



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 31 OF 2012

LESIT, J

REPUBLICPROSECUTOR

VERSUS

ERICK MWENDA GITONGA..... ACCUSED

JUDGMENT

The Accused Eric Mwenda Gitonga is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 9th September, 2011 at Kibumbu Village, Chuka Township Sub-Location, Kiangondu Location within Tharaka- Nithi County murdered Catherine Karimi Mutindwa.

Prosecution called 8 witnesses. The facts of the prosecution case are that the accused was a nephew of the deceased and both lived in separate houses on a plot belonging to the father of the accused. On the material day the accused is said to have gone to the house of the deceased at around 8 pm. The two picked a quarrel in which accused was complaining that the deceased was the reason why his father had not shared out his property to his children. The quarrel degenerated into a fight. The deceased first hit the accused on the head with a cooking stick trying to chase the deceased out of her house. Patrick, PW3 a boyfriend to the deceased tried to separate them but accused held him and both of them fell down. It is when the deceased stoop up that the accused stabbed her on the hand. Eventually the deceased was taken first to the Police Station and then later to hospital by PW. 3, 2 and 1, on PW2's motor bike. The deceased died same night while undergoing treatment.

The Accused gave a sworn defence. His defence was that the deceased called her at 8 pm on the material day and started quarrelling him saying that he would get no property from his father. The accused stated that the deceased insulted him saying that he had no brains. She then hit him on the head leading to a fight. Accused said that Patrick, PW3 who was also present hit him and he fell down. He said that when he stood up. He saw that the deceased was holding a knife in her lifted hand and that he held her hand to avoid being stabbed and in the struggle PW3 hit him and he fell down releasing the deceased who also fell down. The accused stated that he went to his house without knowing that the deceased got injured.

I have considered the evidence adduced by the prosecution and the defence in this case. The accused is charged with murder contrary to section 203 of the Penal Code.

Section 203 states:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

The burden lies with the prosecution to prove its case against the accused beyond any reasonable doubt. The prosecution must prove accused had malice a forethoughts at the time he committed the offence.

206 of Penal Code states:-

“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.”

In this case there are undisputed facts. The relationship between the accused and deceased is not disputed. There is no dispute that the accused visited the deceased on the evening of the date of incident and that a quarrel erupted between them which generated into a fight. The accused does not deny that he fought with the deceased. What he denies is knowingly or unknowingly stabbing her.

The eye witness to the incident was PW3, a husband of the deceased. In his evidence, PW3 testified that the deceased first hit the accused on the head with a cooking stick after which both struggled. PW3 testified that he tried to separate the two where upon he and accused also fell down. The deceased was the first to rise up upon which he saw the accused stab the deceased near the left wrist before leaving.

The doctor's finding at post mortem revealed that the deceased had two deep cut wounds one on the left wrist exposing the bone and the other on left arm which cut through the arm severing the brachial blood vessels. From the doctor's finding it is the latter injury which caused death due to hemorrhagic shock due to severe blood loss from the severed blood vessels.

While PW3 noted the accused stab deceased on the wrist he did not notice the stabbing to the left arm which was the injury which caused death. PW3, made mention of the second injury later on in his evidence as injury he noted when they were at the hospital.

However, given circumstances of lighting in the room, which was from a lamp, I have no doubt that both injuries were caused to the deceased during this attack and due to poor lighting PW3 failed to see.

In order for the prosecution to prove that the accused had formed an intention to cause death or grievous harm to the deceased it should adduce evidence to show the accused had planned to execute the attack. That could be proved if evidence was adduced to show the knife belonged to the accused.

PW3, who said deceased was his wife of two years stated he did not know the knives the deceased had. He testified that he could not say with certainty that the murder weapon did or did not belong to the deceased.

Having considered the evidence in this case, I find that the accused and deceased quarreled before fighting and before accused stabbed the deceased. It is evident that the deceased used abusive language to the accused and that such words as 'useless man' and a 'person without brains' were among those uttered. I find that the words were provocative to the accused. I find that there is no evidence that the attack on the deceased was premeditated.

The two places accused aimed to stab the deceased ordinarily are not such as would lead to the conclusion that the accused knew or ought to have known that by stabbing her in those two parts of the body death or grievous harm would result. The issue of force the accused used must be considered against the facts of the case which shows that the accused had been attacked by the deceased. Issue is how much force is too much. In the English case of **Palmer Versus Reginam (1971) 1 ALL ER 1077 at page 1088** where it was stated thus:

“It is both good law and sense that a man is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular acts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some reaction.

If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence make its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence”

I do find that the prosecution has proved that the accused stabbed the deceased leading to the excessive blood loss which led to her death. the accused acted in self-defence. There was no malice aforethought. I find the prosecution has proved the offence of man slaughter contrary to section 202 of the Penal Code.

I accordingly substitute the charge against the accused under section 179 (1) of the CPC from murder contrary to section 203 of the penal code to man slaughter contrary to section 202 of the Penal Code.

The accused is convicted of the substituted charge of man slaughter contrary to section 202 of the Penal Code accordingly.

DATED AND DELIVERED AT MERU THIS 20TH JUNE 2013

LESIIT

JUDGE

