



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL CASE 51 OF 2006

REPUBLICPROSECUTOR

VERSUS

PETER MAINA MACHARIAACCUSED

JUDGMENT

Peter Maina Macharia the accused herein, is charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the charge stated that on 1st day of July, 2006 at around 7.30 p.m. at Durumo Village in Nyandarua District within Rift Valley Province murdered Ann Nyaguthi. The prosecution called a total of seven (7) witnesses in their bid to prove the charge against the accused person.

E. K PW1 a young lad aged 10 years old who is also the son of the deceased, recalled that on 1st July, 2006 he was at home, the accused person came while armed with a knife and enquired the whereabouts of his mother. PW1 told him that he did not where his mother's whereabouts. The accused person went away and came back later, after about 10 minutes. The deceased also arrived and handed over the baby she was holding to PW1. That is when the accused person hit the deceased with a stool and stabbed her with a knife. PW1's grandmother as well as other people gathered the accused person just walked away with the knife.

Joseph Nguya Wagachira, PW2 testified that on 1st July, 2006 at about 6.30 p.m. the accused person found him on the road side and told him that he had killed his sister so they should go and bury her. He repeated this 3 times and PW2 saw the accused person looked disturbed. PW2 knew the accused person well because the deceased was his sister and she had been married by the brother of the accused person who died. PW2 decided to go home but on the way, he met with the wife of the accused person and two other women. They decided to go to the deceased house. They found her lying on the ground with stab wounds on the head, she was bleeding profusely. They reported the matter to the police and the body of the deceased was moved to Nyahururu Hospital for post-mortem.

P. M PW3 a young boy aged 13 years and a son of the deceased testified that on 1st July, 2006 he had gone to watch a football match in town on television. When he returned, he was shocked to find the body of his mother lying on the ground in a pool of blood. He run to the police station and reported the matter. He met PW2 at the police station. He said he knew the accused person as a neighbour.

Kezia Waigwa Mathenge (PW3) also gave evidence that on 1st July, 2006 at about 7.00 p.m., she was called by the wife of the accused person who came to her house crying. They were looking for Kezia, s husband to help the deceased who had been assaulted by the accused person. PW5 joined the two ladies

and they proceeded to the scene. Kezia testified that she was shocked that the accused person could have hurt the deceased who was his sister in law. On the way to the scene, they met with the PW2. They all proceeded to the scene and saw the body of the deceased had multiple injuries. She started screaming and many members of public gathered. PW3 testified that she saw the accused person on the road and tried to question him what had happened and the accused person said that he only hit the deceased twice with a fist.

The report of this murder was made to PC Livingstone Nairobi who was at the time based at Ndurumo police base. When he heard people screaming, he went to the scene and found the deceased on the ground with several stab wounds on the head and on the chest. He also found the children of the deceased and other women. Since there was tension he decided to go back to the base and arm himself with a gun and returned with a colleague called Mwaura.

As they were coming back to the scene, they saw the accused person still armed with a kitchen knife. PW6 ordered the accused person to put down the knife. They arrested the accused person and locked him up at Ndurumo police base. PW6 also recovered the blood stained clothes which the accused person was wearing. Next to the body of the deceased he also recovered a cap which he said he had seen the deceased wearing during the day. He collected a sword next to the deceased and a broken stool which was allegedly used to attack the deceased. The deceased blood stained clothes were also recovered. All these items were produced as exhibits in this matter.

PC Joseph Ngati PW6 testified that on 1st July, 2006, he was based at Rumuruti police Station Crime Office when he received a report of a murder case at Ndurumo police base. He visited the scene on 2nd July, 2006 and found the body of the deceased. He also found PW5 who was guarding the scene. He interviewed the witnesses, and gathered that on 1st July 2006 at about 7.30 p.m. the accused person picked a quarrel with the deceased. The deceased insulted the accused person by calling him uncircumcised man. This infuriated the accused person and reported the matter at Ndurumo Patrol Base but he was advised to report the following day.

The accused person returned to the deceased's house and enquired from PW1 where his mother was, but at the time, she was not in. She came a short while later, that is when the accused person attacked her with a stool. The deceased fell down; the accused person stabbed her on the face and on the head. The accused person went to his home and told people he had killed the deceased. He also proceeded to Ndurumo Patrol Base but he was arrested by the police officers from the Patrol Base. It is PW6 who took the body of the deceased to the mortuary and a post-mortem was performed by Dr. Mburu.

Chief Inspector of Police Crispin Muriuki (PW7) testified that he took over the investigation of this matter from PW6. The post-mortem report which was prepared by Dr Mburu at Nyahururu District Hospital was produced by this witness because Dr. Mburu resigned from the Civil Service and it was not possible for him to attend court without unreasonable delay. PW7 also produced a P3 form regarding the mental and physical examination of the accused person. The accused person was examined by Dr. Mburu and he was certified fit to stand trial.

At the close of the prosecution's case, counsel for the accused person submitted that the accused person's Constitutional Right to a fair trial were infringed upon by the prosecution because he was arrested in 1st July, 2006 and he was not arraigned in court until 4th August 2006. Plea was finally taken on 25th September 2006. Accordingly, counsel urged the court to acquit the accused person.

In response, Mr. Gumo responded that the investigating officer filed an affidavit which gives a detailed account of how the delay was occasioned. The accused person was arrested by officers from Ndurumo Police Post which is 25 kilometres from the mother station. At time the accused person was arrested, there was no official transport and the police had to borrow transport from the Kenya Wildlife Services. Even after the accused person was brought to Rumuruti police station CPL Muriuki had to borrow transport from other departments. Finally the accused person was brought to court on 4th August, 2006 before the Principal Magistrate who remanded him until 25th September 2006 when the plea was taken.

Mr. Gumo submitted that the circumstances of each case must be considered to establish whether the police deliberately delayed the accused person. In this case the prosecution gave a cogent explanation why the accused person was held in police custody beyond the stipulated period. The police did not hold the accused person intentionally but due to problems of transportation and difficult terrain. On evidence Mr. Gumo submitted that prosecution proved their case based on direct and circumstantial evidence.

Placed on defence, the accused person gave unsworn evidence on his defence. He gave a long testimony of how he used to help the deceased who was married to his late brother when his brother died. When the accused person's brother passed away, the deceased moved to Ndurumo centre and the accused person was helping her to support and educate her children. On the material day, the accused person asked the deceased why she had not paid school fees for her daughter who had been sent from the school. The accused person alleged that he had given the deceased 5,000/- to pay the school fees. The deceased retorted that she had used the money to do other things and ordered him to leave her house.

This is when the deceased asked her daughter to get her a knife. The accused person demanded to know why the deceased asked for a knife. A struggle ensued and the accused person refused to move and tried to snatch the knife which accidentally cut the deceased on the cheek. The accused took the knife and put it in his pocket. At that point the deceased took the stool and tried to hit the accused but he snatched and pushed her until she fell down. That is when the deceased was injured. The accused person went to PW2's house and told him that he had fought with the deceased and hit her accidentally. However PW2 ignored him and asked him to look for help elsewhere because he had no regard for the deceased.

The accused person looked for a bicycle and went to look for motor vehicle to take the deceased to the hospital. At the time, he did not know the deceased had passed away. It is when he returned later when he met with the police officers who ordered him to surrender the knife and arrested him and charged him with the murder.

The issue for determination for determination in this case is whether the accused person was defending himself or whether he intended to murder the deceased in cold blood. The defence by the accused person alludes to a self defence. The accused person was seen by PW1 attack the deceased by hitting her with a stool and stabbing her with a knife. The accused person announced to PW2 that he had killed the deceased and they should go and bury her. He went to report the matter at Ndurumo Police Post and met with police officers while still armed with a knife.

The evidence by PW3 is clear that the accused person used to assist the deceased and she actually doubted that the accused person could have injured the deceased. This evidence taken together with the evidence by the accused person tends to show that the accused person started a quarrel which degenerated and the deceased death was not premeditated. Was the accused person defending himself? The law relating to the self defence of a person is provided for under section 17 of the Penal Code as follows:

“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.”

The law of provocation is also found under **Section 208 of the Penal Code** and the use of force in defence with the element of provocations has been used by the courts as sufficient to regard the offence of killing not murder but manslaughter. See the case of **Mungai –vs. - R. {1984} page 86** where the court of appeal held:

“1. If is a doctrine recognised in East Africa that the excessive use of force in the defence of the person or property, whether or not there is an element of provocation present. May be sufficient for the court to regard the offence not as murder but as manslaughter – R. –vs.- Goalie s/o Shaushi {1951}18 EACA 164; R –vs.- Shaushi {151}18 EACA198

2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instance where that results is a proper one in the circumstance

and on the facts of the case being considered - Palmer –vs.- Reginam {1971} 1 All ER 1077.”

There is also evidence that the deceased used to drink illicit brew. The accused person also testified in his defence that he had taken illicit brew on the material day. Taking all the above circumstances I find that the prosecution’s evidence proved a lesser charge of manslaughter against the accused person against the provisions of 202 of the Penal Code.

On the issue of the Constitutional right of the accused person who was not arraigned in court within the stipulated period of time. I find the explanation given by CPL Muriuki satisfactory. The principals to guide the guide the in this respect are well set out by the Court of Appeal in the case of **Paul Mwangi Murunga –vs.- Republic Court of Appeal Case No. 35 of 2006**. There is also long line of authorities both by the High Court and the Court of Appeal and they all underscore the necessity by the trial court to always review pertinent circumstance surrounding each case in the interest of justice.

The investigating officer gave an account of the transport problems they encountered to transport the accused person from Ndurumo Police Base to Rumuluti Police station. There was impassable terrain and on this ground, I do not think that the accused person’s fundamental rights to a fair trial were prejudiced by the delay of 32 days between when he was arrested and first time he was arraigned in court. If the accused person is not satisfied with my findings over this Constitutional issue, he is at liberty to file a suit for damages.

Accordingly, I find the prosecution have proved a lesser charge of manslaughter; the accused person used excessive force and took law into his hands when he stabbed the deceased.

The accused is found guilty and convicted of the offence of manslaughter according to section 202 of the Penal Code.

Judgment read and signed this 25th day of June, 2009

M. KOOME

JUDGE