



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO. 54 OF 2015
(FORMERLY NAKURU HCCRC NO. 67 OF 2014)

REPUBLIC.....PROSECUTOR

-VERSUS-

PETER KIMANI NDICHU alias CHOMELEY.....ACCUSED

J U D G M E N T

1) **Peter Kimani Ndichu** the Accused herein, and a fellow villager **Francis Ng'ang'a Kamau** (the deceased) spent the better part of the evening of 29th May 2014 imbibing alcohol at "Pub 110" in Heni Village. The said bar was owned by **Paul Mwangi Ngarachu (PW1)**. **PW1** was also at the bar for some time on the said evening. He left early but realizing he had forgotten his phone **X-Tigi (black) Exhibit 1**, he sent instructions to his bar attendant **Pauline Wangui Ngugi (PW8)** to send it to his home through the Accused. She complied.

2) The Accused and deceased left the bar about the same time. The deceased's wife **Damaris Wanjiru (PW2)** was drawn outside the house by the voices of the Accused and deceased who were quarreling and fighting over a phone outside her home. The Accused was uttering words to the effect: "**Bring the phone**". The deceased then ordered the Accused to leave, pushing him off. There was a scuffle.

3) In a moment, the deceased fell down having sustained severe wounds to the right thigh and penetrating stab wound to the chest. He died almost instantly. The Accused escaped and jumped into a dam not far from the scene. The villagers who came to the scene following the alarm raised by **PW2** pulled him out. He was handed over to police. Recovered at the scene was the murder weapon, a dagger (**Exhibit 3**), the Tigi phone (**Exhibit 1**) and damaged a Techno phone.

4) The Accused was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars state that on the night of 29th day of May 2014 at around 10.00pm, at Heni village, within Nyandarua County murdered **Francis Ng'ang'a Kamau**.

5) The prosecution case through eleven witnesses is that the Accused and the deceased having disagreed over a phone while outside the deceased's house engaged in a fight at the end of which the deceased was stabbed to death.

6) The Accused by his unsworn defence said that he and the deceased earlier joined up and had drinks at **PW1's** pub even though they had gone there separately. He got drunk. He was given **PW1's** phone (**Exhibit 1**) by the attendant to take to **PW1**. That he and the deceased left together for home. The Accused fell at some point whereupon the deceased offered to carry the phone **Exhibit 1** and the

Accused's phone which had fallen out.

7) That on reaching the deceased's gate the Accused demanded the phones but the deceased denied having them and threatened him. An argument arose and the deceased dashed into his house and came out armed with the dagger threatening to stab the Accused.

8) The Accused said that the deceased got stabbed in the ensuing struggle. He fled home and was arrested by members of public. He discounted **PW6's** evidence as malicious explaining that her family had interfered in his short lived cohabitation with her.

9) Having considered the evidence tendered herein alongside the submissions of the defence, it is not in dispute that the deceased met his death in the course of a scuffle with the Accused person over a phone.

10) The cause of death is beyond disputing: the deceased died of massive blood loss subsequent to the penetrating stab wound to the chest sustained in the course of the scuffle between him and the Accused. The two men were known to each other and had been drinking together before the dispute arose outside the deceased's home regarding a phone.

11) Apart from the chest stab, the other injuries on the deceased were lacerations, possibly caused by the same dagger which caused the stab to the chest. While I do not accept that the stab to the chest could have occurred in the circumstances described by the Accused person, rather than by a deliberate stabbing, it is clear that the fight between the two men involved a dagger. The source of the dagger is difficult to determine. However, the penetrating stab wound to the chest was inflicted by a deliberate aiming of the dagger to the chest.

12) I agree with the defence submissions that the evidence of **Gladys Wairimu (PW6)** the Accused's estranged wife should be treated with caution. Ditto for **PW2**, the deceased's wife as to the source of the dagger. Whatever the case, the admitted evidence of the preceding hours of the night appears to negative any malice aforethought on the part of the Accused. It may well be that throughout the night either combatant was armed with the dagger that came in handy during the fight. But certainly, the Accused must have been the one wielding the dagger at the moment when the deceased sustained the fatal stab wound.

13) Concerning *mens rea*, I think the circumstances of this case do not point to malice aforethought. In the case of **Nzuki -Vs- Republic [1993] KLR 171** the Court of Appeal stated that malice aforethought is a term of art and observed that:

“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 and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who 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”.

14) The Court of Appeal substituted the conviction for Murder with one for Manslaughter in Nzuki's case

after stating that:

“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”.

15) In the case of **Isaak Kimanthi Kanuachobi -Vs- Republic (Nyeri) Criminal Appeal No. 96 of 2007 (ur)**, the Court of Appeal expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal Code:

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See Republic -Vs-Stephen Kiprotich Leting & 3 Others (2009) e KLR HCCC No. 34 of 2008).

In the circumstances of this case, where there was a fight involving the appellant and others in a place of worship leading to another fight where the appellant stabbed the deceased with fatal consequences, we do not think there was malice aforethought at all. The appellant should not have been convicted of murder but should have been convicted of manslaughter.

(See Juma Onyango Ibrahim -Vs- Republic Criminal Appeal No. 312 of 2009 Court of Appeal, Kisumu).

16) Therefore considering all the facts in this case, it is my view that the prosecution evidence establishes the lesser offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. I do find such a charge proven against the accused beyond reasonable doubt and will convict him accordingly.

Delivered and signed in Naivasha this 26th day of July, 2017.

In the presence of:-

Mr. Mutinda for the DPP

Mr. Mburu F. I. for the Accused

Accused - Present

CC - Barasa

C. MEOLI

JUGDE