



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL 68 OF 2012

REPUBLICPROSECUTOR

VERSUS

KINYUA MUGO.....ACCUSED

JUDGMENT

By an information dated 17.10.2012, Kinyua Mugo was charged with the offence of murder, contrary to section 203 as read with section 204 of the Penal code. It was alleged that on 27.1.2012 at Ndagani Village, Kamwangu Sub-Location, Maara District he murdered Japhet Mutegi.

The prosecution called a total of 4 witnesses in support of their case. The accused was placed on his defence and testified on oath. The prosecution counsel was Mr. Mulochi while the accused counsel was Mr. Lekoona.

Anantacia Mukwanjeru Njue (PW1), a farmer in Marima testified that on 27.9.2012 at about 9.00 pm, she left her home to go to the neighbour's house, one Zablon. On the road, she met Mutegi, they walked together and passed through the home of Kinyua, the accused; that Mutegi asked accused for some food from accused but accused said he had none and that Mutegi started quarrelling the accused. PW1 decided to leave when she noticed the quarrel degenerating and went to Zablon's home and went back to her home and slept. Next morning she learnt that Mutegi had been killed. She went to Kinyua's home and saw Mutegi's lifeless body. PW1 knew both accused and deceased and was not aware of any dispute between the accused and Mutegi before this incident. PW1 did not know how Mutegi met his death. Agnes Kiiri Zablon, a resident of Kamwogo told the court that on 27.9.2012 she went to sleep about 7.00 pm. She then heard Kinyua (accused) calling her husband but her husband was not home and he told her that he wanted to tell somebody that he had killed Mutegi. She informed accused to go and report to the sub area and he left. Afterwards, she decided to go and see for herself and found that indeed the information was correct. She went to Kinyua's home called out his name, and asked to be shown the deceased's body and accused led her to a place where she flashed that torch and saw Mutegi's body with blood oozing from his mouth. She ran away screaming for help and went to inform her husband what had happened. PW3, Kaburu Ndubi Thaara is a sub area of Ndagani in Kamuangu Location. He said that at about 1.00 am, the accused went to his house woke him up and informed him that he had killed Mutegi. PW3 said that he told the accused to go back home and he would come next day. He proceeded to Accused's home next day, called him out and asked to be shown where the deceased body was and he did. PW3 said the deceased was lying on his back with a stab wound above the left breast. He reported to the Assistant Chief who came with the chief. Police were also called and came to collect the body.

PW4 Cpl. Alfred Akuru of Maara Police Station recalled that on 28/9/2012, he was instructed to proceed to a scene of crime at about 9.30 am together with two other officers. They found the body of the deceased lying at the back of Accused's house with a deep cut to the right side of the chest. He recovered a Somali sword at the scene, PEX No. 1. PW4 was also present in the mortuary on 11.10.2012 when postmortem was carried out by Dr. Kitili, who filled the post mortem report and handed it over to PW4 which PW4 produced in evidence with consent of the accused counsel. The Doctor found that the deceased had sustained a stab wound on the right chest measuring about 5 cm long through the 5th intercostal space, through the lung which had collapsed with haemothorax. The doctor formed the opinion that the cause of death was cardiopulmonary arrest due to right haemothorax due to the penetrating chest injury inflicted by a sharp object.

In his sworn defence, the accused said that the deceased went to his home in company of a lady and demanded food. He denied having cooked food and that deceased then removed a panga from his coat; that the woman (PW1) left and the deceased chased him round his house while wadding a panga. He was tripped by a stone and fell. The deceased wanted to cut him with a panga and he took out the knife he had, raised his hand and the deceased was stabbed by the knife as he tried to stab accused. When he got up, he found the deceased had died. He denied there being any dispute between them before the incident and also denied that the deceased had done for him any work. Mr. Lekoona submitted that the accused acted in self defence. He relied on the court of Appeal decision of **Ahmed Mohammed Omar and others V. Republic CRA 414/2012** where the court said that there was no rule that a man must be struck first before he acts in self defence.

The genesis of what resulted in the deceased's death is not in dispute. It is agreed by both prosecution and defence that the deceased in company of PW1 went to accused's house where the deceased asked for food from accused but the accused denied having food and it seems that incensed the deceased and a quarrel ensued. Though it all began from the deceased asking for food, it seems that the request for food arose from the fact that the deceased had worked for Accused and had not been paid. This is what PW4 unearthed from his investigations. PW1 did not allude to hearing that there was a dispute over payment for services.

After PW1 left accused's house there is no eye witness to the actual confrontation between accused and the deceased. No doubt it is the accused who made known what he had done to his neighbor, PW2 and PW3 the Sub Area. In his defence he explained that the deceased had a panga which he was chasing him with while he was armed with a knife. However, PW4 only recovered a somali sword at the scene. The question is whether this was the knife that accused had or the panga that deceased supposedly had. Only one weapon was found at the scene. The deceased died on the spot and so if at all he had a panga it should have been found at the scene and therefore two weapon should have been found. From an analysis of the whole evidence, I do not believe the accused's version of the events that led to the deceased's death. Only one of them was armed and that must have been the accused.

The accused has raised the defense of provocation and self defence. The Court of Appeal in the decision of **Ahmed M. Omar** considered the English decision in **R. V. DEANA 2 CR.APP. RL 75 CCA** where the court held that **"there is no rule of law that a man must wait until he is struck before striking in self defence."** The court also cited its own decision in **ROBERT KINUTHIA MUNGAI V. REPUBLIC (1982-88) IKAR 611**, where the court of Appeal said;

"... We think in view of earlier East African cases we have considered, and the more recent English decision of R. V. SHANNON CR LR 438 1980, that, the true interpretation of the judgement of the Privy Council in PALMER V. R is that while there is no rule that excessive force in defence of the person will in all cases lead to manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered"

The court observed in the same case that the doctrine recognized in East Africa that excessive use of force in the defence of the person or property whether or not there is an element of provocation present, may be sufficient for the court to regard the offence, not as murder but as manslaughter. But if the defence of

self defence is upheld, conviction for murder cannot be sustained. In this case, I disbelieve the accused's defence that the deceased was armed. He is the one who was armed. PW1 told the court that when she heard accused reply to the deceased's request for food it was not good and that is why she left. Her reaction was such that she feared what may follow and decided to leave the scene. Having found that the deceased was not armed, there was evidence that the deceased apart from quarrelling did nothing that may have prompted the accused to fear that some danger may be done to him that he would stab the deceased in vital organ in the chest. In my considered view, even if the deceased provoked the accused, he used excessive force in the circumstances being armed while the deceased was not. For that reason, I find that it is accused who caused the deceased death. There has not been proof of malice aforethought against the accused considering how the incident occurred. In the result, I find him guilty of the offence of manslaughter contrary to section 204 of the Penal Code and I convict him accordingly under section 302 of the CPC.

DATED AT MERU THIS 24th DAY OF APRIL, 2015.

R. P. V. WENDOH

JUDGE.

Mr. Wamache for accused

Mr. Mulochi for State

Mr. Mwenda Court Assistant

Accused present.