



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Case 44 of 2009

REPUBLICSTATE COUNSEL

Versus

GENYA MWAVUO NYAWAACCUSED

J U D G M E N T

The accused GENYA MWAVUO NYAWA has been charged with the offence of MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.

The particulars of the charge are as follows:-

“on the 26th day of October 2009 at Guro village, Bofu sub-location, Mtaa Location in Kinago District within Coast Province, murdered NYAWA MTENZI”.

The accused who was represented by MR. OJODE advocate entered a plea of “not guilty” to the charge. The prosecution led by learned state counsel MR. ONSERIO called a total of eight (8) witnesses in support of their case.

PW1 MANGALE CHIMERA told the court that on 26/10/2009 he was out herding his cattle. At about 3.00 p.m. he went to the river to bathe. As he was bathing he heard noise on the river banks. He rushed out of the water to go and check. He found the accused holding the deceased. The accused has a panga in his hand and the deceased was bleeding from a cut on the forehead. PW1 asked accused what the problem was and the accused told PW1 that he has caught the deceased in the bushes with his (the accused’s) wife. PW1 says he saw the accused administer another cut to the deceased on the ear. The deceased then managed to slip out of the accused hands and ran away. The accused chased him briefly but on failing to catch him returned to where PW1 stood. PW1 took the panga away from the accused and ran to inform the family of the deceased of what had befallen their son. He then took the panga to the chief to whom he reported the incident. Later PW1 learnt that the deceased managed to drag himself to his shamba where he was found dead. The police were called in and came and removed the body of the deceased to Kinango Hospital Mortuary. The accused was later arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He denied having had a pre-meditated intention to kill the deceased. The accused stated that he lashed out in anger because he found the deceased making love to his wife in the bushes. This court must now analyze the evidence on record and determine whether the offence of murder has been proved beyond a reasonable doubt.

In any case of murder the prosecution must prove the following three (3) ingredients.

- 1) **The fact of the death of the deceased and the cause of that death.**
- 2) **The fact that the deceased died as a result of an unlawful act or omission on the part of the deceased.**
- 3) **The fact that said unlawful act or omission was committed with malice aforethought.**

The fact of the death of the deceased and the cause of that death

are not in any doubt. PW1 was an eyewitness who saw the deceased being cut down.

PW3 KALIMBO MWERU DZUMA was the father of the deceased. He told the court that upon receiving news of his son's death he rushed home where he found the body of the deceased lying there. PW4 SAMSON CHALE JOHO is the chief of the area. He too rushed to the scene upon receiving news of the death of the deceased. All these witnesses testify that they saw deep cuts on the head of the deceased. PW3 & PW4 of whom knew the deceased very well identify him as “**Nyawa Mtenzi**”. Lastly on this point PW8 SERGENT MICHAEL ODUOR who is a scene of crime officer told the court that he took a series of photographs of the body of the deceased. The said photographs were produced in court as exhibits Pexb4. They clearly show an adult male African with deep cuts to the head and skull. It is therefore manifestly clear that the deceased met his death as the result of being cut on the head.

Conclusive proof of the cause of death is provided by the evidence of PW5 DR. MWANAHAMISI SULEIMAN who produced the post-mortem report Pexh1. The doctor too noted cut wounds on the scalp of the deceased leaving brain matter visible. In her opinion the injuries were caused by a sharp object. The cause of death was opined to be ‘cardio-respiratory arrest due to severe head injury’. This was expert medical evidence which was neither challenged nor controverted by the defence.

The next crucial ingredient in a charge of murder is proof that it was the accused who committed the unlawful act which led to the death of the deceased. PW1 told the court that he was bathing in a river when he heard some commotion on the river bank when he came out to check he found the accused holding on to the deceased who was bleeding heavily from a cut on his head. PW1 states that he found the accused holding a panga in his hand. PW1 went so far as to testify that the accused proceeded to cut the deceased on the ear with that same panga. He confiscated the panga from the accused and handed it over to the chief. This panga was also produced in court as an exhibit Pexh2.

PW7 CHIEF INSPECTOR DANIEL MUSYOKA told the court that he recorded a statement from the accused in which statement the accused admitted that he did in fact slash the deceased. No objection was made by the defence to the production of this statement as an exhibit. Indeed in his defence the accused concedes that it was he who cut and killed the deceased. I therefore find that it was the accused who committed the unlawful act which led to the death of the deceased. The *actus reus* of the offence of murder has been proved.

However, proof of the *actus reus* is not necessarily proof of the offence of murder. The prosecution **must** prove the ‘*mens rea*’ or the mental element of the offence of murder which is defined as ‘**malice aforethought**’. In other words it must be shown that the act of accused in slashing the deceased was pre-meditated. In his defence – the accused told the court that the reason why he attacked and slashed the deceased is because he came across the deceased making love to his wife in the bushes. Is this a probable defence or is it just a fanciful tale woven by the accused in an attempt to escape criminal liability for his act. PW1 told the court that he had asked accused why he had cut the accused. The accused replied that it was because he had ‘caught’ the deceased with his wife. The fact that the deceased had been engaged in an adulterous affair with the wife of the accused was well known in the village. PW3 KOMBO MANGALE a neighbor told the court that

“it was well known that the deceased was relating with the accused wife. The matter was reported to the village chairman”

PW2 also confirmed that when he questioned accused about the incident, accused told him that **“he cut the deceased because he found the accused and her wife together”**. PW2 went on to state that

“accused said that he could not restrain himself and he cut the deceased with his panga”.

PW3 who was the father of the accused told the court that the love affair between the accused’s wife and the deceased was well known fact in the village. The matter had been reported to village elders and the deceased had been ordered to pay the accused ‘MALU’ [the traditional Duruma fine for engaging in adultery with another men’s wife]. In his statement confession to PW7 the accused stated as follows

“after that issue [here he is referring to the payment of the traditional “malu” fine for adultery] we stayed well with my wife believing that they had left their affair with the man until on 26/10/2009 at around 4.00 p.m. when I was coming from the bush to cut some building frames and my wife had left to look after our cattle and goats. I saw our cattle mixed with others no of us (sic) and while I was passing between, I saw two person my wife and NYAWA MTEZI laying down. When I approached towards them they stood up while NYAWA MTEZI was holding his trouser with his hand and when they saw me well they started running away in different direction and I ran after NYAWA MTEZI (deceased) and I was having my panga which I was using to cut frames with”

This defence is given further credence by the testimony of PW7 when he states under cross-examination by defence carousel

“I did establish that the deceased and accused fought because the accused found the deceased committing adultery with accused’s wife. Accused was also out there cutting wood. He came across the deceased with his wife”

Therefore the police themselves accepted the accused’s version of events. This statement made was by the accused to police on the 29/10/2009 barely three (3) days after the incident occurred and it is consistent with what the accused told both PW1 and PW2. The accused maintains that he caught the accused and his wife lying in the bushes making love. Given the fact that the love affair between the accused’s wife and the deceased was common knowledge this defence does not seem far-fetched or indeed fanciful. A man who comes across another man making love to his wife in the bushes would no doubt be hit by a blind rage. I have no doubt that the accused must have been provoked into a blind rage by the provocative actions of the accused causing him to lash out. Section 208(1) of the Penal Code defines provocation thus

“208(1) 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 to whom he stands in a conjugal(my emphasis) 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 of offered”

This definition includes an insulting act done with a person to whom one stands in a conjugal relationship. What could be more insulting to any man that to be found making love to his wife. I have no doubt that the scene which the accused came across in the bushes on that day would have caused any normal man and to infact cause the accused to momentarily lose his self-control. There is no evidence that the accused deliberately armed himself and then set out to attack and/ or kill the deceased. The accused was explaining that he was out cutting wood to make frames. As such it was quite logical that he had in his possession a panga to cut the wood. As he was out the accused explained that he believed that his wife was out herding their livestock. Instead he comes across their livestock having been abandoned and finds his wife in a very compromising and provocative position with the accused. The accused lost control and began to slash the accused with the panga which he already had in his hands. It was only the appearance of PW1 that stopped him else I have no doubt the accused would have continued slashing the deceased.

in the circumstances can the accused be said to have been possessed of the *mens rea* for murder. I think not. The accused clearly acted in the heat of passion. The fact that accused did voluntarily go to report the incident to the village chairman shows that his action could not have been –premeditated. The accused did not run away neither did he resist arrest when police came to pick him up. Section 207 of the Penal Code provides 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”

This is precisely the position that prevails in this case. The accused was provoked and acted in the heat of passion. Before there was any time for his anger to die down. As such I hereby acquit the accused of the charge of murder and instead convict him of the offence of manslaughter contrary to section 207 of the Penal Code.

Dated and delivered in Mombasa this 20th day of March 2013

M. ODERO

JUDGE

Mr.Taniu for state

Mr. Njoro h/b for Ojode

M ODERO

JUDGE

20/3/2012

Mr. Tanui – let the accused be treated as a 1st offender

Mr. Onjoro – I ask for a date to enable counsel to mitigate on behalf of the accused.

Court – mention on 21/3/2013 for mitigation

M. ODERO

JUDGE

20/3/13

21/3/13

BEFORE Hon. Lady Justice M. odero

CC – Mutisya

Mr. Tanui – for state

Mr. Ojode – for accused

Mr. Ojode

We submit that this was a crime of passion. Accused was provoked. He is remorseful. We pray for leniency sentence.

M. ODERO

JUDGE

Court

The mitigation is noted. The accused's action led to the loss of a human life. I sentence him to serve five (5) years imprisonment. He has a right to appeal.

M. ODERO

JUDGE

21/3/2013