



Ø Criminal Law – self defence or provocation – burden of proof

Degree of proof required,

Ø Where murder is charged and evidence discloses a possible defence of self defence or of provocation, the burden of proof remain throughout on the prosecution and it is not at any time on the accused for him to establish other defence.

Ø Identification is not merely visual or by photographs.

Ø Identification includes voice recognition.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Criminal Case 29 of 2003

REPUBLIC.....PROSECUTOR

v e r s u s

WILLIAM KUNYIGA KIIRUGARA.....ACCUSED

J U D G E M E N T

The accused, William Kunyiga Kirugara was charged with the offence of murder of one Jadiel Mutembei Ichaba on the night of 26th January 2002 at Mbeu Location Kibuline Sub-Location in Meru North District within the Eastern Province contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63, Laws Of Kenya). The evidence is as set out below

Dr. ISAAC MWANGI MACHARIA was P.W.1

He carried out a post mortem on the body of Jediel Mutembei Ichaba (the deceased). Upon examination of the body he found that the deceased's abdomen was markedly extended. He made the following findings.

- (i) External injuries.
- I) bruise on the left side of the chest and abdomen, the bruise was 5 cm in diameter.
- II) bruise in the abdomen around the umbilicus about 2 cm in diameter.

- (ii) Internal injuries
- i) rupture of the abdominal aortage,
- ii) ruptured spleen,
- iii) bleeding in the abdominal cavity.

This was his opinion

“I formed the opinion that the cause of death was massive bleeding as a result of the ruptured aorta and spleen caused by a blunt abdominal injury. I signed the death certificate No. 47805 and produced as P Exh.1.”

In cross-examination by Mr. Ndombi learned counsel by the accused P.W.1 said **“the deceased injuries were to the abdomen on two parts of the same. The injuries were made by a blunt object because the injuries had large surface area which cannot be caused by a sharp object... the body showed nothing to indicate the time of death it was well preserved. Ordinarily a body starts decomposing 6 hours after death unless there is preservation”**.

P.W.2 No. 48214 Sergeant (Sgt). JOSIAH WANGIRAH testified that he received two suspects, William Kunyiga (the accused) and Alex Gitonga brought to Mikinduri Police Post by an Assistant Chief, Anjuki Sub-Location, one Kabaara on the allegation that the two had committed murder at Njiru area. He interrogated them and handed them over to Njiru Police station in whose jurisdiction the offence occurred.

P.W. 3 CORNELIO KABAARA.

Was Assistant Chief for Anjuki Sub-Location. His testimony was to the effect that he was by his shop on the road when he noticed three people who appeared scared, and on inquiry they informed him that they were scared because they had seen a murdered person and they were looking for the murderers. He testified that he saw some two young men whom he followed. However when he caught up with them, one ran into a maize plantation. He accosted the other one who had remained and who told him that he was Alex Gitonga. Alex Gitonga also told them that William Kunyiga is the one who ran away and had committed the murder at Mbeu area. He chased William Kunyiga and found him hiding in a maize plantation. He is here in court (points at the accused). He took the accused to the Local Police Post.

P.W. 4 LATICIA KAGWIRIA.

Was the widow of the deceased Jediel Mutembei Ichaba. Her evidence was that her husband had come home at about 10.00 p.m., and she and him were happily asleep when at about midnight “Kunyiga Julius came and called out my husband and said, **“please come I want to tell you something”**. I could not know his voice when he called out but I came to know later. My husband responded. **“do you want to kill me”**? He said so as he opened the door and he was hit twice. I saw him fall at the door. Then at the point I recognized the person attacking him as being Kunyiga because he said **“you will be ... throughout this night and day.”**

I had known Kunyiga prior to that day, we were born in the same village i.e. Kiburine. I was born in 1977. His home is near our home. I had spoken to him prior to this date and knew his voice. I started screaming because my husband had fallen on the ground inside the house by the door. In response to my screams a lady called Nkatha came to my house. Kunyiga had run away.

When cross examined by Mr. Ndombi learned counsel for the accused P.W.3 answered. **“At the time there was no light in my house. I identified the assailant by voice only. I had known him since 1977 when I was born. Between the time my husband was hit and when the Police came at 6.00 a.m. we were doing nothing.”**

Upon re-examination by Mr. Muteti learned state counsel, P.W.4 said **“There was no light at the time of the attack. I identified the accused by his voice that night. I saw him running away using moonlight which was bright.”**

P.W. 5 JOSEPH GACIOTE

He identified his body for post mortem purposes. He was the nephew to the deceased.

P.W.6 JOSEPH MUGAMBI

Was a cousin of the deceased. He went to Meru General Hospital on 7.2.2002 and identified the body of the deceased for post mortem purposes.

P.W.7 NO 61014 P.C. WILSON RONO

His testimony was merely that he accompanied his O.C.S IP Lee Kabiru to a scene at Kiburine Market in Mbeu Location where he found the deceased lying dead in a room, and he noticed no physical injuries and took his body to Meru General Hospital mortuary. He returned to the station and did nothing else on this matter, except that the accused was later brought to the station by P.C. Waweru from Mikinduri where he had been arrested and later charged.

ACCUSED PUT ON HIS DEFENCE AND ACCUSED CASE.

On the above evidence the accused was put on his defence in terms of section 306 (2) of the Criminal Procedure Act (Cap 75 Laws of Kenya) and opted to give his evidence on oath.

D.W. 1 WILLIAM KUNYIGA

The evidence given by D.W.1 the accused was the very opposite and anti-thesis of the evidence of P.W.4, Laticia Kagwiria, the deceased's widow. Contrary to the testimony of P.W.4 that it was the accused who went and called out the deceased from his house, the testimony of the accused is that it was the deceased who went to the house of the accused and challenged him to come out of his house. This was his testimony.

“The deceased came to my house at 10.00 p.m. and he was drunk. He said that I had sent many people to him and that he wanted to finish me. He moved out took a panga and as I got out, he tried to cut me. There was firewood outside for burning tobacco. I picked a stick from the firewood and I used it to defend myself. I threw it at him and all I wanted to do was to defend myself.

When I came out of the house I had no weapon and all I wanted to do was to ran away. After throwing the stick at him, I ran away and the next day I was told that he had died. When I threw the stick at him he was 3 metres away”.

Of the evidence of P.W.4, Laticia Kagwiria, wife of the deceased, the accused said-

“She was not present during the episode and she never spoke to me. After I threw the stick it was dark so I do not know what happened to the deceased. It was his wife who told me that he had died after our fight. If he died it was not my intention to kill him.”

Upon cross examination by Mr. Muteti learned counsel for the state, the accused confirmed that the period between 26.01.2002 and 3.02.2002 was one week, when he was in Mikinduri, a different location from ours about 2 kms away.

The accused also testified that he knew that Laticia P.W.4 the deceased's wife was in her house. He had seen both her and the deceased pass by his house, his door was open and both were drunk, before the deceased returned to attack him. His reason for throwing the stick to the deceased was merely because the deceased had a panga. He ran away to his parents house, and spent the night away from his own house, and informed his parents of what had happened. He ran away to rent a room at Mikinduri Market.

The accused did not call any other evidence and the defence was entirely dependent upon the evidence of the accused.

ANALYSIS OF EVIDENCE AND SUBMISSIONS.

Mr. Lompo, learned counsel for the accused submitted that the prosecution had completely failed to establish that the accused committed the offence as charged. These were his reasons:

The prosecution called seven witnesses. Counsel submitted that P.W.1, P.W.2, P.W.5, P.W.6 and P.W.7 never gave evidence that implicated the accused with the offence for which he was charged. P.W.3 gave evidence that was merely hearsay.

To recapitulate P.W.1 was Dr. Isaac Mwangi Macharia. He carried out a post mortem on the body of the deceased. P.W.2 was No. 48214 Sergeant Johan Wangirah. He received two suspects William Kunyiga the accused and Alex Gitonga from an Assistant Chief of Anjuki Sub-Location). He interrogated them and handed the suspects to Njiru Police Station. P.W.3 was Cornelio Kabaara, Assistant Chief of Anjuki Sub, Location who was at his shop when the suspects, the accused and Alex Gitonga were pointed out to him, and he had them, first Alex Gitonga and then the accused who had ran into a maize plantation arrested and handed over to the Police. P.W.5 Joseph Gacote nephew to the deceased who together with P.W.6 Joseph Mugambi identified the body of the deceased at the mortuary for purposes of the post mortem. P.W.7 No. 61014 P.C. Wilson Rono only visited the scene of the crime. He did not carry out any investigations on the crime.

Mr. Lompo consequently submitted that only P.W.4 gave evidence which linked the accused with the offence. She recognized the accused by his voice; and he also saw him hitting the accused and while running away by the light of the moon. Counsel submitted however that even her evidence was not watertight. P.W.4 Laticia Kagwiria was the wife to the accused. She did not say in her evidence with what object the accused was hitting the deceased or what part of the body or how many times he was hit.

Learned Counsel for the accused relied on the evidence of the accused that it was the deceased who went to the house or home of the accused with an assortment of crude weapons a sword and a panga (machete), hurling abuse at the accused and threatening the accused with dire consequences and that in response to the abuse and threats of imminent danger to his person, that the accused picked a stick and hurled it with all might at the deceased who was advancing at him at three (3) meters away and felled him. Having thwarted the danger from the deceased, the accused ran away. Lompo called the action of the deceased self defence, upon serious provocation from the deceased.

Said counsel submitted that once a defence of self defence was raised, the burden or onus of proof shifted to the prosecution and that the prosecution had failed in discharging that burden. Counsel relied upon the English cases of **R. VS LOBELL [1957] All E.R. 734** and **CHAN KAU ALIAN CHAN KAI VS REGINAM [1955] 266**. The latter case was an appeal from Hong Kong Supreme Court to the Privy Council and the Privy Council stated “**where murder is charged and the evidence discloses a possible defence of self defence or provocation, the burden of proof remain throughout on the prosecution and that it is not at any time on the accused for him to establish either defence**”.

The former or earlier case arose in Manchester England, where the same principle was reiterated that

where there is a possible defence of self defence or provocation, the onus or burden of proof of the accused's guilt remain with the prosecution and if, on the whole of the evidence the jury are in doubt whether the act was done in necessary self defence they should find the accused not guilty.

Mr. Lompo also submitted that should the court find the accused guilty of the offence charged then the court should find him guilty of the less offence of manslaughter. Counsel relied on the decision of my brother, Maranga in **Republic vs Wilson Njivu Mwaruruma [2004] el K.L.R.**

Mr. Lompo also submitted that the force used by the accused in self defence was not excessive. The accused used a stick while the deceased was armed with a sword and a panga (machete) that he was justified to defend himself as such, and that the court should so find.

It is necessary to state the prosecution's view, Mr. Muteti learned State Counsel submitted that the prosecution had proved its case beyond reasonable doubt. It was clear from the evidence of P.W.4 Laticia Kagwiria that the accused was the aggressor. He had gone to the home of the deceased and called him out and attacked him without cause. This counsel submitted disposed of any question of self defence and such defence was not necessary and urged the court to find the accused guilty as charged.

CONCLUSION

The basic issue is whether the accused is guilty of the offence of murder as charged. The general rule of evidence is that where an accused pleads "**not guilty**" the prosecution is obliged to prove at the trial every fact or circumstance stated in the charge which is material and necessary to constitute the offence charged, and the further general rule is that, apart from any provision to the contrary, the burden of proof of guilt lies upon the prosecution, and it is not for the defence to prove innocence.

In this case, I am satisfied that P.W.1, P.W.2, P.W.3, P.W.5, P.W.6 and P.W.7 inclusive did not give any evidence which directly involved the accused with the offence. P.W.3 Cornelio Kabaara the area Assistant Chief testified that he was informed (shown) the accused and his companion, Alex Gitonga as persons suspected to have committed the offence, and that the accused having run into a maize plantation, he caught up with Alex Gitonga who informed him that it was the accused William Kunyiga who had committed the offence. It is a great pity that the prosecution did not deem it fit to record a statement from and call Alex Gitonga to corroborate the information he had given to the P.W.3 the Assistant Chief that it was the William Kunyiga, the accused, who had killed the deceased.

The evidence of Alex Gitonga might have cleared such cobwebs and gaps as to who between the accused and the deceased went to the home of the other or was the aggressor, would have thrown some light on the weapon used by the accused to inflict the injuries sustained by the deceased and which eventually led to his death within less than twenty four hours from the time of attack.

Despite these cobwebs and gaps the accused is not out of the woods. The general rule is that the best evidence of which the nature of the case will admit must be produced, if it can possibly be obtained, if not then the next best evidence that can be obtained is admitted. This means that as a general rule where a written document is to be used as proof the original document must itself be produced and where a fact can be proved by persons who actually saw or heard it they must be called. For if it appears that there is any better evidence existing than that which is produced the non-production of such evidence creates a presumption that, if produced it would have revealed some falsehood which at present is concealed.

Would the prosecution be concealing any evidence by not calling Mr. Alex Gitonga to corroborate the evidence he gave to the Assistant Chief that it is the accused who killed the deceased? Although I have said the evidence of Alex Gitonga would have cleared some cob-webs and filled the gaps in the prosecutions case, I am also satisfied that it would not have sub-planted the evidence of P.W. 4 Laticia Kagwiria, the wife of the deceased. I draw this conclusion from the accused's own evidence in cross-examination by Mr. Muteti, learned State Counsel.

“I did not see Laticia that night as she was in her house. I say so because after we fought the deceased went to his house. I knew Laticia was in her house as she went in while both were drunk before the deceased returned to attack me. I saw them because my door was open”.

This is in my view, a very improbable scenario. The accused does not say where the deceased and his wife P.W.4 were coming from after drinking. Was he in that drinking party? His evidence suggests that he was already in his house why did he leave his door open- so that he could clearly see the deceased pass him and later follow him to his house?

The accused’s evidence in chief was that the accused **“moved out and took a panga”**. Moved out from where? Entrance to his door? If the deceased was at the accused’s door, armed with a sword and a panga (machete) would the deceased have thrown wild futile thrusts and failed to cause any injury upon the accused? Would he have let the accused arm himself with an amber stick (more of a log) and hurl it at the deceased three meters away?

Contrast this evidence with the findings of the doctor’s examination of the deceased’s body on post mortem. The deceased body had both external and internal injuries. The deceased’s abdomen was markedly extended. The external injuries included bruises on the left side of the chest and abdomen, 5cm in diameter on the abdomen around the umbilicus, 2 cm in diameter internal injuries included rupture of abdominal aorta, spleen bleeding in the abdominal cavity.

The doctor’s opinion was that the accused’s death was due to massive bleeding as a result of rupture of aorta and spleen caused by a blunt abdominal injury. The doctor confirmed this in cross-examination that the injuries covered a large surface area of abdomen which cannot be caused by a sharp object and could only be caused by a blunt object.

The accused’s theory that he threw a piece of stick or log from a kiln curing tobacco leaves must be treated as no more than a theory. The African **“fimbo”** mistakenly called a stick or the **“Maasai” “Rungu” “Club”** is both an instrument of self-defence and also assault. If it is thrown at the close quarter of three (3) metres, it would cause some injury on some small part of the body, the face, the ear, arm, or even the stomach, depending which area of the body it finds unguarded. For the Accused’s **“stick”** hurled or **“thrown”** at the deceased to cause the kind of injuries described by P.W.1 Dr Isaac Mwangi Macharia, it would not qualify to be either a Maasai Rungu or the African **“fimbo”**. It must have been a sinister blunt object, repeatedly applied upon a disabled and hapless adversary or victim, the deceased, and therefore consistent with the injuries sustained by the deceased, and not a one off **“stick”** thrown at the deceased at a moment of running away from a fight.

The injuries are not consistent with either **reasonable force** in self defence as Mr. Lompo learned counsel for the accused contended or the use of a **“stick”** from a tobacco fire. They are consistent with a well-planned and executed unprovoked attack upon the deceased in his own house and which the deceased was unable to defend himself.

The intention of the party at the time when he commits an offence is often an essential ingredient in it, and, in such case, it is as necessary to be proved as any other fact or circumstance laid in the charge. Intention however, is not capable of positive proof, it can only be implied from overt acts. As a general rule, every man is taken to intend the natural and probable consequences of his own acts. The intent is inferred from the act done.

According to the evidence of P.W.4 Laticia Kagwiria the deceased’s wife the accused went to the deceased’s house called him out at midnight. **“Please come, I want to tell you something.”** In response, the deceased shouted back. **“Do you want to kill me?”** and that the deceased said so, as he opened his door, and **“he was hit twice. I saw him fall at the door.”** Then at that point I recognized the person attacking him as being Kunyiga because he said **“you will be throughout this night and day”** I have already observed P.W.4’s other testimony on recognizing the accused, she and the accused were born in the same village of Kiburini. The home of the accused is near that of the accused she had spoken to the accused prior to the fateful date. She knew his voice. I am therefore satisfied that P.W.4’s testimony on

the identity and recognition of the accused is credible and shows that the accused as the person who attacked the deceased causing him fatal injuries around the area of the abdomen.

P.W.4 is a simple peasant woman, not a forensic expert on the type or size of the object or weapon used by the accused to hit the deceased, twice on her account. If there were two blows as she testified, they must have been of such intense force, and well aimed that they succeeded in knocking down the deceased and causing him the injuries described by P.W.1 which eventually led to the death of the deceased. If there were more blows, like the nature of weapon or object used to cause injuries upon the deceased the court will never know. I am satisfied that the accused caused the death of Jediel Mutembei Ichaba on about 26th January 2002 at Mbeu Location Kiburine Sub Location in Meru North District within the Eastern Province. I am satisfied that by going to the deceased's house at Midnight and luring the deceased by saying "**Come out I have something to tell you**" and upon being challenged "**do you want to kill me**" by the deceased and the response by the accused "**you will be throughout this night and day**" show that the accused had but one mission, to kill the deceased. By hitting the deceased and causing him fatal injuries the accused achieved his purpose. The accused's testimony in evidence in-chief that "**if he died it was not my intention to kill him**" was clear admission that it was he, the accused who inflicted the fatal injuries upon the deceased. The consequent cry that "**if he died I did not intend to kill him**" was no more than an after-thought when it dawned on the accused that a vicious attack on an innocent person unprovoked has serious consequences, so serious that the accused ran into hiding away from his own house, first to his parent's house and later away from his own village, and when the a law and order officers caught up with him, he even tried to hide, but could not escape the long arm of the law.

The evidence of that one vital witness, P.W.4, Laeticia Kagwiria, the wife of the deceased, Jadiel Mutembei Ichaba, was all that was needed to nail the offence as charged upon the accused. The defence of self defence does not hold. I reject the evidence of the accused that it was the deceased who went to his house. On contrary, the evidence of the P.W.4 was clear and uncontroverted, and is credible and coupled with the accused's own testimony in cross-examination that "**if he died, I did not intend to kill him,**" proves beyond any reasonable doubt that the accused went to the house of the deceased for the sole reason of finishing him that night, "**you be throughout this night and day**".

In the premises, I find the accused, guilty as charged of the murder of the deceased Jediel Mutembei Ichaba, and sentence him to death. So may God help his soul.

Dated and delivered at Meru this 7th day April 2008.

M. J. Anyara Emukule

JUDGE.

