



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 80 OF 2013**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**STELLA KINYA.....1<sup>ST</sup> ACCUSED**

**ROBERT MWIRIGI GITHINGI.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

The two accused persons, namely Stella Kinya and Robert Mwirigi were charged with murder contrary to section 203 as read with 204 of the Penal Code, Cap 63 Laws of Kenya.

The particulars of the Offence were that, on 27<sup>th</sup> July 2013 at Kangeta location of Igembe South District within Meru jointly with another not before court murdered Moses Mwenda.

**SUMMARY OF EVIDENCE**

PW1 testified that he found A1 and the deceased fighting along the path and that he was at scene for 5 minutes before A2 arrived as the deceased ran off. That accused person followed him into their home. PW1 also said he followed them and they found the deceased lying on the ground near his house and was bleeding from the forehead. PW1 said he didn't find anyone at home and he stayed for 10 minutes before deceased person's brother known as Captain came and he advised him to take the deceased to hospital. PW1 had no grudge with the deceased or A1. PW1 said he didn't know A2 before but he learnt he was Mwirigi.

PW2 said he was in his farm when he saw A1 pass and when she met the deceased the deceased asked for his panga. PW2 said Stella didn't have a panga. That Mwenda started blocking A1's way saying she would not go if she didn't give out the panga. That the deceased broke a stick from the bush and wanted to beat A1. That A1 also broke a stick and the 2 started fighting PW2 told the 2 to stop fighting. That when the deceased saw A2 come he ran off. That Stella Mwirigi A1 & A2 followed the deceased to his home. He said he took his goats home and followed them. He said his home and Mwendas home is 50 m apart.

That he found Mwenda seated and he talked to him briefly before his bortyher Captain arrived. He said Mwenda had been injured on the forehead and was bleeding. He said he left before the deceased was taken to hospital and the next day he learnt he had died. PW2 said that PW1 Muthane tried to separate A1 and the deceased.

PW2 said A1 and the deceased belonged to the same clan as himself. He said Mwenda behaved as if he was drunk and that he was the 1<sup>st</sup> to pick a stick from the fence. He said A1 was also injured on the forehead which was deformed. He said he didn't see the deceased and A2 fight. He said PW1 went to Mwendas home ahead of him and he found her there.

PW3 Dr Njeru conducted postmortem examination on the body of the deceased and established that cause of death was head injuries due to assault with a blunt object.

PW4 said on 27.7.2013 he met A1 and A2 at home and they had some sticks. He said A1 told him his brother had hit her. He said he met the 2 within their compound. That when accused persons left he proceeded and found deceased on the ground outside his house and he was bleeding from the forehead. That the deceased also had injuries on hip joint and could not walk fast. He said he found 4 children at home who raised alarm when fight was going on. He confirmed that PW1 and PW2 had arrived at scene earlier.

PW4 said he took deceased to Kangeta Health Centre but he was referred to Maua. That on arrival at Maua the doctor pronounced him dead and the body was taken to the mortuary. He confirmed that the deceased demanded for his panga from A1 and that is why fight ensued. He

said accused persons are his neighbours.

PW4 said he arrived after the offence had been committed. He confirmed that when he met A1 she had injury at the back of her left palm.

PW5 PC Ngumbao produced statement of initial Investigative office P.C Abere. He said A1 and A2 pursued the deceased to his home and beat him up and he fell down unconscious. He said initial Investigation Officer in his statement indicated he recovered sticks used in the fight but he didn't produce them in court. He confirmed A1 reported having been assaulted and a P3 was issued. He confirmed it is A1 and the deceased who were fighting as per evidence of Thurania PW2 and Charles PW1.

When accused persons were placed on defence, A1 said the deceased was her cousin. She said on 27.7.2013 she went to visit deceased persons aunt and on her way back home she met the deceased who started blocking her way. That when she asked him why he was blocking her way he said that A1 had his panga. A1 said she didn't have the panga.

That the deceased picked a stick from the fence and hit A1 on the wrist and they started fighting. That they pushed each other in course of struggle the deceased fell and hit his head on a stone. That A1 also used a stick to hit the deceased while also raising alarm and the deceased ran off to their home which is about 50M. A1 said her home was farther than deceased persons home. She said that Mwendas sister Regina and Stephen went to the scene and she explained what happened.

A1 said her brother A2 also went to scene when he heard screams. She said she went to hospital in company of A2 and she was treated and she reported assault to police and the report was booked. She said when she returned home at 6.30 pm she saw the deceased passing. She said that before she could go for X-ray that had been requested she was arrested and taken to Maua police station where she was charged and taken to court. She said she was not allowed to get to hospital for X-ray and she remained in the cells for 3 weeks until when the court visited the prison that an order was issued for her to go to hospital and it was found her hand was fractured. She produced X-ray film and P3 form Ex D1 and D2. She said A2 was arrested when went to visit her at the police station. She said when deceased injured her hand she fought back and she didn't have intention to kill her. Treatment notes Ex D3(a)(b)(c) and ExD4. She said that she suffered permanent injury and can't even use the hand and she is usually assisted to wash her clothes.

A2 testified that on 27.7.2013 he was in the house when a girl called Purity went to report to him that Mwenda was assaulting his sister. He accompanied the girl back to scene near the deceased persons home and we found A1 crying while holding her left hand. That he took her to hospital in Maua in company of Purity. That from hospital they were referred to police station and the report of assault was booked. He said A1 had been referred for X-ray but the next morning chief arrested her. That when he went to police station he was also arrested and charged jointly with A1 for offence of murder. He said when he got at scene Mwenda had left. He said Charles was not known to him but Stephen was their neighbour. He said he met Regina and Thurania at the scene.

## ISSUES FOR DETERMINATION

In a murder case are whether fact of death has been proved:

- a) **The death of the deceased and the cause of death**
- b) **That the accused caused the unlawful act or omission which caused the death and**
- c) **That the accused had malice aforethought as defined under section 206 of the penal code**

Section 206 of the Penal Code Provides:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- a. **An intention to cause the death of or todogrievous 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 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**
- d. **An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

The 1<sup>st</sup> ingredient has been established by the evidence of all the prosecution and defence witnesses.

As regards 2<sup>nd</sup> and 3<sup>rd</sup> ingredient, it is the deceased who attacked the 1<sup>st</sup> accused person according to evidence of PW1 and PW2. PW4 confirms that he saw A1 had injury at the back of her left palm which she said was inflicted by the deceased and A1 produced evidence that she went for treatment on the same day and she was referred for treatment but she didn't go for X-ray because she was arrested the next morning. In the case of **NZUKI VS REPUBLIC [1993] KLR 171** where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- Intention to cause death

- Intention to cause grievous bodily harm

-Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

(b) In the case of DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR) cited in the case of REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR, Bosire, O'kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

**“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”**

In this case by using a stick to fight the deceased it could be construed that the 1<sup>st</sup> accused person intended to cause grievous body harm.

A1 said that the deceased blocked her path demanding for a panga which she was not aware of and when she said she didn't have panga deceased started beating her with a stick and a fight and struggle ensued. A1 said that deceased fell on a stone while they were pushing each other. PW1 and PW2 said that when the deceased saw A1's brother he ran off to his home.

PW1 said he followed A1 and A2 when they pushed the deceased to his home and found he was seated outside the house and bleeding from the forehead. PW1 said A1 and A2 didn't beat the deceased at the house. PW2 also confirmed the deceased ran off when he saw A2. PW4 said he found the fight was over but he met A1 and A2 within the compound and A1 told him the deceased had injured her hand and he saw the injury. It is clear that there is no evidence implicating A2 in the fight that took place between A1 and the deceased. The first accused person raised the issue of self defence as the deceased attacked her with a stick and she had to defend herself. The issue of self- defence was discussed in the case of Ahmed Mohammed Omar & 5 Others v Republic [2014] eKLR where the court held as follows;

**“What are the common law principles relating to self defence” The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in PALMER VS R [1971] AC 818. The decision was approved and followed by the Court of Appeal in R VS McINNES, 55 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.”**

The Court of Appeal further held that;

**“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.”**

This court finds that the deceased person having been aggressor A1 had a right to defend herself after being proved into a fight and therefore this court accepts her defense of self -defense as supported by PW1 and PW2 as well as the documentary exhibits produced by the 1<sup>st</sup> Accused – Ex D1, D2, D3(a) (b) and (c) and D4. I do find that there is no basis to find accused persons guilty considering there is no evidence connecting A2 to the offence and also because the deceased suffered injuries to which he succumbed in the course of A1 defending her person after being attacked by the deceased. Both are acquitted under S. 215 C.P.C

HON. A.ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED THIS 25<sup>TH</sup> DAY OF JANUARY 2019

In the presence of:

CA: KINOTI

Accused 1 Present in person

Accused 2: Present in person

State: Ms Mwaniki for state. Ms Nelima holding brief for Mokuu advocate for accused.

**HON. A.ONG'INJO**

**JUDGE**