



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL CASE NO. 27 OF 2012**

**REPUBLIC ..... RESPONDENT**

**V E R S U S**

**WILSON MWITHALI..... ACCUSED**

**J U D G M E N T**

The accused stands charged with murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of offence are that on 10<sup>th</sup> August 2012 at Laza township Tana River District within Tana River County murdered Ali Komora Salim. He has denied the charge.

I have to state at the outset that initially the accused was charged with another by the name of Jane Shororo. The charge against the other accused was however later dropped by amending the charge sheet during the trial. In addition I also have to say that this case was mainly heard by another Judge and I took over the case just before the close of the prosecution case.

The prosecution called several witnesses. PW1 is Bakari Galbra Argamso a farmer from Kalkacha in Hola. It is his evidence that on 9/8/2012 he operated a boda boda at Hola town carrying passengers. On that day he took passengers to Mikinduri road where he saw two people fighting. He tried to separate them but did not succeed. One of the people was knocked down by the other and one was on top. The one who was knocked down was Ali the deceased.

He knew the one who was on top as a person who worked for Toaloki bar but did not know his name. The one on top of the other then left and brought a big stick from the Toaloki bar. At this point two passerby snatched the stick from him. He then went back to the bar. The witness told the deceased to escape as the other person was likely to come back come with a weapon. Before long the other person came back from the bar with a knife. When Ali saw the knife, he tried to escape but the other person, reached close, ran towards Ali and when Ali turned he stabbed him, then dropped the knife and ran to Toaloki bar. Then three girls in the bar told the assailant to escape, but the witness and others chased and restrained him. One of those who chased was called Shehe. They took him to the DO's office Galole and handed him to the Administration Police officers.

It is his evidence that when they went back to the scene, they found that the deceased was already dead. This witness was later recalled to identify the knife without a handle which was with the Government Chemist.

In cross examination he stated that there were three girls in the bar. He stated that he informed the police that Ali told him that the accused had taken his girlfriend. Ali did not however give the name of the girlfriend. He stated that the incident occurred at about 12.30 am and that he was alone as his passengers had left. He was not aware that two people had initially been jointly charged. He maintained that he saw

only one woman at the scene whom Ali claimed to be his girlfriend. He stated he was not aware that Ali had a knife. He was also not aware that Ali was getting in between the accused and his girlfriend and that Ali wanted to stab the girl and that the accused intervened. He denied that the girl ran to hide. He stated that he met two people fighting furiously.

In re-examination he stated that Ali told him that the accused had taken his girlfriend. He maintained that the accused went to Toaloki Bar and came back with a big stick, and that when the stick was taken away he went back to pick a knife. He maintained that Ali had no knife.

PW2 was Zuberi Ngayafa Juma a farmer at Hola. His evidence is that on 9/8/2012 he was woken up by a remark "***anakuja na bakora***". After a while he heard a remark "***Ali kimbia huyu mtu anakuja na kisu***".

On walking out of the house, he found two people fighting one on top of another. He tried to separate them but noticed that one had a knife. He noticed that the deceased who was lying down had a stab wound on the left chest. The one who had the knife panicked and dropped the knife and ran towards Toaloki bar. The one who was injured then asked that his mother be called.

He has further testified that the one who had stabbed the other then came out of the bar and started running away. They chased and restrained him with one Shehe. They then took him to the DO's office.

In cross examination he maintained that he saw the accused holding a knife. He insisted that he was not exaggerating though his witness statement did not indicate that he mentioned "***anakuja na bakora***".

PW3 was Shehe Akari Bonaya a businessman in Hola town. It is his evidence that on 9/8/2012 while in bed he heard unusual noise. He came out of the house and about 200 meters away he saw a person lying on the ground and another held by the public. He joined others to take the accused who was struggling to the DO's office.

PW4 was Rukia Ambala Mara the mother of the deceased. It is her evidence that on 8/8/2012 she went to Hola to look for her son the deceased. She was informed that he had gone to harvest sand. On 10/8/2012 however she was woken up by a sister Naomi Maro and two others who informed her that her son had been stabbed.

She proceeded to the scene and saw the body in a vehicle. They took the body to Hola Hospital mortuary.

In cross-examination she stated that the deceased had told her that he was seducing a Meru girl, whom she had not seen.

PW5 is Maulidi Wayu Bwahade a farmer in Laza townin Hola. His evidence is that he was informed that his grandson had been killed. As a result he went to Hola District Hospital and then to Garissa Provincial General Hospital where he witnessed the post mortem examination.

PW6 is APC Stanley Kiplagat Bett. It is his evidence that on 9/8/2012 he was on duty at the DO's office Galole when about 20 people brought a suspect Wilson Mwithali. They alleged that he had stabbed someone. He restrained the public from beating him. He learnt later that the victim had died.

In clarification to the court he said that he received the report on 10/8/2012.

PW7 is Dr. Julius Rogena of Garissa Provincial General Hospital. He produced the post mortem form for Ali Kofa the deceased filled by Dr. Mwangi. Before the Doctor could testify on the post mortem it was noted that the information was in the name of Kimwele Timanje as the deceased. The Prosecution Counsel then asked for adjournment to amended the information which was not opposed. Adjournment was granted and the information amended to reflect the name of the deceased herein.

Later the same doctor came with a postmortem form and said the name of the deceased was wrongly

entered on first page as Wilson Mutotia and that he had rectified the anomaly. No objection was raised. He stated that postmortem was done on 10/8/2012. It was human male body aged 17 with blood stains on the clothes. There was a small cut on left ear and a deep cut on left side of chest 4 cm long. Death was due to heavy bleeding. There was dark blood on the wound to the ear, which meant that it was not the cause of death. The body was not opened because the relatives of the deceased objected to such action. He produced the postmortem form as an exhibit.

In cross-examination he stated that he would have wanted to know what really caused the death if he was the post mortem doctor.

At this point the trial Judge was transferred and I took over the case and PWI Bakari Gabe Argamso was recalled. He identified the knife allegedly used which had no handle.

In cross examination he maintained that he saw the knife even though the incident occurred at night.

PW8 is George Lawrence Oguda on Principal Government Analyst at Mombasa. He has testified that he received items (a) to (i). Item (a) was a blood sample of the deceased, (b) was a blood sample of accused, (c) was a blood sample of Jane Shololo, (d) was a kitchen knife, (e) was a pair of red slippers, (f) was a leather bangle, (g) was a pair of ladies open shoes (h) was a black T-shirt with white stripes, (i) was a dark blue T-shirt with light blue sleeves. According to the report, items (d) (e) (y) (h) and (i) tested positive for human blood. The knife (d), and items (g) and (i) were stained with blood from (a) – that is the deceased's blood. Item (h) the T-shirt had blood stains from (b) – the accused's blood. Item (e) and (f) did not generate any profile. He signed the report and produced the same as an exhibit.

He was shown the knife and the other items and he identified them in court.

PW9 is Police Cpl Geoffrey Maroko. He received a murder report at Hola Police Station, proceeded to the scene with PC Kipyegon, and saw a body and a crowd of people. He collected exhibits which included a knife which was next to the body.

He arrested the accused, and they also arrested Jane at Hola prison. He recorded witness statements and witnessed the postmortem examination at Garissa Provincial Hospital. He took blood samples and other items to the Government Analyst in Mombasa. He produced the items recovered from the scene, including the knife as exhibits.

In cross examination, he stated that from what he gathered, there was a fight over Jane Shororo. This was the prosecution evidence.

When put on his defence the accused stated on oath that he worked as a butcher in Sirai bar at Laza in Hola township. He worked for 2 months.

On the day in question, he was on duty till 10.00 Pm and his lover Jane Shororo who worked in a nearby bar visited him. They left for home and 50 meters from the house, a person stopped them by blocking the two. He talked as if he wanted Jane. He then threatened the accused and started a fight and produced a knife and wanted to stab him. They struggled and the attacker fell down, and the knife injured him. He denied stabbing the deceased. He denied going to take a knife from his place of work.

He was cross- examined at length. He insisted that he did not stab the deceased. Sometimes his voice was inaudible. He maintained that it was the deceased who tried to stab him and ended up falling and injuring himself with his own knife.

At the end of the case, both counsel for the prosecution and the defence made extensive submissions, which I have considered.

The accused stands charged with murder. The prosecution insists that he killed the deceased with malice aforethought. He has denied the charge and stated that there was a fight which was provoked by

the deceased over a woman, and that the deceased fell and injured and killed himself with his own knife.

In order to prove an offence of murder under Section 203 of the Penal Code, the prosecution is required to prove three specific elements. Firstly, the death of the deceased. Secondly, that such death was unlawful and was caused by the accused. Thirdly, that the accused caused such death with malice aforethought.

Did the deceased herein die? Though the postmortem report was produced by a doctor on behalf of another, and there were mistakes in the names on the first page, in my view there is no dispute that the deceased died. He was a healthy young man of 17. He was physically seen by people who knew him to have died at the scene in Laza Hola Township. His body was transported from Hola to Garissa hospital and post mortem conducted. His death and cause of death was confirmed scientifically by the post mortem doctor. The accused himself stated that the deceased fell on his own knife thus stabbed himself and died. I find that indeed, the deceased died and that he died of a knife wound to the left of his chest. He thus died of hemorrhage secondary to a deep penetrating chest stab wound as found by the post mortem doctor.

The next issue is whether the accused caused the death of the deceased. The prosecution says so. The defence is that the accused actually injured himself with his own knife. I have carefully considered the evidence on record. The incident occurred at night. The eye witness PWI Bakari Galbra Argamso stated that it was the accused who stabbed the deceased. The doctor found a single deep wound in the chest. The accused said that the deceased fell on his own knife as they struggled and thus injured himself and died. A knife stained with blood of the deceased without a handle was produced in evidence.

One has to take into account that the incident occurred at night. Visibility must have been poor. However, the eye witness PWI was very close to the accused and the deceased. He tried to intervene in the fight. The eye witnesses even tried to separate the two. He described the events as they unfolded. The description of events is both clear and believable.

In my view, such a deep wound in the chest as found by the post mortem doctor cannot have been caused by a person falling on his own knife, unless the deceased was committing suicide like "Brutus" in the play "Julius Caesar". Besides the deceased and the accused must have faced each other during the struggle and a knife held by one of them could not injure the front of the chest of any of them if he fell down. The post mortem doctor herein found a vertical and not a slanting injury, which could not, in my view, arise from a fall to the ground as suggested by the accused. I find that the accused was not truthful about the stabbing. I find that the accused stabbed the deceased with a knife once in the chest and as such caused his unlawful death.

I now turn to the third element of malice aforethought. Malice aforethought is defined under section 206 of the Penal Code as follows:-

***"206- malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-***

***(a) An intention to cause death of or to do grievous harm to any person, whether the 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 intention 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 intended to commit a felony".***

The evidence from the prosecution and defence herein is that there was a fight or a struggle between the accused and the deceased, ostensibly over a woman- the feme fatale Jane Shororo. She was initially charged jointly with the accused. The evidence on record is that the accused initially, after a physical confrontation, took a stick which was snatched from him by those present. He again went to his place of work and took a knife, which he now used decisively to stab and kill the deceased.

In my view, this is really a borderline case with regard to malice aforethought. In between the deceased and the accused was a woman. Men are weak where women are concerned, especially when the woman for whom men are competing is still at the scene as in the present case. The evidence from the prosecution which I believe is that when the accused was confronted by a rival to the woman whom he had picked from the bar and was going home, he initially went to his nearby place of work and came back with a big stick. When the stick was snatched from him he went back and came with a knife and stabbed his rival the deceased.

The accused leaving and arming himself with a stick and then arming himself with a knife might be interpreted as having an intention to kill amounting to malice aforethought strictly speaking. However, the deceased could also have gone away in this vicious fight for a woman. He did not, though the evidence from PWI was that he advised him to go away. In my view, the temper of the accused did not cool down in the fight for the woman. In the continuing passion of anger, he stabbed the deceased. The above situation in my view created provocation, which is defined under Section 208 (1) of the Penal Code. Though provocation can be defence it is not a complete defence, like self defence. It only reduces the gravity of the offence in murder cases to manslaughter. I rely on the case of REPUBLIC –VS- GACHANJA (2001) KLR 428 at page 439 where the court stated as follows:-

***“This being the position I hold that during discussion between the accused and the deceased, they disagreed and there up the deceased stabbed the accused in the stomach. That was a wrongful act done against the person of the accused and provoked him into attacking the deceased, which he did viciously and brutally inflicting the fatal injuries. The accused therefore acted under provocation when he killed the deceased. The offence which the prosecution has proved committed by the accused is manslaughter”.***

The passion of contest over the woman who was certainly, in the company of the accused and the fact that the deceased insisted on the pursuit of the woman in my view precipitated the provocation.

The killing was however unlawful and as such it amounts to manslaughter.

I thus find that the prosecution has proved the lesser offence of manslaughter against the accused. I thus convict the accused for the offence of manslaughter contrary to Section 202 of the Penal Code.

Dated and delivered at Garissa this 22<sup>nd</sup> day of September 2015.

**GEORGE DULU**

**JUDGE**