



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO. 8 OF 2019

BETWEEN

REPUBLIC.....PROSECUTOR

AND

NICHOLAS MURRI.....ACCUSED

JUDGMENT

1. The accused, **NICHOLAS MURRI**, was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the information were that he murdered **KEVIN OUMA NYONGESA** (“the deceased”) on the night of 24th July 2018 at Osupuko area in Transmara West Sub-county within Narok County.

2. The prosecution on marshalled 5 witnesses to support its case; Hellen Naiyoma Kirioki (PW 1), Andrew Lelmashon Kirionki (PW 2), John Ole Rumbe (PW 3) PC Gregory Malakwen (PW 4) and Dr Obosi Leah Okoro (PW 5) to prove that the accused cut the deceased with a panga causing his death. The accused testified on oath in his own defence and called three witnesses; Nelly Nashipai (DW 2), Elizabeth Murri (DW 3) and Martha Morba (DW 4). It was not disputed that the deceased worked for PW 2. While PW 2 was a neighbour to the accused. Both PW 2 and the accused admitted that their families were embroiled in a dispute concerning their respective boundaries.

3. PW 1 testified that on the night of 24th July 2018, she was asleep when she was awoken by the deceased screaming. She went to the gate and using the light from her phone she saw the accused cutting the deceased using a panga. PW 1 told court that she immediately raised an alarm and called her brother, PW 2. PW 2 was at home when he heard a scream. At about the same time, he received a call from PW 1 who informed him that the deceased was being beaten. He rushed to his brother’s homestead and found the deceased lying on the ground. He recalled that when he arrived, the accused was still cutting the deceased and the dogs nearby were drinking his blood. He testified that the accused continued to cut the deceased on the head and neck until he grabbed the panga from the accused and tied him with a rope. He also recalled that the accused also had an injury on the leg.

4. The Senior Chief of Osupuko location, PW 3, recalled that PW 2 called him on the material night and informed him that a person had been injured. He called the police at Kilgoris and an ambulance. He directed the police to the scene where they found the deceased was lying at PW 2’s brother’s gate. He observed that the deceased had cuts on the head, legs and hands. He found the accused hands had been tied.

5. The investigating officer (PW 4) confirmed Kilgoris Police Station received a report that a man had been assaulted at about 900pm on the material night. The Commanding officer instructed officers to go to the scene. They took the accused and the deceased to Transmara District Hospital as they had both sustained injuries. The deceased was immediately referred to the Kisii Teaching and Referral Hospital (“KTRH”). PW 4 conducted inquiries and found that the accused had cut the deceased with a panga. PW 4 testified that his investigations revealed that the deceased was killed due to a land dispute between the accused and his neighbour.

6. The accused (DW 1) recalled that on the material night, his wife, DW 3, told him that he needed some food for one of her visitors who had come to their place on that day to attend a funeral. The accused decided to go and buy rice from a kiosk some distance away. He left his home with his phone, money, TV remote and a maasai rungu. As he passed by PW 2’s brother’s home, he saw someone holding a panga while hiding at the fence trying to stop him. When the person shouted at him, “*fucker’s wewe*”, he recognized the voice as that of the deceased. He held up his rungu but on second thoughts he decided to run away but the deceased flung the panga he was holding at him. The panga cut his left leg causing him to fall down and start screaming. He also recalled the deceased telling him that “*I will kill you today*”.

7. The accused further testified that the panga remained stuck in his leg but he managed to remove it whereupon the deceased tried to take it from him but he resisted. He could not recall how long the incident took but PW 2 arrived sooner and tied his hands with a rope. He testified that he became unconscious shortly thereafter found himself at Kilgoris Hospital on 27th July 2018. Due to the seriousness of his injuries, he was transferred to KTRH where he underwent treatment for 3 months.

8. DW 2 testified that she was watching TV with the accused before he left with his phone, TV remote, hat and Maasai shuka. After about an hour, she heard screams went out of the house and followed the noise until she found the deceased injured and lying down near the gate. DW 3 testified that the deceased had left the house to buy food and she later heard him screaming and saying that, “*Uncle has killed me*”. She followed the screams and saw PW 1 coming towards the gate. She found the accused and the deceased struggling over a panga. She told court the deceased had a rungu which he used to beat the accused but stopped on command of PW 1. PW 2 and PW 1’s son, Leparan, then tied the accused with rope. DW 4 testified that upon hearing screams, she went outside the house and heard the accused screaming that uncle had killed him. She testified that she saw two people fighting and pushing each other over a panga.

9. The offence of murder is defined by **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.*” The prosecution must prove beyond reasonable doubt the following three ingredients; it must prove the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

10. The fact and cause of the deceased’s death was proved by the postmortem results. PW 5 produced the Post Mortem form on behalf of Dr Benjamin Ndibile who conducted the autopsy on the deceased’s body at KTRH mortuary on 8th August 2018. Dr Ndibile observed the following signs of medical intervention and external injuries:

- Crepe bandage of the left forearm and bilateral bandage of the lower limbs bilaterally.
- Suprapubic sutured incision 4cm with 2 nylon stitches.
- Left-temporo – frontal sutured laceration 4 cm in length with 3 nylon stitches.
- Left mandibular laceration 11 cm in length with 17 nylon stitches.
- Left mandibular sutured linear laceration 11 cm in length with 16 nylon stitches.
- Subcutaneous laceration 6 cm in length with 16 nylon stitches.
- Right C-shaped laceration extending from the right neck to the right maxillary region 20cm in length with 24 nylon stitches.
- Right parietal laceration extending to the occipital 8.5 cm in length with 10 nylon stitches.
- Right forearm laceration (sutured) that extended to the middle finger 22cm in length with 27 nylon stitches.
- Posterior trunk multiple septic wounds with the largest being 4 X 4 cm and the smallest 3 X 2 cm.
- Distal tibio-fibula fracture (closed).

11. Dr Ndibile noted that there was no skull fracture but the brain cavity had pus and fluid and there was evidence of brain injury as the gyri and sulci were flattened. Dr Ndibile concluded that the cause of death was multiple cut wounds due to sharp object and meningitis.

12. Counsel for the accused argued that the deceased may have died from meningitis and not the injuries sustained from the attack. I accept the testimony of PW 5 who explained that although the deceased was suffering from meningitis, the same could have been as a result of sepsis from wounds inflicted on him. In other words, the multiple cut wounds were the cause of death.

13. On the issue whether the accused caused the injury to the deceased which led to his death, the two direct witnesses, PW 1 and PW 2 testified that they saw the accused cutting the deceased. PW 2 testified that he saw the accused use a panga to cut the deceased all over the body. This is corroborated by the results of the postmortem report which show that deceased had several cuts wounds all over his body. PW 2 told court that he found the deceased lying down with cuts on the neck and head and that he grabbed the panga from the deceased before tying his hands. Likewise, the defence witnesses, DW 3 and DW 4, confirmed that they saw the accused and deceased fighting over a panga.

14. Although counsel for the accused pointed to some inconsistencies in the evidence of PW 1 and PW 2, I do not think such inconsistencies detract from the fact that only the accused and deceased were at the *locus in quo* when the witnesses and members of the public arrived. Both of them were injured and in as much as the accused’s case is that he was also injured by the deceased, he is the only one who could have inflicted the injuries that caused the death of the accused. This position is also fortified by the fact that in his own defence, the accused did not even suggest that the injuries could have been inflicted by a third party. I therefore find and hold that it is that accused who inflicted the injuries on the deceased that led to his death.

15. I now turn to the issue of malice aforethought. Counsel for the accused submitted that from the evidence, the accused acted in self defence and on the basis of the evidence he was entitled to an acquittal. This defence is provided for under **section 17** of the **Penal Code** which states as follows:

17. Subject to any express provision of 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.

16. The common law position was elucidated by the Court of Appeal in **Ahmed Mohammed Omar & 5 Others v Republic**, NRB CA Criminal Appeal No. 414 of 2012 [2014] eKLR (see also **IP Veronica Gitahi and Another v Republic** MSA CA Criminal Appeal No. 23 of 2016 [2017] eKLR) where it accepted the position set out in **DPP v Morgan** [1975] 2 ALL ER 347 where the House of Lords held that the essential element of self-defence is that the accused believed that he was being attacked or was in imminent danger of being attacked. The Court stated 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. But in DPP v Morgan (Supra) it was held that:

...if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.

17. Flowing from the decision I have cited, the question is whether the accused believed he was under attack. I must emphasise at this point that it is not for the accused to prove his defence. He only has to raise sufficient evidence to cast doubt on the prosecution case and it is for the prosecution to disprove the defence beyond reasonable doubt.

18. Counsel for the accused submitted that the testimony of PW 1 and PW 2 was tainted by the fact that the Kirionki family had a land dispute with the Ole Murri family and it was the intention of the prosecution witnesses to fix him. He also pointed out that testimony of PW 1 and PW 2 was inconsistent and was not credible for that reason. While it is true that there was a land dispute, there is no reason why that the same argument or motive would be ascribed to the accused and his witnesses. I shall therefore examine the evidence outside the motives of the parties to determine whether the prosecution proved its case.

19. The accused testified the deceased waylaid him and as he was trying to run away he was attacked with a panga that sliced through his left leg following threats by the deceased to kill him. He also testified that he had injuries on the head and chest. He showed the court scars on his head and arms and I was able to see that he was walking on crutches as his left foot was badly injured from the cut he sustained. Since the accused could not have cut himself on the left leg with a panga and prosecution did not provide any other explanation for the injury on his left foot, I accept that the accused was attacked.

20. What is clear is that both the prosecution and defence witnesses were alerted by screams. While PW 1 heard the deceased screaming, DW 3 and DW 4 heard the accused screaming. PW 1 came from her home toward the gate and at the same time DW 3 and DW 4 came from the opposite side. PW 2 arrived after PW 1 and he found DW 3 there. Although DW 3 and DW 4 testified that they found the accused and deceased fighting over the panga, their testimony is inconsistent with the injuries sustained by the deceased. If they found the accused and deceased struggling over the panga, they would have seen the accused take the panga from the deceased and cut him several times on the neck and head. On the other hand, the injuries on the deceased are consistent with the evidence of PW 1 and PW 2 that the accused was cutting the deceased who was already on the ground when they arrived and that it is PW 2 who grabbed the panga from him.

21. As was held in the **Ahmed Omar Mohammed Case (Supra)** the reasonableness or unreasonableness of the accused belief is material in assessing whether the accused believed he was under attack. I find that by the time he started cutting the deceased, the accused was no longer laboring under a fear of attack. He had already disarmed him by taking the panga. The common evidence of PW 1, PW 2 and DW 2 was that when they arrived the deceased was already on the ground hence the inescapable conclusion is that the accused would only have continued to cut him violently while he was still on the ground even though he himself was injured.

22. The injuries sustained by the deceased speak for themselves. The deep cut on the forearm signify some form of defensive injury as the deceased was trying to block the cuts being inflicted on his upper region. The cuts on his head and neck were significant and the multiple wounds on the posterior or back side of the trunk show that when the deceased turned, the accused continued with his assault. He only stopped either because he was weak as a result of his own injury or that the panga he was using was taken by PW 1. In these circumstances, I am constrained to hold that the accused belief that he was under threat from the deceased was not tenable on the evidence and thus the defence of self-defence is not available to him.

23. Counsel for accused further submitted that even if the court finds that the accused acted in self-defence, then it was still open to the court to find that the accused acted under provocation due to loss of control following the injury and intense pain inflicted on him by the deceased. This position is supported by the Court of Appeal decision in **Mungai v Republic [1984] KLR** where it quoted its predecessor in **Rex v Shaushi s/o Miya [1951] 18 EACA 164, 168** as follows:

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 the 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 aforethought is rebutted and the offence will be manslaughter.

24. The defence of provocation under **section 207** of the **Penal Code** is to the effect that, "... when a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only ..." **Section 209(1)** thereof goes on to define "provocation" to mean and include "...except hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person 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 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 done or offered ..."

25. Whether the accused was provoked to lose his self-control is a question of fact which the trial court has to determine based on the evidence presented. In **Peter King'ori Mwangi & 2 others v Republic MSA Criminal Appeal No. 66 of 2014 [2014] eKLR**, the Court of Appeal noted that a successful defence of provocation requires that two conditions be satisfied; first, the "subjective" condition that the accused was actually provoked so as to lose his self-control and second, the "objective" condition that a reasonable man would have been so provoked.

26. In considering the defence of provocation, I harken back to what I stated in respect of the self defence. The evidence points to the fact that the accused had already disarmed the deceased and there was no threat to him once he dislodged the panga from his leg. From an objective standpoint this was sufficient time to cool. That the accused went on to cut the accused multiple times as I have shown, dislodged

his defence of provocation.

27. Under **section 206** of the **Penal Code** malice aforethought is deemed to be established by evidence proving any one or more of the following circumstances:

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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

c. An intention to commit a felony.

28. Evidence of malice aforethought may direct or indirect depending on the peculiarity and facts of each case at the trial. In **Rex v Tubere s/o Ochen [1945] 12 EACA 63**, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In this regard, I have discounted self defence and the defence of provocation. The accused used a panga and cut the deceased multiple times on the head and neck area culminating resulting in his death. Such injuries must have been cause with the intention to cause grievous harm or indeed death within the meaning of **section 206** of the **Penal Code**.

29. From the foregoing, I find the accused **NICHOLAS MURRI** guilty of the murder of **KEVIN OUMA NYONGESA** and I convict him accordingly.

DATED and DELIVERED at KISII this 27th day of MAY 2019.

D.S. MAJANJA

JUDGE

Dr Nyagaka, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.