

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 97 OF 2008

REPUBLIC..... PROSECUTOR

VERSUS

MOHAMED ALI SOYAN..... ACCUSED

JUDGMENT

The charge facing the accused, MOHAMED ALI SOYAN Alias KICHWA, is that on 22nd September 2008, he murdered MOHAMED AMARA at Moro Village in Tana River District.

PW 1, DANIEL NGANGA CHEGE, testified that on 21st September 2008 he met the accused, when he had come from California Club, where he had been watching a video.

PW 1 testified that the accused was armed with a knife, whose handle he used to hit PW 1. As a consequence of that assault, PW 1 broke some teeth.

PW 2, OMAR MATA, is the father to the deceased.

On the night of 21st October 2008, PW 2 woke up from his sleep, when he heard noises. A neighbor of his then informed him that his son, Amara, had been knifed by the accused.

When PW 2 rushed to Garissa General Hospital, he found his son admitted therein.

It was the evidence of PW 2 that his son told him that it is the accused who had stabbed him with a knife.

The victim died about 14 days after the incident. Meanwhile, before his death, he had repeatedly made it clear that the person who had stabbed him was the accused herein.

PW 3, BADA OMAR JALLO, was a Village Elder at Mororo.

On the night of 21st October 2008, at about 11.00 p.m., PW 3 heard shouts by someone who was saying that he had been stabbed with a knife, by Mohamed Kichwa. PW 3 rushed to the scene from where the shouts emanated, and he found the deceased lying on the ground, whilst holding his tummy.

PW 3 assisted the deceased by tying his tummy with a piece of cloth, so as to stop his intestines from falling out.

He then left PW 4, who is a brother of the deceased, organizing to take the victim to hospital.

Later, PW 3, was in the group of persons who arrested the accused. The arrest was effected behind some bushes, where the accused was hiding.

The accused said that he was hiding from the family of the victim. He then asked and the other villagers to take him to the police station.

At the police station, the accused stated that he had stabbed the deceased using the knife which he snatched from the deceased.

Meanwhile, PW 3 had noted, at the time they arrested the accused, that the accused was bleeding on his left hand. The accused told PW 3 that the cut on his hand had been inflicted by the deceased. The accused also told PW 3 that it is only after the deceased had stabbed him that the accused snatched the knife, and used it to stab the deceased.

PW 4, RAMADHAN AMARA MATA, is a brother of the deceased.

He confirmed that it was PW 3 who first informed him that the deceased had been stabbed with a knife.

PW 4 escorted the deceased to hospital, where he was admitted.

When PW 4 asked his brother who had injured him, the brother informed him that it was the accused who had stabbed him.

PW 5, OMAR DULO AMARI, was a Police Reservist. In his capacity as a Reservist, PW 5 did assist the chief with issues of security.

He was informed by PW 2 that the deceased had been stabbed by the accused. He then learnt, from some youth who were within the vicinity, that they had seen the suspect headed towards the bridge.

PW 5, PW 2 and the youth followed the suspect, and they arrested him at a bush, near the bridge.

PW 5 escorted him to the Tana River Police, when the accused was re-arrested. Shortly after the said re-arrest by the police, PW 1 arrived at the scene and told PW 5, and the police, that the accused had injured him earlier.

During cross-examination, PW 5 told the court that the accused explained to him that he had stabbed the deceased with the knife which he had snatched from the deceased.

PW 6, PC SAMUEL KAGUNDA, was a police officer who was attached to the Garissa Police Post.

He was one of the officers who re-arrested the accused at the Tana River Bridge Police Post.

PW 6 then visited the victim at the Garissa District Hospital. PW 6 noted that the victim had an injury on his stomach.

In the assessment of PW 6, the injury of the victim had been caused by a sharp object.

And when PW 6 interviewed the victim, the latter said that he had been injured by the accused.

PW 6 caused the accused to be charged with assault. However, when the victim succumbed to the injuries which had been inflicted by the accused, PW 6 caused him to be charged with murder.

By the time the accused was charged with murder, a doctor had carried out a post-mortem examination on the body of the deceased. The doctor concluded that the cause of death was severe peritonitis following an abdominal stab wound.

After the prosecution closed its case, the accused gave a sworn defence.

He said that on the material date, he was at Jedidah Muoroto Bar, where a lady named Nyambura joined. The two of them were friends, and they had drinks together.

Later, the deceased entered the same bar, and he held Nyambura's hand. When the accused asked him what he was asking Nyambura, the deceased is alleged to have insulted the accused, by saying that he had Aids.

According to the accused, he got annoyed and he therefore engaged the deceased in a fight. During the fight, the deceased produced a knife, which stabbed the left hand of the accused.

It is then that the accused snatched the knife, and used it to stab the deceased in the stomach.

The accused told the court that he was sorry about the death. He attributes his action to his drunken state. And he explained that he and the deceased had fought over Nyambura.

The accused had known Nyambura for about ten (10) years, but he was unaware whether or not Nyambura was also a friend to the deceased.

After the accused concluded his testimony, his advocate, Mr. Anyango Ogutu submitted that the accused had only acted in self-defence, and also under grave provocation.

As far as the accused was concerned, his action was therefore justified.

Furthermore, the accused said that he did not intend to kill the deceased. The death was thus described as an accident. He had not prior intention to kill the deceased.

From the evidence tendered, the facts of the case are largely uncontested.

The accused readily concedes, on oath, that he stabbed the deceased in the stomach. He used a knife to stab the deceased. And it is the stab wound which ultimately led to the death of the deceased. In SELEMANI Vs REPUBLIC (1) [1963] E.A. 446 the Court of Appeal for East Africa expressed itself thus on the issue of self defence;

“If a person against whom a forcible and violent felony is being attempted repels the force by force and in doing so kills his attacker, the killing is justifiable, provided there was reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case there is no duty, in law, to retreat, though no doubt questions of opportunity of avoidance of disengagement would be relevant to the question of reasonable necessity for the killing.”

I have scoured the evidence tendered by the accused, but have found no suggestion that the accused did not have an opportunity to disengage from the alleged fight with the deceased.

If anything, the accused did consistently indicate that he;

“had used NYS tactics to snatch the knife from the deceased and stabbed him.”

One would have expected the accused to disengage from the fight after he had snatched the knife from the deceased.

Instead of disengaging from the fight, the accused stabbed the deceased on his stomach.

In my considered view, the force used by the accused was so excessive that the intestines of the deceased were left protruding from his belly. PW 3 had to tie a piece of cloth around the wound, to stop the intestines from falling out!

On the other hand, the accused was entitled to defend himself when the fight erupted between him and the deceased. But he was not entitled to utilize excessive force.

In the SELEMANI case, the Court of appeal held that;

“If the force used is excessive, but if the other elements of self defence are present, there may be a conviction of manslaughter.”

In the case of DAVID LENTIYO Vs REPUBLIC, (NKU) CRIMINAL APPEAL NO. 181 OF 2005, the

Court of Appeal made it clear that when an accused is in danger from his opponent, he should first strive to retreat from the danger. This is what their Lordships said, at page 5;

“It is to be emphasized that in a case of self defence, if an accused finds he is in evident danger from his opponent, he must retreat from the danger but, if he finds that he cannot retreat further, then he can use force to defend himself.”

In this instance, the accused suffered a stab injury to his hand. He was therefore entitled to defend himself. But such an entitlement was limited to using no more force than was necessary for his self preservation.

When he used excessive force, as he did herein, the court must tell the accused that he had no right to do so.

Accordingly, I do find the accused guilty of manslaughter contrary to Section 202 of the Penal Code.

Dated, Signed and Delivered at Nairobi, this 3rd day of February 2011

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FRED A. OCHIENG
JUDGE