



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL CASE NO. 11 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MARK KANGONGO KANDA.....ACCUSED

J U D G M E N T

1. The accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence was that **on the 2nd day of April 2015 at Chebai Sub location within Elgeyo Marakwet County murdered Elias Tanui Kangongo**.

2. The accused denied the charge. The prosecution called a total of 6 witnesses to establish their case. When put on his defence the accused gave sworn evidence but he did not call any witness.

3. The brief summary of the prosecution case is that **PW1 Ezekiel Kibet Chebii** was called by the accused on 2nd April 2015 at 9.00 pm to his place. He went after a while and found him wearing only vest and innerwear. The deceased was lying down and he hit him twice. There was blood all over. They then took him to the hospital but died while undergoing treatment. The sticks he used to assault the deceased were identified by PW1. The incident took place at the accused house.

4. **PW2 Charles Kemboi** and a step brother to the accused identified the body at the mortuary.

5. **PW3 Paul Kore Tilitei** is equally a neighbour to the accused . He was called by one Joseph Rotich and told that the accused had attacked the deceased. At the scene, the accused was found beating the deceased. They then took him to the hospital but died while undergoing treatment.

6. **PW4 Betty Chepkoech Kangongo** is the wife to the accused and the step mother to the deceased. She said that when she came home at around 8.00 pm she found the accused already asleep. While she milked the cows the deceased came and inquired whether the accused was home. She said the deceased appeared angry. He heard some noise from the house and when she went there she found the deceased was holding a Jembe. They were fighting. The deceased hit the accused on the forehead and the hand. The deceased hit him on the head and he lost conscious. People came including the village elder and persuaded him to stop. The deceased was taken to Kapcherop hospital where he died before being transferred to referral hospital. The witness identified the pieces of stool used during the fight.

7. **PW5 Joseph Rotich** testified that he was called by the deceased wife concerning the incident. He went to the scene and the accused told him that the deceased had attacked him. By then the fight had already stopped. The deceased was taken to the hospital but died in the process of treatment and as they await to be transferred to the Referral hospital.

8. **PW4 Dr. Godfrey Obala** produced the post mortem report which showed the cause of death as cardiopulmonary arrest secondary to severe head injury.

9. As indicated earlier the accused gave sworn testimony in his defence and stated that the accused came and attacked him while he slept. Prior to this he had taken alcohol and was drunk by the time he retired to bed. He said that someone came and hit the lamp and told him 'toa'. He had earlier own sold the potatoes and had some money. In the process of fighting and defending himself he realised it was the deceased, his son. He unfortunately died while he attempted to get an ambulance so as to take him to Referral hospital.

Analysis and Determination

10. I have heard the witnesses very well as well as read the parties written submissions. The question of who assaulted the deceased is not

indispute. The accused admits as much. As a result of the assault the deceased died from the injuries. All the eye witnesses including his wife confirmed this.

11. The question which has been raised by the defence is whether the accused was provoked. In my view yes.

12. The above answer is on the affirmative. The term provocation has been defined by Black Law Dictionary 10th Edition as;

“The act of inciting another to do something especially to commit a crime; something (such as words or actions) that affects a person reason and self control especially causing the person to commit a crime impulsively.”

13. The accused was well sleeping in his house that particular evening. The accused wife was milking. The deceased came asking for the accused. Suddenly the accused wife heard commotion and when she came she saw the deceased hit the accused with a hoe stick. It is not known what they spoke with the deceased in the house.

14. The only thing that was witnesses was the accused continuing to assault the deceased. The accused was half naked. Is it possible that the deceased wanted part of his father's money which he had sold the potatoes earlier on?

15. Whetev the reasons , I find that the fact that the incident took place at the accused home clearly meant that there was every chance that the accused was provoked. Apparently it was the accused who called PW1 and informed him of the incident.

16. In the premises, this was a proper case to have altered the charges to manslaughter. As stated by the accused wife, she witnessed a fight between the two before the deceased was overpowered by his father.

17. In the premises and taking into consideration the fact that the accused has been in custody from April 2015 I find that the time he has spent in custody is sufficient to have taught him a lesson. It is sufficient punishment were this court to consider changing the charges to Manslaughter as suggested above.

18. The accused is hereby set free unless lawfully held.

Delivered, signed and dated at Kitale this 30th day of January, 2019.

H.K. CHEMITEI

JUDGE

30/1/19

In the presence of:

Mr Kakoi for State

Bororio for Accused

Accused present

Court Assistant – Kirong

Judgment read in open court.