



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 2 OF 2015

REPUBLIC

VERSUS

KISEE MUSYA alias MISTARI

JUDGEMENT

The accused herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that the accused, on 31.1.2015 at Maendeleo 'B' Village in Kurawa Sub-Location, Tarasaa Division within Tana Delta Sub-County murdered NASORO KOMBO.

Nine witnesses testified for the prosecution. PW1 STEPHEN NYAMAI KITHEKA testified that on 31.1.2015 at about 7.00 pm he was at home at his place of work at Kurawa in Tana River when the accused arrived. The accused informed him that he had been attacked by a man at a nearby farm after the accused had inquired from the man what he was doing. The man had a panga and a rungu and hit the accused on the head. The accused had a visible injury on the head. The accused informed him that he fell down but later picked himself and snatched the panga from the man. He cut the man who was still on the ground. PW1 further testified that the accused was carrying the panga. He went back to the scene with the accused. He went out to look for assistance. Many people gathered at the scene. The man was taken to hospital. He used to see the attacked man around the village. The man had injuries on both hands and on the head.

PW2 HUMPHREY KALAMA MASHA is the area Nyumba Kumi Village elder. On 31.1.2015 at about 7.00 pm he was heading home on a motor bike when Charo Mtengo called him on phone and informed him that the deceased had been assaulted. He took twenty minutes to reach the scene. He saw many people. The deceased could talk. The deceased informed him that it was the accused, who is also called "**Mistari**" at the village, who had assaulted him. The deceased had cuts on both hands and head. He called the Senior Village elder and area chief. He took the deceased to Marereni Hospital but the doctor pronounced him dead. He took the deceased's body to his house. Members of the public assaulted the accused. He restrained them. The police went and took the body and the accused.

KOLDE YUSUF HASHARO was PW3. He is the Assistant Chief of Kurawa Sub-Location. On 31.1.2015 he was at his home when he got a phone call informing him about the incident. He advised the caller to take the deceased to Marereni Hospital. At about midnight, PW2 called and informed him that the deceased had passed on. In the morning he went to PW2's home. He saw the deceased had cuts on

both hands and head. The police went there and took the body. The accused was taken to hospital. He later went to the scene and saw some blood.

PW4 JUMA PAKA is the deceased's uncle. His testimony is that on 31.1.2015 he was at home. He slept that night. In the morning he heard that someone had been killed. He went to PW2's house and saw the victim was his uncle. The deceased had cuts on both hands and head. He saw the accused was also there and had been tied with ropes by members of public. The deceased had no grudge with the accused.

PW5, Sergeant DANIEL KIMAIYO was based at Tarasaa police post. On 1.2.2015 at 6.00 am he went to Kanagoni road block to release Cpl. Salim who was on night duty. Cpl. Salim informed him that at night members of the public had taken an injured man to hospital on a motor bike but there was no information on the status of the victim. At about mid-day, the area police officer commanding station and other officers went to the road block while carrying the body of the victim. They enquired whether he had seen any panga. He had not. Later that night, one of his colleagues went to the toilet and saw a panga. The toilet was in a pit latrine used by many people. The panga was retrieved the following day in his absence.

PW6 police constable LEONARD SIELE was based at Garsen police station. He investigated the case. He went to PW2's home and found the deceased's body lying on a bed. He took photographs. They were taken to the scene where he saw blood. He drew a sketch plan of the scene. The accused was being held at PW2's home. The accused was taken to Ngao District hospital where he was treated and discharged. The accused had been beaten by members of the public.

According to PW6, his investigations revealed that the accused was from a kiosk that night. He met the deceased who had a rungu and a panga. The deceased hit the accused who fell down. The accused snatched the panga from the deceased and hit him on the head and both hands. It is the deceased who started assaulting the accused. PW6 interviewed witnesses and recorded some witness statements. The panga used in the incident was retrieved from a pit latrine at a road block. He went and collected the panga.

It is PW6's evidence that the accused's clothes had blood. He forwarded the accused and deceased's blood stained clothes to the Government Chemist for analysis. It is his evidence that the accused used excessive force. He later charged the accused with the offence.

PW7, Dr. ABDUL AZIZ MTWANI produced the post mortem on the deceased conducted on 10.2.2015 by Dr. Mina Mumba at the Malindi District hospital. The deceased had fractures on both forearms, fracture of the orbital bone and multiple lacerations on the head. The cause of death was severe head injury secondary to blunt force trauma.

PW8 P.C. GABRIEL KOSGEI was based at the Malindi C.I.D office. He is a scene of crime gazzetted officer. On 3.2.2015 he received a film from Tana Delta C.I.D office forwarded by PW6. He processed eight photographs. PW9, GEORGE LAWRENCE is a Principal government analyst based at the Mombasa Government Chemist. He received exhibits from P.C. Wesley Rono. The exhibits were accused and deceased's blood plus their clothes. His analysis showed that the blood on the accused's clothes was that of the accused while the blood on the deceased's clothes was that of the deceased.

In his unsworn defence, the accused testified that on the 31.1.2015 he went to the Gurera shopping centre where he bought milk and bar soap. Before leaving the shops, two children of Stephen Kitheka (PW1) aged 12 and 9 years respectively told him to wait for them as they headed to the shops. They later joined him and walked towards their home. While on the way, the children saw someone in a farm that was being taken care by PW1. He had not seen the man but the children insisted that they had seen someone. He was smoking a cigarette. He decided to go and check. He saw someone harvesting maize with a small sack. The man said **“pole mzee usinipige ni njaa” – Sorry, don't beat me its due to hunger**”.

It is the accused's evidence that he dropped the cigarette and stepped on it. Suddenly he was hit on the head. The man had a panga. He dropped the milk he was carrying. The two children ran away. He pushed the man and he fell down. He screamed saying there was a thief. Two people went to the scene

while he ran away with the panga to PW1's house. He went back to the scene with PW1 and met the deceased on the ground. The deceased told them not to assault him as the other two people had injured him. He was later arrested and charged. He had no intention of killing the deceased.

In his written submissions Mr. Okuto, counsel for the accused, submit that the evidence is circumstantial. No one saw the accused kill the deceased. Counsel further contends that it is the deceased who started assaulting the accused. The accused acted in self defence. Counsel relies on the Case of **ROBERT KINUTHIA MUNGAI V REPUBLIC, Court of Appeal at Nairobi, Criminal Appeal No. 84 of 1984 KAR 1988-89 at page 621 paragraph 6**. The Court of Appeal in that case stated as follows: -

“..... Where a forcible and violent felony is attempted on the person of another, the party assaulted, or his servant or any other person present, is entitled to repel force and, if necessary, to kill the aggressor. There must be a reasonable necessity for the killing, or at least an honest belief based on reasonable grounds that there is such a necessity.”

The main issue to be determined by this court is whether the accused murdered the deceased. In other words, whether the prosecution has proved its case beyond reasonable doubt against the accused. The prosecution evidence does prove that indeed it is the accused who inflicted the injuries on the deceased. The defence evidence that the accused ran away while two people had reached the scene is not true. That evidence is misplaced by the evidence of PW1 and PW2. If indeed the accused was with two children of PW1, why didn't the children inform their father about the incident upon reaching home? PW1 was just at home when the accused went there carrying a panga. Further, PW1's evidence is that the accused informed him that he had met a man in the farm who had hit him on the head. PW1 testified that the accused told him that he had snatched the panga from the deceased and cut him in return. The accused did not tell PW1 about the other two men.

It is the evidence of PW2 that he reached the scene after about twenty minutes upon receiving a phone call from Charo Mtengo. The deceased could still talk. The deceased told him that it was the accused who had assaulted him. The deceased knew the accused. The accused confirmed to the court that at the village they call him **“Mistari”**. The deceased told PW2 that it was **“Mistari”** who had assaulted him. That evidence was passed over to the investigation officer PW6 who testified on the same line. Given the evidence herein, it is established that indeed it is the accused who killed the deceased. The defence evidence does not raise any doubt on the prosecution case.

The other issue for determination is whether accused intended to kill the deceased. Under Section 203 of the Penal Code, the main ingredient of the offence of murder is malice aforethought. Section 206 of the Penal Code gives the circumstances under which malice aforethought can be established.

According to PW1, PW2, PW3, PW4 and PW5, there was no grudge between the accused and the deceased. The incident occurred at about 7.00 pm and it was dark. It could be possible that the deceased was stealing the maize. The sketch plan drawn by PW6 show that there was maize at the farm. The incident occurred near a foot path. The accused was on his way home.

It is the evidence of PW6, the investigating officer that it was the deceased who first assaulted the accused. This is also the evidence of PW1 who was the first person to get into contact with the accused and the deceased. There was no intention on the part of the accused to kill the deceased. The accused was on his way home. The accused was beaten by members of the public. It is not clear whether the injuries he suffered were those inflicted by the members of public or by the deceased. I do, however, hold that the deceased was the first one to attack the accused. PW6 testified that the scene showed that there was a struggle.

The post mortem report indicate that the deceased had a fracture of the right wrist which could be possible defensive injuries. He also had a deep cut near the right eye and head injury. According to PW6, the accused used excessive force. Given the fact that the incident occurred at night and it was the deceased who had the panga, I do find that the accused was defending himself in those circumstances. He manage to snatch the panga from the deceased and during the struggle he could not know which part of

the body he was hitting the deceased. The accused acted in self defence and had no intention to kill the deceased. The deceased was the first one to attack the accused. That must have provoked the accused who opted to defend himself.

In the end, I do find that the prosecution has not proved the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. However, the prosecution has proved the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code against the accused. The accused is hereby not found guilty of the charge of murder. The accused is however found guilty of the offense of manslaughter and is hereby convicted of that charge.

Dated and delivered in Malindi this 30th day of May, 2016.

S.J. CHITEMBWE

JUDGE