



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Case 22 of 2012

REPUBLIC PROSECUTION

VERSUS

SALIM ABDALLAH MACHIMBOJA.....ACCUSED

JUDGMENT

The accused **SALIM ABDALLAH MWACHIMBOJA** 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 that:

“On the 29th day of April, 2012 at Mwandimu Village in Kwale County within Coast Region murdered KIDZELIE MULOKA NDALU.”

The accused who was a 14 year old schoolboy and who was represented by **MR. OKAALO** advocate entered a plea of ‘*Not Guilty*’ to the charge. The Republic led by **MR. GIOCHE**, learned state counsel called a total of ten (10) witnesses in support of the charge.

The brief facts of the prosecution case were that the deceased was the grandfather of the accused and the accused lived with the deceased in his homestead. A few weeks before the death of the deceased the two had a disagreement because the deceased had accused his grandson of stealing his money. The deceased even called in police and led them to the accused’s school to arrest him but the accused managed to escape by jumping out of the window. The accused then left his grandfather’s home and went to reside in the home of **PW8 MOHAMED OMAR** who was a distant relative. On 30th April, 2012 the material day at about 6.00 a.m. **PW1 MLONGO NDORO** a daughter-in-law of the deceased stated that she awoke and went behind her house in order to relieve herself. She noticed the deceased lying at the door of his house. She called out to him but he did not respond. **PW1** moved closer to the deceased and noticed a big cut wound on his head. She then realized that he was dead. **PW1** raised the alarm and other villagers came. The matter was reported to police who came and removed the body to the mortuary. Police commenced investigations into the matter and the accused was eventually arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto her defence. He elected to make a sworn defence in which he admitted having been involved in a commotion with the deceased on the night in question. However, he denies having murdered the deceased. This court now has the duty to examine the evidence adduced before it and make a determination on whether the prosecution has proved this charge to the required legal standard.

The order to prove a charge of murder the prosecution must prove the following three ingredients beyond

reasonable doubt:

- (1) The fact of the death of the deceased as well as the cause of such death.
- (2) The fact that it was the accused who committed the unlawful act or omission which led to the death of the deceased.
- (3) The fact that the aforesaid unlawful act or omission was done with malice aforethought.

In this case proof of the death of the deceased is readily available. **PW1** told the court how she found the dead body of her father-in-law lying at his door in the early morning. **PW2 MWERO KIDZELIE** and **PW3 MRABU KIDZELIE** both sons of the deceased also told the court that upon receiving the news they rushed to their father's compound only to find his body lying dead at his door. All these witnesses identify the deceased as **KIDZELIE MULOKA NDALU**.

The cause of death is equally straightforward. The witnesses who say the body all speak of seeing a gaping cut wound on the head. **PW5 DR. CHRISTINE KABERA** performed the autopsy on the body of the deceased. She too noted that the skull was cracked with protrusion of brain matter. She found the cause of death to be '*blunt trauma to the head*' and '*cardio-respiratory arrest secondary to cord transection*' which she opined was caused by a sharp object. I am therefore satisfied that both death as well as its cause has been proved beyond a reasonable doubt.

The next crucial question is whether sufficient evidence exists to prove that it was the accused who attacked and killed the deceased. There was no eye witness to the murder. **PW1** said she merely found the dead body outside when she woke up. She has no idea how it got there. **PW1** also states that she heard no commotion during the night. However, **PW7 OMAR MOHAMED**, a 12 year old boy who was a friend to the accused and **PW8** his father both told the court that after the accused ran away from the home of the deceased he came to stay in their compound. Both witnesses testify that the accused whilst staying with them told them that he had been involved in an altercation with his grandfather on the night in question when he had gone to retrieve his shoes from the house. He told both witnesses that he picked an axe and hit the deceased with it before running away. The evidence of the two witnesses is consistent. They were both friends of the accused and indeed they had offered him refuge in their home. They had no reason to lie or fabricate evidence against him. **PW8** told the court that when the accused gave him this information he reported the matter to the sub-chief. Police later arrested the accused from their home.

In his defence the accused corroborated the evidence of **PW7** and **PW8**. He confirmed to the court that the deceased was his grandfather with whom they had disagreed. The accused told court that on the material day he went to the home of the deceased at 8.00 p.m. in order to collect his shoes. He claims that the deceased when he saw him grabbed the boy and tried to hit him. The deceased took up a stone with which to hit the accused but unfortunately he fell. The accused then picked up a nearby axe and hit the deceased before running away. The accused confirms that he did later narrate to **PW7** and **PW8** what had happened. It is quite clear therefore that by his own admission it was the accused who by hitting the deceased with an axe committed the unlawful act which led to the death of the deceased. As such the '*actus reus*' for the offence of murder has been sufficiently proved.

The prosecution must also prove to the court that in committing this unlawful act the accused was motivated by malice aforethought. The fact that bad blood existed between the accused and the deceased is not in any doubt. Most witnesses were aware of this. The accused admits that he had run away from his grandfather's home because the latter had accused him of theft. However, the fact that the two had disagreed is only proof that the accused may have had a motive to kill the accused. The existence of motive is no conclusive proof of malice aforethought. Malice aforethought requires proof that in committing the unlawful act the accused intention was to kill the deceased. In his final submissions Mr. Gioche argues that the fact that the accused walked all the way to the deceased's home that night is proof that he had formed an intention to murder. With respect I do not agree. There are several valid reasons why the accused would have gone to the home of the deceased. After all that was where he ordinarily

resided. Accused has explained that he merely went there to collect his shoes when his grandfather saw him and grabbed him. The accused lashed back and picked up an axe with which he fatally wounded the deceased. In my view the defence given by the accused is a plausible and possible explanation of the events of that night. It is clear that the accused did not intentionally set out to kill the deceased. He got involved in an altercation with the deceased and unfortunately his actions left his grandfather dead. The fact that the accused candidly admitted to his acts and the fact that he told both **PW7** and **PW8** the same story persuades me that the death of the deceased was an unfortunate accident. The actions of the accused amount to manslaughter since no malice aforethought existed. Section 207 of the Penal Code provides that:

“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 situation that pertains here. The accused having been grabbed by his grandfather immediately without thinking picked the nearest object which happened to be an axe and used it to hit back. His intention was not to kill but to make a quick escape. Thus I find that the *mens rea* for murder being malice aforethought has not been proved as against the accused. As such I do hereby acquit the accused of the offence of murder and instead convict him of the offence of manslaughter under section 207 of the Penal Code.

Dated and delivered in Mombasa this 18th day of March, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Mohamed h/b Mr. Okaalo for the Accused

Mr. Jami for State

Court Clerk Mutisya

Mr. Jami:

Treat as a first offender.

Mitigation:

Accused is a first offender. He is a minor who requires direction. We seek a lenient sentence.

Court:

Sentence reserved pending Probation Officer report. Mention on 8th March, 2013.

M. ODERO

JUDGE

22ND FEBRUARY, 2013

8th March, 2013

Before Hon. Lady Justice M. Odero

Court Clerk Mutisya

Mr. Nzumo for State

Mr. Mohamed for Accused

Court:

Mention 18th March, 2012 for Probation Officer's report.

**M. ODERO
JUDGE
8TH MARCH, 2013**

18th March, 2013

Before Hon. Lady Justice M. Odero

Court Clerk Mutisya

Mr. Gioche for State

Mr. Mohamed h/b Mr. Okaalo for Accused

Court:

I have perused and considered the contents of the Probation report dated 18th March, 2013. The accused is a minor aged 15 years and has delinquent tendencies. He is in need of rehabilitation but away from his home environment which is not conducive. As such I do hereby commit the accused to Shimo La Tewa Borstol Institution for a period of three (3) years.

**M. ODERO
JUDGE
18TH MARCH, 2013**