



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 55 OF 2013

REPUBLIC.....PROSECUTOR VERSUS

EVANS KHAEMBA.....ACCUSED

JUDGMENT

1. Evans Khaemba, the accused, was charged with the offence of **murder** contrary to **Section 203** as read together with **Section 204** of the **Penal Code**. The particulars of this offence as per the Information dated 28th May 2013 were that on 24th May 2013, at Oletushe Village within Narok County, the accused murdered Alfred Mugoya.
2. The prosecution's case was that on the material night, the accused went to the deceased's home and attacked him with a jembe causing him the fatal injuries that resulted to his death.
3. **PW1** who was the deceased's wife told the court that on 13th May 2013 sometime between 10 and 11 pm, the accused person came to their home and demanded the return of his chair which the deceased had refused to pay for. An argument ensued when the deceased refused to comply with this demand. The deceased resisted when the accused attempted to take the chair forcefully. Agitated, the accused grabbed a jembe and hit the deceased on the back.
4. This commotion woke up **PW2**. He was sleeping in his house when he heard the deceased cry out that his head been hit with a jembe. **PW2** immediately went to the scene and found the accused standing by the deceased's door holding a jembe while the deceased lay on the ground.
5. The accused informed him that the chair in the deceased's possession belonged to him. **PW2** successfully persuaded the accused to surrender the jembe to him and to leave the scene. The deceased who was still lying on the ground was advised to rest. He identified "**Exb 1**" as the weapon which the accused was wielding that night.
6. By the following morning, the deceased's condition had deteriorated and he was therefore taken to hospital by **PW1** and **PW2**. He underwent treatment for four days and eventually succumbed to his injuries.
7. **PW3** was the arresting and investigating officer. On receiving information of the deceased's death, he went to the deceased's house where he found him lying on the bed. He recovered the jembe "**Exb 1**" which the accused used to attack the deceased. The accused was arrested at the deceased's house where he had been detained by members of the public.
8. **PW4** conducted the postmortem on the deceased. He was of the opinion that the deceased died from pulmonary thrombosis arising from a complication of blunt trauma injury to the pelvis organs. He produced the postmortem report as "**Exb 2**".
9. After the close of the prosecution case, this court found that the prosecution had established a *prima facie* case against the accused, and placed him on his defence.
10. The accused gave unsworn testimony. He testified that on 17th May 2013, he was at the deceased's house partaking alcohol with the deceased and four other persons. At about 8.30 pm,

these four people left and he was left behind with the deceased and **PW1**. The deceased approached the accused and asked him to give him some money that he was owed by one Mogaka. Apparently the said Mogaka had informed the deceased that the accused would settle this debt on his behalf.

11. Despite the accused denying the existence of any such arrangement, the deceased persisted with his demands. The deceased then attempted to attack the accused with a jembe, but the accused disarmed the deceased. The accused's case was that the deceased may have sustained the injuries during the struggle but he maintained that those injuries were not inflicted intentionally. The two remained friends even after this incident and on the date when the deceased passed away, the two had agreed to work together on the deceased's farm.
12. Both the prosecution and accused's counsel relied on the evidence on record and did not make any further submissions.

ISSUES FOR DETERMINATION:

- i. cause of death
- ii. *actus reus*
- iii. whether accused had malice aforethought

ANALYSIS

13. **Section 203** of the **Penal Code** provides that the offence of murder is committed by a person who *'of malice aforethought causes the death of another person by an unlawful act or omission.'* Therefore, the prosecution must prove beyond reasonable doubt that there was a death, that this death resulted from an unlawful act or omission by the accused and that the accused had malice aforethought.
14. The first two ingredients were proved by the prosecution and not controverted by the accused. The evidence of **PW1**, **PW2** and the accused was that on 17th May 2013, the accused and the deceased engaged in a fight. In the course of this fight, the accused hit the deceased with the jembe that was produced as "**EXB 1**" causing him the fatal injuries that were described by **PW4** and which resulted to his death.
15. The dispute and the issue for determination in this case is whether the accused had malice aforethought that is, whether he inflicted these injuries intentionally.
16. The accused's case was that he did not inflict the fatal injuries on the deceased intentionally. He alleged that it was the deceased who initiated the fight and came at him with the jembe. He argued that if any injuries were sustained by the deceased, they were accidentally inflicted when the accused attempted to disarm the deceased. Therefore, his defence was that he hurt the deceased accidentally.
17. Upon evaluating the evidence I find that the nature of the injuries sustained by the deceased displace the accused's contention that they were inflicted accidentally as he attempted to disarm the deceased. From the post mortem report, the accused sustained internal injuries inflicted by a blunt object. Therefore he must have been hit by the blunt side of the jembe and in order to inflict such injuries, considerable force must have been used. Therefore, the evidence establishes that the accused intentionally hit the accused with the jembe.
18. However, the circumstances disclosed by the evidence show, that the accused had was acting in self defence when he hit the deceased with the jembe.
19. The defence of self defence is a plea of justification by which the accused pleads that the act is not unlawful because it was justified in the circumstances. (See the decision of the Court of Appeal in **Mwanicha V. Republic**, [1992] KLR 188).
20. The elements of the this defence were stated in **Suleiman V. Republic**, (1) [1963] E.A. 446- cited by the Court of Appeal in **David V. Republic**, [2006] eKLR as follows:

"If a person against whom a forcible and violent felony is being attempted repels force by force and in doing so kills the attacker, the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief on the grounds that it was necessary and the violence attempted by or reasonable apprehended from the attacker is really serious.

It would appear that in such a case, there is no duty in law to retreat, though no doubt questions of possibility of avoidance of disengagement would be relevant to the question of reasonable necessity for the killing. In other cases self defence where no violent felony is attempted a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise, to break off the fight or avoid the assault, he may use force, including deadly force, as is reasonable in the circumstances. In either case if the force is excessive, but if other elements of self defence are present there may be a conviction of manslaughter.”

21. In this case, **PW1** who witnessed the fight between the deceased and the accused testified that the accused went to their home to demand for the payment of his money or in lieu, to be given back his chair.
22. She did not clarify who between the accused and the deceased initiated the fight and only stated that the deceased resisted when the accused attempted to take back his chair forcefully. However, her evidence was clear that he is the one who first attacked the accused with the jembe. Her evidence in this regard was that **“the accused grabbed the jembe from the deceased and hit him on the back.”**
23. This evidence corroborated the accused’s testimony that it was the deceased who came at him with the weapon. He was successfully able to dispossess the deceased and use it against him. Therefore when the accused hit the deceased he was under reasonable apprehension of serious injury to his person. The circumstances of this attack were such that the accused could reasonably have retreated or prevented the attack by retreating or otherwise. He had been agitated following the fight and was obviously in a state of fear because his life was threatened and he was in reasonable apprehension of serious injury.
24. Clearly the offence the accused’s actions were not premeditated and that he acted in the heat of the moment. This is further supported by the fact that the weapon used in the attack belonged to the deceased. Ultimately the accused went there to retrieve his money or chair and did not intend to use deadly force to achieve this objective.
25. Accordingly, the constituent of the offence of murder, *mens rea*, was not established by the prosecution. What remains then for determination is whether the force used by the accused was excessive so as to support the conviction for manslaughter. The onus is on the prosecution to prove that this action was not justified. (See **Mwanicha V. Republic** *supra* at page 191).
26. Having found that the deceased was acting in self defence, the question that follows then is whether such force was excessive in order to constitute the offence of murder.
27. What constitutes reasonable force must be determined from the circumstances of the case. The court must take into account the state of mind of the accused. The Court of Appeal in **Mungai V. Republic**, [1984] eKLR held that:

“ a court applies a subjective test, that is the point of view of the accused person himself, with all the intellectual capabilities of which he might, in fact, be possessed, and with all the emotional strains and stresses to which at the moment in question, he might be subjected. To him, under the pertaining circumstances, such force was reasonable in order to avert the attack or protect himself.”

28. From the circumstances of the case, I find that the prosecution did not prove that the force used was excessive. The accused in this case, did not have sufficient time to appreciate that his action would inflict such fatal injuries that would result to his death. He hit the deceased using the blunt side of this weapon on his back once. It is not unreasonable to conclude that his intention may have been to disable the deceased and not kill him.
29. Further, it is noteworthy that the accused only hit the deceased once and voluntarily relinquished the weapon to **PW2** when asked to do so. He thereafter assisted in taking the deceased to hospital and continued watching over him before he succumbed to the injuries.
30. For the above reasons, I find that the prosecution did not successfully disprove the accused’s defence of self – defence. It failed to establish beyond reasonable doubt that on the fateful night, the accused attacked the deceased with the jembe with an intention to cause him grievous harm or

kill him. To the contrary both the prosecution and the defence evidence showed that he did in fact act in self defence and that the force may have been excessive in the circumstances.

31. Accordingly, I find that the offence of murder cannot be sustained. I therefore acquit the accused of the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and instead find him guilty of the lesser charge of **manslaughter** contrary to **Section 202** of the **Penal Code** and I hereby convict him under **Section 322** of the **Criminal Procedure Code**.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 31st day of July, 2015.

A. MSHILA

JUDGE