



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL CASE NO. 10 OF 2017

REPUBLIC.....PROSECUTOR

-VERSUS-

MOTONGORI MARWA GOSIANI.....ACCUSED

JUDGMENT

1. **Chacha Mwita** (hereinafter referred to as '**the deceased**') lost his life on 02/03/2017 from an engagement with the accused person herein, **Motongori Marwa Gosiani**. The incident occurred at Nyamwini village, Komosobo Sub-Location, Kuria West Sub-County in Migori County.
2. The deceased and the accused person were closely related. The deceased was the accused person's uncle. The deceased had also inherited the mother of the accused person. The deceased was hence the accused person's step-father.
3. The accused person was formally charged with the murder of the deceased on 13/03/2017. He denied the information and a trial was held.
4. Nine witnesses testified in support of the information facing the accused person. **Mwita Chacah Joseph** testified as **PW1**. The deceased was his uncle and the accused person was his cousin. **PW2** was **Nyanokwe Mwita Chacha**. He was a brother to the deceased. **Mark Mwita Chacha** testified as **PW3**. He was a son to the deceased. **Boke Marwa Luciana** testified as **PW6**. She was the mother of the accused person and a wife to the deceased by inheritance. **PW4** was the arresting officer. He was **No. 91243 PC Orecha Evans Ochieng**. **PW5** was **No. 80072 Corp. Benson Ingosi** a Scenes of Crime Gazetted Officer attached at DCI Migori. **Margaret Wahu Maina** a Government Analyst working at the DNA Laboratory in Nairobi testified as **PW7**. **Dr. Vitalis Owuor K'Ogutu** testified as **PW9**. The investigating officer **No. 61403 Corp. James Kiogora** testified as **PW8**. I will refer to the witnesses in the sequence in which they testified before Court.
5. The prosecution case was that in the afternoon of 02/03/2017 PW1, PW6 and the deceased were at the home of PW6. PW1 and the deceased took the local brew commonly known as '*chang'aa*' which PW6 used to sell. The two were at the home of PW6 from around 01:00pm upto 04:00pm. During that time the accused person passed by. He met PW1, PW6 and the deceased. The accused person picked a quarrel with the deceased. PW6 intervened and asked the deceased to leave the accused person alone as the accused person was by then drunk. The deceased duly obliged. The accused person then entered inside his house and later left carrying a panga. PW1 and the deceased continued with the drinking upto around 04:00pm. They then left the home of PW6. They walked away on a path.
6. After a short distance, PW1 and the deceased were confronted by the accused person who emerged from a bush which was on one side of the road. The accused person was armed with a panga and a club. He had a panga on the right hand and the club was on his left hand. Without uttering any word the accused person attacked the deceased and cut him severally with the panga. PW1 witnessed the accused person cut the deceased on the head and the left hand. The fingers on the left hand were severely injured. The deceased fell and the accused person disappeared into the bush. PW1 raised alarm and people gathered. PW6 responded to the screams and rushed to the scene. PW3 also went to the scene.
7. PW1 was cross-examined on whether he had really witnessed the attack. In confirmation he took hold of the Bible and raised it. He stressed that he was truthful.
8. PW2 was among those who were at the scene. Sensing that the deceased could be dead PW2 rushed to Isebania Police Station to report the matter. On arrival at the police station PW2 reported the matter to PW4 who was the officer at the Report Desk. PW4 informed PW2 that the accused person had also reported the incident and that he was in police custody. PW2 saw a blood-stained panga and trousers at the report office.
9. PW2 accompanied the police to the scene. PW8 was with PW5 and other officers. On arrival at the scene the police observed the body of the deceased and the scene. PW5 took photographs. The police carried the body to Pastor Machage Hospital mortuary for preservation

awaiting further police action.

10. PW8 led the investigations. He interrogated and recorded statements from potential witnesses. He also interrogated the accused person. PW8 organized for a post mortem examination of the body of the deceased. It was conducted on 08/03/2017 by PW9 at Pastor Machage Memorial Hospital Mortuary. PW2 and PW3 identified the body of the deceased prior to the autopsy. PW9 saw a deep cut wound on the head which ran from the front to the back. The skull was fractured. The left hand was severely damaged and the fingers amputated. PW9 opined that the cause of death was intercerebral haemorrhage due to assault. PW9 filled in the Post Mortem Report.

11. PW9 also mentally assessed the accused person at the Pastor Machage Memorial Hospital on the same day he conducted the autopsy. PW9 found the accused person fit to stand trial.

12. PW8 collected blood samples during the autopsy from the body of the deceased. He also collected blood samples from the accused person. He prepared an Exhibit Memo Form and forwarded the blood samples from the accused person and the deceased together with the clothes he recovered from the body of the accused person and the panga to the Government Analyst in Nairobi for analysis. The purpose was to ascertain the sources of the blood stains on the panga and the clothes.

13. PW7 conducted the analysis and prepared a Report. PW7 concluded that the blood on the panga and the clothes of the accused person was of the deceased.

14. During the trial PW7 produced the Analyst Report as an exhibit. PW9 produced the Post Mortem Report as an exhibit. PW8 produced the panga, the clothes, the Exhibit Memo and the Mental Assessment Report as exhibits.

15. It was the prosecution's position that the panga was the murder weapon and the accused person was the aggressor.

16. The prosecution closed its case and this Court placed the accused person on his defence. He opted to give sworn testimony without calling any witness.

17. The accused person denied killing the deceased. He narrated how he met the deceased who was his uncle at his mother's home (PW6). He bought him some *chang'aa* as they drunk together. The accused person stated that he depleted the money he had on the drink. However, the deceased insisted that the accused person was to give him Kshs. 200/= so that he would continue drinking. As the accused person did not have the money the deceased abused him. The accused person cooled the deceased down but the deceased abused the accused person all the more. The accused person sensed a possible confrontation and decided to leave. The deceased stood on his way and wanted to fight him. PW6 restrained the deceased and asked the accused person to leave. The accused person left and proceeded towards the river. The accused person stated that he met the wife of his brother and informed her what the deceased had done to him. He then walked towards the river.

18. It was the accused person's further testimony that he was surprised to see the deceased jumping unto the path he followed to the river from a nearby bush. The deceased was armed with a sharp and long stick. The accused person was ordered to sit on the road. As he turned to run away the deceased hit him on the back with the stick. The accused person held the stick and they struggled over the same. The accused person then held the deceased by the chest and the deceased removed a panga from around his waist. The panga cut the accused person on the inside of his left hand. They then struggled over the panga. The panga fell aside and the accused person took it. The deceased then pulled the accused person and as the accused person was about to fall the panga cut the deceased on the head. The deceased was injured on the head. The accused person also stated that the deceased was determined to injure him and had to really do his best in the circumstances.

19. The accused person further stated that as the struggle went on he screamed and people gathered. PW1 and PW6 were the first to arrive at the scene. They found the deceased already injured.

20. The accused person took the panga and proceeded to Isebania Police Station where he made an assault report. The accused person stated that the deceased had previously attacked and killed 3 people who refused to buy him alcohol. He had disappeared and resurfaced 5 years later. The accused person stated that even the OCS knew that the deceased was a dangerous person. The accused person stated that having been attacked by the deceased he had to act in self defence.

21. The accused person contended that PW1 was not truthful. He also said that he was not annoyed when the deceased abused him. He reiterated that he acted in self defence.

22. At the close of the defence case the Defence Counsel filed written submissions. He contended that the case was not proved as required in law. He relied on the defence of provocation in contending that the accused person cannot be guilty of murder. He referred to several decisions on provocation. The prosecution submitted that the offence was proved as required in law. It denied proof of any provocation as PW6 was not even the wife of the accused person.

23. It is from the foregone evidence that this Court is now called upon to determine whether the defence of provocation holds in this case as it also determines if the ingredients of the offence of murder were proved. The offence of murder carries three ingredients which 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.

24. There is no doubt that the deceased died. That fact was attested to by PW1, PW2, PW3, PW5, PW6, PW8 and PW9. The first limb is hence answered in the affirmative.

25. As to the cause of the death of the deceased, PW9 produced a Post Mortem Reports which he personally filled in after conducting the autopsy. The report opined that the possible cause of the death of the deceased was intercelebral haemorrhage due to assault. Since there is no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

26. I will consider the two remaining ingredients together. According to the accused person the deceased died as a result of the encounter the two were engaged in. To him, the deceased was injured as they struggled for the panga which ended up cutting the deceased on the head. The accused person raised the defence of provocation.

27. Unless it is proved that the accused person caused the death of the deceased with malice aforethought, the offence of murder is not proved. The prosecution must prove the intention on the part of the accused person to kill the deceased. In doing so I will revisit the evidence as I look at the defence of provocation.

28. The starting point is the law. **Sections 207 and 208** of the **Penal Code** states as follows: -

207. 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, is guilty of manslaughter only.

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 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 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 done or offered.

(2) When such an act or insult is done or affected 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 latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

29. In his sworn testimony, the accused person stated that when he was abused by the deceased he did not get angry. That being the case the accused person was not deprived of the power of self-control neither was he induced to commit any assault. The defence of provocation is therefore not applicable.

30. Although the accused person did not tender submissions on self-defence I will nevertheless deal with it since it formed the gist of the defence. I will first start with a look at the law. **Section 17** of the **Penal Code Chapter 63** of the Laws of Kenya states as follows:

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.

31. The common law position has evolved with time from an objective approach to a subjective one. The Court of Appeal in **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** dealt with the aspect of self-defence in great detail. I fully concur with the analysis in that decision not only because the decision is binding upon this Court but also given that the legal position was rightly and clearly settled. I will herein below reproduce how the Court of Appeal expressed itself in allowing the appeal on the ground that the Appellants acted in self-defence thus: -

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 mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not the 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.”

In BECKFORD v R (supra) it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.

In R. v WILLIAMS [1987] 3 ALL ER 411, Lord Lane, C.J. held:

“In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistaken was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”

It is acknowledged that the case of DPP v MORGAN (supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also SMITH AND HOGAN'S CRIMINAL LAW, 13TH Edition, Page 331.

Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test.

32. By applying the subjective test and in taking the particular circumstances of this case into account, this Court is not convinced that the accused person acted in self-defence. The evidence of PW1 and PW6 outweighs the defence. There is evidence that the deceased was with PW1 when he was attacked by the deceased. The attack was sudden and the deceased could not even defend himself. Even PW1 who was with the deceased did nothing other than screaming. It was the deceased who was in eminent danger and not the accused person.

33. This Court carefully observed the prosecution witnesses testify. They were candid and forthright. They remained firm during examinations. I did not find anything to doubt their testimonies. I believed their testimonies. PW6 who was the mother did not testify that the deceased wanted to beat the accused person at any time. The defence did not lay a basis for such an issue. PW6 was not even examined on that aspect. The issue was only raised by the accused person in the defence. It was an afterthought.

34. This Court further takes issue with the struggle as narrated by the accused person. The accused person only attempted to explain how the deceased sustained the injuries on the head. Therefore, the prosecution's evidence on how the deceased sustained the injuries on the hand remained uncontroverted. There was also the issue of the stick and the panga. What point in time did the deceased leave the stick for the panga? Without seen to be shifting the burden, I must say that the defence did not come out clearly on the issue given that the prosecution did not raise the issue of the long stick.

35. It is the foregone that I initially stated that the defence is not available to the accused person.

36. Having found that the defences of provocation and self defence do not apply in the circumstances of this case, I will now deal with the issue of whether the accused person acted with malice aforethought. **Section 206** of the Penal Code defines 'malice aforethought' as follows:

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

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(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.

(d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.

37. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

*It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions (1975) AC 55*". (emphasis added).*

38. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the conviction of murder with manslaughter observed: -

There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

39. In this case there was evidence that the accused person differed with the deceased. PW6 intervened and even asked the accused person to leave. The attack happened immediately thereafter. The accused person acted in anger.

40. The foregoing analysis yields that the accused person is the one who fatally wounded the deceased but with no premeditated intention.

41. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

42. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analyzed hereinabove, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 19TH DAY OF DECEMBER, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Mwita Counsel for the Accused person.

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

Evelyne Nyauke – Court Assistant