REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 36 OF 2009

REPUBLIC……..……...PROSECUTOR

VERSUS

NICHOLAS KIMUTAI……..……..ACCUSED

JUDGMENT

INTRODUCTION

Nicholas Kimutai Kinyor, the accused herein was charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 17th day of June, 2009 at Kaptel Sub-Location in Nandi District of the Rift Valley Province murdered Cleophas Kimutai Ng'etich.

THE EVIDENCE

The prosecution called a total of seven witnesses. The prosecution's case was that on 17th June, 2009, the accused together with his friends had gone into a bar in the local shopping centre where they drank alcohol. The accused had been employed at a local hotel as a waiter. He closed his business at about 7.00 p.m. and proceeded to a nearby shopping centre namely Kimondi where he intended to do some shopping for the hotel. On arrival he entered into a bar where the deceased together with Josphat Kipleting and Kenneth Kebenei were drinking alcohol. He joined them in drinking. Incidentally, he was known to the deceased who frequented the hotel where he worked to take meals. When he got drunk he decided to go home at about 8.00 p.m. He was in the company of Kenneth, the deceased, Kipleting and Kimani. On arrival at Kaptel – Kobe junction, the group split into two. He and Kennedy went towards Kobe while the rest proceeded towards Kiptel. Immediately he started going towards Kobe, the deceased followed him and attacked him from the back. A quarrel ensued between them. The accused who had a knife stabbed the deceased. Investigations commenced and it was established that indeed it was the accused who killed the deceased. Some blood samples were taken from him and the deceased. A trouser and a T-shirt which were recovered from the house of the accused had blood stains which matched the blood of the deceased.

PW1, Paul Cheruiyot Saurei testified as the father of the deceased. He testified that he was with the deceased on 17th June, 2009 until 3.00 p.m. when the deceased left home. On the following morning he received information that the deceased had been killed at a place called junction. He in turn informed the chief. He also visited the scene and confirmed that the deceased had a stab on the left side of his chest. Josephat Kipkering Kibet who was also in the company of the deceased had also been stabbed but survived.

PW2, Thomas Yego testified that the deceased was his nephew. He stated that he received the report of the death of the deceased on 18th June, 2009 at 6.00 a.m. on 22nd June, 2009, at 11.00 a.m. He went to Kapsabet District Hospital where he witnessed the postmortem of the body of the deceased being conducted.

PW3, Bitok Kibor was the then chief Kiptel Location in Kapsabet Division. He testified that on 18th June, 2009 at about 7.00 a.m, he was called on telephone by one Kipngetich who informed him that the deceased Cleophas had been killed near Kaptel Junction and his body was lying on the road. He relayed the message to the administration police officers who in turn informed the police. He also proceeded to the scene where he found that the Assistant Chief had already arrived. He mobilized some youth in the village to look for the suspect who had fled to Chemululu Location. He called the Chief of that location one Mr. Rono who informed him that the suspect who is the accused herein had been arrested and taken to Kapsabet Police Station. One of the administration police officers who arrived at the scene was Mr. Obipo. He visited the house of the accused where he recovered a knife, a trouser and a T-shirt which had blood stains. He forwarded them to PW3. PW3 also informed the OCS Kapsabet Police Station of what had happened. Police visited the scene and moved the body to Kapsabet District Hospital Mortuary.

PW4, Dr. Gilbert Cheruiyot produced the post mortem form which had been prepared by Dr. Simba then working at Kapsabet District Hospital. The latter had since been transferred to North Eastern. He performed the post mortem on the body of the deceased. It was concluded that the cause of the death of the deceased was hypovolemic and cardio genetic shock due to perforation of right ventricle of the heart. The witnesses explained that hypovolemic meant loss of a lot of blood which leads to the lungs collapsing. He produced the post mortem form as an exhibit.

PW5, Lammek Kipchumba recalled that on the 18th June, 2009 at about 8.00 a.m., while he was at home, heard some noises coming from the Kaptel-Kobe junction. He proceeded to the scene where he found a crowd of people, the chief and administration police officers. The deceased's body lay on the ground. He then accompanied the chief and one administration police officers to the house of the accused which was about one kilometer from the scene. The house had two rooms. The police officer entered into the bedroom and under the bed found one long black trouser which had blood stains at the knee level. Inside one of its pockets was a knife. In addition, there was a white/blue stripped T-shirt which also had blood stains on the front side. Also recovered from the accused's house were a black cap and a black jacket. He returned to the scene where they handed the items to the police who had also arrived.

PW6, Assistant Superintendent of Police Samuel Gathirwa was the then Officer Commanding Station (OCS) of Kapsabet Police Station. At the time of his testimony he was working at the CID headquarters Directorate of Personnel in Nairobi. He summed up the evidence of the prosecution witnesses. In addition, he testified that he visited the scene and confirmed that indeed the deceased had died from a stab wound on the chest. At the time of visiting the scene, the accused had been arrested and he accompanied him to the scene. On looking at the scene he confirmed that there had been disturbance which was a sign of a struggle. The body lay on its belly. There was a pool of blood underneath it. He was shown a knife, a jacket, a T-shirt and a black long trouser which had been recovered from the house of the accused. He identified all those items in court.

On return to the police station, PW7 prepared an exhibit memo form with which he forwarded the recovered items to the government chemist for analysis. The blood on the items was to be compared with the blood sample of the deceased which had been taken from him during the postmortem exercise.

In cross examination, PW7 stated that a statement under inquiry of the accused was recorded in which he admitted having killed the deceased in self defence. He reiterated that the scene of murder showed a lot of disturbance. He had gathered information that both the deceased and the accused had fought. It was said that the accused was accusing the deceased person of having taken some meals in the hotel he (accused) worked and had not paid the bills. PW7 further stated that on the fateful night the accused together with the deceased, Josephat Kipleting Mibei and Kennedy Tanui Kebenei were all drinking alcohol together and the incident occurred on their way home after the drinking spree. He stated that the accused had told him that he had fought with the deceased.

PW7, Henry Kiptoo Sang was a government analyst who examined the items forwarded to him by PW6 for DNA profiling and comparison. In his findings he found that the knife was moderately stained with human blood while the long trouser with the T-shirt were heavily stained with human blood. On doing DNA analysis the same was unsuccessful in regard to the blood on the knife as it had decomposed. On profiling the DNA from the T-shirt and the trouser, the blood samples were confirmed as belonging to Cleophas Kimutai the deceased herein. He produced the analyst report as evidence.

After the close of the prosecution's case the court ruled that the accused had a case to answer and he was put on his defence. He opted to give a sworn statement of defence. He admitted that he killed the deceased in self defence. He stated that after he parted with the deceased at the Kiptel – Kobe junction, the deceased who had left towards Kiptel direction followed him and held him from the back. He felled him on the ground and started beating him. His friends tried to separate them but the deceased sat on his stomach as he lay on the ground. Pleas by the accused to the deceased to flee him were not heeded to. He then threatened the deceased that if he did not free him, he would stab him with the knife he had. He bruised him. That is how he was able to free himself. He ran home.

The accused denied that he had quarreled with the deceased at the bar where they were drinking together. They had neither argued on their way home. He denied that the deceased was indebted to him on account of meals he had eaten and failed to pay for. He stated that he did not know why the deceased followed him after they had separated. His further defence was that he stabbed him because he held him at the neck and his pleas to free him had fallen on a deaf ear.

The accused went on to state that on the following morning he worked as usual. While at the hotel, he heard some noises. He went to the scene and found the deceased dead. Later he closed business to go and do some shopping for the hotel. He passed by his home where he met his father who told him that he was being sought on allegations that he had killed the deceased. He proceeded to the shop where the Chief, Baraton Location arrested him. He pleaded innocence and urged the court to acquit him.

In cross examination, the accused stated that the deceased was a frequent patron at his hotel but he always paid for his meals. He stated that although himself and the other friends he was with drunk alcohol, the deceased did not drink alcohol. He stated that his friend, Josephat tried to separate them. He could not remember stabbing Josephat. He denied he had armed himself because he intended to stab the deceased. He pleaded innocence and urged the court to acquit him.

SUBMISSIONS.

At the close of the defence case learned counsel for the accused, Mr, Marube submitted that the prosecution had only proved a case for manslaughter. That it was evident that the accused had stabbed the deceased in self defence. He submitted that the deceased confronted the accused for no apparent reason. He over powered him, felled him to the ground and strangled him by the neck. The accused tried to free himself in vain. He urged the court to find the accused's defence plausible as the prosecution failed to avail as witnesses other persons who witnessed what had happened. He urged the court to look at the cases of **Ahmed Muhammed Omar and 5 Others -vs- Republic (2014) e KLR - Court of Appeal at Nairobi Criminal Appeal No. 414 of 2012, Republic -vs- Nkuru Gwatia 2014 at KLR, Jane Koitee Jackson 2014 e KLR and Republic -vs- Joseph Macharia Waweru 2015 e KLR** in which courts upheld the defence of self defence in similar circumstances as in the instance case.

Miss Mokua, learned state counsel for the state urged that the prosecution had proved their case beyond all reasonable doubt. She submitted that the accused did not explain why he had carried the knife with him. It could only be construed that he had the knife because he had premeditated that he would stab the deceased. In any case, his intention to stab the accused was clearly demonstrated in that he stabbed one Josephat who had tried to separate them. Furthermore, the points at which the blood stains were found on his clothes clearly demonstrated that he was the culprit. She urged the court to note that the eye witnesses who would have been called by the prosecution could not be traced as they had relocated from their usual residences. It was her submission that the accused used unreasonable force which was excessive in the circumstances. Whilst referring to the case of **Ahmed Mohammed Omar and five others-vs-Republic**

(supra) Miss Mokua submitted that a defence of self defence could only apply if an accused does what is reasonable in the circumstances that he kills a deceased. In the present case, she submitted, the accused was not reasonable in applying the excessive force he did.

EVALUATION OF EVIDENCE.

I have carefully considered the evidence adduced by the prosecution and the defence as well as the rival submissions. The accused faces a charge of murder. Being a criminal trial the burden of proof entirely lies with the prosecution to prove their case beyond any reasonable doubt. They must prove that it is the accused who fatally stabbed the deceased; and that at the time he killed him, he was possessed of malice aforethought to cause the death or grievous harm to the deceased. In the instant case, undoubtedly, the accused admits he was responsible for the death of the deceased. What he denies is that he had premeditated the death. His defence is that he killed the deceased by stabbing in furtherance of self defence. It is therefore the onus of this court to prove that the accused had malice aforethought when he stabbed the deceased. Malice aforethought is defined under Section 206 of the Penal Code as follows:

> **Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -**

a. **An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
b. **Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
c. **An intent to commit a felony;**
d. **An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

The circumstances of this case are that the deceased died from a stab wound. Hence, the prosecution must prove that in stabbing the deceased, the accused had an intention to cause the death of or do grievous harm to the deceased. They must also prove that he had the knowledge that the act or omission causing the death of the deceased was probably likely to cause his death or grievous harm. While advancing the defence of self defence, learned counsel for the accused urged the court to apply the subjective test as opposed to the objective test. The subjective test in my view must be applied to an individual case as no case is similar to the other. What is in issue herein is whether the accused at the time he stabbed the deceased reasonably believed that his life was in danger. It is imperative then that the prosecution having advanced the motive that the accused killed the deceased because he was indebted to him, proves that indeed it is as a result of the anger for non-payment of the debt that the accused killed the deceased. Where the prosecution advances a motive as to have necessitated the killing of the deceased it is obligated to discharge the same failure to which the court would be inclined to rule in the favour of the accused. In the alternative, where the accused as in the present case tenders the defence of self defence, in the absence of any other evidence tendered by the prosecution to controvert it, the court must rule in the favour of the accused.

In the case of **Nzuki-vs-Republic 1993 [KLR] 171** the Court of Appeal in substituting the charge of murder with manslaughter observed as follows:

> ***"There was a complete absence of motive and there was absolutely nothing on the 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."

Again in the case of **Raphael Mbuvi Kimasi-vs-Republic 2014 [KLR]** the Court of Appeal in citing **Isaac Kimanthi Kanuachobi -vs-Republic (Nyeri) Criminal Appeal No. 96 of 2007 (ur**) observed that;

> **"In the circumstances of this case 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."**

A similar scenario as in the case of **Isaac Kimanthi Kanuachobi** obtains in the instant case. This is a case in which the deceased and the accused with their friends had a happy session before the incident. They started their journey to their respective homes together. It is on the way that the accused and the deceased appear to have quarreled and a fight ensued in the presence of their other friends. It would have been prudent that the prosecution called as witnesses the persons who witnessed the scuffle. That was not the case lending credence solely to what the accused told the court. I say so because the alleged motive of the killing could only have been confirmed by those who were present and would have told why the accused and the deceased quarreled and eventually fought. What is on record then is that there was completely no motive as to why the deceased attacked the accused. He did so with so much force that he felled him to the ground and held his neck. At that time, needless to say, the accused must have sensed danger to his life and was obviously bound to fight back. With him was a knife which was the quickest weapon that he would have attacked the deceased with. In those circumstances, it is difficult to conclude that the accused although having viciously stabbed the deceased intended his death or to cause grievous harm to him. As fate had it, he succumbed to the injury.

To buttress this point the case of **Ahmed Mohammed Omar and 5 Others –vs- Republic [Supra]** is a good comparison to the instant case. The Appellants in that case were charged with murder and were convicted accordingly. In convicting them, the learned trial judge observed that the Appellants who were administration police officers had used excessive force by shooting at the deceased(six in number) with live bullets when it was not confirmed that they were under eminent danger. On appeal, the conviction was overturned and the Appellants were set free. The learned Githinji, Musinga and J. Mohammed, JJA, noted that the Appellants went on duty at night at a time when there had been a confrontation between taxi operators and motor cycle operators. It was a time when many police officers were being killed in the line of their duty by armed gangs. When they were confronted with a situation that the mob did not retreat despite shooting in the air, the court observed, it was safe to conclude that the Appellant reasonably believed that their lives were in danger and decided to open fire. In that case, the court referred to the case of **Deane-vs-Republic, 2 Cr. App. R.75, CCA** in which the court observed that a police officer cannot wait until he is struck before striking in self defence. Further, with regard to the case of Ahmed Mohammed Omar & 5 others it was wrong of the trial judge to have arrived at a verdict of conviction when he had observed that police officers **"perform their duties in circumstances that are often fraught with danger to their lives, it is not an easy job."**

I totally align myself with the submission of the learned counsel for the accused in observing that in evaluating whether a defence of self defence can be upheld the test to apply is subjective. The instant case clearly fits into this test. It is a case in which the accused stabbed the deceased because he reasonably believed that his life was in danger. The deceased held the accused on the neck which is an obvious delicate position likely to cause death if the accused was strangled. He reacted with the knife which was the available defence weapon. I have said it before that the mere fact that so much force is used against a victim is not, of itself, a factor that establishes malice aforethought. Each case depends on the circumstances at the time the offence is committed. In this case, all that the accused herein wanted was that the deceased freed him when he realized that his life was in danger. He stabbed him and walked away only to learn much later that the deceased had died. I do not think in those circumstances malice aforethought was established. Although death resulted from the stabbing, I am unable to conclude that the

accused truly intended to kill the deceased.

In the result, I uphold the accused's defence and find that the prosecution did not prove beyond reasonable doubt that the accused murdered the deceased. I find the accused guilty of the offence of manslaughter contrary to Section 202 of the Penal Code and I convict him accordingly.

DATED and DELIVERED at ELDORET this 20th day of April, 2016.

G. W. NGENYE MACHARIA

JUDGE

In the presence of:-

1. Miss Mokua for the State.

2. Mr. Okara holding brief for Mr. Marube for the Accused.