



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU Criminal Case 26 of 2006

REPUBLIC PROSECUTOR

VERSUS

EZEKIEL KARURI M'IKABU 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 that on 17th April 2006, at Muringene Location in Meru North District within the Eastern Province murdered David Mutuma M'Ikabu. The deceased and the accused were brothers. The evidence adduced before court indicate that a fight ensued between the two on the fateful day which was related to their dispute over the *miraa* plants. The doctor who gave evidence stated that the cause of death was due to bleeding and lack of oxygen which were secondary to the chest injury. The postmortem indicates that the deceased had two stab wounds on the left side of the chest. The investigating officer stated that on 17th April 2006 whilst he was at Maua police station at 7.15pm the accused attended the police station to report that he had been assaulted. He alleged that he had been cut by David Mutuma. The accused reported to this officer that the fight was over the *miraa* shamba which belonged to their father. He noted that the accused had deep cut wound on the head and the hands. He was therefore sent him to Maua District Hospital to seek medical attention. On that day at 8pm, a lady by the name of Margaret Mukami, a sister to the accused and the deceased, reported that they had rushed the deceased to the hospital but the deceased had passed away. These officers in the company of others went to Maua District Hospital where they confirmed the death of the deceased and where they also found the accused being attended by doctors. The accused was arrested. He said that when Margaret Mukami reported the incident at the police station, she had said that it was the deceased who was fighting the accused at their homestead. This officer went to the scene and was able to establish that indeed the fight was in respect of the shamba. According to his investigation, both brothers were claiming ownership of the entire shamba. He took a sketch map of the same which was produced before court. He also produced before court medical treatment notes of the accused which related to the treatment at Maua District Hospital. After the arrest of the accused, the officer said that the accused was produced before court 23 days later. He attributed the delay in producing the accused before court to the fact that the witnesses who are related to both the accused and the deceased were reluctant to record witness statement. However, he did not obtain a statement of Margaret Mukami and the mother of both the accused and the deceased. He further stated that some of the witnesses related to the accused went into hiding. During that period, the accused was also attending hospital daily for dressing of his wounds. On being cross examined, this officer was able to identify the scars that resulted from the injuries inflicted on the accused by the deceased. He

also stated, contrary to what he had said before, that the accused mother did record a statement and according to her statement, the deceased on the material day was armed with a panga and was claiming that the shamba belonged to him. He then started to cut the accused. He also referred to another statement of Gladys Nkatha wherein she stated that the deceased had a panga and the accused had a knife. He finally stated that the last statement obtained from the witnesses was recorded on 5th May 2006. PW3 was the wife of the deceased. On the material day, at 4pm, she had gone to collect cattle fodder for her animals. While she was cutting them, her child came to her and informed her that her husband had been killed by the accused. She said that the accused had sworn in the morning and told the deceased that he would kill him. She too confirmed that the quarrel related to the *miraa* shamba. On being called by her child, she went to the homestead and found the accused and the deceased fighting. She said both the accused and the deceased were having a sword. In describing the deceased injuries, she said that he suffered a cut on the chest and she counted 5 stab wounds on the head, the chest, the rib and the stomach. She also noted that the accused had cuts on his face. When she arrived at the homestead, she found both the deceased and the accused cutting each other. They were able to get a wheelbarrow to take the deceased to hospital but the deceased died before arrival. She was cross examined and she confirmed that when the fight between the deceased and the accused started she was not there. She however was present when the deceased was cut on his face. She stated that the accused had with him a panga and a small sword whilst the deceased had a panga. She confirmed that she had recorded a statement at the police station after the incident. On being interrogated, in respect of her statement, she denied that she had informed the police that the deceased had a long panga locally called c-line. She however admitted that she had told the police that the accused only had a small knife. She however denied that she had told the police that it was the deceased who had started to cut the accused. She was questioned on why she did not record in her statement what she stated in court that the accused had threatened to kill the deceased. In her response, she said she had told the police but she was not aware why the police did not record the same. On being re examined by the state counsel, in respect of the alleged threat by the accused to the deceased, she first said that the accused threatened the deceased about 6 months before the incident. She later added that the accused had threatened the deceased on the morning of the incident. That was the only evidence that the prosecution adduced in this case. The court found the accused had a case to answer and he was put to his defence. The accused said that he was in the business of selling *miraa*. On the material day, he had come from his cousin's place and was on the way to his shamba. He saw the deceased with a long blade sword. The deceased begun to cut him. In that respect, he pointed to his forehead where the deceased cut him. The deceased, according to him, cut him 3 times. He had on him a small knife which he said was about 6 inches long. Because of the extreme pain he was feeling, he used the knife to cut the deceased. This is what he stated:-

“I cut him because I was in extreme pain, blood was flowing. I had to do something because he wanted to kill me.”

He denied that he had attacked the deceased as stated by PW3. In chief, he finally stated that he was kept in police custody for 28 days before he was brought in court. On being cross examined, he said that the deceased came to him when he was in the shamba. Without a word, the deceased begun to cut him. The deceased he said had a grudge with him because he claimed that the shamba that had been allocated to him was smaller than his. Their mother had requested them to get a surveyor so that the shamba could be sub divided. The shamba is 1 acre. He denied that he started the fight. He then state:-

“The deceased was also holding my private parts. I also thought I was going to die. Otherwise, the, (sic) I did not intend to kill deceased. We fell down. I stabbed him while we were down.”

On being re examined, he reiterated that he had no intentions of killing the deceased. It is clear that the accused as confirmed by PW2 had deep cut wounds on the head and the hands. PW2, according to his investigation, found that it was the deceased who initiated the fight. He first cut the accused. The fact that the accused had also cut wounds on his hands does indicate that he was cut as he attempted to protect

himself. The witness statement of the mother to the accused and the deceased and the other statement of Gladys Nkatha also confirmed the same. It is clear that when PW3 arrived at the scene the fight had already started. She could not therefore tell the genesis of it. The evidence therefore that she gave that it was the accused who started the fight was either fabricated or at best speculative. It ought to be noted that she was the wife of the deceased and there is the possibility of giving bias evidence because of that relationship. It is also clear that she did not tell the police when she recorded her statement that the accused had threatened to kill the deceased. It is also interesting to note that when the state counsel asked her when the accused made the threat, she first stated 6 months before the incident then later stated the morning of the incident. I find that the evidence of PW3 cannot be relied on because of those inconsistencies. The accused gave sworn testimony and in my view his evidence was very clear and not contradictory. The deceased, according to him, attacked him cutting him 3 times. He threatened to kill the accused. The accused had a knife which he was using to prune the *miraa* plant. It is that knife that he used to cut the deceased when he thought that he was going to die. 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.”

Having reconsidered the evidence adduced I find that the deceased viciously attacked the accused and that in my view, put the accused in immediate peril. He repelled force by force and unfortunately that resulted in the death of the deceased, his brother. Considering the evidence in court, I find that the accused can indeed be availed the defence of self defence as provided under Section 17 of the Penal Code. The killing of deceased is in my view justifiable because accused had an honest belief the deceased wanted to kill him. The deceased clearly had a big sword which he attacked and threatened to kill the accused. The accused defended himself by stabbing the deceased twice, according to the postmortem. In doing so, it is clear that he was trying to avert imminent danger. He said that the deceased was holding onto his private part when he cut him. He could not therefore retreat. In view of the above, I find the accused not guilty of the charge of murder and I hereby

acquit him and order that he be released from custody unless he is otherwise lawfully held.

Dated and delivered at Meru this 19th day of March 2010.

MARY KASANGO

JUDGE