



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE 52 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

SAMMY BUNDI MURIUNGI.....ACCUSED

JUDGEMENT

Sammy Bundi Murungi the accused person in this case is charged with murder contrary to section 203 as read with S.204 of the Penal Code. The particulars of the offence are that on the 6th May, 2009, at Kithangene Village, in Mweru Sub-Location, Imenti South District the accused murdered Lawrence Muthini Ndubi.

The prosecution called seven witnesses. The facts of the prosecution case were that the deceased was friends with a sister of the accused one Faith Karwiba. Their friendship broke up but before it did the deceased had given her 20,000/- in installments, which both intended to use to start a business.

Faith left home before paying back the money to the deceased. The deceased thereafter kept going to Faith's home hoping to get his money back.

On the material night Elsie, PW1 sister of Faith and the accused spent the whole day with the deceased. Elsie prepared supper which both of them ate. Elsie's father was asleep and the accused had not returned home by the time she left the accused in their kitchen shade and went to sleep, before 10 pm. At 2 am Elsie heard the accused calling their father to open up the main house. He was saying that someone was trying to kill him. Elsie opened the main house only to find the deceased lying on the ground outside their home bleeding profusely. The accused called neighbours, PW2 Stella Kawira, her husband Antony and others, informing them that he had beaten the deceased. The deceased was taken to hospital where he died the next day.

The cause of death was cardio pulmonary arrest due to epidural haemorrhage on right parietal region with brain oedema and compression. The report was Exh.1.

The accused was placed on his defence. He gave a sworn defence. He stated that on the material night he arrived home at 2 am. He had been at his aunt's place with others making arrangements for a wedding. The accused said he found the deceased at a shade used as a kitchen. He said that the accused spoke to him and said in Kiswahili that he wanted from him only one of two things, either his money which his sister Faith took from him, or Faith. The accused stated that he then told the deceased that he could not give him either. The accused stated that the deceased then lifted a knife and told him that he would kill him that night. The accused said that he fell down in shock when he saw the knife. That while down he saw a piece of wood which he picked, stood up and hit the deceased with it on the head. He then woke up his family members and neighbours and helped take the deceased to hospital.

I have carefully considered the evidence adduced by the prosecution and defence. I have also considered submissions by Mr. Mungai learned state counsel and Mrs. Ntarangwi for the accused.

The accused faces a charge of murder contrary to section 203 of the Penal Code. That section defines murder as follows:

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

The prosecution must prove that accused had formed the necessary intention to cause death or grievous harm to the deceased. Section 206 of the Penal Code describes circumstances which constitute same 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.”

There was no eye witness of this incident. PW1 who was at home when the incident occurred said that she was asleep at the time. According to PW1, she left the deceased in their kitchen all before 10 pm and went to sleep. At 2 am she woke up when she heard her brother the accused calling their father saying someone was trying to kill him.

PW2 who was woken up by the accused at her home the same night of the incident merely repeated what the accused told her and her husband. PW2 said that the accused told them that he had beaten the deceased.

The burden lies on the prosecution to prove the charge against the accused beyond any reasonable doubt. There was no eye witness of the incident. The only evidence before the court of how the incident occurred is from the accused in his statement in defence. His defence was that the deceased had been waiting for him at their home; that he went home at 2 am to find accused armed with a knife which he used to threaten him with death. The accused defence was he picked a piece of wood nearby and hit the deceased once on the head.

The post mortem examination findings established that the deceased had a blunt injury on the forehead with a fracture, brain aedema, hemorrhage and which consequently to death. Mrs. Ntarangwi relied on **Paul Kokwony vs Republic CA No. 153/2000** for the proposition that since the accused acted in self defence and provocation, the burden lay on prosecution to disprove it and that in any event the accused could not be convicted of murder but only of manslaughter. In the cited case the court of appeal observed:

“We have considered the facts of this appeal and the submissions by counsel appearing and it is now clear to us that the main issue here is provocation. Section 208(1) of the Penal Code provides.

‘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 persons or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in 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.'

It was during the fracas that the appellants picked up the bow and arrows and shot at the deceased and as a result the deceased died. The issue now is, whether in view of these circumstances, the defence of provocation was available to the appellant. In Bullard v. R. [1961] 3 ALL E.R. 470 the reasons of the Judicial Committee were delivered by Lord Tucker and the material passage of his opinion was as follows:-

'It has long been settled law that if on the evidence, whether of the prosecution or of the defence there is any evidence of provocation fit to be left to a Jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked.'

Mr. Mungai learned State Counsel urged that the prosecution had discharged its burden and had proved that provocation and self defence does not arise given the evidence of cover up by the father of deceased and also the trail of blood at the scene.

PW3, father of the deceased testified that when he visited the home of the accused the day following the incident, he was told by Elsie (PW1) that the accused and their father had beaten the deceased. PW3 said that the accused protested to Elsie in his presence asking her whether what she told him (the father of the deceased) was what the family agreed.

The contradiction alleged by PW3 did not come out in the evidence of Elsie or in the accused statement in defence Elsie's evidence was given before PW3. Her evidence was that she did not witness the incident because she was asleep. PW3's evidence stands on its own. It is also unreliable since Elsie's evidence was that she did not witness the incident. Even if she told PW3 what he alleged, that statement ought to be regarded as hearsay in the circumstances.

The father of Elsie and the accused was not called as a witness. It is clear he was at home at the time of the incident. However, given the evidence of Elsie and also that of the accused, their father was asleep when the incident occurred. His evidence would therefore have been of no material importance to the prosecution case.

In regard to the trail of blood, it was clear from Elsie's evidence that when she opened the door to the main house where she was, she saw the deceased lying on the ground near their kitchen. Elsie stated that the deceased stood up, walked a distance before he collapsed. The prosecution evidence through Elsie accounted for the presence of blood in the kitchen wall and at the scene where PW2 and others found the deceased before taking him to hospital.

Considering the prosecution evidence on the issue of alleged cover up and the trail of blood, I find that nothing turns on both issues. It is clear from the prosecution evidence that except for the accused and deceased no one else saw what led to the injury which led to the deceased death.

I find that from the defence by the accused that there was evidence of provocation and self defence. That defence has not been shaken or controverted. The prosecution did not prove that accused premeditated to murder the deceased. The prosecution only demonstrated that the deceased had gone daily to accused home to demand for a refund of his money. It was shown clearly that the one who had the deceased money had ran away with the money. In the circumstances deceased frustrations for loss of money and his constant visits to accused home, taken together with accused statement in defence that the deceased had threatened to stab him to death, all demonstrate that the only one who could have planned the attack

was the deceased not accused.

I find that the deceased was the aggressor. In the circumstances I find that the prosecution had not established or proved malice aforethought against the accused.

I find that the defence of provocation and self defence is available to the accused. Consequently I reduce the charge facing him 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 contrary to section 202 of the Penal Code and convict him accordingly.

DATED SIGNED AND DELIVERED THIS 29TH DAY OF MARCH , 2012.

**LESIIT, J
JUDGE.**