REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 15 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

KYALO MULWA.....ACCUSED

R U L I N G

1. **Kyalo Mulwa,** "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 **26th** day of **December, 2010** at **Kwa-Ukungu Shopping Center, Nzunguni Sub-location, Kyangwithya East Location** in **Kitui District** within **Kitui County** murdered **Francis Muinde** (Deceased).

2. It was the Prosecution's case that on the **26th** day of **December, 2010** at about **6.30 p.m.,** the Deceased and PW1 **Lazarus Mwendwa** went to **"Kwa Mariam"** night club (bar). They found the Accused seated at the verandah drinking. The Deceased confronted the Accused alleging that he had stolen his money and a mobile phone. A fight ensued between them. The Deceased picked a sugarcane from one **Sammy Kilonzo** and struck the Accused inflicting an injury on his head. They were separated and the Accused who was bleeding left.

3. Fifteen minutes later, the Accused returned with a piece of wood that he used to hit the Deceased on the head twice. By the time PW2 **Muinde Muimi** the father of the Deceased got to the scene he was not talking. He found him lying on the verandah. He was rushed to **Kitui District Hospital** but he died while undergoing treatment. PW5 **Dr. Patrick Mutuku** conducted a postmortem on the Deceased's body. Externally, the body had clotted blood all over the face and neck region. The head had fracture of skull extending from the left temporal region through the left parietal bone and ending at the occipital region, massive haematoma below the skin of skull and massive subdural haematoma. He concluded that the cause of death was brain death secondary to massive subdural haematoma due to skull fracture.

4. When put on his defence, the Accused denied having caused the death of the Deceased. He admitted having been at the bar drinking alcohol and having been hit with a sugarcane by the Deceased. He stated that he left the scene on being hit by the Deceased and was escorted by one **Mutinda Kasinda.** Denying having returned to the scene of the incident he stated that when he reached home he called a taxi to take him to hospital and he was arrested while awaiting the arrival of the taxi.

5. Issues to be determined in the matter are:

- Whether death occurred.

- Whether the unlawful act that resulted into the death of the Deceased was caused by the Accused.

- Whether it was committed with malice aforethought.

6. The fact of death is not in doubt. The body of the Deceased was identified to the Doctor who performed the postmortem by his relatives. PW5 confirmed the fact that the Deceased died as a result of injuries sustained on the head. The Deceased sustained a fracture of the skull.

7. It has been submitted by Counsel for the Accused, **Mr. Mwalimu** that there is no corroborative evidence to support that of PW1 and the Accused was suspected to have been the hit man because he was wounded by the Deceased.

8. **Ms. Awour,** learned Counsel for the State on the other hand argued that the Accused left the scene angry after being assaulted by the Deceased. He was the only one who had a motive.

9. The only witness who testified as to how the Deceased sustained the injury that he later succumbed to was PW1. He was a person known to both the Accused and Deceased. The evidence is therefore of a single witness. PW1 stated that the Accused returned fifteen minutes later. He estimated the time to have been about **7.00 p.m.** This brings in the question whether he was able to see properly.

10. In the case of **Matonyi vs. Republic (1986) KLR 198** it was held that:

> ***"(1) Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need of testing with the greatest care the evidence of a single witness respecting identification…..***
>
> ***(2) ……***
>
> ***(3) The court must warn itself of the danger of relying on evidence of a single identification witness. It is not enough for the court to warn itself making a decision. It must do so when the evidence is being considered and before the decision is made.***
>
> ***(4) Failure to undertake the inquiry of correct testing is an error of law and such evidence cannot safely support a conviction."***

11. I am also alive to the provisions of **Section 143** of the **Evidence Act, Cap 80 Laws of Kenya** that provides:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

That notwithstanding I caution myself of the need to test evidence adduced by PW1 with greatest care.

12. At the outset, when the Deceased assaulted the Accused using a sugarcane they were separated by PW1. It was his testimony that when the Accused returned at about **7.00 p.m.,** the electricity light was on including the security lights at the bar and on nearby buildings. The light enabled him to see the Accused who found the Deceased having mounted the motorcycle. He saw him hit the Deceased twice on the head with a wooden stick but he could not state with certainty if the wooden stick that was produced in court was the weapon he used on the fateful day.

13. Questions that were asked in cross examination suggested that the Deceased may have been assaulted by somebody else and that after the incident the Accused went in search of PW1. However, the questions put up did not shake evidence adduced by the witness. After the police got information of passing on of

the Deceased PW3 **No. 88218 P C Joseph Musumba** went in search of the Accused. He found him sitting outside his house holding a wooden stick that they recovered. This was the stick/piece of wood adduced in evidence as a murder weapon although PW1 could not tell with certainty if it was the one.

14. The Accused herein was assaulted by the Deceased who demanded from him his money. The Accused bled from the injury that was occasioned by the Deceased. Following the assault upon his person by the Deceased when he returned he had the intention to retaliate. Therefore, evidence adduced by the Prosecution proves that it was the Accused who committed the unlawful act that caused the death of the Deceased.

15. This, therefore, brings us to the issue whether he acted with malice aforethought which is defined by **Section 206** of the **Criminal Procedure Code** as:

> ***"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."***

16. The Accused herein was lawfully partaking his alcohol at the club/bar. PW1 had this to state at what transpired:

> ***"Kyalo the Accused was seated at the verandah of the bar drinking. There were customers seats at the verandah of the bar. The deceased jumped at the accused and they started fighting. I did not know what was happening. The deceased was saying he wanted money. The deceased picked a sugarcane from one Sammy Kilonzo who was selling the same. The deceased struck the accused with the sugarcane. I separated them and they stopped fighting. The accused was bleeding on the face where he had been hit with the sugarcane….. As the deceased was about to take off the accused struck him with a piece of wood on the head……. The deceased fell off the motorcycle……. The accused was saying he could not accept having been assaulted until he spit blood. The accused appeared violent and nobody dared to go close to him….."***

17. From the foregoing there existed an element of provocation. **Section 208(1)** of the **Penal Code** defines provocation as:

> ***"(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."***

Provocation is a recognized defence that lessens the severity of the charge. The **Penal Code** recognizes such a defence. **Section 207** of the **Statute** provides thus:

> ***"When a person who unlawfully kills another under circumstances which, but for the provisions***

of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."

In the case of **Republic vs. Hussein s/o Mohamed (1942) EACA 55** the Court of Appeal held:

"When once legal provocation as defined in our code has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation, the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence, but will not of itself necessarily rule out the defence of provocation."

18. From the account given by PW1 as to what transpired, it is obvious that the Accused was wronged by the Deceased. He demanded for his money. Later he explained to PW1 that two (2) days prior to the material date the Accused had stolen his **Kshs. 2,600/=** and a mobile phone. The Deceased was a school teacher therefore a person with general knowledge. On cross examination PW3, the Police Officer was not aware if the Deceased had made any report of theft to the police. Therefore that remained an allegation that was not proven.

19. On being struck with the sugarcane, the Accused left while bleeding then returned with a piece of wood/stick. He was full of rage such that people could not move near him. PW1 estimated the time that lapsed between the time he left after he was assaulted and the time of his return as approximately **15 minutes.** He did not state what made him come up with the estimate. Therefore it could have been fifteen minutes or less. The Accused was a 'bodaboda' operator, an ordinary person who could easily be provoked by an assault that caused him actual bodily harm. Therefore by moving to search for a weapon that he could use in retaliation he acted in the heat of passion. He was temporarily deprived of the power of self control as narrated by PW1.

20. From the foregoing although the Accused did not consider the defence of provocation, the same is established, as there was no proof that he acted with malice aforethought, I therefore find him guilty of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code.** Accordingly, I convict him of the same.

21. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **28th** day of **September,** 20**16.**

L. N. MUTENDE

JUDGE