REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 45 OF 2015

REPUBLIC……...……...……PROSECUTOR

Versus

DAVID GITONGA ITHARII alias HASSAN A.....ACCUSED

JUDGEMENT

This case is of a charge of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) of the Laws of Kenya facing one **David Gitonga Itharii** alias **Hassan Ahmed** hereinafter refereed as the accused.

The brief facts upon which the prosecution indicted the accused with the offence of murder are that on the 14th day of November 2015, the accused and one **Fredrick Mureithi Muriuki**, hereinafter referred as the accused were at their residence in Ongata Rongai – Kajiado County. The accused and the deceased in the presence of PW5 started a heated argument which developed into a physical fight. In the ensuing events the accused grabbed a knife and a stone which he held in both hands. They started wrestling each other again while the accused was still in possession of the knife and the stone which the deceased did not succeed in dispossessing him. The accused got an opportunity to jump at the deceased and stabbed him with the knife occasioning personal injuries.

The accused pleaded not guilty to charge. He was represented at the trial by learned counsel Mr. Itaya while the prosecution was conducted by Mr. Alex Akula, the Senior Prosecution Counsel. The prosecution called a total of ten (10) witnesses to prove the essential ingredients of the offence beyond reasonable doubt constituting the following:

(1) That the deceased died.

(2) That the deceased died as a result of unlawful acts of omission and commission.

(3) That the assailant or perpetrator of the murder had malice aforethought.

(4) That the accused was positively identified as the one who killed the deceased.

PROSECUTION CASE:

The accused and the deceased worked with Viva Security Services Company under the operations director **PW4 Geofrey Rukenya**. PW4 stated that on the 14/11/2015 while at home he received a telephone call from **PW5 Stanley Kariuki** that the accused and the deceased had been involved in a fight as a consequence accused stabbed the deceased with a knife inflicting fatal injuries. As the operations director PW4 cut short his leave to travel from Kirinyaga to Nairobi in order to deal with the issue

regarding the death of the deceased.

PW5 testified that on the material day the deceased give the accused Kenya Shillings Two Hundred (200) to go and buy vegetables and other groceries for use to prepare a meal. On return they divided among themselves duties at the kitchen. PW5 further stated that the deceased started to cut the vegetables as the accused prepared the ugali. PW5 testimony indicates that as this was going on the deceased uttered the following words to the accused: ***"You should make enough ugali that you will eat so that I can beat you."***

According to PW5 the accused in response told the deceased that he was not interested to fight him as threatened. PW5 further stated that the food was made ready which they all served and settled to eat. The deceased was at it again by telling the accused that the accused will not manage the fight because even the shoes he was wearing belonged to someone else. According to PW5 this seemed to annoy the accused who pushed the deceased with his hands. The deceased rose up and pushed the accused towards the bed area. This prompted PW5 to take action of separating them from escalating the fight. The separation saw each of them thrown outside the house.

PW5 further stated that the deceased returned back to the house and called on the accused demanding of him to cook another ugali as the earlier one had poured during the confrontation. This did not go well with the accused. It was PW5 evidence that the accused armed himself with a knife on one hand and a stone on the other hand ready to face off with the deceased. According to PW5 the accused jumped on the deceased stabbing him at the chest area. This occasioned bodily harm where they sought assistance from PW6 Ken Isindu to rush the deceased to the hospital for treatment. PW6 told this court that when he arrived at the scene the deceased was on the ground bleeding from the nostrils and his hand. He took action of restraining the public from lynching the accused while he covered the deceased body.

PW1 PC Ngeno a scenes of crime officer testified on his role of preserving the scene through photographs taken on the 14/11/2015 at Ongata Rongai where the killing took place. The certificate and photographs developed were admitted in evidence as exhibit 1 (a) and (b) in support of the case for the prosecution. PW2 and PW3 a cousin and father to the deceased testified on how they were requested to participate in identifying the body of the deceased to the pathologist who performed a postmortem at the City Mortuary.

PW7 a police officer attached to Ongata Rongai Police Station testified as one of first officer to visit the scene of murder on the 14/11/2015. On arrival PW7 stated that they found a lifeless body and together with PW1 took photographs of the scene. PW7 further testified that the deceased body was transported to the City Mortuary while the accused was escorted to Kenyatta National Hospital for treatment. This was because the accused had been subjected to some beatings by the public as punishment for his action of killing the deceased.

PW8 a medical doctor examined the accused and prepared a mental fitness certificate in favour of his capacity to stand trial. PW9 a government chemist presented the analyst report regarding the blue jeans, black jacket, blood samples of the accused, and a knife. PW9 testified that the analysis undertaken on the exhibits and blood samples conclusively pointed to DNA match between the blood stains on the knife as indicative of the deceased person. The prosecution led the evidence of PW10 Cpl Fredrick Kamweru. He testified on the investigations conducted of recording witness statements, preservation of the scene and forwarding the exhibits to the government chemist for analysis.

At the scene he examined the body of the deceased which he confirmed had stab wounds in the rib cage area. PW10 further stated that he sought the presence of the deceased's cousin and father (PW2 and PW3) to attend the postmortem in order to identify the deceased body to the doctor. PW10 further told this court on recovery of the murder weapon; the knife at the scene and subsequent analysis at the government chemist to link it as the one used to inflict the deceased injuries. The postmortem by Dr. Njeru was admitted in evidence by consent under section 77 (1) of the Evidence Act Cap 80 of the Laws of Kenya. On examination the doctor confirmed the deceased sustained injuries of a fracture to the left fourth rib and left lung. In his opinion the deceased death was due to chest injuries as a result of the penetrating

sharp wound.

At the close of the prosecution case the accused was placed on his defence. In his unsworn statement the accused told the court on the 14/11/2015 the deceased sent him to the grocery to buy some vegetables and other items for the house. When he returned back to the house they started jointly to cook food in the presence of PW5. The accused further stated that in the course of preparing the meal the deceased started to insult him which escalated into a fight. According to the accused PW5 made attempts to separate them but did not succeed. The accused version was that the deceased took a kitchen knife which in the struggle to disarm him inflicted himself sustaining fatal injuries. The accused further testified that in company of PW5 and PW6 they tried to make arrangements to rush the deceased to the hospital but there was no immediate means of transport available. It was at this juncture members of the public who visited the scene started to beat the accused for causing the death of the deceased. He denied the offence and the sequences of events as explained by the prosecution witnesses.

At the close of the trial both counsels filed written submissions. Mr. Itaya, the learned counsel for the accused submitted that the prosecution case fell short of proving all the ingredients beyond reasonable doubt. The learned counsel contended that malice aforethought specifically was not established from the evidence presented by the witnesses. In his highlights learned counsel invited the court to look at the circumstances where the deceased was the one who started the fight against the accused. Additionally learned counsel submitted that the prosecution failed to show how the accused came to be in possession of the knife tendered in court as a murder weapon. Learned counsel contended that the accused person should be acquitted of the offence as charged.

On the part of the prosecution Mr. Akula for the prosecution submitted that all the elements of the offence have been proved beyond reasonable doubt against the accused. Mr. Akula reiterated the testimony by the ten prosecution witnesses who linked the accused with the ingredients of the offence.

As regards the death of the deceased Mr. Akula, invited the court to refer to the testimony of PW2, PW3 and the postmortem report. Secondly on unlawful death of the deceased Mr. Akula contended that the evidence of PW3, PW6 and PW4 is clear that deceased death was unlawful. Mr. Akula further submitted and made reference to the testimonies of PW7, PW9 and PW10 together with the postmortem to demonstrate how the deceased met his death. Mr. Akula argued that there are no compelling reasons to have justified the death of the deceased under the exceptions provided in the law.

Thirdly on malice aforethought Mr. Akula, relied on the testimony of PW3, PW5, PW6 and the postmortem report. In his contention Mr. Akula submitted that the accused was the one who armed himself with a knife which he used to stab the deceased inflicting the fatal injury. In support of the case for the prosecution Mr. Akula cited the following authorities ***David Lentiyo v Republic [2006] eKLR, Jared Otieno Osumba v Republic [2015 eKLR, Charles O. Maitanyi v Republic [1986] KLR 198***. According to Mr. Akula the prosecution case is watertight as linking the accused with the offence of killing the deceased.

It is therefore prudent at this stage to consider the underlying facts of the case, the evidence by the prosecution, the defence and the charge to establish whether each ingredient was proved beyond reasonable doubt:

The first ingredient - the death of the deceased.

The accused in this matter on 14/11/2015 was at Ongata Rongai in company of the deceased and PW5. PW5 saw the accused and the deceased commence a quarrel which later escalated into a fight. The deceased sustained injuries during the fight with the accused. It was a stab wound to the chest. PW5 reported the matter to PW4 who is their boss in the company they work for as security officers. PW5 further reported the matter to the police who investigated it conclusively. PW1 took photographs of the scene including the deceased body. PW2 and PW3 positively identified the body of the deceased at the City Mortuary. The postmortem report by Dr. Njeru confirms the death of the deceased. There is no dispute therefore as to the death of one Fredrick Muriuki, the deceased in this charge murder.

This ingredient is therefore settled.

The second ingredient of unlawful death of the deceased

Murder is the taking of a human life by another human being against the law save in defence of property or imminent danger to self. The Republic constitution 2010 under Article 26 provides for right to life to every citizen. Under Article 26 (3), "***A person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law***."

In the instant case the deceased was presumably in good health and alive in the morning of the fateful day of the 14/11/2015. He was at home and set to prepare a day's meal for consumption with his fellow colleagues PW5 and the accused. The deceased and accused started to quarrel and a fight ensued. They were separated by PW5 and pushed out of the house.

What followed thereafter was the accused getting hold of a knife and a stone. The accused according to PW5 stabbed the deceased with the knife. The photographs exhibited of the deceased denote physical injuries to the deceased chest. The postmortem report confirmed a fracture of the rib and injury to the lungs. The deceased died on the spot. The blood stained knife was recovered and subjected to DNA profile of the deceased. The government analyst report confirmed DNA match of the blood stained knife with the sample taken from the deceased.

The inference to be drawn from the evidence by the prosecution is that the death of the deceased was unlawful caused by the acts of omission or commission of the accused.

Third ingredient is that of 'malice aforethought'. This is defined as the man endangering state of mind conceived by the accused. See analysis of causation by J.M. Nyasani. Malice aforethought is defined under section 206 of the Penal Code providing circumstances the prosecution must lead evidence to prove against the accused in any of the following:

> **(1) An intention to cause the death of another.**
>
> **(2) An intention to cause grievious harm to another.**
>
> **(3) Knowledge that the act or omission causing death will probably cause the death of or grievious harm to same person, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievious bodily harm is caused or not, or by a wish that it may not be caused.**
>
> **(4) An intent to commit a felony.**
>
> **(5) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.**

The East African Courts have pronounced themselves on these issues in a plethora of cases. A sample of those are herein referred to: In ***Bonaya Tutut Ipu & Another v Republic [2015] eKLR*** the court stated that:

> **"Malice aforethought is the *mens rea* for the offence of murder and it is the presence or absence of malice aforethought which is a decision in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case."**

In ***Paul Mungai Ndingi v Republic [2011] eKLR*** the court of appeal held that:

"Malice aforethought is deemed established by the evidence proving an intention to cause death or to do grievious harm to any person."

In the case of ***Chesaket v Uganda Cr. Appeal No. 95 of 2004*** the court of appeal held thus issue as follows:

"In determining a charge of murder whether malice aforethought has been proved the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted and the subsequent conduct of the accused person."

In ***Republic v Tubere S/O Ochen [1945] EACA 63*** the court held that it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it is used and the part of the body injured and ordinarily an inference of malice aforethought would flow of a spear or of a knife than from the use of a stick. In ***Republic v Karioki Wa Njagga [1734] 1EACA 149*** the court held that there was malice aforethought on the part of the appellant who had knowledge as a reasonable than that by stabbing the deceased in the way he did he would probably cause harm which was likely serious to injure health of the deceased. In ***Republic v Ndatamia & 2 Others [2003] KLR*** the court held that there was sufficient proof of malice aforethought as defined under section 206 (b) of the Penal Code where the accused persons beat the deceased violently and persistently and when they were persuaded to stop they would not listen. They continued to beat the deceased inflicting injuries on him which cause his death. *(For the above see also **Musyoka J on Criminal Law in Kenya**).*

Having set out the law i can now consider the evidence as placed before me by the prosecution and nature of the defence by the accused. The accused in this case used a knife to inflict injuries on the deceased as per PW5. PW5 further confirmed to this court that the accused stabbed the chest of the deceased and soon thereafter fell on the ground bleeding from the nostrils and chest area. The postmortem report by Dr. Njeru opined the cause of death as chest injuries due to penetrating sharp wound.

There is no dispute that the accused had personal misunderstanding generated by the deceased issuing threats of fights to the accused. The threats by the deceased turned violence and efforts to separate them by PW5 bore no fruits. According to PW5 the accused and deceased fought without any one of them using a weapon or object. It's only after a little while PW5 saw accused armed with a knife and a stone challenging the deceased to a duel. Their actions turned fatally violent when accused jumped unto the deceased stabbing him at the chest. The accused denied that he was the one who stabbed the deceased. He alluded the stab wound as self inflicted by the deceased.

I make reference to the testimony of PW5 and the defence raised by the accused. The accused has not explained why he armed himself with a knife and the stone which turned the fight fatal. The testimony of PW5 is direct evidence against the accused. The accused admitted in his defence that PW5 made attempts to separate them from continuing with the fight. The evidence by the prosecution establishes that the injuries suffered by the deceased were no self inflicting but caused by the accused. The medical evidence from the postmortem reports corroborated the testimony of PW5.

I have given careful consideration to the whole evidence adduced by the prosecution and the defence whether this ingredient has been proved. I am satisfied that the star witness PW5 gave cogent and credible evidence on the events of the 14/11/2015 when the deceased met his death. The accused in his defence did not rebut both direct and circumstantial evidence on how the deceased met his death.

In the instant case the most important question which begs for an answer is whether there were extenuating circumstances present to warrant this court reduce the charge of murder to that of manslaughter. The law has flagged the following circumstances to all as a mitigation in reducing the blame worthiness of the accused immaturity, intoxication, provocation, self defence, defence of property. See ***Mohammed Ahmed & Others v The Queen [1957] EA 146, Odhiambo v Republic [2009] KLR 347, Mungai v Republic [1976 – 1985].***

This legal proposition was discussed in the case of ***Mburu Ole Legure v Republic [1934] 1EACA 157***. It

was held that it is only in cases where there is express malice that the accused cannot claim the excuse of provocation. The court is expected to consider whether such circumstances, which determine the moral wickedness of the accused conduct, exist. See ***Muiruri v Republic 1976 – 85 EA 311***). These circumstances if established reduce the absence of pre-meditation on the part of the accused to commit the offence.

The accused herein in his unsworn testimony invited the court to drawn ain inference of self defence from the deceased insult and beatings. The applicable law in Kenya is found under section 17 of the Penal Code which states as follows:

> **"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."**

The celebrated case of ***Palmer v Republic [1971] AC 814*** followed by the court of appeal decision ***Republic v Mcinnes 55 Cr. Appeal R 551*** **Lord Morris** stated thus:

> **"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, may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances such 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 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. There may be no longer any link with a necessity of defence the defence of self defence either succeeds so as to result in an acquittal or it is disapproved in which case as a defence it is rejected.**
>
> **In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."**

In ***Munga v Republic [1984] KLR*** it was stated that the use of excessive force in the defence of a person will frequently result in a conviction of manslaughter rather than murder.

The persuasive authority from Uganda in the case of ***Uganda v Mbubula [1973] High Court Criminal No. 225*** the court set out a test of four elements to constitute self defence as follows:

> **(1) That there must be an attack on the accused.**
>
> **(2) That the accused must as a result of the attack, have believed on reasonable grounds that he was in imminent danger of death or serious bodily harm.**
>
> **(3) That the accused must have believed it necessary to use force to repel the attack made upon him.**
>
> **(4) That the force used by the accused must be such force as the accused believed on reasonable grounds to have been necessary to prevent or resist the attack.**

The question of importance on this aspect of the case is whether the evidence led was such that it would justify a defence of self defence. From the evidence submitted by the prosecution particularly PW5 it was clear that the accused and deceased started fighting on the provocation of the deceased. There is sufficient

evidence from PW5 that the drums of war came from the deceased. The deceased threats to the accused to feed well so as to get energy for a fight obviously could trigger an irritation. The first push came from the accused against the deceased. The attack ensued between them prompting PW5 to intervene and threw them outside the house. The nature of injuries was superficial in view that no weapon was used by either party. The attack turned violent when accused armed himself with a lethal weapon, a knife exhibit 2 which he used to stab the deceased. Besides the knife the accused also was in possession of a stone. It appears he never got the opportunity to utilize it after inflicting the injuries with the knife.

What i draw from the evidence is that the attack was random and spontaneous. However the accused had time to flee when PW5 separated them but he stand up to the challenge from the deceased. All these actions though not condoned happened at the spur of the moment without any pre-mediation.

As this is a matter covered with the law and authorities i reiterate that in this country an accused person who pleads provocation as a defence ought to bring himself or herself with the following elements:

(1) That there was an act of provocation instigated by the deceased.

(2) That as a result there was both actual and reasonable loss of control due to provocation.

(3) That the act of retaliation was proportionate to the provocation.

From the evidence carefully set out and evaluated in respect of the offence of murder i arrive at a conclusion that: It is not in dispute that eh deceased was involved in an alteration with the accused. It is also clear from the evidence that the deceased was stabbed shortly from which he suffered severe injuries on the fourth rib, left lung and thoracic area. These injuries according to the autopsy report occasioned the death of the deceased. In committing the offence malice aforethought was not proved by the prosecution.

Lastly, the evidence by the prosecution proves beyond reasonable doubt that the accused is guilty of a lesser offence of manslaughter as opposed to murder under section 203 as read with section 204 of the Penal Code as earlier indicted. I therefore under section 179 of the Criminal Procedure Code reduce and substitute the charge of murder with that of manslaughter contrary to section 202 as read with section 205 of the Penal Code. I find the accused guilty of the charge and do convict him accordingly.

Dated, delivered, signed in open court at Kajiado on 19th day of December, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Accused - present

Mr. Akula Senior Prosecution Counsel – present

Mr. Itaya for the accused - present

Mr. Mateli Court Assistant – present

SENTENCE

The accused person has been convicted for the offence of manslaughter as provided for under section 202 of the penal code. The sentence for a person found guilty of the offence by a court of law is life imprisonment. The accused was earlier on charged with the offence of murder which at the end of the trial

was substituted with that of manslaughter. Before sentencing. The court called for a presentence report which was prepared by the probation officer dated 18/1/2017. The report paints a picture of strong family ties though home visit with the parents at Tigania appear to be rare. The employer gave a positive report on the accused behaviour during the period he has been in employment. The report also interviewed the family of the victim who are still traumatized with the death of their son which has impacted on them negatively. I take note that the family was invited to participate in the sentencing hearings for the court to receive victim impact statement but they chose to opt out and leave the court to make a final order on the case. Mr. Itaya counsel for the accused submitted in mitigation and advanced to this court that the accused is remorseful. The prosecution counsel Mr. Akula also submitted that the accused had no previous criminal record of any nature.

I must then consider the provisions of section 205 on life sentence. I take into account the mitigation; the accused has no previous records. The accused person is a young man aged 25 years. I further take into account the law and the sentencing guidelines in terms of the principles the court has to apply in sentencing the offenders upon conviction. In this regard, I am of the view that a life sentence is not justified but there is no doubt the offence is serious, that custody term of imprisonment is in evitable weighing one factor after another. In my considered opinion I sentence the accused to a term of 10 years imprisonment but under the provisions of section 332 (3) of the Criminal Procedure Code cognizance on the period of detention custody awaiting trial computed to be slightly over one year be discounted in favour of the accused. Accordingly I sentence the accused to nine (9) years imprisonment.

14 days right of appeal explained.

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R. NYAKUNDI – JUDGE

30/1/2017

The sentencing order made in the presence of the accused.

Mr. Itaya advocate for the accused.

Mr. Akula for the Director of Public Prosecutions

Mr. Mateli – Court Assistant