



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO.3 OF 2016

REPUBLIC

VERSUS

HUSSEIN EDIN MAALIM

JUDGMENT

The accused was charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code Cap.63 Laws of Kenya. The particulars of the offence are that the accused on the 19.5.2016 at Yaballo trading centre of Moyale sub-county within Marsabit County murdered ABDI HASSAN IBRAHIM.

The state called six witnesses in support of its case.

PW1 SHOBA HASSAN EDIN informed the court that on the 19.5.2016 at about 1.30pm he was at Yaballo trading centre. The accused and the deceased differed and started quarrelling. The accused had a stick. The accused was knocked down and they were separated. After some time the accused took a machete and assaulted the deceased. He dropped the machete and was arrested. The deceased was taken to hospital but died. He did not know the cause of the difference between the accused and the deceased. On the material day he was together with the accused at a wedding ceremony before the incident.

PW2 HASSAN ADAN SALAT is the chief of Nana location. On the 19.5.2016 at about 1.30p.m he got a phone call that the accused had killed the deceased and members of the public wanted to lynch him. They went to the scene with a doctor and dispersed the crowd. They arrested the accused. **PW3 DR. BILL AMUNDE KHALUMI** was stationed at the Moyale hospital. He conducted a postmortem on 20.5.2016. the deceased had a cut wound on the left parietal occipital area. The skull was fractured and there was bleeding. He formed the opinion that the cause of death was hemorrhagic shock as a result of head injury. He also assessed the accused mentally and found him fit to stand the trial.

PW4 PC FREDRICK DIBONDO was stationed at the Moyale Police station. The case was reported on the 19.5.2016. They were led to the scene by members of public. He investigated the case and had the accused charged with the offence. **PW5 ABDINOOR BORA** is a community health worker. On the material day he saw the accused quarrelling with the deceased. He tried to intervene and put the accused in a room. Shortly the accused came out with a panga and attacked the deceased. Before attacking the deceased, the deceased dared the accused to attack him. The deceased started bleeding. Police were called to the scene and a doctor also went to the scene and found that the deceased had passed on. The accused was very angry.

PW6 is the investigating officer. He was based at the Moyale Police station. On the 19.5.2016 the case was reported. They went to the scene and found that the deceased had passed on. They collected a panga from the scene and a pair of sandals, vest, shirt, and a white scarf. A postmortem was conducted and the accused was charged with this offence. His investigations revealed that the accused and the deceased are relatives. They had no bad relationship.

The accused gave sworn evidence. He stated that the deceased was like his brother. On the 19.5.2016 they disagreed a bit and they were separated. He went to the market. While at the market the deceased approached him from behind and attacked him. The deceased held him by the neck and he fell down. He felt annoyed and tried to defend himself. He found a panga nearby and in bad luck aimed it on the deceased and cut him. It was very hot and the deceased started bleeding. He held the deceased trying to stop the bleeding. While holding the deceased the police were called and he was arrested. The deceased had hit him on the chest and he still feels the pain. The deceased hit him with a stick. He did not intend to kill the deceased but he was provoked when the deceased hit him. He just threw the panga at the deceased and cut him once. He was defending himself.

The issue for consideration is whether the accused murdered the deceased. The evidence on record show that the accused and the deceased were together on the 19.5.2016. PW1 saw the two together and they started quarrelling. The evidence of the prosecution is to the effect that

the two fought and the accused fell down. They were separated and the accused picked a panga and hit the deceased. In his defence the accused testified that it is true he hit on the deceased as the deceased had assaulted him. The prosecution evidence confirms that actually the deceased hit the accused on the material day. The accused fell down and in the process of defending himself picked a panga and cut the deceased once.

It is the accused evidence that the deceased was like his brother. They were together that day and the deceased approached him from behind, held him by the neck and assaulted him. After cutting the deceased with the panga the accused went to hold on the deceased in an attempt to stop the bleeding. According to the accused he did not intend to kill his friend. Section 203 of the Penal Code states as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

For one to be convicted on the offence of murder it has to be proved that he had malice aforethought. It is clear from the evidence on record that the accused had no intention of killing the deceased. The two were friends and according to the investigating officer they were relatives. Section 206 of the Penal Code give the instances where malice aforethought can be established. The accused caused the death of the deceased through an unlawful act. Although he was acting in self defence, it is clear that he used excessive force and in the process killed the deceased. I do find that the accused’s unlawful action falls within the Provision of Section 202 of the Penal Code which provides for the offence of manslaughter. It is the accused who caused the death of the deceased.

According to the accused he felt provoked when the deceased assaulted him. The defence evidence is to some extent in line with the prosecution evidence. The accused was attacked and he fell down. Section 208(1) defines provocation as follows:

The term “provocation” means and includes, except an 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.

Given the evidence on record I am satisfied that the deceased’s action of assaulting the accused did provoke the accused. The accused responded by taking a panga and cut the deceased. The incident occurred at the same time and immediately the accused acknowledged his mistake and started administering first aid on the deceased by way of trying to stop the bleeding. The Police went to the scene and arrested the accused who was still with the deceased. The accused did not run away from the scene and was waiting for assistance to take the deceased to hospital. PW3 produced the postmortem report. It is clear from the report that the deceased died because of excessive bleeding. The accused tried to stop the bleeding but could not.

In the end, I do find that the prosecution has not proved its case on the charge of murder Contrary to Section 203 as read with Section 204 of the Penal Code against the accused. However, the prosecution has proved the offence of manslaughter Contrary to Section 202 as read with section 205 of the Penal Code. The accused is not found guilty of the offence of murder as charged. The accused is however found guilty of the offence of manslaughter and is hereby convicted on that offence.

Dated, Signed and Delivered at Marsabit this 29th of May, 2018

S. CHITEMBWE

JUDGE