



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 41 OF 2011**

**REPUBLIC ..... PROSECUTOR**

**V E R S U S**

**JULIUS MICHUBU LAIBUNI ..... ACCUSED**

**JUDGMENT**

**Julius Michubu Laibuni** is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on 24/7/2011 at Anjilu Village in Mikinduri West Location, Tigania East District, murdered **Geoffrey Gikundi Mugambi**. The case went to full hearing with the prosecution calling a total of 6 witnesses. The accused testified on oath and called one witness in his defence. The accused was represented by Mr. Kaimenyi Advocate.

**PW2 Jackson Thurunira** of Mikinduri was going to the bus stage about 4.00 p.m. when he heard screams behind him; he turned and saw Geoffrey, the deceased, being chased by Michubu, the accused; he stated that accused was stabbing deceased on the back as he chased him. PW2 ran back towards them; by the time he reached them, Geoffrey had fallen. PW2 picked stones and ordered accused to stop stabbing the deceased further or he would stone him. It is then that **PW1, Michuki, Jacob Mutiga** arrived at the scene and also threatened to pick stones if accused did not drop the knife he had; that accused listened to PW1 and dropped the knife, It is then PW1 and 2 got hold of accused, called Police and handed over the knife that accused had dropped. Police picked up the injured person and arrested accused. Both PW1 and 2 denied seeing any fight.

**PW3 CPL Antony Leibokhe** the Investigation Officer took over this case after the original investigations officer died. He produced the knife that was recovered as Exh. 1.

**PW4 Joseph Muriungi Mugambi**, an uncle to both accused and deceased learned that accused had stabbed Geoffrey; he went to check on Geoffrey on the next day only to find that he had died. He attended the post mortem on 29/7/2011 and identified the body of the deceased to the Doctor.

**PW5 Lawrence Kinyua Muthoni**, a Government Analyst, analysed the blood on the knife recovered in this case and blood samples of the deceased and found the DNA to match.

Post mortem was conducted on deceased's body by **Dr. Mutuku** and the report was produced in Court by **PW6, Dr. Bett. Dr. Mutuku** found that the deceased had sustained a deep stab wound on the posterior aspect of the left thigh, 2 cm on the anterior mid thigh, deep wound on the poputeal fossa severing blood

vessels and nerves, artery and vein. He formed the opinion that the cause of death was cardio respiratory arrest due to massive haemorrhage following multiple stab wounds.

In his worn defence, the accused told the court that on the fateful day, he went to church with his brother Geoffrey; they left the church at 1.00 p.m., went home and later they went to a bar together with his two friends. They drank till 4.00p.m., when Geoffrey poured alcohol on the table and they started quarrelling because they were drunk. The friends intervened and they left for home and while home, Geoffrey took the kitchen knife and cut him on the left hand and face and the forehead and they started struggling over the knife. He begged Geoffrey not to kill him; that Geoffrey chased the friends while armed with the knife; that while struggling over the knife, the Chief (PW1) who is their cousin came and separated them; that his brother-in-law Thurania came and snatched the knife from Geoffrey. Police came and took both of them for treatment. He denied having planned to murder his brother. In cross examination, accused said that deceased was injured as they wrestled over the knife when they fell.

**DW2 Moses Muriuki**, a friend of the accused testified that on the fateful day, he met accused and the brother on the road and they went to the bar together; that the two brothers got drunk; that alcohol poured and they left for home; that they went to accused's home; that deceased entered the house, came out with a kitchen knife and cut accused on the hand and face; that a struggle over the knife started and he went to stand a far off; that both fell and Police came and took both of them. He denied seeing PW1 and 2 at the scene.

After the close of the defence case, Mr. Kaimenyi submitted that the prosecution had not proved their case to the required standard because PW1 and 2 could not tell what transpired between accused and deceased and they could not tell how it all started; that accused's defence is corroborated by DW2's evidence that there was a fight and charge of murder cannot be sustained.

In reply, Mr. Mulochi submitted that both *actus reus* and malice afore thought were proved because PW1 and 2 saw accused chase deceased and stab him; that the Doctor's evidence was that deceased died due to multiple stab wounds which corroborates PW2's evidence.

To prove an offence of murder, the prosecution has to establish the following ingredients:

1. **Proof of the fact and cause of death of deceased;**
2. **Proof that the death of the deceased was the direct consequence of unlawful act or omission on the part of the accused (*actus reus*);**
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 mean an intention to cause grievous harm or cause the death of one.

PW5, an uncle of the deceased attended the post mortem and identified the body to Dr. Mutuku who performed the post mortem. Dr. Mutuku was of the view that the cause of death was cardio respiratory arrest due to massive haemorrhage following multiple stab wounds. The wounds were set out in the post mortem reports. Death is not in dispute.

The accused has raised the defence of self defence. Although at first, he claimed that the deceased was injured as they struggled over a knife, during cross examination by Mr. Mulochi, accused did admit to killing his brother, though he said it was in self defence. Having raised the said defence, it is upon this court to examine the evidence adduced by both the prosecution and the defence to determine if indeed the act was committed in self defence. **Section 17 of the Penal Code** states that:

***"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.”***

Court of Appeal considered the said defence in ***Robert Kinuthia Mungai v Rep. (1982-88) IKAR 611*** where the Court said:

***“We think in view of the East African cases we have considered; and the more recent English decision of R. V. Shannon CR LR 438 1980, that the true interpretation of the judgment of the Privy Council in Palmer v Rep is that while there is no rule that excessive force in defence of the person will in all cases lead to manslaughter, there are nevertheless, instances where that result is a proper one in the circumstances and on the facts of the case being considered.”***

Again 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. 551:***

***“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 ...”***

In ***Beck Ford v Ford (1987) 3 ALL ER 425***, the test for self defence was that a person could use such force in the defence of himself or another as was reasonable in the circumstances as he honestly believed 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.

According to accused, it is the deceased who first attacked him and had the knife; that they started struggling over it and in the cause of, both fell and the deceased was injured. DW2 reiterated what accused said but could not conclusively tell how deceased got injured. To the contrary, PW2 told the court that after he heard screams, he saw accused chasing the deceased and stabbing him on the back. I am inclined to believe the testimony of PW2 because his testimony tallies the findings of Dr. Mutuku as regards the injuries found on the deceased and also PW1 who arrived at the scene and found accused still armed while deceased lay seriously injured on the ground. The injuries found on deceased were as follows:

***“Deep stab wound seen on the posterior aspect of the neck measuring 2 cm long and 6 cm deep, severing muscles on the posterior aspect of neck and shoulder plus blood vessels. Deep stab wound seen on the posterior aspect of the left thigh (mid thigh) measuring 2 cm long and 6 cm deep. 2 cuts seen superficially on anterior mid-thigh on the left measuring 2 cm long each. Deep stab wound on the popliteal fossa right leg measuring 2 cm long and 10 cm deep, severing muscles blood vessels and nerve – popliteal artery and vein.”***

Most of the injuries were inflicted on the posterior or back of the deceased, in consonance with PW2's evidence. If indeed, accused and deceased struggled over the knife, the question is how did the deceased come to sustain all these injuries on the back of his body? This court will not believe that the injuries were sustained in a struggle over the knife. Further to that, the stab wounds were so many that I will prefer to believe the evidence of PW2 that he saw accused chasing and stabbing the deceased from the back until the deceased fell. It is the arrival of PW2 on the scene and then PW1 that made accused stop stabbing the deceased. Even if the court were to believe that it is the deceased who had the knife and first

attacked accused, which I do not believe; the accused must have disarmed deceased and had subdued him because the deceased was fleeing for his life. So why would accused continue stabbing the deceased as he ran and screamed? Accused's life was no longer in peril, and in my view, accused engaged in a vengeful mission when he chased and stabbed the deceased several times. Accused's defence is not convincing at all. Although accused showed the court 2 scars, one on the forehead and another on the hand, there is no evidence that he sustained them at the time. The court would have observed them at the time of the plea and a record of it made on the file. Further, the defence had an opportunity to cross examine PW1 and 2 and they never alluded to accused having sustained any injuries on the fateful day. The allegation that he too was injured is an afterthought.

PW1 and 2 said there was nobody else at the scene and it is questionable whether indeed DW2 was present or not. Even the accused admitted that PW2 arrived when he was still struggling over the knife with deceased. In my view, the accused's defence is totally dislodged by the evidence of PW1, PW2 and the findings of the Doctor. If at all the accused was first attacked by deceased then what followed was use of unreasonable force that this court views as revenge or pure aggression.

Accused admitted that both PW1 and 2 were people known to him. In cross examination of accused, he recalled what PW2 told the court and did not dispute it to be untrue. Accused agreed that there was no reason for PW1 and 2 to frame him. I believe and find that they were credible witnesses. I find that it is accused who chased the deceased as he stabbed him and caused the fatal injuries. The deceased did not sustain two or three or four stab wounds but several deep stab wounds on different parts of the body, but mainly at the back confirming that he was assaulted as he fled. The multiple injuries found on the deceased are evidence of malice aforethought.

In the end, I find that the prosecution has proved its case to the required standard, that is beyond any reasonable doubt. I find accused guilty as charged and convict him accordingly under **Section 322 of CPC**.

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2016.**

**R.P.V. WENDOH**

**JUDGE**

**25.2.2016**

**PRESENT**

Mr. Musyoka for State

Mr. Kaimenyi for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused