



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO. 94 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

TIMOTHY KIBOGA CHOCHI.....ACCUSED

JUDGMENT

1. The accused **TIMOTHY KIBOGA CHOCHI** was a tenant at a building in Pipeline Estate Nairobi wherein the deceased was employed and working as a caretaker. On the fateful day the deceased was at the said building wherein he was living on ground floor while the accused was living on the fourth floor. Both the accused and the deceased lived thereat with their families.

2. On the 28th day of November, 2011 the accused was having a drink at a nearby pub when he decided to go back to the flat known as "EMMAUS" plot so as to answer the call of nature only to find the toilet locked. Since the bathroom was open and not able to control the urge the accused decided to relieve himself at the bathroom.

3. This act did not please the wife of the deceased who reported to him the action of the accused and as any loving husband and being the caretaker of the flat he confronted the accused and a quarrel ensued therefrom leading to the death of the deceased, the subsequent arrest and charge of the accused.

4. The accused was therefore charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code, the particulars of which were that on the night of 28th November, 2011 at Pipeline Estate in Nairobi Area within Nairobi County murdered **JESSE MBUGUA KARANJA**. He pleaded not guilty to the said charges and on 19th March, 2013 his trial commenced before Ombija J, as he then was, who heard the evidence of three prosecution witnesses that is PW1, PW2 and PW3 before retiring from the Judiciary.

5. On 24/2/2016 the matter was placed before me for further trial and upon compliance with the provision of Section 200 and 201 (2) of the Criminal Procedure Code which was further confirmed by both the prosecution and the defence the matter proceeded for hearing from where it had reached and upon conclusion of the prosecution case the accused was placed on his defence at which he gave unsworn statement of defence.

PROSECUTION CASE

6. **PW1 ADAMS KWABA OSONGO** who was a security guard at the Emmaus Plot heard noise coming therefrom and when he responded to the same, found the deceased who was a caretaker thereat quarreling with a tenant who had urinated at a wrong place. He separated them and each went his way at about 8.00 p.m. At about 9.00 a.m. he heard the noise again and when he responded once again he found the wife of the deceased crying and the accused running away from the scene. It was his evidence that the accused threw down a knife as he ran away only to be arrested by some guards and handed over to the police. He noticed that the deceased had been stabbed.

7. **PW2 JOSHUA NYACHUO ONDIGA** a supervisor with **REAL ESTATE SECURITY** testified that PW1 called him on phone and informed him of the incidence. He ran to the scene and found the deceased stabbed on the left side of the stomach and the accused tied with ropes who was then handed over to him. He took the deceased to Kenyatta National Hospital passing through Embakasi police station together with the accused who was re-arrested and upon the advise of the police taken for treatment as he had been injured by the mob at the scene of the incidence.

8. **PW3 MILKA WAMBUI KAMAU** the wife of the deceased stated that they were living on the 1st floor and that on the material day the accused went to the common bathroom to urinate and she told him not to do so. He ignored her forcing her to inform her husband who confronted the accused and a fight broke between them from which the deceased sustained injuries to the head. The other tenant responded to the fight and assaulted the accused and stopped the fight. After fifteen minutes the accused went back to their room, knocked at the door

and stabbed the deceased who responded to the knock at the door injuring him on the stomach. She stated further that the deceased shouted that he had been stabbed by Timothy (the accused) and he fell down. It was her evidence that there was adequate fighting at the scene. She stated further that when the accused came to their house he was in the company of his wife and two children.

9. PW4 OLIVER MUGO KINYORO was called to the scene by PW1 and found the deceased lying down covered with a towel and when he opened the towel saw that his intestines had come out. They took the deceased to Kenyatta National Hospital where he was admitted at the ICU where he subsequently died. It was his evidence that when he returned back to the plot he found that the accused had been beaten by the public. He was handed the murder weapon which he gave to the police. I stated under cross examination that he did not know the accused before the incidence.

10. PW5 JOHN WAWERU KARANJA identified the body of the deceased for purposes of post mortem examination which was conducted by **PW7 DR PETER NDEGWA** who confirmed that the cause of death was exsanguinations due to a stabbed wound to the abdomen, while **PW6 Dr. Z. KAMAU** testified on behalf of **DR. MAUNDU** who examined the accused who had swollen upper lip, red left eye and bruises on the left eye brow. He confirmed that the accused was fit to stand trial. This was done in the presence of **PW8 PC MAURICE MUKARA**.

11. PW9 CI HESBON ESENDI investigated the case, forwarded the exhibits to the Government Chemist and produced the results therefrom indicate that no blood stains were detected on the knife. In cross examination he confirmed that he had recommended that the accused be charged with manslaughter but was overruled by ODPP.

DEFENCE CASE

12. When put on his defence the accused stated that he was in a club about 200 meters from his residence from 6.30, which did not have toilets so he decided to go the flat at the gate the wife of the deceased was behind him and found the toilets on the ground floor locked, since he was pressed he decided to use the bathroom which was open. As he was leaving the said bathroom he met the deceased who was a caretaker thereat who just hit him with his fist. A fight ensued therefrom before two other caretakers joined and assisted the deceased in beating him up despite plea from the other tenants. He stated that one tenant separated them and advised him to go to the dispensary since he was bleeding only for the deceased to pull him into his house and that to free himself he kicked the deceased causing him to fall down on the items in the house which upset his wife who took a knife and approached him with the same.

13. It was his further evidence that he kicked the said knife, bit the deceased on the finger freeing himself but at the door met one of the caretakers who pushed him back into the house and to defend himself he picked the said knife which the deceased fell on. He then ran towards the gate where the watchman at the gate held him before he was handed over to the police.

SUBMISSIONS

14. It was submitted by the prosecution that the accused was not so intoxicated so as not to know what was happening. It was submitted that the accused had time to go to his house to pick up a knife and went back to the house of the deceased thereby having time to cool down taking away the defence of provocation from the same. It was submitted that the accused was placed at the scene.

15. On behalf of the accused it was submitted that the same was drunk at the time of the commission of the offence and that the accused attacked the deceased having been driven by serious provocation and that the stab was only one. In support thereof the accused relied on the Court of Appeal decision in **VMK v REPUBLIC [2015] eKLR**.

ANALYSIS AND DETERMINATION

16. For the state to sustain a conviction on a charge of murder under

Section 203 of the Penal Code the following ingredients must be proved beyond any reasonable doubt:-

(a) The fact and the cause of death of the deceased.

(b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.

(c) That the said unlawful act of omission or commission was caused by malice aforethought.

17. The fact and the cause of death of the deceased is not in dispute. The fact of death was confirmed by the evidence of PW1, PW2 and PW4 who took him to Kenyatta National Hospital from where he died and PW5 and PW8 who identified the body and attended to the post mortem examination. The cause of death was confirmed by **PW7 DR. PETER NDEGWA** to be exsanguinations as a result of stabbed wound.

18. The second ingredient that the death was caused by unlawful act of omission or commission on the part of the accused person which is commonly referred to as the *actus reus* of the offence has been proved by the evidence of PW3 the wife of the deceased person. She positively identified the accused who was their neighbour and confirmed that the accused had urinated in the common bathroom which act

was confirmed by the accused person in his defence. She reported to the deceased who confronted the accused and a fight ensued between them. This fact was further confirmed by the accused in his statement of defence. PW1 confirmed that he responded to the noise from the flat and found the accused and the deceased quarrelling and separated them, this fact was admitted by the accused in his defence.

19. From the evidence tendered it is clear that the accused was placed at the scene by most of the prosecution witnesses. The accused himself in his defence admitted that there was a physical confrontation between him and the deceased but through his Advocate on record submitted that the confrontation was as a result of an act of provocation on the part of the deceased at a time when the accused was intoxicated.

20. The evidence tendered by the prosecution witnesses which stands unchallenged by the defence confirms and I find that the death of the deceased was caused by the accused person and dismiss his defence that the deceased hit himself on the knife he was holding taking into account the nature and the extent of injuries as confirmed by Dr. Ndegwa. Further the wife of the deceased who was with the accused at their house contradicted the evidence of the accused on how the offence was submitted. I believe the evidence of the wife of the deceased as she had no reason whatsoever to frame the accused.

21. The final issue for determination is whether the said death was caused by malice aforethought and whether the defence of provocation and intoxication as submitted by the defence is available to the same. It must be noted that provocation is one of the statutory defences available to an accused person charged with the offence of murder.

22. Section 207 of the Penal Code provides as follows:-

207. "When a person who unlawfully kills another under circumstances which 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 defined and before there is time for his passion to cool is guilty of manslaughter only."

23. Section 208 of the Penal Code defines provocation in the following terms:-

"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 the assault of the kind which the person charged committed upon the person to whom the act or insult is done or offered.

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

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

24. The Court of Appeal in the Court of Appeal at **Mombasa Criminal Appeal No. 118/2014 VMK v REPUBLIC** submitted by the defence stated that the definition of provocation requires that two conditions be satisfied for the defence to be made out namely:-

a) The 'subjective' condition that the accused was actually provoked so as to lose his self control and

b) The 'objective' condition that a reasonable man would have been so provoked and stated further that once the fact pointed to the provocation of the accused person the onus lay upon the prosecution to rebut the provocation.

25. The issue for determination is therefore whether the accused was provoked by the deceased and whether the accused did the act which caused the death of the deceased in the heat of passion caused by the said provocation. The evidence tendered before the court is that the accused having urinated in the common bathroom was confronted by the deceased and a quarrel ensued which generated into a fight and the accused and the deceased were separated only for the accused to go for a knife at his house and came back to the house of the deceased where he stabbed him and according to PW1 the accused later on threw down the said knife and attempted to run away from the scene.

26. I have contrasted the evidence of PW3 the wife of the deceased who was with him in the house to the extent that the accused came with his child and knocked onto their door and when the deceased responded to the knock and opened the door for the accused only for the same to attack him with a knife against the accused account and note that even if the deceased had provoked the accused earlier by asking him why he had urinated in the bathroom of which his attitude was that since he pays rent he had a right to urinate anywhere in the building it is my finding and hold that at the time of the attack there was no provocation as the earlier fight between them had ended and for the accused to go to his house and come back armed with a knife it is the finding of the court that the accused had not been denied power of self control but had premeditated the attack on the deceased. I therefore dismiss the defence of provocation having taken into account the prosecution evidence.

27. The other defence raised by the accused is that of intoxication that is to say that the accused in his drunken state defended himself as he was attacked by several men who had been called by the deceased as reinforcement to beat him up. In his defence the accused stated that he left his place of work and went to a club near the scene where he met his friend and they drank beer and since the club did not have toilets he decided to go to the flat which was two hundred meters away.

28. Was the accused therefore so intoxicated to the extent that he was unable to form the required malice aforethought? According to PW3 the accused was not so intoxicated since he knew that he was paying rent which gave him the right to urinate anywhere in the flat. He was

able to walk from the club to the flat and therefore find that the accused was cognizant enough to know what he was doing and knew thereafter what he had done by attempting to run away from the scene.

29. I therefore find and hold that the accused did not meet the requirement of Section 13 of the Penal Code which provides as follows:-

“13. (2) intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing.”

and therefore dismiss his defence herein.

30. Having taken into account the evidence tendered by the prosecution as analyzed herein together with the defence tendered by the accused I am satisfied and hold that the prosecution proved beyond any reasonable doubt all the elements of the offence of murder against the accused person and accordingly find the same guilty and convict him of the murder of **JESSE MBUGUA KARANJA** as charged.

DATED, SIGNED and DELIVERED at Nairobi this 22nd day of February, 2018

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Ogada for the State

Mrs. Makau for Onunga for the Accused

Accused present

Tabitha court clerk