



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 42 OF 2011

REPUBLIC PROSECUTOR

VERSUS

BENARD KIMATHI KITHEE 1ST ACCUSED

GERALD KAYOYI KIMARURI 2ND ACCUSED

JUDGMENT

Benard Kimathi Kithee and **Gerald Kayoyi Kimaruri** were jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The accused are alleged to have jointly murdered **David Ntongai Mauta** on 18/7/2011 at Murua Village, Amugenti Sub Location, in Kabuline Location of Igembe District.

The Prosecution called a total of five witnesses in support of their case. Both accused testified on oath but did not call any other witness. The accused were represented by Mr. Mokuia Advocate while the prosecution was led by Mr. Mulochi.

PW2, Ayub Mutea testified that on 18/7/2011 about 6.00 a.m., they were guarding their father's *miraa* with his half brother David Ntongai (the deceased). They had spent the night in the *miraa* farm. They had lit a fire in the *miraa*; that David requested to sleep for a while as PW2 kept watch. PW2 said he moved away about 2 metres from the deceased, and sat among *miraa* trees but could see the deceased. He then saw Bernard Kimathi (accused 1) coming running towards where deceased lay, followed by Gerald Kayoyi, 2nd accused. He saw accused 1 who was armed with a C-line slasher (*panga*), cut deceased on the head once and the brain came out. PW2 rose up to ask why accused 1 was killing deceased but they charged at him and chased him and he ran off to call his uncle Charles (PW4) whose home was nearby. PW4 escorted him to go and report to the Chief who referred them to report to Maua Police Station. Later, the body of deceased was taken to Maua Police Station. PW2 stated that the incident occurred at 6.00 a.m. and he was able to see the accused persons well. He said that though accused 2 was present, he did not do anything. He was not present when the 2 were arrested, but identified the C-Line *panga* that accused 2 was allegedly arrested in possession of. He was not aware of any dispute between accused and deceased.

PW3 Samuel K. Mwika, the Assistant Chief of Kianda Sub Location received a report of a murder on 18/7/2011 and at 10.00 a.m., he went to Itharone Market after he was informed that a murder suspect, accused 2, had been seen and with help of members of public, they arrested accused 2 who was in possession of a C-Line *panga* and he was handed over to the Police.

PW4 Charles Kamenchu Mauta testified that he was in his *shamba* about 8.00 a.m. on 10/7/2011

guarding his miraa when he heard screams and noticed that it was the noise of Ayub Mutea (PW2) who informed him that Kayoyi (accused 2) and Kimathi (accused 1) had killed Benard and that they were chasing him. He went to the scene and saw that the deceased was injured on the head and the brain was exposed. PW4 said that the deceased was his brother. He later learnt of the arrest of accused 1 and later on same day, he heard of accused 2's arrest. He denied that deceased and accused were business partners. In cross examination, PW3 said that he knew that accused 1 used to steal *miraa* and that accused 1 had earlier stolen his *miraa* but paid him for it. He also said that PW2 is a son to his cousin, Sebastian Muriuki. He denied that him and PW2 murdered deceased.

The post mortem was conducted by **Dr. Robert Meto** but the report was produced by **Dr. Kahomba (PW1)**. The Doctor found that deceased had sustained a deep cut (15 cm) on the left parietal and occipital region of the skull with brain oozing. The Doctor formed the opinion that the cause of death was severe head injury due to a sharp injury.

PW5 PC Mathias Kadenge of Maua Police Station is the Investigation Officer in this matter and the one who received the murder report from PW2. PW5 went to the scene of the murder with other officers, noted the injury to the head, and collected the body to the mortuary. On the same night, he received accused 1 from Kanuni AP Camp and accused 2 on the next day while in possession of a C-Line slasher; that the C-Line was not taken to the Government Analyst because there were no blood stains on it.

When called upon to defend himself, accused 1 denied the allegation against him and told the court that he was at his home about 7.30 a.m. when accused 2 went there and he had been cut on the hand and requested to be assisted to be taken to Hospital; that accused 2 informed him that he had been cut by Ntongai and that he had in turn cut Ntongai. He said that PW2 lied to the court because he helped take accused 2 to Hospital. He said that on that morning, he was at home with his wife and at 7.20 a.m. accused 2 went there with one Thurairia who had a motor cycle. He denied having had any quarrel with deceased or PW2.

In his defence, accused 2 stated that on the fateful day, he left his house about 6.20 a.m. with a *panga* and rope going to get fodder for his cattle. On his way back he reached Muriuki's farm which Ayub (PW2) was guarding *miraa* when he saw somebody approach him and wanted to cut him but he blocked the *panga* with his hand. He noticed the person was Ntongai (deceased) who first asked him where he had got the grass he had but before PW2 could answer, Ntongai tried to cut him. He cut the deceased then ran to Kimathi's house; that Kimathi, dressed him, and that as accused 1 escorted him to the friend's home, he was arrested by the Area Chief. He was then taken to Meru General Hospital after arrest. He produced the treatment notes in evidence DEx. 1. He said that even when he came for plea he admitted having cut the deceased but also told the court that the deceased had cut him too.

After the close of the defence case, Mr. Mokuia submitted that the accused have testified on oath with accused 2 admitting having acted in self defence; that they should be acquitted; that in the alternative, accused 2 be found guilty of manslaughter because he even showed the court the injuries that he sustained.

Mr. Mulochi on the other hand argued that the prosecution case had been proved to the required standard because PW2 saw the two accused well, knew them well; that there is sufficient evidence on record to found a conviction and the accused should be found guilty for the offence of murder.

To establish a charge of murder, the prosecution has to prove that:

- 1. Proof of the fact and cause of death of deceased;**
- 2. Proof that the death of the deceased was a direct consequence of the unlawful act or omission on the part of the accused;**
- 3. Proof that the said unlawful act or omission was committed with malice aforethought (*mens rea*).**

Malice aforethought is defined under Section 206 of the Penal Code to broadly mean, an intention to cause grievous harm or cause the death of one.

The death of the deceased is not in doubt. The Post mortem that was done on the deceased's body did reveal that the cause of death was deep cut on the head. Accused 2 admitted he inflicted that injury. The deceased, PW2 and 4 are people who know each other well as they hail from the same home area. That fact is not denied. The accused persons denied knowing of any reason why the witnesses and especially PW2, who is the key witness herein, could frame them for this offence.

PW2 is the key witness in this case. He told the court that the scene of crime was in the *miraa* farm of one Sebastian Muriuki, his father. It is where PW2 and the deceased were guarding *miraa*. Accused 2 admits to have been walking on a path, through the said *miraa* farm of Sebastian when he met the deceased. It seems the scene of crime is not disputed. Contrary to what PW2 told the court that he saw accused 1 come running and cut the deceased, accused 2 admits to having been the one who cut the deceased on the head and caused the fatal injuries. His reason being that the deceased attacked him first asking where he had got the grass he was carrying. Indeed, when the accused appeared before this court for plea on 20/9/2011, about a month after the offence was committed, the court noted that accused 2 had a big scar on the left hand. When the charge was read to him, accused 2 admitted to having cut the deceased on the head after the deceased accosted him and cut him on the hand. Accused 2's defence has been consistent from the onset. What cannot be explained is whether indeed, PW2 was present at the scene and whether he was able to see what transpired. The other question is why he did not refer to the injuries that accused 2 sustained. Even PW3, the Assistant Chief who arrested accused 2, did not make reference to the accused 2 having had any injuries. In cross examination, when asked if accused 2 had any injury, PW3 denied seeing any. The accused 2 was treated at Meru District Hospital on the day of the incident i.e. 18/7/2011 as per the medical notes he produced (DEx. No. 1). The notes bear the stamp of Meru District Hospital. Having considered the evidence of PW2 and 3, I think either PW2 was not at the scene of crime, or he did not see what happened or he withheld some evidence. The prosecution witness failed to disclose the fact that accused 2 was injured in a confrontation with the deceased. In fact, PW2's evidence is totally at variance with that of the defence. The duty always lies with the prosecution to prove its case beyond any reasonable doubt and that duty never shifts to the accused. In this case, the accused 2's defence has raised very serious doubts in the prosecution case as to what exactly transpired before the deceased met his death. Accused 1 has denied having been at the scene. Instead, accused 2's defence has been consistent from the day the plea was taken and the evidence of injuries he sustained are evidence that he took part in a confrontation with the deceased.

PW3 told the court that accused 1 was a common *miraa* thief and had recently stolen his *miraa* for which he paid him back. Might accused 1 been mentioned in this case because he was a known *miraa* thief? On the other hand, accused 2's presence in the *miraa* farm may be that he was also a *miraa* thief. But even if that was the case, PW1 should have told the court the truth as to what he witnessed if at all.

Having carefully considered the prosecution evidence and especially the evidence of PW2 who was the key witness to the crime, this court is at a loss whether at all PW2 saw accused 1 at the scene. This is because the person who seems to have had a confrontation with the deceased is accused 2 who admitted to that fact from the time he took plea and evidence of the injuries that accused 2 sustained on the hand supports his defence. It is the same accused 2 who was found with a slasher (*panga*) some hours after the incident. Accused 1 denied being at the scene and in view of what I have considered above, I have doubts as to his involvement in deceased's death and I give him the benefit of doubt and acquit him of the offence of murder.

The accused has raised a defence of self defence. Having done so, it is the duty of this court to examine the evidence on record to determine if indeed the act he committed amounts to self defence. Section 17 of the PC avails an accused the said defence. **Section 17 of the Penal Code** states:

“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.”

In the English Case of Rep

v Deana CR APP RL 75 CCA, the Court held as follows:

“There is no rule of law that a man must wait until he is stuck before stricken in self defence.”

The Court of Appeal also considered English cases when considering the said defence. The Court of Appeal in the case of Ahmed Mohamed Omar v Rep CRA 414/2012, considered the English case of Rep v MC INNES 55 CR APP 557 where the court stated:

“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 on 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 a 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. Any other possible issue will remain ...”

The test for self defence is therefore, that a person can use force in the defence of himself or another as is reasonable in the circumstances and honestly believes them to be. The test for self defence is, therefore, a subjective one rather than objective because it depends on the facts and circumstances of each case.

In the instant case, the accused 2 confessed before this court that he is indeed the one who cut the deceased after the deceased tried to cut him. Indeed, accused 2 sustained an injury on the hand. The injury suffered was seen by the Court and there is medical evidence to that effect. From the post mortem report, the deceased died as a result of one deep cut on the head (15 cm) which extended from the parietal to the occipital region of the skull that left the brain oozing. It was a single cut though aimed at the head.

From the examination of the evidence in its totality, I find that there is evidence that the accused 2 possessed the intention to kill the deceased. He reacted when his life was threatened and in perilous danger. It will never be known whether accused 2 was a *miraa* thief or was just a passerby. In the end, I find that the necessary ingredient for the offence of murder i.e. malice aforethought, was not proved. Instead, I find that the accused 2 killed the deceased unintentionally and an offence of manslaughter has been proved against accused 2. I find him guilty of the offence of manslaughter contrary to **Section 202 of the Penal Code** and convict him pursuant to **Section 322 of the CPC**. As for accused 1, he is set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF FEBRUARY, 2016.

R.P.V. WENDOH

JUDGE

25/2/2016

PRESENT

Mr. Musyoka for State

Mr. Kaimenyi Holding Brief for Mr. Mokuu for Accused

Ibrahim/Peninah, Court Assistants

Present, Both Accused