



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT MERU

CRIMINAL CASE 79 OF 2008

REPUBLIC PROSECUTOR

VRS

GERALD MWENDA KAILEMIA ACCUSED

J U D G M E N T

By the information dated 24/12/2008, **GERALD MWENDA KAILEMIA** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the PC. The particulars of the charge are that on 9/12/2008 at Muthara Location, Kitharene Sub-Location in Tigania, he murdered **JOSPAT MUTUMA**. The accused denied the offence and the case proceeded to hearing with the prosecution calling a total of 9 witnesses. He was called upon to defend himself and gave evidence on oath.

PW1 Maureen Gatwiri Kobia, told the court that the deceased was a neighbor and on 8/12/2008, about 7.30 p.m. while at her home with her siblings in their kitchen, Mutuma, the deceased knocked at their door and asked for their father because he wanted him to take him to Hospital because he had been cut by Gerald Mwenda, who used to work for her grandfather PW2 (Josphat Kithia). She looked at Mutuma's neck using a torch and noticed blood was dripping. Her father was absent, and she informed Mutuma that and the deceased ran towards the grandfather's house and she met her cousin Purity Mwendwa PW4 and Cecilia Karimi PW3 and they all followed Mutuma to the road where he boarded a vehicle to go to Hospital. She learned of deceased's death next day.

PW2 recalled the 9/12/2008 when deceased went to his house about 7.30 p.m. with an injury on his neck and was bleeding profusely. The deceased informed him that Gerald had cut him. He performed first aid on him and took him to the road where he assisted him to board a taxi to take him to Hospital. PW2 said that he had employed the accused and they had related well; that about 5 days before, the deceased had reported to him that he had a confrontation with accused but the deceased did not disclose the nature of the disagreement save that it was over childish things. When he later asked accused why they had quarreled with the deceased, he asked if he had told him about the childish things. PW2 further said that deceased was injured 3 days later and PW2 went to check on the house in which he had given to accused to live in but he was nowhere and removed all his belongings and the *panga* that PW2 had given him to use was missing. He said that that was the last day accuse was in his home.

PW3 Cecilia Karimi, recalled that on 9/12/2008 about 5.00 p.m. the accused went where she works to ask for Purity Mwendwa PW4 but she was not home. Purity returned home about 7.00 p.m. and PW2 informed her the deceased has been looking for her and she left to look for deceased and she came back running with deceased. Later they heard that the deceased had been cut and she went to the stage to see him and he said that Gerald cut him. She admitted to have been a girlfriend to the deceased but had

declined accused's advances for friendship.

PW4 testified that when she returned home their house help PW3 informed her that the deceased had been looking for her and she left to go and see the deceased. She found him at their house. They talked and when they heard the vehicle that collects tea leaves, she parted with him as he went to weigh the tea. A few minutes later, she was informed that the deceased had been cut. She found when he had already left for Hospital. She denied knowing of any disagreement between accused and deceased.

PW5 Paul Manyara, a brother to the deceased said that the deceased called him about 8.00 p.m. on the fateful day and informed him that Gerald had cut him. He did not know Gerald. He later found the brother dead and attended the post mortem on 1/12/2008.

Doreen Nkirote (PW6), did corroborate PW4's evidence that she went to the place where Mutuma worked and left with him to check the Tea vehicle. Later, one Mugambi followed to check on Mutuma but came back to report that he had been cut. They went where Mutuma was and on questioning him, he denied knowing who had cut him. She further told the court that on 1/12/2009, Gerald went where she worked with the deceased at night while armed with a torch and *panga* and pointed at deceased and vowed that one day, he would cut deceased's neck or give him poison and left. When she enquired from deceased why the threats, the deceased denied knowing why. She denied knowing of the existence of any grudge between them.

PW7 Peter Mugambi, said that PW6 and deceased were working for the same employer. He recalled PW4 calling the deceased from the home and later learned that he had been cut. He denied knowing who cut the deceased nor did he know of any dispute between accused and deceased. He also said that he was aware Cecilia and Gerald were friends.

The post mortem was conducted by Dr. Macharia and the Report produced by Dr. Juliet Wanjiru (PW8). The Doctor found that the deceased had sustained a deep cut on the left side of the neck 10 cm long, damage to the trachea, severed left common carotid and left jugular veins; cervical spine and cervical spinal cord at C₃ and C₄. He formed the opinion that the cause of death was neck injury caused by sharp object.

The Investigation Officer in this matter was PW9 Barnabas Nyaga. He recalled that he had received a report of murder on 9/12/2008 and on 11/12/2008; accused presented himself to the police station fearing that he may be lynched by the public. Upon investigations, he found that accused and deceased had a dispute over a girl and accused claimed that they fought but he did not see any injury on the accused.

The court found that accused had a case to answer and was placed on his defence. He testified on oath that he did kill the deceased but it was not intentional. He said that he had delivered milk to Kirati and on his way back home he decided to go and take some liquor about 7.00 p.m. and when there, the child of Josphat Kithia's sister (deceased) asked him to buy him alcohol but he had no money but deceased insisted. He took one cup and when walking away the person followed him, stopped him, grabbed the person but he overwhelmed accused and he fell; that the person had a *panga* which fell out and when the accused person wanted to get on him, he threw the *panga* at him and the deceased said he was hurt; that accused took out the shirt, tied the wound and took him to the home of Josphat Kithia; that he gave the *panga* to the said Josphat and next day, he reported at the police station.

None of the witnesses saw what transpired between the deceased and accused before the deceased was injured. The issue for this court to consider is whether the death occurred as the accused has told the court. The accused seemed to be raising the defences of self defence and/or provocation. He also seemed to claim that he had drunk alcohol.

Section 17 of the PC defines defence of person or property as follows:

"17. 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”.

Section 207 of the PC provides for the defence of provocation as follows:

“207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only”.

The Court of Appeal had a chance to deal with the two defences in the case of ***Mungai v Rep (1984) KLR 85 pg 98***, where the Judges held:

“However, notwithstanding the fact that section 17 of the Code statutorily requires that criminal responsibility for the use of force in defence of person or property shall be determined according to English common law, it does appear that the doctrine is recognized in East Africa that the excessive use of force in the defence of person or property may lead to a finding of manslaughter: see R v Ngoilale [supra] and R v Shaushi (1951) 18 EACA 198, the latter of which was cited with approval in Hau s/o Akonaay v R (1954) 21 EACA 276 in which, at pages 277 and 278, the following passage occurs:-

“In the circumstances covered by the Common Law rule cited above and in the circumstances of the instant case there exist elements of both self-defence and provocation. This Court has already in R v Ngoilale and R v Shaushi s/o Miya [1951] 18 EACA 164 and 198, indicated its view that section 18 is wide enough to justify the application of any rule which forms part and parcel of the Common Law relating to self-defence and in the latter said (at p 200):-

“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.”

The court heard the testimony of PW3 who stated that she was a girlfriend of the deceased and did admit that the accused had made advances at her but she declined. PW9, the Investigation Officer told the court that from his investigations, he found that accused and deceased had a dispute over a girl.

PW7 who worked with deceased on the other hand said PW3, was a friend of accused. The other witnesses PW1, 4 and 6 did not seem to know of these relationships. PW2, the accused’s employer who praised accused for having been a very good worker and whom he had housed in his compound, said that he had received a report from the deceased that he had had a confrontation with accused but he did not disclose the nature; that when he tried to find out, the deceased described it as ‘childish things’. On PW2 questioning the accused about the quarrel, accused was surprised that deceased had talked to PW2 about the disagreement which he also described as ‘childish things’. In addition to PW2’s evidence, PW6 Doreen, who worked with the deceased also told the court that the accused had on 1/12/2008 threatened the deceased in her presence, that he would cut off deceased’s neck or give him poison. The testimonies of PW2, 3 and 6 were not dislodged in any way and I am persuaded to believe that the accused had a grudge against the deceased, most likely over the two’s interest in PW3 (Cecilia). I have considered the evidence of PW2 and 6 as against the defence raised by the accused and I am more convinced by the evidence of PW2, 3, 6 and 7 as being the truth.

PW1, 3, 4 and 5 told the court that the deceased had just been with them and left them while in company of PW4 to check on the vehicle which ferries tea but soon thereafter, the deceased came back to PW1’s house having been assaulted; and then proceeded to PW2’s house where he went about 7.30 p.m. The deceased was not anywhere near a beer drinking den where the accused claims a confrontation occurred

between him and deceased. The accused's allegation that it is the deceased who accosted him and attacked him is not believable considering the very consistent evidence of PW1, 3, 4, 6 and 7. Accused did not allude to anything that would have caused him to lose control of his emotion or fear for his life. He cannot avail himself the defence of provocation or self defence.

As respects the defence of being drunk, it is provided for under Section 13 of the PC. It provides as follows:

“13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of 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.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

The accused said that he had only taken one cup of whatever liquor he consumed. He has narrated to the court in detail what happened thereafter. In my view, a person can only avail himself that defence if he did not know what he was doing or that it was wrong or that he was so intoxicated at the time of the act that he did not know himself.

This court also does not believe accused's defence that he did first aid on deceased because when PW1 saw the deceased after he was injured, no first aid had been done on him. It is PW2 who said that he tied deceased's wound and arranged to have him taken to Hospital. PW2 further testified that after the deceased had been taken to Hospital, he went and checked in the house where the accused used to sleep but found his clothes gone and so had the *panga* he had given him to use. It means accused fled soon after the event. Accused's contention that he was deceased's friend is not true. If he was genuine that he acted in self defence and the deceased was truly his friend, he would have tried to get him help.

From the foregoing I am satisfied that there existed a grudge between accused and deceased arising from rivalry over a woman and the accused made his threats real by way laying and viciously attacking the deceased. I find that he did not act in self defence but the act was premeditated, planned and executed by accused.

To prove an offence of murder, the prosecution must prove the two ingredients:

1. That the accused committed the act of murder (actus reus)

2. That the accused had the intention to kill or cause grievous harm on the deceased (mens rea) also known as malice aforethought.

In the instant case, there is no doubt that it is the accused who committed the act that caused deceased's death. From a close examination of the evidence of the prosecution and defence case, I am satisfied that

the accused had the intention to kill or do grievous harm to the deceased arising from a disagreement over a woman and he attacked deceased aiming at the very delicate part of his body by cutting his neck severing the major vessels and fracturing the spinal cord. I find that the prosecution has proved beyond any doubt that the offence of murder was committed. I will find accused guilty as charged and convict him accordingly under Section 322 of CPC.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF SEPTEMBER, 2015.

R. P. V. WENDOH

JUDGE

25/9/2015

PRESENT:

Mr. Mulochi, for State

Mr. Igweta Holding Brief for Mr. Otieno, for Accused

Faith, Court Assistant

Present, Accused