeru –vs- Republic (2006) 2 KLR** the court held thus:

***“1. Killing of a person can only be justified and excusable where the action of the accused which caused the death was in the course of averting a felonious attack and no greater force than was necessary was 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 or peril 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.***

***2. In this case, it was the duty of accused to show that at the time of the cutting deceased's neck, he was in the course of averting a felonious attack and that no greater force than necessary was applied. Accused was bound to show that he was in immediate danger or peril arising from a sudden and serious attack by the deceased.”***

41. In the instant case it is the accused person who went to Pw2's house where she was relaxing with the deceased. Pw1 was cooking while her sister was washing Pw2's Kikoyi. The deceased was not armed as no one was expecting the accused. If indeed the deceased attacked the accused as he claims, that could have been specifically put to Pw1 and Pw2 in cross examination since both of them were present in that house at the time.

42. There is no evidence of any danger that the accused faced. He went to that house with an intention of injuring the deceased person which he did. He even came armed with a knife which he left with after committing the crime. Nobody attacked him or injured him at all. There

was no justification for what he did. He acted out of jealousy and he over did it. He properly executed what he had planned to do.

43. My finding is that the prosecution evidence is overwhelming and has displaced the accused's defence of self defence. I find that malice aforethought has been established. For my part I find the accused guilty of murder contrary to section 203 of the Penal Code and convict him accordingly.

Orders accordingly.

**Delivered, signed & dated this 30<sup>th</sup> day of July 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**