



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 35 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

FLORENCE KETER.....ACCUSED

JUDGMENT

INTRODUCTION.

Florence Keter, the accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on diverse dates between 30th April 2012 and 1st May, 2012 at Kileges Village in Uasin Gishu within the Rift Valley Province murdered Geoffrey Kiprono Keter .

THE EVIDENCE

The prosecution called a total of 7 witnesses. **PW1 John Kimeli Kosgei** was a village elder from Gitao Village in plateau Sub Location in Eldoret. His testimony was that on 30th April, 2012 at about 7.00 p.m. three villagers namely Joseph Arusei, Richarge Cheburet and Ben Kimeli Kosgei alias blackei went to his house and informed him that Geoffrey Keter (deceased) had been killed by his wife. The deceased lived about 200metres from his house. The report was that he had been killed on the previous night. They further reported that the deceased's wife who is the accused herein had threatened to commit suicide and kill her children. According to the report they had received the report from a daughter of the deceased's brother one Loice. PW1 in the company of the three villagers proceeded to the house of the accused. They were welcomed by the accused. PW1 cheated the accused that they had visited her house to look for some suspected stolen goods which were hidden in her house. The accused asked them what goods they were looking for and she attempted to run away. He and the other villagers held her. They also contained the children who were in the compound. They led her to the main house. PW1 entered into the bedroom and on the floor noticed some blood stains. The bedroom had two beds. Besides one of the beds were boxes and two sacks crossed over each other and were tied in the middle. The boxes were placed on top of the two sacks. At the edge of one sack protruded a head of human being. PW1 touched the sack and blood started oozing out. He then noticed a human hand on the other side of the sack. He returned to the sitting room and informed the others what he saw. He asked one of them Joseph to immobilize the accused by tying her hand. He then asked he accused why he had killed her husband and she said that the deceased had disturbed for too long and could not bear it any more. She also indicated to PW1 that she was preparing a meal for herself and the children and after they ate would kill all her children and then strangle herself. PW1 called the Assistant Chief one Julius Rutto and the chief one Joseph Mutai Korir and informed them what had happened. The Assistant Chief immediately arrived at the scene. He interrogated the accused who informed him that she had been pushed to the end by the deceased to kill

him. In the meantime other villagers arrived to the scene. The Assistant Chief also called the police from Plateau Police Station who arrived at about 1a.m the next day. The police interrogated the accused in the presence of PW1 and she informed them that she had killed her husband single handedly. She was commanded to remove the body from the bedroom into the sitting room.

In cross examination, PW1 stated that he was well acquainted with the family of the deceased and he knew very well that the deceased and the accused had domestic problems. The accused had indeed reported to him how the deceased had abandoned her and the children and had started cohabiting with another woman in the same village. He had also arbitrated in their problems and the deceased had promised to leave the other woman. However, he did not keep his promise after which PW1 advised her to involve her larger family. He recalled that on a third occasion the accused went to him crying and had a cut wound on her head. She reported to him that she would not tolerate the problems at her home. She had decided to go and confront the other woman. On arrival at her rival's home she found her husband who snatched a panga she was holding and with which she intended to cut the other woman. That is when the other woman took away the panga and cut her on the head. He stated that both the deceased and the accused had been blessed with three children, two girls and one boy aged eight, six and three years respectively. He further stated that the accused waited until her husband was asleep when she hit him. He confirmed that the accused never used to drink alcohol.

In re-examination, PW1 stated that the domestic quarrel between the accused and the deceased had intensified from the month of January 2012.

PW2, Julius Kimaiyo Ruto from Kileges Village was the Assistant Chief of Chepkero Sub-Location. He entirely corroborated the evidence of PW1. In cross examination he stated that on visiting the scene, he took control of the crowd that had gathered and wanted to lynch the accused. He further stated that he had never deliberated on a solution to resolve the accused's domestic problem.

PW3 Henry Kipkoros Tanui was a brother to the deceased. His testimony was that he identified the body of the deceased when the postmortem exercise was being done on 4th May, 2012 at the Moi Teaching & Referral Hospital.

In Cross examination, he stated that the accused had approached him and his brother in regard to the domestic problems she had with her husband. He stated that they had talked over those issues but were never reported to the police.

PW4, Loice Jeptoo was a sister in-law to the accused person. Her testimony was that on the 30th of April, 2012 while on her way from Chepkero stopped over at the home of the accused who invited her for lunch. After the lunch the accused escorted her and that is when she informed her that she had killed her husband who had been disturbing her for a long time. She also warned PW4 to tell her parents that they should never visit her home because she would kill them. When she arrived at her home, she found her father together with Zephania Tanui alias 'blackie' who she informed what the accused had told her. According to PW4 the accused told her that she had killed the deceased at 12.00 midnight. The deceased was a brother to PW4. PW4 later at about 12.00 p.m. visited the scene and confirmed that indeed her brother had been killed.

In cross examination, PW4 confirmed that it was true that the deceased and the accused had domestic problems owing to the fact that the deceased had started cohabiting with another woman. To her knowledge, most of the times the deceased spent the night in the other woman's home and when he returned to the accused's home in the morning would beat her up. She stated that the other woman used to sell changáa. She also stated that the village elders had tried to reconcile the accused and the deceased but the deceased had refused to change. Further, the deceased was feared in the village as he used to beat people when he drank alcohol. In addition, she stated that she was aware of an occasion in which both the deceased and his concubine had beaten the accused. The accused was forced to flee to her parents' home. She had then been assaulted with a panga. In summary, she stated that the accused lived a difficult married life.

PW5, Mathew Tanui was an uncle to the deceased, the latter being his brother's son. He received the information of the death of his nephew on 30th April, 2012 at about 6.00 p.m. from one "blackei". He visited the home of the deceased where he saw the body in the bedroom under a bed. It was wrapped in two sacks. His other evidence entirely corroborated that of PW1 and 2.

In cross examination, he reiterated that he was aware that both the accused and the deceased had domestic problems over a love affair the deceased had with another woman in the village. He was aware that the deceased spend most of his time with his lover. He was also aware that the deceased was a violent man. He stated that he was aware that the deceased would take the proceeds of the milk the accused sold to his lover.

PW6, Dr. Walter Nalianya performed the postmortem on the body of the deceased on 4th May, 2012 at Moi Teaching and Referral Hospital. His evidence was that the major injuries were on the head which had multiple fractures which exposed the brain tissues. Bones of the face had also been fractured. He formed an opinion that the cause of the death was due to severe head injury due to blood trauma.

PW7, Police Corporal Arthur Benja then working at Plateau Police Station was the investigating officer. He summed up the evidence of the prosecution witnesses. He confirmed that on 30th April, 2012 at about 7.00 p.m. he was informed on telephone by the area Assistant Chief (PW2) about the incident. He visited the scene in the company of Police Constable Nyongesa. He confirmed that he saw the body of the deceased whose head had been crushed flat. He testified that on interrogating the accused she told him that she had killed her husband because he had sired a son with another woman out of wedlock.

At the close of the prosecution's case the court ruled that the prosecution had established a prima facie case and called the accused to answer in defence. She chose to give a sworn statement of defence. In principle, she did not deny having killed the deceased who was her husband. Her case was that she acted in self defence. She testified that on 1st May, 2012, at about 6.00 a.m., the deceased arrived home and started beating their second born, one Brenda then aged 4 years. According to the accused, the child had done no wrong. The child was sick and the accused threatened to kill her instead of living with a sick child. He also claimed that he would marry another woman. The accused was angered by the deceased's actions and she intervened to save her child's life. That is when he kicked her stomach and threatened that he would kill her instead of the child. On the ground were some sticks which the deceased was using to beat the child. He aimed at the accused with the sticks. The accused grabbed one of the sticks from him. She then hit him. He fell down and became unconscious. On noticing that the deceased was on the ground she informed one of her children and her sister in law, Loice (PW 4). She also informed the village elder who in turn called the chief. The chief thereafter informed the police.

In her further defence the accused stated that her relationship with the deceased was all through acrimonious. The deceased had neglected his responsibilities towards her and the children. He had started a love relationship with another woman in the village who used to sell alcohol. She had tried to sort out their domestic problems but the deceased who was a violent and proud man had refused to change his habits. In addition, the deceased's lover used to go to her home and beat her. She used to do both crop and dairy farming. When she sold the maize and milk the deceased would take the entire proceeds to his lover. She stated that at the time of the incident, the deceased had spent the night with the other woman. She urged the court to look at the fact that she reacted in self defence.

In cross examination, she reiterated that her marriage with the deceased was very turbulent for a period of about five years since the deceased started an out of wedlock relationship. As at the time of his death, the deceased and his lover had a one month old male child. She stated that on the fateful day, she went to the other woman's home to look for her husband but the woman beat her up. She stated that she hit the deceased with an axe handle. She denied that she beat him when he was a sleep. She also denied that she was angry because the other woman had given birth to a boy insisting that she too had a son and had no reason to be angry.

In re-examination, the accused insisted that she acted in self defence. She also insisted that the deceased had not married the other woman but had kept her as a concubine.

SUBMISSIONS:

At the close of the defence case, learned counsel for the accused Mr. Marube submitted that the accused hit the deceased in self defence after he attacked her. He urged the court to take into account the evidence of PW,1 4 and 5 which revealed that the deceased was a violent man and attempts to reconcile him with the accused had failed at his instance. He had refused to listen to village elders and his family who had prevailed upon him to live peacefully with the accused. He submitted that it was apparent that the accused intervened when the deceased wanted to injure their child. In retaliation, the deceased turned his anger on the accused. In self defence, she picked the nearest weapon which was an axe handle and hit him but unfortunately he succumbed to the injuries. The court was urged to find that the accused had not premeditated the death of the deceased.

Learned State Counsel Ms. Mokuu, submitted that the prosecution had proved their case beyond all reasonable doubt. The evidence had established that the accused had premeditated the death of the deceased as she was angry that he had sired a child out of wedlock and was not supporting the family. Further that she aimed at the head with so much force knowing very well that that force would kill the deceased. Finally, she submitted that the accused could not have acted in self defence because at the time PW4 saw her she had no injuries on her body.

EVALUATION OF EVIDENCE

The court has accordingly considered the entire evidence as well as the rival submissions. It is clear that none of the witnesses saw the accused killing the deceased. However, by her own sworn statement of defence she admitted to having killed the deceased. Therefore, the fact as to the death and cause of the death of the deceased is not disputed. It is also not disputed that the person who caused the death of the deceased is the accused herself. What remains for determination herein is whether the accused was possessed of malice aforethought when she killed 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.**

Malice aforethought was also well defined by the Court of Appeal in the case of **RAPHAEL MBUBI KIMASI -VS- REPUBLIC (2014) e KLR, COURT OF APPEAL AT NYERI CRIMINAL APPEAL NO. 61 OF 2013** by Hon. Visram, Gattambu & Odek JJA in the following words;

“Our analysis of the facts of this case shows that the conduct of the appellant does not necessarily come within paragraph (b) of Section 206 of the Penal Code as to what constitutes malice aforethought. In the case of Nzuki -vs- Republic, (1993) KLR 171, this court stated that malice aforethought is a term of art and emphasized 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 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 -vrs- Director of Public Prosecutions, [1975] AC 55”.*

In Nzuki -vs- Republic, (supra) the inculpatory facts were that Nzuki pulled the deceased out of a bar and fatally stabbed him with a knife. What, however, was unnerving is that there was no evidence as to there having been any exchange of words between Nzuki and the deceased nor was there any indication as to why Nzuki came into the particular bar and straight away pulled the deceased out of it and then stabbed him. The court observed that the prosecution is not obliged to prove motive, but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. (See Rep -vs- Sharmpal Sigh s/o Pritam Singh, (1962) EA 13 at Page 17. The court in substituting Nzuki's charge of murder with manslaughter observed:

“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.”

In Raphael Mbuvi Kimasi –vrs- Republic [2014] e KLR, *ibid*, the Court of Appeal delivered itself as follows;

“In the case of Isaak Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007 (ur), this Court 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 =vrs= R, Criminal Appeal No. 312 of 2009 Court of

Appeal (Kisumu).”

Being persuaded by the decision in Juma ONyango Ibrahim =vrs= R (supra) and Nzoiki =vrs= Republic, (Supra) we find that the prosecution had not proved malice aforethought on the part of the appellant to the required standard. The totality of the above is that we allow the appeal against the offence of murder and set aside the conviction and sentence of death. We substitute in its place a conviction for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The appellant is sentenced to serve 10 years with effect from 28th August, 2006, when he was first arraigned before Court.”

In the present case, none of the prosecution witnesses saw the accused kill the deceased. The revelation of the death was made by PW4 a sister in law to the accused. According to her evidence, the accused told her she killed the deceased because he had disturbed her for too long. It is important to emphasize that the burden of proof in a criminal case always lies with the prosecution to prove the case beyond all reasonable doubt. That burden is not lessened by the fact that an accused has admitted to having committed the offence. As such, in the instant case, the prosecution was duty bound to dislodge the defence of self defence advanced by the accused. They were also duty bound to prove the motive that drove the accused into killing the deceased. In the absence of a strong case for the prosecution the court will definitely believe the defence advanced by the accused.

The prosecution advanced a case that the accused intended to kill the deceased because he had sired a baby boy with his lover. However, that motive is clearly discounted by the fact that the accused too had a son who was her last born. It is also the prosecution’s case that the accused premeditated the death of the deceased and did not react in self defence because she did not strike once but several times on his head until she ensured that she was dead. That the same could be demonstrated by the several fractures on the deceased’s head and face. I agree that there lies a possibility that the accused did not strike the deceased once but several times, a fact vindicated by the evidence of PW6, the doctor, given that the skull and face had been crushed. But her defence which the prosecution filed to dislodge easily convinces the court that she attacked him out of anger. In such circumstances, the accused was provoked to act in self defence. The background to the relationship between her and the deceased was agitating enough to cause her to react with the force she did.

It is now currently acceptable in our jurisdiction that excessive use of force in self defence may result in a finding of manslaughter. This was the observation by the Court of Appeal in the case of **Mungai v Republic (1984)KLR, 85** in which learned Judges Kneller, Hancox, JJA and Nyarangi,Ag JA delivered themselves as follows;

“However, notwithstanding the fact that section 17 of the Code statutorily requires that criminal responsibility for the use of force in defence of person or property shall be determined according to English Common Law, it does appear that the doctrine is recognized in East Africa that the excessive use of force in the defence of person or property may lead to a finding of manslaughter: see R v Ngoilale (supra) and R v Shaushi [1951] 18 EACA 198, the latter of which was cited with approval in Hau s/o Akonaay v R [1954] 21 EACA 276 in which, at pages 277 and 278, the following passage occurs:-

“In the circumstances covered by the Common Law Rule cited above and in the circumstances of the instant case there exist elements of both self-defence and provocation. This court has already in R v Ngoilale and R v Shaushi s/o Miya [1951] 18 EACA 164 and 198, indicated its view that section 18 is wide enough to justify the application of any rule which forms part and parcel of the Common Law relating to self-defence and in the latter said (at p 200):-

“no doubt this element of self-defence may, and, in most cases will in practice, merge into the element of provocation and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts

done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat to attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.”

We have no doubt therefore that, in the instant case, the learned trial judge should have directed himself in accordance with the rule of Common Law which we have cited.”

I have already found that the prosecution failed to prove that there existed a motive behind the killing of the deceased. On other evidence available all the prosecution witnesses save for the doctor who conducted the postmortem confirmed that the accused and the deceased had an extremely turbulent marriage. His own sister, PW4 categorically stated that the deceased was a violent man who listened to no one for guidance. This was also said of him by PW1,2,3,4 and 5. It is not disputed that for the last five years preceding the incident the deceased more often than not spent the night in the house of his lover. This was replicated on the morning of the incident. He arrived home in his usual quarrelsome behavior and started beating one of their children. The accused intervened and the deceased turned his heat on her. That is how the accused struck back. According to the prosecution, the deceased was attacked when he was sleeping. But that is an issue that cannot be verified from the evidence. The accused had for so long suffered in the hands of the deceased. He had even combined effort with his lover to so often beat the accused. It is my view then that at the slightest provocation the accused was bound to fight back the stumbling block that hindered her from living a happy life. That happened on the morning of the incident when the accused beat her and in retaliation picked the object closest to her and in anger fatally injured the deceased.

Although it is clear that she did not strike once, given the background of her relationship with the deceased, she was likely to hit him several times until her tempers came down and until she saw she was out of danger. For that reason, I think that the prosecution’s case that malice aforethought can be established when an accused hits the deceased more than once cannot stand. My view is that in the heat of passion, the accused can hit the deceased as many times as the anger persists until the tempers cool down and the danger is removed. In the circumstances, I am unable to rule that the accused was possessed of malice aforethought. I conclude that the killing of the deceased amounted only to manslaughter.

In the result, I find that the prosecution did not prove beyond all reasonable doubt that the accused murdered the deceased but instead proved beyond all doubt that without malice aforethought killed the deceased. I find her guilty of the offence of manslaughter contrary to Section 202 of the Penal Code and I convict her accordingly.

DATED and DELIVERED at ELDORET this 18th day of April, 2016

G. W. NGENYE MACHARIA

JUDGE

In the presence of: -

- 1. Mr. Marube for the accused.**
- 2. M/S Mokuia for the State.**