



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL CASE NO. 7 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AMBROSE TARI.....ACCUSED**

**JUDGEMENT**

1. Ambrose Tari the accused person herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 20<sup>th</sup> February, 2014 at Mubwayo Village within Busia County, the accused person murdered Emmanuel Osimbo (hereinafter referred to as the deceased).

2. PW4 Hesborne Wanga Ojiambo and PW5 Joseph Juma Odikinyi were witnesses to the incident that led to the demise of the deceased. PW4 told the court that on the material day at about 2.00 p.m. he was at the home of the accused person weaving baskets with him when Taabu summoned the accused by his nickname Amedi. The witness alerted the accused that he was being called by his son. The accused stood up and walked for a short distance before picking a rod. Although he could not see Taabu, he knew his voice as he had schooled with him. After a short while he heard the noise of something falling followed by a someone saying: “you are killing me.” The voice of the person in distress was neither that of the accused or Taabu. Since he did not want to get involved, he left quietly. He later learned that the deceased had been killed.

3. During cross-examination, the witness stated that there was a land dispute between the accused person and the deceased. He said that he could not clearly see what was happening as his view was obstructed by a grass thatched house. He testified that he never saw the accused hit anyone. Re-examined, the witness stated that he saw the accused and Taabu assaulting the deceased.

4. On his part, PW5 stated that on the material day at about 3.00 p.m. he visited the accused person at his home to claim a debt from him. He found the accused weaving baskets with PW4. Shortly thereafter the accused’s son by the name Taabu summoned the accused who followed him to the back of the house. PW5 followed them and found the accused fighting with the deceased. The accused wrestled the deceased to the ground as the deceased cried. The accused was assaulting the deceased with a rod. The witness tried to intervene but the accused turned upon him and the witness took off. PW5 told the court that the accused and the deceased were not armed.

5. Asked why he did not record a statement immediately after the incident the witness stated that he did not do so as he was afraid.

6. PW6 Police Constable Paul Kamau Mwangi investigated the matter. He told the court that on 20<sup>th</sup> February, 2014 he was at Port Victoria Police Station when at about 3.45 p.m. he noted a report of creating disturbance in which one Ambrose Taabu had reported that the deceased had gone to threaten them. On the same day at about 5.20 p.m. the OCS received a report from the Assistant Chief of Makombe sub-location that the deceased had been killed at the home of Ambrose Taabu. They proceeded to the scene where they collected the body of the deceased. Initially it was reported that the deceased had been killed by a mob but his investigations revealed that it was the accused person and another who killed the deceased. He charged the accused with the offence of murder.

7. Upon cross-examination, PW6 revealed that at the time of reporting the offence of creating disturbance, Taabu had taken a panga and a spear to the police station. He admitted that although the panga and spear were in court, he never alluded to them in his evidence-in-chief and neither did he produce them as exhibits. He also stated that he had recorded in his statement that the deceased was killed by an irate mob. The witness also mentioned that the accused person had a land dispute with one Sylvester Ochami who belonged to the family of the deceased. The witness also conceded that he had photographs which he never referred to in his evidence-in-chief.

8. PW7 Dr. Angira Stephen Khadwa produced a P3 form and a post-mortem report filled by Dr. Ronald Machuso. The P3 form showed that the accused person was mentally fit to undergo trial. According to the witness, the injuries noted on the body of the deceased were burns on the left arm extending to the upper half of the back, deformed right arm with fractured humerus bone, maggots in the buttocks, collapsed left lung with bleeding in the chest cavity, ruptured spleen with excessive bleeding, bruising on the scalp with bleeding and bleeding on the

occipital region.

9. The medical officer who conducted the post-mortem report concluded that the cause of death was cardiopulmonary arrest due to blunt trauma to the abdomen with spleen rupture and extensive intra-abdominal bleeding. He formed the opinion that a blunt object caused the rupture of the spleen.

10. In his defence the accused person denied committing the offence with which he is charged. He stated that on the material day he was shelling maize in his house when the deceased went there while armed with a panga telling him he had gone for him. The deceased asked him why he had gone to record a statement so that he could be jailed. The deceased also told the accused that he had taken him (the accused) to the cell but he had escaped. The deceased advanced towards him but he retreated and went to the back of the house where he noted that the stick he had seen the deceased plant on the ground was actually a spear.

11. It was the accused's testimony that he grabbed the spear and told the deceased he would not run away and threatened to spear him. A neighbor raised alarm saying they wanted to kill each other. The accused told the deceased to put the panga on the ground or he would spear him. People responded to the alarm. They advised him to go and report the incident to the police. He took the panga and spear and went and reported the matter to the Assistant Chief at his home but found that he had gone to Mubwayo market.

12. The accused testified that he proceeded to Mubwayo market and reported the matter to Assistant Chief who told him to report the matter to the Chief who in turn directed him to take the spear and the panga to the police station. He delegated the duty of taking the spear and the panga to the police station to the son of his brother. According to the accused, the deceased had already left his homestead before he went to the home of the Assistant Chief.

13. The accused stated that when he investigated why the deceased had claimed that he had recorded a statement, he found that his brother had recorded a statement as a witness of a woman who had been assaulted by the deceased. The accused told the court that on 23<sup>rd</sup> February, 2014 he responded to police summons and upon arriving at the police station he was arrested and charged with the murder of the deceased. He denied knowing how the deceased met his death.

14. In written submissions filed before the court, the defence counsel urged the court to acquit the accused stating that the evidence adduced did not show that he killed the deceased and even if he killed the deceased, he did so out of provocation.

15. The State's position is that the evidence adduced proved that the accused murdered the deceased.

16. One of the questions for the determination of the court in this case is whether it is the accused person who inflicted the injuries that led to the death of the deceased. There is also need to determine whether the prosecution has proved malice aforethought.

17. In the case of **Racho Kuno Hameso v Republic [2014] eKLR**, the Court of Appeal stated that:

**“Turning to malice aforethought, we are alive to the fact that it is now trite that for the offence of murder to hold, there are three elements of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. These are: (a) Demonstration and or proof of existence of the death of the deceased and the cause of that death. (b) Proof that the accused committed the unlawful act which caused the death of the deceased and (c) proof that the accused had malice aforethought.”**

18. Counsel for the accused submitted that the prosecution did not establish that it is the accused who inflicted the injuries that led to the death of the deceased. According to counsel there was no clear identification of the accused.

19. Counsel for the State pointed out that PW4 and PW5 knew the accused person very well and the issue of identification is a non-issue.

20. The evidence of PW4 and PW5 was clear that they knew the accused prior to the incident. PW4 told the court he was weaving baskets with the accused. PW5 said he had gone to collect his debt from the accused. The evidence of the two witnesses indicated that they had previously engaged with the accused. He was a person known to them prior to the incident. They both saw him pick a rod and walk towards the back of his house as Taabu led him. PW4 heard something fall down and retreated as he did not want to get involved. PW5 followed the accused and found him fighting with the deceased. He tried to intervene but the accused chased him away. These two witnesses had no differences with the accused prior to the incident. I therefore find their evidence believable.

21. The accused's defence that he was alone in his house when the deceased arrived does not agree with the evidence of PW4 and PW5. His defence does not explain how a person who had left his compound by the time he went to look for the Assistant Chief was found killed in his compound. His evidence fails to explain the role of Taabu in the murder of the deceased. In short the evidence of the accused person cannot be believed in its entirety. PW5 was clear that the deceased was not armed therefore dislodging the accused's claim that the deceased was armed with a panga and a spear.

22. The evidence of PW4 and PW5 was that the accused picked a rod and joined his son Taabu in assaulting the deceased. That assault resulted in the rupture of the spleen of the deceased which resulted in his death. If the deceased was indeed armed as alleged by the accused, he would have inflicted injuries on the accused or his son. There was no evidence of such injuries. Likewise, there is no evidence that the injuries sustained by the deceased were inflicted by a sharp object.

23. In **Racho Kuno Hameso** (supra), the Court of Appeal in reference to Section 206 of the Penal Code held that:

**“From the above content, the law recognizes express, implied and constructive malice. It also appears that express malice is proved when it is shown that an accused person intended to kill, while implied malice is established when it is shown that an accused person intended to cause grievous bodily harm. However when it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery); or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm, he is said to have had constructive malice aforethought.”**

24. In this case, the accused must have known that his assault on the deceased could result in his death. He never cared about the consequences of his actions and he chased PW5 when he attempted to rescue the deceased.

25. The accused’s dramatized sending of a panga and a spear to the police station can only be deemed to have been an attempt to cover up the crime. Apart from PW6’s claim that he had initially thought the deceased was killed by an irate mob, there is no evidence whatsoever on the record to show that the deceased was killed by a mob. Even assuming that the deceased was indeed killed by a mob, it is evident that the accused was among the people who killed the deceased. The evidence placed before the court shows that the accused was responsible for the demise of the deceased.

26. There was the submission by the accused’s counsel that the doctor who declared the accused fit to stand trial was not a psychiatrist and was thus not capable of preparing a report on the accused’s mental status. On this, I find that no question was raised about the accused’s ability or inability to follow the court proceedings. At no time did the court note that the accused was incapable of proffering a defence. The question as to whether or not the doctor who examined the accused was a psychiatrist does not make much difference as the accused was not prejudiced in any way. The accused himself did not raise insanity as a defence. I thus find that the accused’s trial was regular and proper.

27. There was the submission by counsel that the accused was provoked. Much as the accused denied coming into contact with the deceased, this court, having found that the accused killed the deceased, is obligated to consider the defence vis-à-vis the evidence adduced.

28. Section 208 of the Penal Code provides for the ingredients of provocation thus:

**“208. Provocation defined**

**(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.**

**(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 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 committed upon the person by whom the act or insult is done or offered.”**

29. In the case at hand, there is no eyewitness as to how the fatal engagement between the accused and the deceased commenced. PW4 stated that he heard somebody fall down and walked away as he did not want to be involved. PW5 stated that he went and found the accused and the deceased fighting.

30. The evidence of PW5 points to the possibility of the deceased having started the fight. Although PW5 stated that neither the deceased nor the accused was armed, it is clear from the evidence that the deceased had a rod. The possibility that the deceased was armed with some weapon cannot be ruled out.

31. In the circumstances of this case, there is a possibility that the accused was provoked. As such, I do not find the accused guilty of murder. I nevertheless find him guilty of the lesser charge of manslaughter. In the circumstances, I convict the accused of manslaughter contrary to Section 202(1) as read with Section 205 of the Penal Code.

**Dated and signed at Malindi this 20<sup>th</sup> day of March, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

**Dated, signed and delivered at Busia this 19<sup>th</sup> day of April, 2018.**

**K. W. KIARIE,**

**JUDGE OF THE HIGH COURT**