



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 29 OF 2012

REPUBLIC.....RESPONDENT

VERSUS

ABDALLAH OMAR MWANGESHIACCUSED

JUDGMENT

The above named Accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that:

“On the 8th day of June, 2012 at Mwakwasinyi Village within Taita Taveta County murdered RAPHAEL KIGWAYA”.

The prosecution called seven (7) Witnesses in support of their case with the defence calling the Accused who gave sworn testimony.

The Accused is related to the Deceased who is his step father. They were staying in the same homestead at a village called Makwasinyi Taita -Taveta.

In his defence the Accused testified to the effect that the family usually took meals at the Deceased house and that on the fateful night at about 8:00 pm he proceeded to the Deceased house. He found his step-father who appeared drunk. The Deceased proceeded to hurl insults on him. He picked a piece of wood and attempted to hit the Accused with it. The Accused opened the door and decided to walk away. The Deceased followed him and attempted to hit the Accused who got hold of the Deceased hand. They struggled and the Deceased fell on the ground. The Accused heard the Deceased scream once and he kept quiet. He further testified to the effect that he did not know what caused the Deceased to scream. Later members of public arrived at the scene and he was arrested. He denied having killed the Deceased. Under cross-examination by Counsel for the prosecution Mr. Masila, the Accused stated that both the Deceased and himself were drunk that day. He had started drinking from 2:00 pm to 8:00 pm. Further that it was not him chasing the Deceased but it was vice versa and that he was running away from him.

Section 203 of the Penal Code provides,

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

Section 206 of the Penal Code provides for malice aforethought in the following manner,

“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 off or grievous harm to some person, whether that person is he person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be caused

(c) 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”.

Evidence by **PW 1 ADILIA CHARI KIKWAI** is to the effect that on the 8th day of June, 2012 at about 8:00 pm she had visited the Deceased who is a relative and a neighbour. She found him feeding a small child. The Accused who is also her relative was present. She heard him say that he would kill the “**mzee**”. The Accused started chasing the Deceased and they proceeded to the bushes. She heard a neighbour shout that the Accused had killed his father. She proceeded to the scene and found the Deceased lying on the ground already dead. There was a stab wound on the neck.

RAEL KIGWANYA (PW4) is the daughter of the Deceased. On the day in question at about 8:00 pm she was in the house cooking supper. She was in the company of the Deceased and her sister When the Accused arrived while drunk and said that he was going to kill the Deceased or one of his children. The Deceased was armed with a panga. He threatened to kill the Witness. He went and armed himself with a knife and followed his father who had decided to run away.

Suddenly, she heard a neighbour shout that the Accused had killed the Deceased. She went to the scene and found her father lying on the ground dead. The Accused was chased and arrested by members off public

PHIDES MURUNDE(PW 5) is a neighbour of the Deceased. She was in her house when at about 8:00 pm she heard somebody screaming and shouting that **MWANGESHA** (the Accused) was finishing him. She got hold of a torch and rushed outside and found the Deceased lying outside her compound. She called her husband and informed him that the Accused had killed his father. Her children chased and arrested the Accused. Members of public gathered and threatened to lynch the Accused but they were prevailed upon by the chief who organized for the Accused to be taken to police station.

Upon close evaluation of the evidence adduced before the Court it transpires that there was bad blood between the Accused and the Deceased.

The Deceased was not the Accused biological father. The Accused father had died and his mother was remarried by the Deceased.

The Accused was clearly seen by **PW 4 RAEL KIGWANJA** who is his sister, while at home when he arrived while drunk and threatened to kill her and her father. He armed himself with a panga and knife and she saw him chase the Deceased. He was saying that he would return and finish her. Suddenly she heard her neighbour shout saying that the Accused had killed his father. Her evidence is corroborated by PW 5 who upon hearing somebody screaming outside her house that he was being killed by Mwagesha (the Accused) she opened the door and found the Deceased lying on the ground having been stabbed on the neck. **PW 1 ODILIA** also corroborated PW 4' s evidence. She had visited their home. She had heard the Accused utter words to the effect that he would kill the “**mzee**”. She had testified to have

observed the Accused pushing and chasing the Deceased.

The Accused defence is that its the Deceased who chased him and attempted to hit him with pieces of wood and that he fell down and probably hit himself on the neck fatally injuring himself.

In the submissions by Counsel for he defence three issues have been raised in defence.

1. Self-defence
2. Provocation
3. Intoxication

Self defence. The Accused arrived home and found the Deceased feeding one of his sisters when an argument arose. Evidence before the Court is that its the Accused who armed himself with a panga and a knife and started chasing his father. The Deceased was an old man aged close to seventy (70) years whereas the Accused was aged forty (40) years. There is no plausible evidence that the old man was armed at the time.

There is no evidence to the effect that its the old man who provoked the Accused.

Evidence adduced before the Court is to the effect that ts the Accused who started the whole commotion.

He clearly and openly announced his intentions by stating that he would kill the Deceased and his daughter.

His acts were premeditated. He was constantly quarreling with his father for reasons best known to himself.

He has raised the defence of intoxication. Section 13(1) of the Penal Code provides,

“Save as provided in this section, intoxication shall not constitute a defence to nay criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time off the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and

(a) the State of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission”.

In the present case the Accused is said to have been drunk. He himself stated to have started drinking from 2:00 pm to 8:00 pm. Its not stated what kind off drink he was imbibing and what quantity he had consumed but of much importance is whether he voluntarily caused the state of intoxication or it was caused by another person maliciously or negligently and whether as a result of that intoxication he had become temporarily insane. The Accused in the instant case imbibed drinks voluntarily. There is no mention of a third party having maliciously or negligently caused the state of intoxication on the Accused. When the Accused went home he clearly stated his main objective which was to kill the Deceased and his daughter (PW 4). He voluntarily armed himself with a panga and a knife, chased the old man and accomplished his mission by stabbing him on the neck and fatally injuring him. These were not the acts of an insane person but those of a cool and calculating mind. The defences of self-defence, provocation and intoxication are not available to the Accused in the present case. It is not in dispute that the cause of death was due to cardio pulmonary arrest and shock due to ruptured carotid artery. I am satisfied that the Accused caused the death of the Deceased with malice aforethought. I find him guilty as

charged for the offence of murder contrary to section 203 as read with section 204 of the Penal Code and he is Convicted accordingly.

Judgment delivered dated and signed in open Court this **28th** day of **April, 2015**.

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M. MUYA

JUDGE

28TH APRIL, 2015

In the presence of:-

Learned Counsel for the prosecution Mr. Masila

Learned defence Counsel Mr. Thiaka

Court Assistant Musundi

M. MUYA – JUDGE

Masila:

We do not have his records. He may be treated as a first offender.

Mitigation:

The Accused person has been treated as a first offender. He is remorseful. The Accused has a young family. He has one wife and two children. The oldest being a seventeen (17) years old. The Accused has been in remand since 2012. Education of the girl child should be encouraged. His future appears grim. He has learned in prison. He has been a model person. He may need guidance. We pray for a non custodial Sentence. He is the sole bread winner.

Thats all.

Court:

Probation Report on **13th May, 2015**.

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M. MUYA

JUDGE

28TH APRIL, 2015