REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.58 OF 2010

LESIIT, J

REPUBLIC……..…….…….....……...PROSECUTOR

-VERSUS -

JOSEPH MACHARIA WAWERU…….……ACCUSED

JUDGMENT

1. The accused **JOSEPH MACHARIA WAWERU** is charged with Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

"On the night of 5th and 6th August 2010 at GwaKarime village, Mangu location in Gatundu North District, within Central Province, murdered GEORGE GAKUMO"

2. The entire prosecution case was heard by Hon. Muchemi, J who also placed the accused on his defence. I heard only the defence case.
3. The prosecution called 11 witnesses. The brief facts of the prosecution case are that on the evening of the 5th August, at 8 p.m., PW3 parked a motor bike registration no. KMCJ 243V at Kamwangi Total Petrol Station for the night. PW3 co-owned the motor bike with one Charles Kiogora. He missed it the next morning only to be arrested when he reported the matter at Kamwangi AP Camp.
4. At 11 p.m. same night of 5th, the watchman at the Kamwangi Petrol Station saw a person pushing away the same motorbike. The watchman, PW6 spoke to the man who confirmed that the motor bike was his and he let him take it away. PW6 could not identify that man as he had not seen him before. However he identified a jacket P.Exh.5 as similar to what the man was wearing that night.
5. At around midnight of the same evening of 5th, PW1 was asleep in his house with his wife when they heard the deceased calling PW1's wife, who was his distant cousin and neighbour. On going to check, they saw the deceased sprawled on the ground bleeding profusely and very weak to talk.
6. PW1 sent PW5, the father of the deceased a text message to go to PW1's home quickly. PW5 was already on his way to PW1's home after hearing screams in their neighbourhood. PW5 eventually organized and took the deceased to Gatundu District hospital where he died the following day.
7. PW2 a neighbour to PW1 and 5 also heard screams from PW1's home that night and he too went there to find out what was happening. He found the motor bike KMCJ 243V P.Exh.2, abandoned on the road not far from PW1's home. PW2 pushed the motor bike to the Kamwangi AP's Camp with the help of other people.
8. PW7 was one of the many boda boda motor bike operators within Kamwangi area who took the

law in their hands and stormed into the house the accused used to live in at 8 a.m. on 6th August 2010. They took over a white jacket P.Exh.5 which they handed over to PW4, the investigating officer of this case. At 1 a.m. on the night of 6th and 7th August 2010, the same group arrested the accused and handed him over to PW4.

9. PW4 took the accused to PW8, on the 16th 2010 who took a statement under inquiry from him. The statement P.Exh. 6, was admitted in evidence without objection.
10. PW11 Dr. Mikalo performed a post mortem examination on the body of the deceased. He formed the opinion that the cause of death was excessive bleeding due to deep cuts especially the one measuring 12 cm long by 5 cm deep on the left shoulder. The doctor saw other cuts, one on the scalp exposing the skull measuring 10 cm long which had been stitched and another cut on the left ear lobe.
11. A psychiatric nurse, Mr. Kimere PW9 examined the accused on the 11th August 2010 and found him mentally fit and aged around 26 years old. PW9 found no injuries on the accused.
12. The accused gave an unsworn statement in his defence. In that statement the accused said that he was an employee of PW3. He stated that on the material day he drove a customer to Mufagoro Shopping Centre. That on his way back he met a person who stopped him. On stopping a second man emerged. The accused stated that the two started demanding for cash and his mobile phone, which they took from his pockets after which they engaged him in a fight before the two ran away after stabbing and clobbering him.
13. The accused said that he walked to the nearest house where he was advised to go home and report the matter the next day. The next day he went to hospital, was treated then went back to his house where police later arrested him.
14. I have carefully considered the entire evidence adduced by the prosecution and the defence and submissions made by both sides.
15. The accused faces a charge of murder. The burden lies with the prosecution to prove beyond any reasonable doubt that the accused person attached and inflicted injuries on the deceased and that as a result of those injuries the deceased died. The prosecution must prove that at the time the accused inflicted the injuries on the deceased he had formed an intention to either cause death or grievous harm to the deceased.
16. The circumstances that constitute malice aforethought is defined under **Section 206** of the **Penal Code** thus:

"206. Malice aforethought 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."

17. I have set out the entire evidence adduced by the prosecution in this case. There was no eye witness account of what transpired on the material night or of how the deceased got injured out of which injuries he died. The prosecution is relying on the statement under inquiry, P.Exh.6, taken from the accused by Chief Inspector of Police, Gitari Pius Muchira on 16th August 2010 at 2.30 p.m., ten days after the night of incident. The prosecution is also relying on the identification of the jacket, P. Exh. 5.
18. The statement under inquiry goes into greater detail than the defence and it was admitted without

any objection. In the inquiry statement the accused stated that he was a victim of a robbery as he rode back to Kamwangi Shopping Centre where he waits for clients. He stated that he was stopped by two people who robbed him of 400/- and that as he resisted the robbery he was able to disarm one of the thieves of a knife which he also used to stab him on the neck.

19. The accused in his statement under inquiry contended that when the two robbers ran away after stabbing and clobbering him, he ran to a nearby home where he got escort back to where he had abandoned his motorbike. He claims that his escort advised him to run away as he could be harmed by relatives of the man he had injured if they found him. The accused stated he did as advised and that he went to his family and slept.
20. The accused in his inquiry statement stated further that police arrested him on the 7th August, two (2) days later and that they took away his clothes. He also says that he gave the police the knife he used to stab the deceased with.
21. The prosecution is relying on the evidence of the jacket, P. Exh. 5. The jacket was taken from the accused house. While accused admits police took some clothes from him he does not disclose what kind of clothes they were. On the other hand, PW7 claimed he and others took the jacket from accused house and gave it to the police. The same jacket was identified by PW6 as similar to the one worn by the man who pushed away the motor bike, P. Exh. 2. There is inconsistent evidence regarding the recovery of the jacket. That notwithstanding it is clear that the human blood found on it did not belong to the accused or the deceased. The value of the jacket is more to accused favour as will be demonstrated herein below.
22. Mrs. Kinyori for the accused in her submissions urged that the accused has admitted that he inflicted injuries on the deceased. Counsel urged that the accused acted in self-defence as is evident from his statement in defence and also his statement under inquiry to the police.
23. Mrs. Kinyori cited four cases and stated that all the cases deal with the issue of self-defence. I will consider each of them herein below: In **REPUBLIC VS. DAVID KINYUA (2014) eKLR** a case decided by this court I cited **MUNGAI VS. REPUBLIC (1984) KLR 85** thus:

"No doubt this element of self-defence may, and, in most cases will in practice, merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter."

24. The second case cited is **REPUBLIC –VS- ERICK ODHIAMBO ONYANGO HIGH COURT CRIMINAL CASE NO. 71 OF 2007** where Anyara Emukule, J observed thus:

*"A strong Court of Appeal was confronted with a similar scenario in the case of **MOKWA VS. REPUBLIC [1976-80] 1KLR 1337**. The situation in that case was not very dis-similar to this case on the use of force. The Appellant in that case was assaulting a girl called Maria Kemunto, and her sister Kerubo intervened. The Appellant turned against Kerubo and started beating her. Maria ran to seek for help from Kerubo's husband, and 2 other men. The four rushed and found the Appellant still beating Kerubo. In the process of restraining him the Appellant removed a knife from his jacket pocket and stabbed the deceased four times. The Appellant also received an injury on his hand during the fight with the deceased. Reversing the conviction on manslaughter by the trial Judge, the Court of Appeal said:-*

"where self-defence is successfully raised as a defence to a charge of murder, a verdict of manslaughter on the ground that excessive force was used in self defence is only open to the court if the prosecution discharged the onus of showing that the accused had time for reflection and that he could have counted and aimed the blows which he inflicted."

*The Court also observed that the trial judge had correctly directed himself "that where a person in legitimate self-defence of person or property uses excessive force or more force than was necessary in the circumstances (always providing that all other elements of self-defence are present) he should not be convicted of murder but of manslaughter, as was also held in **MANZI MENGI VS. R. [1964] E.A. 289,***

292*.”””*

25. In the same cited case of **REPUBLIC –VS- ONYANGO**, supra, Emukule, J cited an Indian case of **ALINGAL KUNHINAYAN vs. REPUBLIC [1905] I.L.R 28 Mad. 454 – IND** where the court said:

“The view that a person should not exercise his right of self-defence if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than what the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger, but on whether there was reasonable apprehension.”

26. Emukule J, also cited a Canadian case **REP. –VS- OGAL [1928] 3 DLR 676** where the court held:

“The force used by the accused in defending himself, as he did against an assailant armed with a hammer was not disproportionate to the nature of the attack made on him, although it caused the fracture of his assailant's skull, and he had brought himself, within, and was justified by Criminal Code S. 23 *(equivalent to Section 207 of our Penal Code).*

27. The third case cited is **DZOMBO CHAI VS. REPUBLIC MOM C.A. NO.256 OF 2006**. However the case deals with admissibility of dying declarations and is not relevant to the instant case.
28. The last case cited of **REP. –VS- RUMBA BEJA AND ANOTHER MOMBASA HIGH COURT CRIMINAL CASE NO. 37 OF 2010** deals with the issue of hearsay evidence and is not relevant to this case.
29. Ms Mwaniki, learned prosecution counsel in her submissions urged the court to find that the prosecution had proved the element of malice aforethought and also the charge of murder beyond any reasonable doubt. Counsel urged that there was no doubt that it was the accused that inflicted the fatal injuries on the deceased and that the accused admitted as much in his defence.
30. Ms. Mwaniki cited section 111(1) of the Evidence Act and urged that since the accused claims self-defence, the burden lay on him to prove that the defence is available to him.
31. Section 111(1) of the Evidence Act reads in part as follows:

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:”

32. The burden lies with the prosecution to prove accused guilt on a standard of proof beyond any reasonable doubt. That burden is not lessened even where the accused makes an admission. That notwithstanding the court has the duty to examine the entire evidence and to satisfy itself whether from the entire evidence before it an offence has been proved.
33. Before I deal with the Statement under Inquiry by the accused and whether it amounts to a confession l propose to consider the issues raised in this case.
34. Mrs. Kinyori for the accused urged that the accused was acting in self defence and that he was also injured as PW12 the doctor who examined him found. There was no witness number 12 in this case as the prosecution called only 11 witnesses and the defence only the accused person. PW10 is the Psychiatric Nurse who examined the accused as to age, mental status and injuries. He found the accused was mentally fit, was an adult and had no physical injuries. It is not therefore correct to say that the accused was found with any injuries when examined by a doctor.
35. Mrs. Kinyori urged that the knife produced in evidence by PW4 the Investigating Officer and examined by the Government Analyst was of unknown source. That submission was not accurate

as in his defence, the accused stated that he gave the knife to the I. O., PW4. Likewise in his Statement under Inquiry, the accused stated clearly that he gave the weapon, a knife to the police. The recovery of the knife was squarely part of the defence admission that it was the accused who handed over it over to police. Furthermore, PW4 was clear in his evidence that the knife was surrendered to him by the accused and that he took it to the government chemist for analysis. I find that the accused admitted that he used the knife to inflict injuries which proved to be fatal to the deceased. The issue of the knife, that it was the 'murder' weapon, and that the accused surrendered it to PW4 is not an issue as it was not disputed.

36. Mrs. Kinyori urged that the accused acted in self defence and should benefit from that defence. Ms. Mwaniki on the other hand maintained that the prosecution had proved accused guilt to the charge of murder.
37. Ms Mwaniki urged that the accused had the burden to eastablish self defence as he claimed. In **MORRIS MUNGATHIA VS REPUBLIC CRIMINAL APPEAL NO. 212 OF 2006 COURT OF APPEAL AT NYERI,** the court held:

"The law on self-defence was succinctly stated in the privy council case of CHAN KAU V. R(2) (1955) W.L.R.192 as follows:

'In cases where the evidence discloses a possible defence of self defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence apart from that insanity. It would appear to us that the duty of an accused person facing a murder charge who relies on the defence of self defence is to lay before the court facts upon which the defence is based. The whole purpose of doing so is to enable the court and the prosecution to understand the basis of such a defence. He assumes no responsibility of establishing that defence. The prosecution, however, has the onus of showing that the appellant was not acting in self-defence and that there was time and opportunity before the fatal blow to retreat (see **Manzi Mengi v. R [1964] EA.289**'"

38. It is clear from the above case that the burden remains throughout on the prosecution to prove the accused guilty of the offence and does not shift to the defence.
39. As earlier alluded to in this judgment the prosecution, and it is entitled to it, is relying on the Statement under Inquiry for a conviction. The accused Statement under Inquiry was in tandem with accused defence except that the former was more detailed. In both, the accused stated that he was returning from dropping a client when two men accosted him, robbed him, and engaged him in a fight while each was armed and that he managed to stab one of the robbers with their own knife.
40. The accused statement as to the circumstances leading to the attack was neither challenged nor controverted by the prosecution. None of the prosecution witnesses saw what transpired or how it occurred.
41. There were contentious issues in this case. PW3's evidence was that he was the one using the motor bike, P. Exh. 2 for business at the time in issue. He denied he knew the accused before the incident. He also said that he had not employed the accused neither did he ever use him to do business for him with the motor bike. The accused on the other hand contended that he was an employee of PW3.
42. I find that the accused was lying that he was an employee of PW3. The accused could not tell the registration number of the motor bike in his Statement under Inquiry. Secondly he did not have the ignition key to the bike at any time. The ignition key was in the custody of PW3 and by the time he reported the bike missing he had it in his possession and gave it to police. It was P. Exh. 3. Thirdly, if the accused had the bike legitimately, he could not have abandoned it on the road as there was no reason to do so. I believe PW3 that he was not the employer of the accused.
43. That means that the accused took PW3's motor bike on the night in question without authority and without colour of right. That does not however establish accused culpability to the charge of murder. The action of taking the motor bike without the consent of the owner was a different and unrelated offence.
44. Regarding the incident the accused said he was under attack by two men. The fact of three people at the scene where the deceased was fatally injured and later died is confirmed in my view by the

fact that the white jacket P. Exh. 6 had human blood which after DNA profiling was found to belong to a third male who was neither the accused nor the deceased. That man did not show up at any stage of the investigations. That suggests as accused claimed that the missing man was the deceased cohort and that he with the deceased were up to no good on the night in question. This in turn imputes that it is most probable that it was the deceased and his cohort were the villains not the victims.

45. The accused was involved in an altercation which degenerated to a fight and the resultant end was severe injury to the deceased. The accused claimed that the knife, the weapon used in the attack, belonged to the deceased. There is no evidence to contradict the accused.
46. The accused said he was attacked with a knife and a club and that in self defence he snatched the knife from the accused and stabbed him with it. The doctor's evidence shows that the deceased had three cuts. One on the ear lobe and the other on the scalp were not serious enough to cause death. The one which caused death according to the doctor was the deep stab to the left shoulder area. The report was P. Exh. 9.
47. I find that the accused defence that he was attacked at 11pm as he rode the motor bike is not disputed. The accused defence that his attackers were two is also not disputed. The accused defence that both had implements that could be used to harm is not controverted either.
48. The test whether the force used is justifiable is measured against whether there was reasonable apprehension on the accused part as opposed to whether there was actual danger. (See Indian case of **ALINGAL KUNHINAYAN vs. REPUBLIC [1905] I.L.R 28 Mad. 454).**
49. Each case must be determined on its own unique circumstances and facts. There has to be evidence to support the fact that the person pleading self defence was in a crisis for reason of being in imminent danger and only then could it be justifiable for him to take an action to avert the danger. If there has been an attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. However the action taken in self defence must be proportionate to the necessity of the situation. (See **PALMER VS REGINAM (1971) 1 ALL ER 1077 at page 1088)**
50. In the instant case the only evidence we have of the facts leading to the incident is from the accused. Considering the entire facts and circumstances of the case I find that I am bound to accept his word. The accused was attacked by two people one armed with a knife and the other a club. He had to fight the two of them and in the process disarmed one and turned the weapon against him. The danger the accused faced from his own words was imminent, near enough and serious enough to require an action to avert it and at the same time ruling out malice aforethought.
51. Having considered the entire evidence before me and from the foregoing, I find that the accused inflicted serious injuries on the deceased which caused the deceased death out of his admission. However the prosecution did not discharge its burden to establish that at the time the accused inflicted the said injuries he was motivated by malice aforethought. The same has therefore not been proved against him. I find that having regard to all the circumstances of the case that the accused is entitled to self defence. Accordingly I substitute the charge against the accused from murder, contrary to section 203 of the Penal Code to manslaughter, contrary to section 202 of the Penal Code, under section 179 (1) of the Criminal Procedure Code. I find the accused guilty of the substituted charge of manslaughter under section 322 of the Criminal Procedure Code and convict him accordingly.

Dated at **Nairobi** this **29th** day of **April, 2015**.

LESIIT, J

JUDGE