



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 42 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD GITONGA.....ACCUSED

LESIIT J.

JUDGEMENT

The accused person was charged with murder contrary to section 203 as read section 204 of the Penal Code. It is alleged that on the 9th day of August 2007 at Marimanti Location, Tharaka District within the Eastern Province, murdered Muthengi Mauro.

The prosecution called 3 witnesses the prosecution case was that on the material day the accused persons was heard at about 5 pm saying “I will hurt him down like a deer” it was PW 2 David Karimi who heard the accused saying those words as Karimi walked towards the market from the village. The prosecution case was further that at about 7.30 pm same day the accused was heard saying The accused was heard by PW 3 s saying “that old man you are proud of I have finished him” the land belongs to M’Tonyoro. PW 1 on her part heard the deceased saying “ I have finished that thing you will never see it again” PW2 said that he heard the accused say at 8.30 the following words the one you used to boost off I have finished him and whoever wants the land could come for it.

The accused persons in his defence says that he was walking along a path on the material day when he met the deceased carrying a sword. The accused claims that the accused attacked him and that he jumped from one side of the road to the other one and also tried to ran away to escape. That the deceased went chasing after him and that he lifted a stone and hit the deceased on the head with it as a result which

the deceased fell down. He says he went up to where the deceased was lying and confirmed that he was dead. The burden lies on the prosecution to prove the charges against the accused beyond any reasonable doubt. The prosecution must prove that the accused by some act or omission with malice aforethought caused the death of the deceased. The evidence adduced by the prosecution was merely circumstantial that the accused was heard making threats that he would hurt down someone like a deer that day. 3 hours or so later the accused was heard boasting that he had finished him. PW 1 2 and 3 who were the wife, and sons, in their evidence said that they recognized the accused voice as the one who issued the threats and two hours later declared that he had accomplished his mission. No one actually witnessed this incident. The accused does not deny that he caused the death of the deceased. He however put forward the defence of self defence. This defense is provided for under Section 17 of the Penal Code which states as follows:-

“17. Subject of any express provisions in this court or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of personal property shall be determined according to the principles of English Common Law”.

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 recognised 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.”

The only eye witness of the incident is the accused. His evidence stands unchallenged that he acted in self defence.

The evidence of the prosecution witnesses was heard by my predecessor Hon. Ouko J. the matter was thereafter taken over by Hon. Kasango J. for a reasons which cannot be explained from the record she assumed that the matter was for defence hearing and proceeded to set it down for defence hearing. On the date set for defence hearing Hon. Kasango J was on leave and I therefore took over the matter and

since the accused wished to proceed with the case from where it was left by Hon Kasango J. I proceeded to take the defence evidence as now transpired that the prosecution never closed its case. This would render the whole trial defective and therefore a mistrial. I have considered the circumstances of the trial itself and the length of time the accused has been in custody during the pendency of the case. I have also taken into consideration that from the date of plea on the 24th September 2007 and continuously throughout the trial proceedings the accused person has always informed the court that he was the one who caused the death of the deceased taking what the accused said as his defence it is also clear that the accused has never denied that he caused the deceased death. I have decided that in the interest of justice I will not declare this a mistrial but instead I will consider the statement made by the accused as his defence as a confession made to this court as envisaged Section 25 A1 of the Evidence Act which states as follows:-

Dated Signed and delivered at Meru this 17th day of February 2011

LESIT, J

JUDGE