



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL CASE NO. 17 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KIOKO MULEI.....ACCUSED

J U D G M E N T

1. **John Kioko Mulei**, the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **4th day of April, 2009** [particulars withheld] **Location** in **Mwingi District** within the **Eastern Province** he murdered **R K M** (deceased).

2. Facts of the case are that the Accused and Deceased were neighbours and relatives. On the **29th March, 2009**, the Accused went to the house of the Deceased where he found her children among them, **PW2 C K** and **PW4 P K M**. He was offered a seat, he sat and asked for the whereabouts of the Deceased. The Deceased who was sitting next to her kitchen responded and greeted him. He asked her to preach to him. All over a sudden he stood and cut her severally with the panga that he had. The Deceased's children screamed and scampered. **PW1 J W M**, was informed of the incident. He went to the scene to find a large crowd. He assisted people who rushed the Deceased to hospital amongst them was **PW3 N M**. The matter was reported to the police. The following day **PW1, PW5 Kitheka Muthoka** and the Assistant Chief of the area went in search of the Accused. They found him in the thicket and took him to **Nguni Police Station**. They handed over the panga that they recovered to **PW6 No. 58234 P C Gregory Maingio**. He was later transferred to **Ukasi Police Station** and charged with a holding charge of causing grievous harm. Thereafter, on the **4th April, 2009** the Deceased passed on and the charge was substituted with the information as stated.

3. When put on his defence the Accused who opted to give unsworn evidence denied having committed the offence. He stated that on **4th April, 2009** he had been incarcerated at **Waita Prison (Mwingi)** having been arrested on **29th March, 2009** for the offence of Murder of the Deceased his family member. He stated that he found the Deceased running around his house carrying a panga. She then interred something in the ground. When he confronted her, she attacked him with a panga. He used a stick to hit the panga which fell down. He picked it and used it to hit her on the head. He was arrested the following day.

4. Issues to be considered are:

- Whether the Accused caused the death of the Deceased.

- Whether he did it with malice aforethought?

5. The fact of death of the Deceased was proved by evidence adduced of a postmortem pursuant to the provisions of **Section 33** and **77** of the **Evidence Act** as the Doctor who conducted the autopsy was away and finding him would have caused unreasonable delay. **Dr. Allan Albert** on examining the body found the Deceased having sustained three (3) cut wounds on the scalp, two (2) cut wounds on the left Temporal Region measuring 14cm, two (2) cut wounds measuring 12cm running parallel to each other on the left Temporal Region of the cranium. He formed the opinion that the cause of death was cardiopulmonary arrest secondary to subdural haematoma due to severe head injury.

6. Malice aforethought is defined by **Section 206** of the **Penal Code** which provides thus:

“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.”

7. In **Republic vs. Ndalania & 2 Others (2003) KLR Osiemo J.** held:

“For the offence of murder, malice aforethought is deemed to be established by evidence of knowledge that the act or omission causing death or grievous harm will probably cause death or grievous harm to some person whether that person is actually killed or not although such knowledge is accompanied by indifference whether such death or grievous harm will occur.”

8. Eye witnesses who testified PW2 and PW4 were at home when the Accused went looking for the Deceased. On finding her he sought to know if the Deceased knew God and he acted by cutting her severally. He went to the Deceased’s home while armed with a panga. Therefore they were categorical that it was the Accused who committed the act that caused the death of the Deceased.

9. It has been submitted that the evidence of Prosecution Witnesses was riddled with gleaming inconsistencies with regard to the Accused’s guilt and in particular the weapon the Accused was found with at the time of his arrest, namely panga. However, looking at the defence put up, the Accused admitted having cut the Deceased with the panga on the head but claimed to have been provoked and acted in self-defence.

10. Considering the contention of the Accused that he acted in self defence, I must consider the law on that aspect.

11. **Section 17** of the **Penal Code** provides thus:-

“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.”

12. Principles of common law in respect of self-defence were stated in the case of **Palmer vs. Republic**

(1971) A.C. 814 which was approved and followed by the Court of Appeal in **Republic vs. McInnes**, 55 Criminal Appeal R 551 where Lord Morris 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 in 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 way of revenge or punishment or by way of paying off an old score or may be pure aggression.....”

13. Evidence was adduced by PW2 and PW4 proving the fact that the Accused acted for no apparent reason and just cut the Deceased. They were cross examined at length but it was not suggested to them that the Accused acted in self-defence. There was also no suggestion that he was provoked.

14. In this case it is important to interrogate what transpired in the course of trial. The Accused was arraigned before court on the **11th May, 2009**. Following a court order to assess his mental status, he was examined by **Dr. D. A. Kokonya** a Psychiatrist and found to have a positive history of substance abuse and perpetual disorder. He was found unfit to plead to the charge. Consequently he was committed to **Mathari Mental Hospital**. After undergoing treatment for approximately two (2) months he was examined and by a report dated **7th August, 2009** declared fit to plead. He pleaded to the charge. On **5th May, 2010** his mental status was questioned by the court. Ultimately he pleaded to the charge on the **23rd January, 2010**.

15. From the foregoing, the question to be posed is whether the Accused was under the influence of some substance that had affected his mind. the defence of insanity arising from infirmity of mind is contained in **Section 12** of the **Penal Code** that provides:-

“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

If the Accused was suffering from infirmity of mind at the time of committing the act that caused the death of the Deceased then he was criminally responsible.

16. The Law in this regard is however clear. In the case of **Muswi s/o Musela vs. Republic (5956) EACA 622**, the Court of Appeal for Eastern Africa held that as a general rule evidence of the state of mind of Accused should be called by the defence. The Accused was duty bound to prove on a balance of probabilities that due to infirmity of mind he committed the act in question. This was not the case in the instant case. The Accused's defence indicated that he was sane at the time of committing the offence save that he acted in self-defence. Therefore I would have no basis, factual or otherwise to assume that at the time of committing the act that resulted into the death of the Deceased the Accused suffered from infirmity of mind.

17. In the premises, I find that the Accused went to the home of the Deceased armed with a panga, a weapon that he used to cut the Deceased occasioning her severe injuries. Having been in control of his mental status, he was aware that cutting the Deceased severally would at least occasion her grievous harm or even cause her death.

18. In the result, I find him guilty and convict him of the offence of **Murder** as charged.

19. It is so ordered.

Dated, Signed and Delivered at Kitui this 27th day of July, 2016.

L. N. MUTENDE

JUDGE