



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 78 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

SAMWEL GACHURU NDEGWA.....1ST ACCUSED

PETER NDEGWA GACHURU 2ND ACCUSED

PETER NDEGWA KARIUKI 3RD ACCUSED

JUDGMENT

The three accused persons **SAMWEL GACHURU NDEGWA** (hereinafter referred to as the 1st accused), **PETER NDEGWA GACHURU** (hereinafter referred to as the 2nd accused) and **PETER NEGWA KARIUKI** (hereinafter referred to as the 3rd accused) are all jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the 7th day of August, 2013 at Mbora Village Mirangine Location, Mirangine District, within Nyandarua County, jointly murdered SAMSOM WACHIRA WAHOME”

All three accused persons pleaded ‘**Not Guilty**’ to the offence. Their trial commenced on 2/12/2015 and the prosecution led by the learned State Counsel called a total of seven (7) witnesses in support of their case.

PW1 EUNICE NJOKI was the mother of the deceased. She told the court that the three accused persons were all known to her as they were her relatives through marriage. The 1st accused was her brother-in-law while the 2nd and 3rd accuseds were both her nephews. The 2nd accused was a son to the 1st accused. It also became apparent from the evidence adduced that there existed had blood between the family of **PW1** and the family of the accused person on account of a land dispute.

PW1 told the court that on 7/8/2013 at 2.00pm the deceased came home complaining that the 2nd and 3rd accuseds had abused him. The deceased then left to go and confront the two. **PW1** followed him to the farm where the three persons were cultivating. **PW1** claims that upon arrival at the farm the three accuseds jointly attacked the deceased using their jembes as weapons. The deceased fell down in the shamba. He was rushed to a nearby clinic and later to Nakuru PGH Hospital where he was admitted. The deceased eventually succumbed to his injuries three days later.

The incident was reported to police who commenced investigations. The three accused persons were eventually arrested and charged. The police also searched the house of the 2nd accused from which they recovered two jembes which were produced as exhibits **P.exb 1** and **P.exb 2**. All three accused were then charged with this offence of murder.

At the close of the prosecution case the three accused were found to have a case to answer and were placed onto their defence. They gave sworn defences in which each denied the charge. This court must now analyse the evidence on record to determine whether the charge of murder has been proved beyond reasonable doubt.

The offence of murder is defined in Section 203 of the Penal Code, Cap 63, Laws of Kenya as follows

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

The prosecution must prove the following key ingredients of a murder charge.

1. The fact as well as the cause of death of the deceased.
2. That it was the accused who by an unlawful act or mission caused the death of the deceased.
3. That said unlawful act or omission was committed with malice aforethought

On the fact of the deceased's death there can be no controversy. **PW1** the mother of the deceased stated that after the assault her son was admitted at Nakuru PGH Hospital where he died. She identifies the deceased as **'Samson Wachira Wahome'**.

Evidence regarding the cause of death was tendered by **PW2 DR. TITUS NGULUNGU**, the government pathologist who conducted the autopsy on the body of the deceased **PW2** told the court that he noted a round laceration on the head of the deceased. Upon an internal examination of the head **PW2** noted a laceration on the scalp and fragment of the skull. He formed the opinion that the cause of death was **'severe head injury attendant by extensive skull fracture epidural haematoma and brain lacerations and contusion due to blunt force trauma to the head'** **PW2** filled an signed the post-mortem report which he produced as an exhibit **P. exb 3**.

Having proved the fact as well as the cause of death, the prosecution must tender evidence to prove that it was the three accused person who fatally attacked the deceased.

The only eyewitness to the incident was **PW1**. Being the mother of the deceased she could not be said to be an independent and/or objective witness. **PW1** told the court that the deceased came home complaining that his two cousins (2nd and 3rd accuseds) had abused him. He left to go out to confront them in the shamba. **PW1** says that she followed the deceased.

The testimony of **PW1** is that the 2nd and 3rd accuseds attacked the deceased using the jembes they were using in the farm whilst the 1st accused came out of his home and also attacked the deceased using a panga. Firstly if this version given by **PW1** was to be believed then it would be expected that the deceased would have had multiple cuts and bruises all over his body. However **PW2** the pathologist was categorical that he only noted one injury on the head of deceased.

Secondly the jembes allegedly used in the attack were recovered that very day in the house of the 2nd accused. None of the jembes had any blood stains on them which is contrary to what would have been expected if they had been used in assaulting the deceased.

During cross-examination it was put to the witness that it was her son the deceased who caused the altercation by assaulting the 1st accused. **PW1** vehemently denied that the deceased had attacked anyone.

However, **PW2 MARTIN KARANJA MUHERE** who was the area chief told the court that upon arrival at the scene he was told by the 2nd accused that the deceased had assaulted the 1st accused. **PW3** also told the court that when he went to the police station he found the 1st accused making a report about having been assaulted by the deceased. If the 1st accused and his sons had truly launched a viscous attack on the deceased as alleged by **PW1** then it is highly unlikely that he would have gone to the police station. **PW3** further confirms that he saw that the 1st accused had a wound under his eye and he also confirms that the 1st accused did go to hospital to seek treatment for his injury.

PW7 INSPECTOR JOEL KOECH was the investigating officer. He too confirmed that the 1st accused did go to the police station to report an assault on his person. **PW1** booked that report. Under cross-examination **PW7** states that he saw blood-stains on the shirt of the 1st accused. This indicates that 1st accused had injures. All this evidence gives credence to the allegation by the defence that it was the deceased who went out to attack them in their farm. I therefore find that **PW1** was not an entirely honest witness. Her evidence had clearly been slanted in order to favour the deceased who was her son and to implicate the 3 accuseds.

Similarly I find that the evidence of the chief **PW3** was also not entirely objective **PW3** told the court that he recovered next to the deceased in the shamba the knife which had been used by the deceased to attack the accused persons. **PW3** claimed that he handed over that knife to the OCS Mirangine Police Station. No knife was produced in court as an exhibit. **PW4 JAMES GIKONYO** a neighbor who went to the scene however contradicted **PW3** when he testified that he saw no weapon at all next to the deceased. **PW6 PC JOHN MWANGI** who visited the scene only talked to having recovered two jembes. He did not mention any knife. **PW6** stated under cross-examination

“I did not see any knife allegedly recovered at the scene. I did not see the Assistant Chief with any knife. I did not see the Assistant Chief hand over any knife to the OCS”.

PW7 the investigating officer also denied the fact that any knife was recovered. It is clear that **PW3** who was the area chief had lied to the court in this regard/ it is quite possible that **PW3** had taken sides with one of the protagonists and his evidence therefore was slanted to suit the side which he favoured.

From the testimony of the witnesses it is clear that this incident involved a fight over the long standing land dispute between the parties. The deceased went out to the farm in order to confront the accused for abusing him. The deceased in the process assaulted and injured the 1st accused.

From the evidence this was an all our fight between the parties. The deceased cannot be said to have been entirely blameless in the incident. Indeed **PW7** the investigating officer confirms the 1st accused was also injured in the commotion.

I therefore reject the evidence of **PW1** that all the three accuseds attacked the deceased. I find no evidence that 1st or 3rd accused attacked the deceased. Indeed 1st accused was himself a victim of an assault by the deceased. I therefore acquit the 1st and 3rd accused of the charge of murder.

The 2nd accused in his defence confirmed that he did indeed hit the deceased. However the 2nd accused explained that this was in reaction to the assault by deceased on the 1st accused who was his father. The 2nd accused in his defence stated

“I had not planned to kill the deceased. I only reacted when he hit my father. My father’s face was full of blood. When I saw this I do not know what came over me and I hit the deceased with my jembe...”

Therefore the 2nd accused pleads that he was provoked into acting as he did. Section 208(1) of the Penal Code defines provocation as

“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 in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation or in the relation by matter 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”.

I have no doubt that an assault on ones father amounts to an act of provocation. No son would stand by and watch his elderly father being assaulted without reacting. The action of the deceased in assaulting the 1st accused caused the 2nd accused to temporarily lose control. Since the incident occurred in the shamba the 2nd accused in the struck out with what he had in his hand which was his jembe thereby fatally injuring the deceased.

Section 207 of the Penal Code provides that

“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 herein under defined, and before there is time for his passion to cool is guilty of manslaughter only”

I find that the 2nd accused acted in the heat of the moment before there was time for his passion to cool. I am satisfied that the 2nd accused was provoked into acting as he did.

For the above reasons I find that no malice aforethought has been proved. There was no premeditation involved.

Accordingly I acquit the 2nd accused of this charge of murder and in its place I substitute a conviction for manslaughter under Section 202 of the Penal Code.

Dated and delivered in Nakuru this 26th day of May 2017

Read in open court.

Ma Alwala holding brief for Mrs Nenda

Mr. Chigiti for DPP

Maureen A. Odero

Judge

Mr. Motende – Treat as a 1st offender.

Court – Mention on 31/5/2017 for mitigation. Accused 2 to be remanded in custody.