



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL CASE NO. 4 OF 2016**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**B N M.....ACCUSED**

**JUDGMENT**

1. As a result of a confrontation between **BNM**, the accused person herein, and **Anthony Maina Makori** (hereinafter referred to as **'the deceased'**) on 14/01/2016 at Kwibu village in Kuria West District within Migori County, the deceased sustained some injuries and was rushed to hospital. He passed on as he was undergoing treatment.
2. The accused person was then arrested and charged with the murder of the deceased before this Court. He denied the charge and hearing of the case was ordered.
3. The circumstances under which the deceased died and what followed thereafter were brought out by the six prosecution witnesses who testified before this Court. The witnesses are one **Judith Kwamboka Samwel** who testified as **PW1**, the husband to PW1 one **Samwel Wambura Rioba** who testified as **PW2**, **Evans Gimaino Rioba** who had employed the deceased as a worker in his farm testified as **PW3**. **Thaddeus Wambura Rioba** testified as **PW4**, the Doctor who conducted the post mortem examination on the deceased one **Dr. Sammy Mwatela Ruwa** testified as **PW5** and the Investigating Officer **No. 233726 Insp. Joshua Nyambu Shoka** testified as **PW6**.
4. On 14/01/2016 as PW1 was inside her house she heard the deceased and the accused person quarreling. As the quarrel intensified, PW1 went outside and saw the two. The deceased carried a hoe (jembe) while the accused person had a panga. The deceased was abusing the accused person by telling him to get treated for HIV/AIDS as he was ailing. The deceased then attacked the accused person using the jembe he had but the accused person evaded the jembe and swiftly attacked the deceased using the panga. He cut the deceased on the side of the head and the deceased fell down. The accused person then left the scene.
5. As people gathered, PW1 called her husband, PW2, who was a motor cycle rider who came and took the deceased to Makongoroto Health Centre for medical intervention. As the deceased was being treated, he passed on. The body was taken to Pastor Machage Memorial Hospital Mortuary pending further police action. Since it was late in the night, PW2 and PW4 reported the matter to Nyamaharaka Police Post the following morning. PW2 and PW4 then saw the accused person near the Police Post who was limping and walking using a stick. They informed him that the deceased had died and the accused person wept. PW2 used his motor cycle to take the accused person to the Police Post where he was arrested and placed in custody.
6. PW3, a motor cycle rider as well and the employer of the deceased, learnt that the deceased was injured from his wife **Everlyne Robi** (not a witness) who called him at around 05:00pm. PW3 rushed to PW1's homestead and learnt that the deceased had been taken to hospital. He rushed there and saw the deceased undergoing treatment. When the deceased died, PW3 accompanied PW2 and took the body to Pastor Machage Memorial Hospital Mortuary for preservation.
7. PW4 was inside a house of his brother's son when he heard screams from the neighbourhood. He rushed there and found the deceased having sustained head injuries and lying on the ground. The deceased was bleeding profusely and could not speak. He accompanied PW2 to hospital and when the deceased died and was being taken to the Mortuary aforesaid, PW4 returned to his home. He recorded his statement with the police later on.
8. PW5 conducted the post mortem examination on the body of the deceased on 19/01/2016 on request from PW6. The body was identified by **James Omuga Orocho** and **Golfer Ondieki**. PW5 observed that the body had stiffened and fisted. There was a wound on the right occipital region measuring about 6cm long and a visible skull bone. Internally, there was a closed head fracture measuring 6cm on the right occipital region. PW5 opined that the cause of death was due to haemorrhagic shock due to the scalp wound on the right side of the head which was caused by a sharp object. He filled in a Post Mortem Report and signed it which he produced as an exhibit.

9. Investigations were conducted by PW6 from Isebania Police Station who visited the scene and recorded statements from witnesses. He witnessed the post-mortem examination and also accompanied the accused person to Migori County Referral Hospital for mental assessment where the accused person was found fit to stand trial. He then preferred the information against the accused person and charged him.

10. The prosecution then closed its case and by a ruling of this Court, the accused person was placed on his defence. He opted to give an unsworn defence without calling any witness. Whereas the accused person admitted that there was a fracas between him and the deceased and that the deceased was injured in the process he denied that he intentionally caused the death of the deceased. He contended that it was the deceased who for no apparent reason started abusing him as he kept quiet. That the deceased then attacked him with the jembe he had but he evaded it and it cut the ground so deeply. That the deceased attempted to cut him again and the accused person got hold of the deceased and they struggled. In the process the deceased was cut by the panga the accused person had. He contended that the fight was so fierce and did not have any opportunity to escape as had he attempted so, the deceased would have injured him on the back. The accused person stated further that he never provoked the deceased at all neither did he intend to harm him. He acted in self-defence, he so said.

11. At the close of the defence case, the Defence Counsel indicated that he was intent on filing written submissions and the Court granted him 14 days to do so but failed to. The matter was fixed for judgment.

12. It is on the basis of the above evidence that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder.

13. The offence facing the accused persons is an information of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

**(a) Proof of the fact and the cause of death of the deceased;**

**(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;**

**(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.**

I will now consider the above issues as follows: -

**(a) Proof of the fact and cause of death of the deceased:**

14. As to whether the deceased died, all the prosecution witnesses so confirmed. The Court therefore finds as a fact that indeed the deceased herein died.

15. On the cause of the death of the deceased, PW5 produced a Post Mortem Report which he prepared upon conducting the examination. The said report gave the possible cause of death of the deceased to have been due to haemorrhagic shock due to the scalp wound on the right side of the head which was caused by a sharp object. Since there is no contrary evidence this Court concurs with that medical finding. The other limb is likewise answered in the affirmative

**b) Proof that the death of the deceased was caused by the direct consequence of an unlawful act or omission on the part of the Accused:**

16. I will now turn to the second ingredient. There is no doubt that the deceased died out of the injury he sustained in the process of the confrontation with the accused person. The circumstances under which the deceased sustained the injuries have already been stated above. The accused person takes the position that he acted in self defence.

17. Does therefore the defence of self-defence hold in such circumstances? In dealing with the issue I will first start with a look at the law. **Section 17** of the **Penal Code** Chapter 63 of the Laws of Kenya states as follows:

***"17. 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 person or property shall be determined according to the principles of English Common Law."***

18. The common law position has evolved with time from an objective approach to a subjective one. The Court of Appeal in **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** dealt with the aspect of self-defence in great detail. I fully concur with the analysis in that decision not only because the decision is binding upon this Court but also given that the legal position was rightly and clearly settled. I will herein below reproduce how the Court of Appeal expressed itself in allowing the appeal on the ground that the appellants acted in self-defence thus: -

***"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. But in DPP v MORGAN (supra) it was held that:***

***".....if the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken***

view of facts, whether or not the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

**In BECKFORD v R (supra) it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.**

**In R. v WILLIAMS [1987] 3 ALL ER 411, Lord Lane, C.J. held:**

“In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistaken was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”

**It is acknowledged that the case of DPP v MORGAN (supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also SMITH AND HOGAN'S CRIMINAL LAW, 13<sup>TH</sup> Edition, Page 331.**

**Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test.'**

19. It is not in doubt that the deceased is the one who first attacked the accused person. He attempted to cut him with a jembe but the accused person was fast enough to evade it. The jembe cut the ground so deeply. According to the accused person the deceased made a second attempt to cut him, but PW1 who was an eye-witness only saw the deceased attempt to cut the accused person once. I have weighed the evidence of the accused person against that of PW1 on what exactly happened at the scene. I will agree with the evidence of PW1 which was on oath unlike that of the accused person. Further, I am aware of the dangers of relying on a single witness accounts and I have equally warned myself. I observed the demeanor of PW1 as she testified and she was straight-forward. Her evidence is credible and was not shaken on cross examination. I therefore hold that when the deceased attempted to cut the accused person and the accused person evaded the attack, the accused person in turn quickly retaliated the attack on the deceased. The accused person was therefore not in such a state of affairs that had he attempted to run away the deceased would have cut him on the back. Alternatively, the accused person would have easily restrained the deceased after he evaded the attack.

20. By applying the subjective test and in taking the particular circumstances of this case, this Court is not convinced that the accused person acted in self-defence. Whereas the accused person was attacked by the deceased first, he was not in such a danger that called him to act in self defence. There was an opportunity for the accused person to have easily taken off and avoided further confrontation. The defence does not therefore come to the aid of the accused person as it is so remote and far fetched. I now echo the holding in the case of **Palmer v. Regina (1971) All ER 1077** where the Court stated that:

**“Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence.”**

21. I therefore find that it was the accused person, who by an unlawful act, caused the death of the deceased.

c) **Proof that the said unlawful act or omission was committed with malice aforethought: -**

22. On the third ingredient, I have no hesitation in finding that no malice aforethought was proved in this case. Both the deceased and the accused person had not met that day. There had been no prior confrontation between the accused person and the deceased. The deceased was also the one who started the confrontation. PW1 alluded to that as well as the accused person. Further, the accused person only cut the deceased once after the deceased attacked him with a jembe. I find that the attack was not premeditated.

23. The foregone finding is guided by **Section 206** of the **Penal Code** which defines '**malice aforethought**' and the following decisions of the Court of Appeal. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

**“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-**

**i) The intention to cause death;**

**ii) The intention to cause grievous bodily harm;**

**iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.**

*It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions (1975)AC 55*". (emphasis added).*

24. In the case of **Nzuki vs. Republic (1993)KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed that: -

*“There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”*

25. The foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, it is clear that the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

26. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

27. These are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 27<sup>th</sup> day of July 2017.**

**A. C. MRIMA**

**JUDGE**