



CRIMINAL

Self defence

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 54 OF 2004

REPUBLIC PROSECUTOR

VERSUS

PETER NTUNDU NABEA ACCUSED

JUDGMENT

The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of that offence are as follows:-

“PETER NTUNDU NABEA on the 18th day of April 2004 at Njia Location in Meru North District within Eastern Province murdered IBRAHIM MUTUA NTONGA.”

The prosecution called three witnesses. The 1st witness Fridah Kananu was the wife of the deceased. She testified twice in this case. When she testified on 23rd January 2006, she stated that on 18th April 2004 at 6pm, she was at her home cutting napier grass. She heard screams coming from the upper side of her home. She rushed to that place and found the accused M’Naibea. She also found her deceased husband. She then stated:-

“My husband was screaming and Ntundu (accused) had a panga while Andriano (son of deceased) had a stone. Ntundu was cutting the deceased on the head. I was very close 3 – 4 meters away. I saw him do it. Then, Andriano threw a stone which hit the deceased on the shoulders.”

On being cross examined, this witness retracted part of her earlier statement when she said that she found the accused lying down alongside the deceased who was also lying down. She also stated that when she arrived at the scene, she found the deceased had already been assaulted. She saw the injuries of the deceased on the shoulders and the head. On cross examination she did not confirm whether the accused person had, prior to that incident two healthy eyes. She however noted before court that the accused was only having one good eye. The same witness testified again on 22nd February 2007. On this occasion, she stated that she heard screams. She run towards where the screams were coming from, which was about 1km away. At the scene, she found her deceased husband lying down whilst the accused was lying on top of him. She also found other people at the scene and they were the ones whose screams she had heard. She noted that both the accused and the deceased were dusty. On cross examination, she stated that she found the deceased and the accused lying side by side. She testified that she did not see any weapon at

the scene. Gilbert Karuti Mutia was the 2nd witness for the prosecution. He is an assistant chief of Kia Location Igembe North Division, Meru North District. On 2nd April 2004 at 6pm, he went to the home of the accused and arrested him because it had been reported to him that the accused had committed murder. On being cross examined, he stated:-

“I know the accused quite well since childhood. Before this incident he had both eyes but he lost one eye during the fight with the deceased.”

The 3rd witness for the prosecution was PC Japhet Rimberia. Whilst on duty at Maua Police Station on 19th April 2004 at 11am, he received a murder report from Kia Location. When he went at the scene, he saw the deceased lying down. On making enquiry, he said the deceased and the accused were said to have been fighting when the accused son hit the deceased with a stone. That son was still at large. This police officer said that he received a panga related to that incident. He was informed that it was the panga with which the deceased was armed with. He confirmed that the accused had injury to his left eye which was bandaged at that time. On the prosecution closing its case, the court put the accused to his defence. The accused stated under oath that he was a farmer. On 18th April 2004, he went to work in his farm in Rwanda. At 4pm, he was on his way back home. As he went at some distance he heard someone making noise. He could not see the person but all he heard was the noise he was making. By then it was 6pm. He met the person making the noise. That person was speaking in Swahili language and he said:-

“I will finish you right now.”

The accused said he asked him what he had done and that person responded by saying:-

“You will know.”

It was then that the accused began to run to escape being cut by the deceased with a panga. The accused ran for 1½ km, and all the while, the deceased was chasing him. The accused felt tired then he saw some stones. He picked up two stones and armed himself with them. The deceased raised the panga and cut him on the left side above the eye. The court was able to observe that injury and that the accused's left eye was scarred. The accused said that he hit the deceased with a stone and as a result, he fell down and the accused also fell down. The accused said that he did not know what happened thereafter but he found himself in hospital. He later learnt that the deceased had died. He said that before the deceased cut him, he used to have two good eyes. He then said:-

“This person (deceased) is a villager, I knew him. He was even a good friend of mine. We were good friends. Even when I heard of his death, I was shocked. When I threw the stone, my intention was to evade him cutting me. I was protecting myself since he had said he would finish me.”

The accused said he did not see his son at the scene. On being cross examined he accepted that he killed the deceased but said it was not intentional.

There was no direct evidence brought to court showing that the accused killed the deceased. The accused himself does admit hitting the deceased with a stone to protect himself before he passed out. The prosecution did not produce a post mortem report which would have assisted the court to know the cause of death. This is because PW1 the wife of the deceased said at one time that the deceased had cuts to his head and shoulders. It would have been of assistance to the court to know if the deceased died of injuries caused by a sharp instrument or a blunt instrument. The accused raised a defence of self defence. The accused stated he was chased by the deceased who was armed with a panga. The police officer who gave evidence recovered that panga which belonged to the deceased. The accused alleges he was injured by the deceased before he reacted in self defence. His injuries were confirmed by the assistance chief. The assistant chief, the deceased wife, were able to observe the scar. Section 17 of the Penal Code provides as follows:-

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

That Section provides the defence to a person who is defending either person or property that is self defence. The determination of whether that defence is available to a party is to be determined according to the principles of English Common Law. There has been local decisions in respect of the English Common Law application. In the case of **David Lentiyo Vs. Republic** Criminal Appeal No. 181 of 2005 the Court of Appeal had this to say:-

“Under English law there is a broad distinction made where questions of self defence arise. If a person against a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a 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. In other cases of self defence where no violent felony is attempted a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise break off the fight or avoid the assault, he may use such force, including deadly force, as is reasonable in the circumstances. In either case if the force used is excessive, but if the other elements of self defence are present there may be a conviction of manslaughter: R.V. Biggin (2), R.V. Howe (3), Robi V. R. (4) (in relation to defence of property)”

The Court of Appeal also considered the same issue in the case of **John Njoroge Vs. Republic** Criminal Appeal Case No. 186 of 1987. The Court of Appeal had this to say:-

“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 the crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression.”

It should be noted that the accused and the deceased were both dusty and were found unconscious lying down next to each other. That supports the evidence of PW3 the police officer who stated that his investigations revealed that the accused was attacked by the deceased and that he repelled the attack. The panga at the scene was recovered by the police officer who confirmed that it belonged to the deceased. The accused was injured following that incident. Prosecution did not produce contrary evidence to the defence offered by the accused. The defence is that accused on being cut by deceased on his left eye he reacted by hitting the deceased with a stone. Whether that act was what caused the death of deceased, the court does not know because the state did not produce the post mortem report. The defence of self defence is available to the accused in this case. There is evidence the deceased chased the accused quite some distance with a panga. The act of hitting the deceased with a stone was therefore self defence. In view of what is stated above, I find the accused not guilty of the charge of murder. I acquit him of that charge and order that he be set free unless he is otherwise lawfully held.

Dated, signed and delivered at Meru this 27th day of September 2011.

**MARY KASANGO
JUDGE**