



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 60 OF 2011**

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE NJOROGE NDUNGU.....ACCUSED

**JUDGEMENT**

**Background**

The accused, George Njoroge Ndung'u, was arraigned in court on 4<sup>th</sup> August 2011 for the murder of Michael Kiberu Ndung'u (deceased) contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge state that the accused murdered the deceased on 20<sup>th</sup> July 2011 at Mukurwe Village in Gatundu North within Kiambu County. He was remanded in custody until 11<sup>th</sup> August 2011 when the charges were read and explained to him in a plea. He denied the charge and the case was fixed for hearing. For reasons that appear on the court file records, hearing of this case did not commence until 14<sup>th</sup> July 2014, three years later. My predecessor, Hon. Lady Justice Florence Muchemi took evidence of five (5) prosecution witnesses. I took over the conduct of this case in November 2014. I received evidence of three (3) prosecution witnesses and the defence.

**The law**

A murder charge is grounded on section 203 of the Penal Code. It is committed when any person with malice aforethought causes death of another person by an unlawful act or omission. The penalty for murder is death as per section 204 of the Penal Code. Under section 206 of the Penal Code, malice aforethought is deemed to be proved when there is evidence proving either or all of the following:

- i. **an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- ii. **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;**
- iii. **an intent to commit a felony;**
- iv. **an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

The prosecution bears the burden of proving that the accused person before the court is the person who

caused the death of the victim in the manner specified under section 204 of the Penal Code. There must be proof of the *actus reus* (the unlawful act or omission) and *mens rea* (the mental intent). These two components of murder must be proved beyond reasonable doubt.

### **Prosecution case**

From what can be discerned from the evidence, the accused is the elder brother of the deceased. The families of the deceased and the accused lived on the same land and their houses were not far apart. It was estimated by Jane Njoki, wife of deceased (PW1) and Moses Kamau, deceased's son (PW3) that the deceased lived about 20 metres from his younger brother the deceased. Their father Ndung'u Njoroge, PW6, lived about 200 metres from his sons.

In the evening of 20<sup>th</sup> July 2011 the accused had a domestic dispute with his wife, Mary Njeri (PW5) inside their house. Njeri was ordered to leave the home. She ran out of their house to seek help from her brother in law, the deceased. She was accompanied back to her house by the deceased. PW1, the deceased's wife followed them. Both the deceased and PW5 found the door open and entered the accused's house. They found the accused inside the bedroom. The deceased called the accused who did not answer. PW5 entered the bedroom intending to pick her clothes so that she could leave but the accused held her from the back and pulled her into the bedroom. He closed the door. PW5 managed to run out of the room. At the time the deceased was standing at the door. PW5 ran towards the deceased's house to seek refuge.

Shortly thereafter the deceased shouted calling his son PW3. He told PW3 that he had been stabbed. The accused continued attacking the deceased using a metal pipe to hit the deceased several times on the head. PW3's pleas to his uncle, the accused, to stop assaulting the deceased did not stop the accused. Shortly thereafter, the deceased while holding the metal pipe chased PW1. PW3 chased after the accused and managed to snatch the metal pipe from him. In the meantime PW1 ran towards her father-in-law PW6 screaming for help. By the time they returned to the scene they found the deceased lying on the ground severely injured.

The deceased was taken to Gatundu District Hospital where he died on 23<sup>rd</sup> July 2011, three days later, while undergoing treatment. The matter was reported at Gatundu Police Station.

The accused was arrested by members of public on 21<sup>st</sup> July 2011 and handed over to Samuel Miring'u Kamau, the Assistant Chief (PW2). PW2 handed the accused over to the police at Gatundu Police Station. The Investigating Officer, Police Constable Ismael Ibrahim Hussein (PW9) saw the accused on the morning of 22<sup>nd</sup> July 2011 in the police cells. The accused was wearing a bloodstained green T-shirt (Exhibit 3) and bloodstained grey trousers (Exhibit 4).

### **The defence**

In his defence, the accused told the court that on 20<sup>th</sup> July 2011 around 9.30pm he disagreed with his wife over a bicycle said to have been sold by their son; that the wife left to call his brother the deceased who accompanied his wife back to accused's house; that they found the accused had gone to sleep; that the deceased hit the bedroom door without knocking and broke it open; that the deceased pulled off the blanket the accused was covering himself with. He held the accused and started hitting him on the head with fists and strangling him without explaining what the problem was. He testified that the deceased let him go and left; that the deceased returned holding a metal pipe; that the accused picked a piece of timber; that the deceased aimed the metal pipe at the accused who used the piece of timber to shield himself; that they pushed each other until they reached the road where the deceased fell and let go of the pipe; that the accused picked the pipe; that Moses Kamau (PW3) told the accused to give him the metal pipe which he did. He said he did not hit the deceased. He said that the deceased could not stand and he (accused) went to look for transport to take the deceased to hospital. He said that by the time he returned to the homestead with transport (motorcycle belonging to his friend Biden Mwaura Kamau) he found the deceased had been taken to hospital. He told the court that with his friend they looked for deceased in

various hospitals that night without success. He said he learned later that the deceased had been taken to Gatundu District Hospital.

### Submissions

In his submissions after the close of defence case, the accused pleaded defence of provocation and self-defence. Mr. Nyambane, holding brief for Mr. Muchemi for the accused submitted that the accused is a peaceful man and on the date in question he was provoked by the deceased who burst into accused's room armed with a metal bar and this provoked the accused who acted on the heat of passion. Counsel further submitted that the deceased attacked the accused first necessitating the accused to act in self-defence and used reasonable force. Counsel asked the court to find that the charge of murder has not been proved and reduce the charge to manslaughter. Counsel submitted **Republic v. Dokicha Salato Abashore [2014] eKLR; Republic v. Jotham Bulimo Alusa[2007] eKLR** and **Republic v. David Kinyua (alias Mboi) Ntongai [2014] eKLR** to support the defence case on provocation and self-defence:

On the other hand, the prosecution submitted that they have proved murder beyond reasonable doubt and asked the court to convict for murder.

### Determination

The issues for determination as I understand them are firstly, whether the prosecution has proved unlawful act or omission by the accused person causing the death of the deceased; secondly, whether *mens rea* on the part of the accused has been proved and thirdly whether the defences of provocation and self-defence are available to the accused.

There is no dispute that the deceased died on 23<sup>rd</sup> July 2011. The evidence of Dr. Francis Ngugi (PW7) who examined the body of the deceased is that the deceased had two wounds on the scalp, one on the vertex (6cm long) and one on the occipital scalp (5cm long); some bruises on the right knee and calf of the right leg; multiple linear skull fractures on the left temporal parietal and right parietal regions measuring 25cm long and intracranial bleeding. He concluded that the deceased died as a result of intracranial bleeding due to blunt head trauma.

I have carefully considered the evidence of PW1, PW3 and PW5. The three witnesses were present at the scene. I find this evidence in harmony that PW5 went to seek help from her brother-in-law the deceased after a disagreement with her husband the accused. The deceased accompanied her back to her house where they found the accused inside his bedroom. However, evidence differs as to who opened the bedroom door. According to PW1 the deceased entered the accused's bedroom and rescued PW5 who ran out of the house. PW3 who said he could hear what was happening inside his uncle's house told the court that he heard his father tell the accused to open the door but the accused did not open the door. He said that he heard the door being opened and PW5 ran out of the house. PW3 did not specify who opened the door. Obviously he could not see inside the house according to his evidence. PW5 told the court thus:

**“The deceased went to my house with me. The wife of the deceased also came to our house. We found the door was open and we entered. My husband was in the bedroom as we stood in the sitting room. The deceased called my husband and he refused to answer. I entered the bedroom to pick my clothes so that I could leave. The accused held me from the back. He pulled me to the inside of the bedroom and closed the door. I pulled the door with one hand and ran out. The deceased stood at the door when I was coming out. I ran to the house of the deceased to seek refuge there.”**

While I find that this evidence does not clearly agree as to who opened the door to accused bedroom, I find the discrepancies are not fatal to prosecution case. I find no evidence that the deceased broke open the door to accused's bedroom or pulled the blanket off the accused as the accused slept.

After careful analysis of the evidence I find that I have no doubt in my mind that the accused attacked his younger brother the deceased on 20<sup>th</sup> July 2011. The evidence of PW1, PW3 and PW5 is clear on this.

Specifically, PW3 witnessed the assault on his father by the accused. He pleaded with the accused to stop without success. PW6, their father, came to the scene after the attack but he confirmed finding the deceased lying on the ground outside his house critically injured. Teresia Wanjiku Ndung'u, their neighbour (PW4) also confirmed finding the deceased lying down in his compound in critical condition and bleeding from the head. I find the evidence proves the unlawful act causing severe injuries on the deceased who late died as a result thereof.

With proof of unlawful act, the next issue is whether the accused possessed malice aforethought. I have considered the evidence of the three witnesses, PW1, PW3 and PW5, that the accused attacked the deceased. PW3 told the court that he pleaded with the deceased to stop hitting the deceased without success. But before concluding on this issue, I wish to consider whether the defences of provocation and self-defence are available to the accused.

Provocation is defined under section 208 (1) of the Penal Code in the following terms:

**The term "provocation" means and includes, except 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 person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the 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**(emphasis added).

When there is evidence to prove provocation, then the court must reduce the offence of murder to manslaughter by dint of section 207 of the Penal Code.

I am alive to the principle that the onus of proof in a criminal case does not at any time shift to the accused person. Even where an accused raises defence of provocation and self-defence as in this case, all that is required of him is to prove the same on a balance of probability and thereby raise doubts in the court's mind. The prosecution still retains the onus of tendering evidence to rebut the defence raised by the accused.

The deceased in this case did not go to the accused's house with the intention of attacking him. He went there in company of his sister-in-law, PW5, after she ran to deceased's house to seek help. I have stated elsewhere in this judgement that I find no evidence that the deceased broke open the door of accused's bedroom. He may have entered the bedroom as evidence shows but the intention was to rescue PW5. After PW5 ran out of the room, the deceased left. I find no evidence that the deceased was armed with any type of weapon, whether stick or metal rod as claimed by the accused. The evidence shows that the deceased went back to his compound after PW5 ran from her house. He sat outside where he was attacked by the accused. He shouted calling his son PW3 who came out. PW3 witnesses his father being assaulted by his uncle the accused. PW3 pleaded with the accused to stop assaulting the deceased without success. The accused has no injuries when he was examined by Raphael Karanu, PW8. Evidence further shows that the accused's T-shirt was examined at the Government Laboratory and was found to have bloodstains from the deceased, a clear indication that he came into contact with the injured deceased.

I am persuaded by the evidence by the prosecution witnesses. I find no evidence that the deceased attacked the accused. I therefore do not believe the accused when he says the deceased broke open his bedroom door and pulled the blanket off the accused. I do not find the act of entering into the accused house to assist PW5 amounting to provocation. The accused was already angry following the disagreement with his wife and upon failing to get her he vented all the anger on the deceased. I find no proof on a balance of probability of provocation or self-defence. I find that the evidence by the accused that he was acting in self-defence after he was provoked does not dislodge the prosecution case and does not cast doubts in my mind that the accused attacked the deceased or provoked him in any manner.

PW3 pleaded with accused to stop hitting the deceased. The accused did not stop. He also chased PW1 with the intention of attacking her. I find his actions amount to intention to cause the death or grievous

harm as defined under section 206 of the Penal Code. In my considered view, *mens rea* has been proved and that the defences of self-defence and provocation are not available to the accused.

I wish to distinguish the authorities cited by the defence with this one. In **Mungai and David Kinyua cases above**, the circumstances that led to the death of the deceased are not similar to the instant case. In those cases, the deceased clearly attacked the accused. There is no evidence in the instant case that the deceased intended to attack or even attacked the accused.

I must, and do hereby, reject the defence of the accused. I find all the ingredients of murder in the instant case proved beyond reasonable doubt and consequently enter conviction against the accused person. He is convicted of murder as charged. Orders shall issue accordingly.

**Dated, signed and delivered this 19<sup>th</sup> November 2015.**

**S. N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms Magoma, prosecution counsel

Mr. Muchemi, defence counsel

Mr. George Njoroge Ndung'u, accused

Mr. Daniel Ngumbi, court clerk