



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL (MURDER) CASE NO. 18 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

HENRY OBISA AUKO.....ACCUSED

JUDGMENT

1. **Henry Obisa Auko**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

On 7th July, 2017 at around 10.00 am at Kanyamedha village in Kisumu West Sub-County, within Kisumu County murdered Elizabeth Auko

2. The prosecution summoned a total of 11 (eleven) witnesses in support of its case while the defence called only the accused.

Prosecution Case

3. **PW 1Ezina Achieng Auko**, mother to accused and deceased stated that on 7.7.17 at about 6.00 am as she was leaving home in the morning to go to her place of business, accused called her back and threatened to either kill her or his sister Elizabeth. That as accused advanced towards her, she got onto a motor cycle and rode away. That at about 10.00 am, she was called back home and she found her daughter Elizabeth who had a deep cut on the neck lying dead outside her house. It was her evidence that accused had told her that he wished to build rental houses on her land and he had told him to buy his own land.

4. **PW 2 Simon Ochieng Auko**, brother to accused and deceased stated that on 7.7.17, he was assisting his sister Elizabeth to air maize when accused joined them. That after airing the maize, he went back to his house and left accused with Elizabeth. That shortly thereafter, he saw a crowd gathered outside his mother's house. That he rushed to the scene and found Elizabeth lying dead bleeding profusely. It was his evidence that on 6.7.17, accused had threatened to remove rubbish, referring to his mother, Elizabeth and his brother Vitalis whom he claimed did not want him to build rental houses on his mother's land.

5. **PW 3 Daniel Mwallo Adongo**, accused's cousin recalled that on 7.7.17 at about at about 10.00 am to 11.00 am, he was with accused, PW2, Elizabeth at PW1's home. That he then went away with PW2 and left accused with Elizabeth. That shortly thereafter, he saw a crowd gathered outside his mother's house. That shortly thereafter, he was called by a neighbor and upon returning home found Elizabeth lying dead bleeding profusely. It was his evidence that he had on 30.6.17 been informed by one Sophia that accused had threatened to kill Elizabeth.

6. **PW4 Rosemary Anyango**, a neighbor to PW1 testified that on 7.7.17 at about 10.00am, she heard her neighbor Sophia screaming that Elizabeth had been killed. That she rushed to the home of PW1 where she found Elizabeth lying dead outside her mother's house.

7. **Sophia Achieng Juma**, a neighbor to PW1 testified that on 7.7.17 at about 10.00am, he went to PW1's home and saw blood flowing from near the door. That the blood led her to the veranda where she found Elizabeth lying dead with an injury on her neck. That she screamed and PW4 rushed to the scene. That she later reported the matter to the area chief.

8. **PW6 Erick Odhiambo Deya**, a bodaboda rider recalled that on 7.7.17, she went to pick PW1 at 6.00 am from her home and he heard accused threaten to either kill her or his sister Elizabeth. That sensing danger, he asked PW1 to board the motor cycle and they left hurriedly. That later the same day, he learnt that Elizabeth had been murdered. That he returned to PW1's home and saw deceased's body which had a deep cut on the neck. **PW7 Morris Adongo Ndege**, accused's uncle was called to the scene after deceased died.

9. **PW8Dr. Robert Omollo**, of *Jaramogi Oginga Odinga Teaching and Referral Hospital* stated that he performed an autopsy on the body of **Elizabeth Atieno Aukoon** 11.7.17 and found it had a near amputation cut of the neck. The doctor formed an opinion that deceased died of cardiovascular arrest secondary to severe hemorrhage due to deep sharp object cut on the neck. He produced the postmortem form **PEXH.1**.

10. **PW 9 APC Tobias Okello Juma**, stated that on 7.7.17 at about 22.00 hours, accused went to Kagonyi AP Camp and reported that he had killed his sister. That he escorted accused to Kisumu Central Police Station for further investigations.

11. **PW10PC Juliana Mola**, the investigating Officer stated that on 8.2.17, she visited the scene of crime at Kanyamedho and saw blood stains behind PW1's house. That she re-arrested accused and escorted him to Maseno Police Station where she recorded witness statements and later caused him to be charged for the murder of the deceased.

12. **PW11 PC Chrispus Abula**, a scenes of crime officer visited scene of crime on 7.7.17 and took 6 photographs which he produced together with his certificate as PEXH. 2 (a) to (f) and 3 respectively.

The Defence Case

13. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put her on his Defence. Accused stated that he woke up early on 7.7.17 and went to his shop at about 6.00 am. He stated that he returned home at about 9.00 am where he found his sister Elizabeth, PW2 and PW3 with whom he discussed various family issues. That shortly thereafter, PW2 and PW3 went away and left him with deceased. It was his evidence that she quarreled with deceased regarding the shop that he was operating and he told her not to interfere with family issues since she was married. It was his evidence that deceased attempted to cut him with a panga but he took it away and slapped her with it on the neck fatally injuring her. He conceded that he gave himself up and was arrested and later charged. He also conceded that he had previously quarreled with his mother.

ANALYSIS AND FINDINGS

14. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngarivs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows:-

(a) **the death of the deceased occurred;**

(b) **that the accused committed the unlawful act which caused the death of the deceased; and**

(c) **that the accused had malice aforethought.**

(a) The death of the deceased

15. The death of the deceased has been proved by the PW1, 2, 3, 4, 5, 6 and 7 who saw deceased's body with a deep cut on the neck and by the postmortem form **PEXH. 1** produced by PW8 that confirms that deceased *died of cardiovascular arrest secondary to severe hemorrhage due to a deep sharp object near amputation cut of the neck.*

(b) Proof that accused committed the unlawful act which caused the death of the deceased

16. Accused has conceded that he committed the unlawful act which caused the death of the deceased. From the foregoing; I find that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which constitutes the '*actus reus*' of the offence.

(c) Proof that deceased had malice afterthought

17. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. The ingredients of murder were explained in the case of **ROBA GALMA WARIO VS REPUBLIC [2015] eKLR** where the court held that;

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

18. Malice aforethought was defined in the following cases;

(a) **NZUKI VS REPUBLIC [1993] KLR 171** where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- **Intention to cause death**

- **Intention to cause grievous bodily harm**

- **Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.**

(b) In the case of DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR) cited in the case of REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR, Bosire, O'kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

19. Accused raised the issue of self defence saying that he was defending himself after deceased threatened to cut him with a panga. The issue of self defence was discussed in the case of Ahmed Mohammed Omar & 5 Others v Republic [2014] eKLR where the court held as follows;

“What are the common law principles relating to self defence” The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in PALMER VS R [1971] AC 818. The decision was approved and followed by the Court of Appeal in R VS McINNES, 55 Lord Morris, delivering the judgment of the Board, said:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

20. The Court of Appeal further held 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.”

The accused said he took the panga from the deceased, slapped her with it causing her the fatal injury. The question is whether the accused faced imminent danger to justify using the force that he applied in hitting back.

21. In assessing “reasonableness” of the act of the accused, it is important to consider the circumstances of the case. In the Court of Appeal case of Njeru v Republic ... [2006] 2 KLR 46, the court in dealing with self defence held:-

1. Killing of a person can only be justified and excusable where the action of the accused which caused the death was in the course of averting a felonious attack and no greater force than was necessary was applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.

2. In this case, it was the duty of accused to show that at the time of the cutting deceased’s neck, he was in the course of averting a felonious attack and that no greater force than necessary was applied. Accused was bound to show that he was in immediate danger or peril arising from a sudden and serious attack by the deceased.

3. By virtue of Section 17 of the Penal Code, the principles of the English common law were applicable in determining criminal responsibility for the use of force in defence of the person or property. Under those principles, a person who attacked may defend himself but he may only do what was reasonably necessary. Everything would depend on the particular facts and circumstances.

22. I am aware that where the accused raises defences of self defence or provocation, he does not thereby assume any burden of proving his innocence. It is for the prosecution to prove that the accused was not provoked or that he did not act in self defence. In other words the prosecution must disprove the defences of provocation and self defence and it must discharge this burden beyond reasonable doubt (See Joseph Kimanzi Munywoki Vs Republic, Cr. App. No. 31 of 2003 CA Nairobi), [2006] eKLR). In the case of Beckford Vs R [1988] AC 130 Lord Griffiths (at p.144) rendered himself thus on self-defence:-

“It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful.”

23. I have considered the injuries occasioned to the deceased. The attack on her was so vicious that one would really wonder whether that was done by way of self defence. Evidence that accused had threatened to kill either his mother or the deceased on the morning of the day deceased was murdered is well corroborated by PW1 and PW6. The evidence on record points to accused as an aggressor who sought out the deceased and engaged her in a quarrel regarding an earlier dispute relating to some shop in their mother's compound. I am not persuaded by the evidence that the appellant acted in self defence. His action was out of proportion. The attack on deceased and the near amputation of her neck leaves no doubt in the mind of the court that accused must have known that the act of cutting the deceased on the neck with a sharp instrument would cause her grievous harm or death.

24. In my considered view, the prosecution evidence is overwhelming and effectively dislodged the defence offered by the accused. I am therefore satisfied that malice aforethought has been established in terms of Section 206(b) of the Penal Code.

Disposition

25. Consequently, I have come to the conclusion that the state has proven its case beyond reasonable doubt. Accused is found **GUILTY** of the offence of murder and he is accordingly convicted.

DATED, DELIVERED AND SIGNED THIS 26th DAY OF July, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Accused - Present

For Accused - Mr. Onyango/Mr. Maua

For the State - Ms. Barasa