



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 53 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE MUREITHI GACHUGU.....ACCUSED

JUDGMENT

The accused **GEORGE MUREITHI GACHUGU** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the 5th day of July 2011 at Maina village in Nyahururu municipality within Laikipia County, murdered, BERNARD NYAMASYIO NZIOKA”

The accused entered plea of ‘**Not Guilty**’ to the charge. His trial commenced before **Hon. Lady Justice Hellen Omondi** on 3/11/2011. The Honourable Judge heard the evidence of the first seven (7) prosecution witnesses after which she was transferred to Bungoma High Court. I took over the case and I heard the evidence of the remaining two (2) witnesses. A total of nine (9) witnesses testified in this matter.

PW1 RAHAB MUTHONI MUREITHI was the wife of the accused. She told the court that on the evening of 5/7/2011 at 8.30pm the accused came home. The family had supper together. Thereafter the accused left the house to go and buy cigarettes. **PW1** states that she later heard a commotion outside the plot. When she went out to check she found the body of the deceased lying dead outside.

PW2 CRACE MUSEMBI is the wife of the deceased. She told the court that on the same day of 5/7/2011 the deceased came home very drunk. She served him supper after which the deceased went out to go to the toilet. Later **PW1** was called out by neighbours where she found the body of her husband lying dead outside. The incident was reported to police who came and collected the body. The police commenced investigations into the matter after which the accused was charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused opted to give a sworn defence in which the accused stated that he stabbed the deceased in self-defence in an attempt to fend off a vicious attack to his own person.

This court must now analyse the evidence on record with a view to determining whether the prosecution have proved this charge of murder beyond a reasonable doubt as required by law.

The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya in the following terms

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

Therefore in order to prove this charge the prosecution must adduce evidence sufficient to prove beyond reasonable doubt the following key ingredients of murder.

- (i) The fact as well as the cause of death of the deceased
- (ii) That the deceased met his death due to an unlawful act or omission on the part of the accused – this forms the ‘**actus reus**’ of murder
- (iii) That said unlawful act or omission was committed with malice aforethought – the ‘**mens rea**’ for murder

Regarding the fact of the death of the deceased there can be no controversy. **PW2** the wife of the deceased confirms having found the body of her husband lying dead outside their house. She identifies the deceased as **'Bernard Nyamasyo Nzioka'**

Evidence on the cause of death was tendered by **PW5 DR. WAITI KARIUKI** who produced the post-mortem report in respect of the autopsy conducted on the body of the deceased. Upon external examination the body of the deceased was found to have several penetrating stab wounds. Upon internal examination hemorrhage was noted. The cause of death was opined to be **'harmoraghic shock caused by excessive bleeding sustained from multiple cut wounds inflicted by a sharp object'**. This was expert medical evidence and has neither been challenged nor controverted by the defence. I therefore find as a fact that the deceased met his death due to multiple stab wounds to his person.

The next question is whether it was the accused who fatally stabbed the deceased. There was no eyewitness to any fight and/or commotion between the accused and the deceased. Both **PW1** and **PW2** were inside their respective houses at the material time and saw nothing. Likewise neither **PW2 PAUL MUNYUA MUIRURI** or **PW4 JARED AMOLO NYANGAU** saw what may have occurred between the accused and the deceased that night. Both were neighbours who only came home to find the dead body lying within the plot. Thus there is no witness who is able to state with certainty that it was the accused who stabbed the deceased causing the fatal injuries.

Be that as it may the accused in his sworn defence admitted that he was involved in an altercation with the deceased on the material night during which he stabbed the deceased.

PW7 CHIEF INSPECTOR MARTIN KORONGO told the court that he recorded a statement under enquiry from the accused which he produced as an exhibit **P. exb 5**. The accused through his lawyer **MR. KANYI** raised no objection to the production of that statement. In the statement the accused admits that he is the one who stabbed the deceased on the night in question. Therefore on the basis of his own admission, I find that it was the accused who fatally stabbed the deceased.

Having proved the *actus reus* the prosecution must prove that the accused acted with malice aforethought. The accused pleads that he acted in self-defence. The accused explains that on that night after buying cigarettes from the kiosk, he returned to the plot and decided to go to the toilet. As the accused left the toilet he met the deceased standing there. The deceased abused the accused calling him **'mbwa hii' ie 'This dog'**. The deceased then jumped on the accused and pulled out a knife with which he stabbed the accused severally and felled him down. The accused struggled with the deceased and wrested the knife from him. He then stabbed the deceased as he lay on top of him. Thus the accused pleads that he only stabbed the deceased due to an unprovoked attack on his person and in an effort to protect his own life.

Self defence is a well known and accepted defence to a charge of murder. Section 17 of the Penal code of Kenya provides that

"Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of persons or property shall be determined according to the principles of the English Common Law".

The position of the English Common Law regarding **'self-defence'** is to be found in the case of **REPUBLIC Vs Mc INNES 55 Cr. App R. 551** where it was held

"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 so, but may only do, what is 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 a 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 by 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 this case the accused has told the court that the deceased abused and attacked him without any provocation from him at all. The accused in his defence narrated the events of that night. In his statement to the police **P. exb 5** the accused gave that very same narration. This statement was recorded on 11/7/2011 a few days after the incident when events were still fresh in the mind of the accused. The accused has given the very same narration. He had not deviated from his story at all. This persuades me that the accused's defence was a truthful account of the events of that night.

The accused told the court that it was the deceased who had the knife which he pulled out and he used it to stab the accused severally. **PW8 CORPORAL COSMAS NGUMBI** confirms that he questioned one **'Samuel Ndungu'**, the owner of the kiosk from where accused had purchased cigarettes. The said **'Samuel Ndungu'** told the police that the accused ran to his kiosk bleeding and asked for money to enable him go to hospital. **PW8** further confirms that after the incident he found the accused admitted at Nyahururu District Hospital with three (3) stab wounds.

Finally on this point **PW8** confirms that his investigations revealed that it was the deceased who had a knife which he used to stab the accused. **PW8** states that eyewitnesses informed him that the accused managed to overpower the deceased and snatch the knife from him. These eyewitnesses later declined to record statements with the police. The doctor has produced a P3 form in respect of a medical examination conducted upon the accused **P. exb 2**. The P3 indicates that the accused had multiple injuries including stab wounds to the abdomen, shoulder and leg. The injuries were said to have been caused by a sharp object such as a knife.

The accused has also produced in his defence a copy of his discharge summary from Nyahururu District Hospital. **P. exb 1**. The document indicates that the accused was admitted in the hospital on 6/7/2013 at 2.30am which was a few hours after the incident, and he was discharged on 7/7/2012 a day later.

The evidence available corroborates the accused defence in all material respects. There is nothing to disprove this defence since no witness has given a contrary account of the events of that night. As stated earlier neither **PW1, PW2, PW3** or **PW4** saw what happened. The evidence of **PW8** lends credence to the defence. The accused has proved that he suffered injuries for which he sought and received treatment in hospital. The attack on the person of the accused was not of a minor nature. The injuries which he sustained were severe and life-threatening. The accused stated that the deceased had felled him down and lay on top of him stabling him. As such the accused had no opportunity to escape or run away. The accused clearly acted in defence of his person and his life. Indeed had he not so acted he may not have lived to tell the tale. His reaction was in my view reasonable given the vicious nature of the attack that he faced. I find that the accused did not act deliberately with malice aforethought in order to kill the deceased. I am satisfied that the accused acted in self defence. Self defence when proved as in this case negates the *men rea* for murder.

In **AHMED MOHAMED OMAR & 5 OTHERS Vs REPUBLIC [2014]eKLR** the Court of Appeal observed as follows

“In ROBERT KINUTHIA MUNGAI Vs REPUBLIC [1982-88] I KAR 611, the court held that it is a doctrine recognized in East Africa that excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter. But if the defence of self-defence is upheld, a conviction for murder cannot be sustained”. (my own emphasis)

In this case the accused has satisfied this court that he acted due to an unprovoked attack on his person by the deceased. The accused has proved that he acted in self-defence and I find that the nature of force applied by the accused was reasonable given the nature of the threat to his life. I therefore find that *mens rea* has not been proved and the charge of murder cannot stand. In view of this court’s finding that it was the action of stabling by the accused which led to the death of the accused. I convict the accused on the lesser charge of manslaughter contrary to Section 202(1) Penal Code.

Dated in Nakuru this 30th day of June, 2017

Mr. Kanyi for Accused

Ms Nyakira for DPP

Maureen A. Odera

Judge