



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL CASE NO. 8 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

NICHOLAS NDIEMA CHESORI.....ACCUSED

J U D G M E N T

The Accused **Nicholas Ndiwa** was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of offence were; on the 6th day of February 2016 at Cheptais Location, Cheptais District within Bungoma County murdered **JUSTUS CHESTIT KEYA** alias **NETO**.

Pw1 Maurine Tembo was running a shop at Chepsokwony Trading Centre. She was staying with the deceased **Justus Chesit Keya** alias **Neto** as a manfriend. The accused was also her manfriend with whom they had had a child in 2006. On 5.2.2016 she was at the shop, which had the front part which was a shop and a next room behind where they were staying. The deceased was at the rear room a sleep. At 5.50 a.m. the deceased went out of the room to answer a call of nature. She heard screams from outside she went to check and found deceased lying down. She saw the accused standing next to him armed with a rungu (club). The accused then hit her on the right shoulder. She escaped and hid in a bush. The next day she received information that deceased had died. She escaped to Uganda and later came back.

Pw3 Ruth Muthoni Kamau was a tenant of Pw2 Maurine at Cheptais. On 6.2.2016 at around 5a.m. she heard Maurine's door being hit and then heard screams from a man who was asking for help. She came out and saw accused beating the deceased. The deceased moved away towards a kiosk but accused followed him and hit him with a stone. The deceased fell down. She went and informed the deceased's sister called Sanja. She later received information deceased had died. On being cross examined she stated that she knew accused well and there was electric light which was bright.

Pw4 Peter Ngiwo Chestit the brother of deceased was in his house when at 5a.m. the deceased came to his house. He saw deceased was only wearing the inner pant and had injuries. He told him accused had assaulted him and wanted to be taken to Hospital. They reported the matter to police and deceased went to Digital Clinic where he was given first aid. At around 9a.m. he died. Pw5 Jackline Chestit accompanied the deceased and Pw4 to police and later to the clinic.

Pw7 Fred Namino Lopogi the Nyumba Kumi Chairman was on the way when he heard screams from the area near District Commissioners Office. He went there and met a group of people. They found accused seated but breathing with difficulty. Accused led them to his house and told them he had been beaten by a person who was spoiling his wife. He showed them the clothes of the person he had beaten. They advised him to report to police.

When accused was put on his defence he gave sworn statement. He testified that the deceased was his cousin and Maurine (Pw2) was his wife. He stated that he was working in Ruiru in Nairobi. On 5.2.2016 he was assigned to drive a vehicle carrying luggage to Kisumu. He then decided to go to his home in Cheptais where he arrived at around 10-11p.m. At home he found Jackline his In-law and Son Resit Kemoi and a relative of his wife. The wife Maurine (Pw2) was not at home. He was told she was at the shop. He slept. At 6 a.m. he went to the shop. His wife opened the door and a person ran out of the house and knocked him. He fell down and started struggling with the person. They struggled and the person ran away and fell into a trench. He did not follow him. His wife then escaped. Upon being Cross – Examined by Mr. Oimbo for State, he confirmed that Maurine was his wife and they had 2 children. He further stated that he is the one who opened the business for her and had been there one month before the incident.

The accused called Dw4 Rezia Kwemboi his son who confirmed that Maurine was his mother and accused his father. He knew deceased who used to come to their house when accused is not there and his mother told him that deceased was his uncle.

M/s Wakoli for Accused filed submissions. Counsel Submitted that the sum total of the evidence adduced was that the deceased was a manfriend of Maurine (Pw2) who was the accused's wife. That on the material day the accused went to the shop where upon knocking, the deceased while naked ran out and knocked the accused. That is when he knew that deceased was having an affair with his wife. Counsel submitted that from the evidence the deceased was having an affair with accused's wife and a fight ensued that the day the accused visited his wife unannounced. Counsel submits that the defence of provocation is available to the accused.

The accused is charged with the offence of Murder under Section 203 which provides: -

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

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

“Section 206

(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 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 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 a felony.

The prosecution is under legal duty to establish beyond reasonable doubt that it was indeed the Accused person who inflicted injury to the deceased, the deceased died from the said injuries and the accused had the necessary intention to cause death or grievous harm to the deceased at the time of inflicting the injury.

Pw1. Dr. Haron Ombongi performed the Post Mortem on body of the deceased on 10.2.2016. He found the deceased had bruises on the chest, fracture dislocation of right shoulder joint, broken right scrotum, fracture of 5th and 6th rib, and ruptured spleen. He formed opinion that cause of death was due to ruptured spleen, due to trauma.

The fact of death and cause of death was established as severe bleeding due to rupture of spleen as a result of trauma. The accused in explaining the events of the day stated in his evidence;

“My wife then opened the door, a person ran out of the house and knocked me down. He also fell down. He tried to hit me on my private parts. I hit him and he released me. He ran away and fell into trench. I did not follow him. My wife ran away.

From the accused's evidence, he admits that there was a fight between him and the deceased where each inflicted injuries on the other. Though accused denies that he beat the deceased or that he was armed, the evidence of Pw2 Maurine and Pw3 Ruth Muthoni who were at the scene, confirmed that indeed the accused inflicted injuries on the deceased. I therefore do find that it is accused who inflicted the injuries on the deceased, from which he later succumbed to.

M/s Wakoli submits that the court should find that the act of the accused were aimed at self defence, and/or provocation. The defence of provocation is defined in Section 207 and 208 of Penal Code.

The court of appeal in **Stephen Kipkeror -Vs- Rep [2003] eKLR** dealt with the defence of provocation;

Section 207:

“When a person who unlawfully kills another under circumstances, but for the provision of this Section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter denied, and before there is time for his passion to cool, is guilty of manslaughter only.

Section 208(1) - The term “provocation” means and includes except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person of in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is some or offered.

(2) when such an act or insult is one or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latte stands in any such relation as aforesaid, the former is said to have the latter provocation for an assault.”

In **Republic Vs Hussein S/O Mohammed (1942) EACA 66**, The Court of Appeal in Eastern Africa held: -

“When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when

considering the question of sentence but will not of itself necessarily rule out the defence of provocation.”

Upon considering the evidence I am satisfied that the accused acted under provocation when he found the deceased running out of his house naked when he asked the wife to open an indication that they had a love affair. I, therefore, find the accused guilty of Manslaughter contrary to Section 202 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

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NICHOLAS NDIEMA CHESORI.....ACCUSED

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. The court has taken in account fact that accused is first offender and what has been stated in mitigation. In particular the court has considered the circumstances of offence which was that offence was Committed when accused found the deceased having an affair with his wife. Accused is hereby sentenced to serve five (5) Years Imprisonment. Right of Appeal within 14 days.

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S N RIECHI

JUDGE