



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL CASE NO. 37 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KIRWA BARNO.....ACCUSED

J U D G M E N T

The accused was 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 **on the 25th day of June 2011 at Kapsait village in Elgeyo Marakwet County Murdered Simon Kamoi Ethiyeni**. The prosecution called 6 witnesses who testified as hereunder.

PW1 Sheila Jelagat kirwa is the accused wife. He said that on the material day at around 9.30 pm the deceased came to her home and found her with the children. The accused was yet to arrive. The deceased was drunk. When he arrived he told the deceased to go away but he resisted. Meanwhile the accused pushed the deceased outside and the two engaged in a fight. She then heard the deceased scream. She rushed outside and found that the deceased had died.

She then sent the eldest daughter to notify her parents so as to report the incident. Later the matter was reported to the police.

PW2 Brenda Kosgei was at home when at around 1 pm her niece Caren came and told her of the fight that was going on between the deceased and the accused.

She went to the scene and found the body of the deceased some few meters from the house. He had injuries on the head and arms.

PW3 William Bargarioria Kosgei heard the screams around 11 pm while asleep. PW1 arrived and informed him about the fight between the accused and the deceased. He went to the scene and found the deceased already dead.

PW4 Joseph Elpa Ekinyulu the deceased brother identified the deceased body for postmortem purposes. He said that the deceased body had cuts on the arms and the head.

PW5 Dr. Blastus Kakundi produced the postmortem report which showed the cause of death as cardiopulmonary failure due to severe hemorrhage due to severe injuries on the head and arms.

PW6 CIP Shadrack Mutogo carried out the investigations. According to his findings the cause of the

fight between the accused and the deceased was some kshs 50 which was change given to the accused as they were drinking liquor at the home of the accused mother in law. The deceased became unruly and began banging the door severally which led to the accused attacking the deceased using a panga. The said witness equally took several sets of photographs which he produced.

When put on his defence the accused gave sworn evidence. He said that he worked as a security officer at Kapsait dispensary .

On the material day he arrived home at 10 pm and knocked the door. He said that the door was opened by someone who had a panga and he raised the same to cut him. He defended himself but was equally cut on the hands and he lost consciousness. He was treated at Kapcherop hospital. He produced the P3 form which indicated the injuries he had sustained.

On cross-examination he said that he did not know the deceased before the incident. He also denied taking changaa with the deceased during the day. He admitted that the panga was his.

Analysis And Determination

The question herein is whether in light of the evidence on record it can truly be established that the deceased was killed by the accused intentionally. Although PW1 , the accused wife and the accused defence vary on how the incident occurred, I can easily conclude that the deceased met his death at the home of the accused.

What runs across the prosecution witness evidence is that both the accused and the deceased were drunk. There is sufficient evidence contrary to the line of argument taken by the accused that they were both intoxicated and had taken alcohol during the day.

It is further conceded even by the accused that the murder weapon used was his panga although the same was not recovered. Further the accused also sustained injuries during the fight. There seemed to be no sufficient evidence to suggest who caused the fight. One thing is clear however that the deceased as well as the accused were drunk. The evidence of the investigating offence state as much.

In light of the above finding, can it be concluded that there was malice aforethought on the part of the accused?

Malice aforethought which is an essential ingredient in the offence of Murder as been defined under section 204 of the Penal Code as hereunder:

206 “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 greivous 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 greivous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or greivous bodily harm is caused or not, or by a wish that it may not be used

c) an intent to commit a felony;

d) an intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.”

In the prevailing circumstances herein there is no sufficient evidence to suggest that there was a premeditated plan by the accused to harm or kill the deceased. Further there is sufficient evidence that both

of them were drunk. Equally its not disputed that the accused sustained injures occasioned by the fight.

Consequently and in light of the above, its my view that the proper charge against the accused ought to have been Manslaughter.

I therefore reduce the charge of Murder to that of **Manslaughter under the provision of Section 205 of the Penal Code** and proceed to convict him accordingly.

Delivered tis 31st day of October, 2016.

H.K. CHEMITEI

JUDGE

In the presence of;

Kakoi for state

Bororio for Korir for accused

Accused – present

Kirong – Court Assistant