REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 67 OF 2009.

LESIIT, J.

REPUBLIC……...…….…….…….....……..…..…...PROSECUTOR

-VERSUS -

DAVID KINYUA (ALIAS MBOI) NTONGAI….....ACCUSED

JUDGMENT

1. The accused **DAVID KINYUA (**alias **MBOI) NTONGAI** is charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

"On the 18th day of June, 2009 at Luluu village Ntunene sub-location, Ntunene location in Igembe District within Eastern Province unlawfully murdered PETER KOOME."

2. The prosecution called a total of five witnesses. The facts of the prosecution case are that on 18th June, 2009 the accused and deceased were helping PW1 pluck miraa from his shamba together with John Mwiti and Harrison Kiburi. The deceased started a quarrel with the deceased when he called him "Kibiro". Eventually PW1 sent the deceased away.

3. Later same morning the accused, PW5 and Harrison finished work and left together to go to their homes. On the way they met the deceased with a long stick. The deceased used the stick to hit accused three times. On the third time PW5 saw the accused hold the stick, and then he saw him chasing the deceased. The accused then removed a knife from his trouser, stabbed the deceased once on the stomach and on another part of the body PW5 could not tell. The accused then ran away.

4. The evidence of PW4 the investigating officer is that the accused presented himself to the police at Laare Police Station. It was on 11th July 2009, one month later. PW4 testified that he arrested him of the offence and charged him.

5. The accused gave a sworn defence. He stated that the accused called him "Kibiru" which meant a donkey in their mother tongue. That after the deceased left PW1's shamba where they were all plucking miraa, he met him (deceased) again on his way home. The accused stated that the deceased attacked him with a knife and that as they struggled over it, the deceased got stabbed in the stomach.

6. The accused stated he presented himself to police three days later. The accused said that he owed deceased 200/= and that on the day in question the deceased was demanding his money back. He stated that the deceased did not want to give him time to get the money to pay him.

7. The accused is charged with murder under **Section 203** of the **Penal Code**. **Section 203** stipulates:

> ***"Any person who of malice afterthought causes death of another person by an unlawful act or omission is guilty of murder."***

8. The essential ingredient for the offence of murder is malice aforethought. The circumstances which constitutes malice aforethought are described 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 the death of or to do grievous harm to any person, whether that 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 intent 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 attempted to commit a felony."***

9. I have carefully considered the evidence adduced in this case both by the prosecution and the defence. I also considered the submissions made by Mr. Omari for the accused. Mr. Mungai for the prosecution did not make any submissions.

10. In this case there is no dispute that the deceased started a quarrel with the accused when he called him "Kibiru". There is no dispute that the deceased was sent away by PW1 in order to quell the quarrel between them. There is no dispute that the accused and deceased met on the road the same morning and a fight ensued in which the deceased was injured.

11. There is a contradiction as to the actual meaning of the word "Kibiru". PW1 and 5 testified that "Kibiru" meant a black man. However, the accused in his defence said it meant a donkey or the word used to refer to an ass. Whatever it meant, it is clear the name was very infuriating to the accused, and that both PW1 and 5 were not surprised by his reaction. If PW1 especially was surprised he should have sent away the accused from his (PW1's) shamba rather than the deceased.

12. Regarding the fight between the accused and deceased, and the injury of the deceased, only PW5 witnessed the fight. According to PW5 it was the accused that had the knife. PW5 testified that the deceased had a long stick which he used to hit the accused with three times. It is on the third time that the accused held the stick and then chased the deceased, got a knife from his trouser and stabbed the deceased twice.

13. When PW5 testified and gave the details of how the attack on the deceased took place, the defence did not put any question to the witness (PW5). No suggestions were made to PW5 to contradict facts he gave for instance regarding who had the knife between the accused or deceased.

14. The issue to determine in this case is whether the accused can claim the defence of self defence and provocation? Related to that issue is whether the prosecution has established malice aforethought in this case.

15. The accused raised two defences, self defence and provocation. **Section 17** of the **Penal Code** 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."

16. **Section 207** of the **Penal Code** 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."***

17. The court of appeal has had occasion to consider the relationship between the defence of provocation and self defence. In **MUNGAI V. REP [1984] KLR 85** at page **98,** KNELLER, HANCOX JJA and NYARANGI Ag. J.A. 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.

We have no doubt therefore that, in the instant case, the learned trial judge should have directed himself in accordance with the rule of Common Law which we have cited."

18. The circumstances of this case show clearly that the deceased begun by insulting the accused by calling him names. The reason for the insults was only known to the accused, as the eye witnesses made no mention of the cause of the altercation. According to the accused, he owed money to the deceased which he did not have to pay back immediately as the deceased was demanding.

19. The provocation in this case was the insult *Kibiru* and the act of way laying the accused and hitting him. The way laying of the accused on the way and the hitting of the accused was also the threat to his person. As the court of appeal observed in the cited case 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.

20. I have considered the circumstances of this case and find that the deceased provoked the accused by first insulting him, then waylaying him and finally hitting him. The accused had the knife in his person before the provocative acts. It cannot be argued that he armed himself in order to attack the accused. The accused act to stab the deceased was not motivated by any malice aforethought.

21. I note that the accused chose to stab the deceased and also did it twice. The provocation and the threat to the accused were near. It had been repeated by the deceased since it first done at PW1's shamba and then on the road. The fact accused used a long stick may not have been appeared serious. However what changes that view is the fact these were repeated acts.

22. As the court of appeal observed in the cited case above, 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.

23. I am satisfied that the accused acted in the heat of passion upon provocation and threat to life which was near enough and serious enough as to rule out malice aforethought. I find that the prosecution has proved the offence of manslaughter against the accused. Accordingly I substitute the information from murder contrary to **Section 203** of the **Penal Code** to manslaughter contrary to **Section 202** of the **Penal Code**. I find the accused guilty of the substituted charge of manslaughter and convict him accordingly.

DATED AT MERU THIS 24TH DAY OF OCTOBER, 2014.

LESIIT, J.

JUDGE