



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 103 of 2003

REPUBLIC PROSECUTOR

VERSUS

JOSEPH CHEGE NJORA..... ACCUSED

J U D G M E N T

Joseph Chege Njora (hereinafter referred to as the Accused) is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 1st day of July 2003 at Mioro village in Muranga District within Central Province he murdered Joel Mugambi M'Kiara (hereinafter referred to as the deceased). This being a criminal case, the burden is entirely upon the prosecution to prove beyond reasonable doubt that the Accused did commit the offence. If there is any doubt the benefit must go to the Accused who must then be acquitted.

A total of 8 witnesses have testified on behalf of the prosecution. Briefly their evidence was as follows: -

At the material time the deceased was working at the home of Esther Njeri Karima (P.W.2) in Mioro village of Muranga District. The Accused who was a nephew to P.W.2 was also staying in the same home – whilst attending a carpentry training. The deceased and Accused each had their own room where they used to sleep. They used to be given food by P.W.2 and they would cook together in an outside kitchen.

On the 1st July 2003, at around 8.00 p.m. P.W.2 was inside her house when she heard a loud bang on her door. When she opened the door she found the Accused standing outside, shaking and looking very worried. P.W.2 moved towards the Accused, but the Accused moved backwards. P.W.2 asked Accused what was wrong. The Accused tried to talk but was unable to do so. The Accused moved out of the varanda and it was then that P.W.2 saw someone lying down near the kitchen. P.W.2 asked Accused what had happened but at that stage the Accused just ran away. Being alarmed P.W.2 screamed and called out to her son David Thuo Karina (P.W.4) who was around at the material time. P.W.4 came with a torch and it was then that they saw that the person lying on the ground was the deceased who was lying on his back. They noticed that the deceased had been hit with a fork jembe which was stuck onto his head.

P.W.4 removed the fork jembe from the deceased's head with the assistance of Alex Maina Thuo (P.W.5) a neighbour and cousin to P.W.4 they then took the deceased to a clinic in Mioro where deceased was given first aid after which they took him to Nyakianga police station where they reported the matter and then proceeded to Nyeri Provincial General Hospital where the deceased was admitted.

Cpl. Daniel Nderitu (P.W.8) who was then attached to Nyakianga Police Station visited the scene and

took possession of the fork jembe which was handed over to him by P.W.4. He produced the fork jembe in court (though both P.W.2 and P.W.4 maintained that the fork jembe produced was not the same one pulled from the head of the deceased). About 6 days later the deceased died. On 12th July 2003 Cpl. Peter Minyori (P.W.7) arrested the Accused from a retail shop within Muranga township. He escorted the Accused to Muranga Police Station and later had the Accused transferred to Nyakianga Police Station.

On 15th July 2003 Dr. Abraham Gatangi (P.W.3) examined the Accused and certified that He was mentally and physically fit to stand trial. On 17th July 2003, Kenneth Mwongera Mathew (P.W.6) a cousin to the deceased, identified the body of the deceased to Dr. N. L. Chege who performed a post mortem examination. The post mortem examination report which was produced in evidence by Dr. Alice Kaaria under **Section 77** of the Evidence Act showed that the Doctor's conclusion was that cause of death was cardio respiratory arrest secondary to head injury. The Accused was subsequently charged with this offence.

In his defence, the Accused person gave an unsworn statement in which He explained how they met with the deceased on the evening of 1st July 2003, at the trading centre where both of them took some Beer upto 8.00 p.m. On their way back home they started quarreling as to who would cook. The accused said He would not cook. The deceased produced a knife and stabbed him on his left ear. The Accused took a stick and hit the deceased's hand and the knife fell. The deceased then took a fork jembe and tried to hit the Accused with it. They started struggling and it was then that the Accused accidentally hit the deceased with the fork jembe.

The defence counsel has submitted that the deceased provoked the Accused and that the deceased was the aggressor, and the Accused person merely hit the deceased in the heat of the moment and in self defence. Defence counsel further submitted that there was no evidence of any malice aforethought. Relying on the case of **Robert Kinuthia Mungai v Republic [1982 – 1988] K A R 611**. He urged the court to find that the Accused person used reasonable force in self defence and therefore acquit the Accused of the charge, or at the worst if force used was not reasonable find the Accused guilty of manslaughter.

From the above evidence it is apparent that although there was actually no eye-witness other than the Accused as to how the deceased sustained his injuries, the fact that the deceased and the Accused were together, and the way the Accused reacted when the incident occurred clearly pointed an accusing finger at the Accused. The Accused has not denied having inflicted the fatal injury but maintains that the same was done in self defence. There being no evidence contradicting or controverting the Accused's evidence as to the circumstances in which the deceased sustained his injuries, the question which arises is whether in the circumstances testified to by the Accused person, He was justified to kill the deceased.

In the case of **Anthony Njue Njeru v Republic Criminal Appeal 77** of 2006 the court of appeal dealing with a similar situation stated as follows: -

“A killing of a person can only be justified and excusable where the Accused's action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the Accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.”

The Accused person has explained that He reacted in self defence and that He believed that He was in imminent danger as the deceased who had already tried to stab him with a knife, had now armed himself with a fork jembe and was trying to hit the Accused. The Accused explained that He did not intentionally hit the deceased with the fork jembe but accidentally hit him during the struggle. Under these circumstances it is evident that the Accused person did not have any malice aforethought as the attack was not premeditated. The Accused only acted in self defence in trying to avert the attack against him. The force used was reasonable as the Accused had no other way of disarming the deceased.

All the Assessors agreed that the Accused was acting in self defence, however, the two Assessors who returned an opinion of guilty to manslaughter failed to appreciate the fact that the Accused was entitled to

use reasonable force in defending himself. Had they considered this, they would have found that the Accused person did use reasonable force and cannot therefore be held criminally liable. I therefore reject the majority opinion of the Assessors and concur with the minority opinion that the Accused person is not guilty as He only acted in self defence and used reasonable force.

Accordingly I find the Accused person not guilty of the charge of murder and acquit him of the same under **Section 322 (2)** of the Criminal Procedure Code. The Accused person shall be set free unless otherwise lawfully held.

Dated, signed and delivered this 24th day of January 2007.

H. M. OKWENGU

JUDGE