



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 61 OF 2014
(FORMERLY KISII HCCR NO. 77 OF 2014)

BETWEEN

REPUBLICPROSECUTOR

AND

JCR.....ACCUSED

JUDGMENT

1. On 14th July 2014, this court was informed that **JCR** (“the accused”) had murdered **WRM** (“the deceased) contrary to **section 203** as read to **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. According to the information the deceased was murdered on 28th June 2014 in Kuria West District of Migori County.

2. The deceased was the mother of the accused and they resided together in the same homestead although the accused had his own separate home. The prosecution case was that on 28th June 2014, the accused murdered the deceased, by slashing her right hand with a panga and causing her to bleed profusely. The prosecution case was as follows.

3. LN (PW 1), an eight year old child, the deceased’s granddaughter gave unsworn testimony recalling what happened to her grandmother. She testified that on that day she was at home with NRB (PW 2) and that the deceased had gone to the accused’s place to get milk. She testified that she heard the deceased screaming and saw her raising her hand before she was cut. He grandmother ran to back to her house screaming. PW 2, child aged 5 years old, also gave unsworn testimony and stated that she saw the accused cut the deceased on her hand although she never saw a panga. She stated that the deceased screamed while coming to her home.

4. SBR (PW 3), the deceased’s daughter-in-law, was alerted to screaming by one Motatiro Sinda. She followed him to her the deceased’s homestead where she found the deceased lying on her verandah bleeding profusely from her right arm. The deceased was taken to Akidiva Memorial Hospital on a motorbike but she died upon arrival. David Busisa Jacob (PW 4), a peasant farmer at Nyamekongoroto, recalled that on the material day he also heard screams coming from the deceased’s homestead. He decided to go there and found the deceased lying on her floor with her hand cut. She was screaming that her child had cut her.

5. DMR (PW 5), the deceased’s son and brother to the accused, recalled that on the material day, in the morning, he had seen his mother before he proceeded to work in his farm which is a

distance away. He was told by a friend that there were screams coming from his home but he initially ignored them but the screams persisted. He nevertheless went home and when he arrived there at about 6.00pm, he found people in the compound crying. He was told that the deceased had been cut by the accused and had been taken to the hospital. He went to report the incident at Isebania Police Station and later attended the post-mortem where he identified the deceased's body.

6. PC Ruth Anzala (PW 7), a police constable at Isebania Police Station, was directed to investigate this matter. She proceeded with the Station Commander and other officers to Nyamekongoroto village at about 5.30pm upon receiving a report of the murder. They did not find the deceased as she had been rushed to Akidiva Memorial Hospital. After interrogating family members, they returned to the station. On the same night, the accused was brought to the Police Station by Administration police officers from Masaba AP Camp. The officers bought four arrows and one panga which was allegedly used to slash the deceased. PW 7 organized for a post mortem to be performed and for the accused to be taken for a mental assessment exam which was done by Dr Michael Kibira (PW 8). PW 8 examined the accused and certified that he was mentally fit to stand trial.

7. When PW 7 was cross-examined about the accused's motive she stated that the deceased denied the accused a chance to sell a cow that belonged to her. She also stated that there was a previous quarrel between the accused and deceased because the accused had sold part of his land and the deceased did not see what he did with the money. She further stated that PW 5 told him about this but she did not record the same in her statement. She also confirmed that there was a quarrel over a cow.

8. The accused elected to give sworn testimony in his defence. He stated that he was married with two children and was living in his own homestead. He recalled that on 28th June 2014, he was at home doing his normal chores. He had cows which he wanted to sell to do some construction work on his house. At about 3.00pm, the deceased came to his place and found him with the cow he wanted to sell. He told her that he intended to sell the cow as it was his. The accused stated that the deceased came with a lot of anger and started scolding him and telling him that one of them must die. He said that the deceased suddenly cut him on the head with a panga. He also became angry, took a panga and cut her hand.

9. After the close of the defence case, counsel for the accused, Mr Mudeyi, submitted that the fact and cause of death were not disputed but that the prosecution did not prove the charge of murder. He submitted that there was no direct evidence was tendered to demonstrate malice aforethought and that the testimony of PW 1 and PW 2, being evidence of children, ought to have been corroborated. He noted that the other witnesses gave hearsay evidence. He further submitted that PW 7 conceded that the scene of crime was at the accused's place and that there was a quarrel over a cow. Counsel maintained that there was evidence of provocation as it is the deceased came to attack the accused and this provoked a fit of rage. Counsel urged that the act of killing was not premeditated and that the accused should be acquitted.

10. The learned prosecutor, Ms Owenga, submitted that the prosecution established a case of murder. She contended that PW 1 and PW 2 gave direct evidence on how the accused cut the deceased and that none of the witnesses gave any evidence of a grudge between the accused and the deceased. Counsel maintained that there was no provocation. She noted that the deceased was aged and given the nature of the weapon used, it was one which the accused knew would cause serious injury if not death.

11. As this is a case of murder the prosecution is required to establish the following ingredients under the provisions of **section 203** and **204** of the *Penal Code*;

- a. Proof of the fact and the cause of death of the deceased.
- b. That the cause of the deceased's death was a result of the direct consequence of the

accused's unlawful act or omission.

c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the *Penal Code*.

12. All the witnesses testified and who saw the deceased before she died confirmed that she suffered a cut on the left hand. The fact and cause of death was not in dispute and was confirmed by Dr Aggrey Idagiza Akidiva (PW 6) who performed the post mortem on the deceased body on 5th July 2015 at Akidiva Memorial Hospital in Migori. The body was identified by DMR (PW 5) and Daniel Nyankore Mangera. The significant finding was that the deceased had a traumatic partial amputation of the right upper limb which severed blood vessels of the same arm. He formed the opinion that cause of death was cardio vascular collapse due to excessive bleeding resulting from the severed blood vessel at the right elbow joint.

13. As to who inflicted the fatal injuries, PW 1 and PW 2 testified how they saw the accused cut the deceased's hand. The testimony of the children was corroborated by the fact that the cause of death was confirmed to be a cut wound on the deceased's arm led to her death. In his sworn statement, the deceased admitted that he cut the deceased with a panga. From the totality of evidence, I find and hold that it is the accused who cut the deceased with a panga on the right upper hand which injury led to her death.

14. The issue of whether the injury was inflicted with malice aforethought is contested. The accused had raised the defence of provocation. **Section 207** of the *Penal Code* describes as "killing on provocation" as follow;

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, he is guilty of manslaughter only.

Section 208(1) of the *Penal Code* defines "provocation" as follows-

The term "provocation" means and includes, as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

15. The implication of **section 208** of the *Penal Code* is that an unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation. It is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of the passion cause by grave and sudden provocation (see **Wero v Republic [1983]EA 549**). Furthermore, the accused does not shoulder the burden of proving the defence, the prosecution that must disprove the defence beyond reasonable doubt (see **Kenga v. Republic [1999] 1 EA 141**).

16. For the defence of provocation to stand, the court must consider whether the accused did the act which caused the death of the deceased in the heat of passion, caused by sudden provocation, that is to say, any wrongful act or insult done by an ordinary person to another ordinary person who stands in a conjugal (*spouse*) or parental (*filial*) in relation to the person insulted. It is not every provocation that will reduce murder to manslaughter. To have that effect, the provocation must be such as temporarily to deprive the person provoked of the power of self-control, as the result of which he commits the act which causes death.

17. In this case, the deceased and accused stood in the position of *mother* and son hence the

relationship fell within the definition of provocation under **section 208** aforesaid. The question however is, whether the deceased actually provoked the accused. The evidence of PW 1 and PW 2 is that the deceased went to the accused's home. No witness testified as to what was said between the two of them. The accused on his part stated that they quarreled over a cow while PW 5 confirmed that there had been indeed a quarrel between the accused and the deceased. In such circumstances, the evidence raises a reasonable doubt on the issue of malice aforethought.

18. I therefore find the accused guilty of the lesser offence of manslaughter contrary to **section 202** of the *Penal Code* and I convict him accordingly.

DATED and DELIVERED at MIGORI this 22nd day of October 2015

D.S. MAJANJA

JUDGE

Mr Mudeyi instructed by Mudeyi and Company Advocates for the accused.

Ms Owenga, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.