



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU**

Criminal Appeal 144 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

S.T. (a child).....SUBJECT

JUDGMENT

The subject, S.T. was charged with murder contrary to **Section 203 as read with Section 204 of the Penal code**. The particulars of the offence were that on the 12th of October 2003 at Ngorongor village, Narok District, the subject murdered Johana arap Mutai (*hereinafter referred to as the deceased*). The prosecution called a total of seven witnesses to prove the charge of murder against the subject. After the close of the prosecution case the subject was put on his defence. He opted to give unsworn evidence in his defence. After the close of the prosecution's case, Miss Magana, learned counsel for the subject made submissions urging this court to find that the proceedings conducted against the subject were illegal and further that the prosecution had not established its case on the charge of murder against the subject. She urged this court to acquit the subject. Mr Koech Learned Counsel for the State submitted that the prosecution had established its case against the subject to the required dard of proof and urge this court to convict the subject.

I will comment on the said submissions made after setting out the facts of this case as narrated by the prosecution witnesses; on 12th of October 2003 at about 9.00 p.m. PW6 Reuben Kenduiywo, a resident of Mulot – Narok District, was sent by his parents to go and call his brother, Daniel Kenduiywo from a place called Garage. He met his brother and gave him the information. His brother agreed to accompany him back home. At the time however, his brother was with his girlfriend called Beatrice, who insisted on accompanying them back to their home. PW6 did not want Beatrice to accompany them. He instructed her to remain behind. Beatrice was not happy and according to PW6, she abused him. He retaliated by slapping her on the face. He recalled that he slapped her once.

Beatrice screamed and attracted the attention of the deceased and PW1 Julius Sigilai. PW6 testified that when the two arrived at the scene, he left them and went to his home to fetch a torch. As he was walking back, he heard the deceased scream that he had been stabbed by the subject. He knew the deceased and the subject prior to the incident. Although it was at night, he was able to recognize the voice of the deceased. After a while, he saw the subject and PW1 ran towards him. As they passed him he chased after them but was unable to catch up with them. He returned back and went back to his house to sleep. He recalled that the night when the incident took place it was not very dark, although he did not mention if there was moonlight. When he was cross-examined by the counsel for the subject he contradicted himself by stating that he had not heard the deceased say anything after being stabbed.

Meanwhile, at about the same time, PW1 and the deceased were asleep at their home when they heard screams. They woke up and went to investigate the source of the screams. They identified the screams to be that of a woman. They went to the scene where the woman, Beatrice, who was screaming. When they reached the scene, they found PW6 beating Beatrice using a whip. PW1 saw the subject arrive at the scene and start beating Beatrice. The deceased intervened and told them not to beat the woman. The subject became annoyed and started abusing the deceased. The deceased responded in kind. After a while the quarrel degenerated into a fight.

PW1 saw the subject remove a knife from his waist. He sought to separate the subject and the deceased from fighting but as he was separating them, the deceased fell to the ground. PW1 and the deceased were trying to disarm the subject, but in the process the subject got hold of the knife and stabbed the deceased on the chest when he was lying on the ground. PW1 recalled that after the subject had stabbed the deceased, he (the subject) ran away. His effort to apprehend the subject was however thwarted by the subject who threatened to stab him with a knife. He went back to the scene where the deceased was lying on the ground and stayed there until midnight. He recalled that the deceased was armed with a 'rungu' at the time of the incident. PW1 was certain that it was the subject who stabbed the deceased and thereby caused him fatal injuries. He did not however tell the court how he was able to see the events as they took place, as he conceded that at the material time it was dark.

PW3 Bernard Kiprotich Rono recalled that on the material night, while he was at his home at about 9.30 p.m. he heard screams emanating from a nearby mole hill. His mother instructed him to go and investigate who was screaming. PW3 accompanied by the subject went to the scene and discovered that it was a woman who was screaming. When she was asked why she was screaming, she said that she had been beaten by PW6 and she was going to scream until the father of PW6 heard. According to PW3, the subject told the woman to stop screaming as she was disturbing people who were sleeping. The woman did not heed the advice and continued screaming.

PW3 testified that the subject then slapped the woman and kicked her. At the time the subject was assaulting the woman, the deceased, and another man who was nicknamed 'twenty two' were at the scene. He recalled that the deceased was not amused that the subject was beating the woman. The deceased, who was armed with a rungu, attempted to hit the subject with the rungu, but PW3 held him. He testified that at that time, the subject and the deceased started abusing each other, calling each other 'ng'etai' i.e. *uncircumcised*. He recalled that the quarrel degenerated into a fight and the deceased and the subject started fighting. He recalled that the deceased hit the subject on his back with a rungu after which he attempted to run away. The subject followed him and caught up with him. They both fell to the ground after which PW3 heard the deceased say that he had been stabbed. He recalled that the deceased stood up and attempted to chase the subject but collapsed after a few metres.

When PW3 went to where the deceased was, he saw that he was bleeding profusely from the chest and his clothes were bloody. Although he requested people who were at the scene to get a bicycle to enable them take the deceased to hospital, no one helped the deceased. He testified that although it was dark, he was able to recognize the voices of the subject and the deceased when they were quarreling and later when they were fighting. He recalled hearing the deceased say that the subject had stabbed him. PW3 did not recall seeing a knife. He testified that the deceased and the subject were friends prior to the incident.

PW4 Joseph arap Kibenei testified that on the material night, as he was escorting the wife of one Elijah Tuwei who was traveling to Narok, he heard people making noises. One of them was saying "do you want to kill me with a knife?". He did not know the voice of the person who made the said statement. After a short while, he heard people shouting as if they were fighting and then saw them chasing each other. One of the person who was being chased fell to the ground and soon thereafter shouted that the person who had fallen with him to the ground had stabbed him and should be stopped. PW4 called another person who had a spotlight and went to see the person who had fallen to the ground. He saw that the person was the deceased. He had a stab wound on his abdomen. He attempted to speak with the deceased but the deceased did not answer him back. PW4 did not know who had stabbed the deceased neither did he see the weapon that had been used to stab the deceased. He reiterated that he had seen the stab wound on the abdomen of the deceased just below his chest.

PW5 Josiah Rotich testified that on the material night, as he was sleeping in his house at Korgor village at about 9.00 p.m., he heard people screaming that the deceased and the subject had fought. He went to the scene to investigate and found the deceased was already dead. He went to the house of the subject and found him sleeping about 300 metres from his house. PW5 spoke to the subject who told him that the deceased had beaten him. PW5 inquired from him the whereabouts of the knife. The subject answered that the knife got lost when he was running away from the scene. PW5 persuaded the subject to go to hospital. Thereafter the subject was handed over to the police at Mulot where he was detained. On the following day at about 6.00 a.m., PW5 went to the house of the subject and searched for the knife. He recovered a knife near the wire fence. The knife was produced in evidence as prosecution's exhibit No. 3. PW5 recalled that he saw that the deceased and confirmed that he had died by using the light from a torch. He testified that when he found the subject, the subject was unarmed.

PW2 Dr. Tony Njoka performed the post-mortem on the body of the deceased. He observed that there was a stab wound on the left Para sternum region. The stab had gone through the sixth and the seventh ribs. The left lung was collapsed. There was blood in the left chest cavity. There was a penetrating wound through the left diaphragm. There was blood in the sac containing the heart. There was a cut on the apex of the left ventricle. There was a penetrating wound through the anterior wall of the stomach. There was blood in the abdominal cavity. He formed the opinion that the cause of death of the deceased was a penetrative chest and abdominal injury with cardiac trauma and massive haemorrhage. The probable weapon used was a sharp object. He was of the opinion that the injuries may have been caused by one blow. He produced the post-mortem report as prosecution exhibit No. 1. He also produced the P3 form which was filled by Dr. Sirma in respect of the subject. The said P3 form showed that the subject had tenderness on the posterior side of the chest. The probable weapon used was blunt. The degree of injury was assessed as harm. The P3 form was marked as prosecution's exhibit No. 2. PW2 was emphatic that the injuries sustained by the deceased was caused by a sharp object similar to a Somali sword and was inflicted from the chest downward.

PW7 PC Simon Wairobi investigated the case and after gathering all the evidence reached the conclusion that the subject should be charged with the offence of murder. He also produced the government chemist report as prosecution's exhibit No. 5. He produced a trouser which had blood stains on its knee and which he claimed the subject had worn on the material night as prosecution's exhibit No. 4. The Government Chemist report related to the blood samples which were extracted from the subject and from the deceased. Some blood was also analysed from the trouser which the subject wore on the material night. The Government chemist report was however inconclusive as to whether the blood found in the trouser worn by the subject on the material night was from the deceased.

When the subject was put on his defence, he denied that he had stabbed the deceased. He recalled that he was at the scene on the material night having been attracted there by the screams of a woman. He testified that he went to the scene and told the woman to shut up and when she refused, he pushed her. He testified that when he pushed the woman, a *rungu* was thrown at him. When he inquired who had thrown the *rungu* at him, the deceased owned up after which they started abusing each other. At that moment they were informed that the police had arrived. The subject ran away from the scene. As he was running, he heard someone say that he had been stabbed with a knife. He denied that he had anything to do with the fatal stabbing of the deceased.

In all criminal cases, as in the present one, it is the duty of the prosecution to establish its case against an accused to the required standard of proof beyond reasonable doubt. The burden of proof is always on the prosecution. The issue for determination by this court is whether the prosecution has established its case against the subject on the charge of murder to the required standard of proof beyond reasonable doubt. The other issue for determination by this court is whether the proceedings against the subject were illegal in view of the fact that the trial took place and was determined more than twelve months after the subject was first charged. I will address both points hereinafter.

It is the prosecution's case that on the night of the 12th of October 2003, the subject stabbed the deceased thus causing him to sustain fatal injuries. The circumstances leading to the said fatal stabbing of the deceased are, more or less not in dispute. PW1 and PW3 testified that they heard a woman screaming

when they were in their houses. The said witnesses testified that they heard the screams between 9.00 p.m. and 10.00 p.m. They went to investigate. They found a woman who is known as Beatrice being beaten by PW6. According to PW3 (who had been accompanied to the scene by the subject), the subject told Beatrice to shut up because she was disturbing people who were sleeping. Beatrice however continued screaming. PW3 and PW1 recalled that the subject then slapped Beatrice. The deceased intervened. In the process of intervening, a quarrel ensued between the deceased and the subject.

According to PW1, he saw the subject remove a knife and then stab the deceased, fatally injuring him. PW3 similarly recalled the deceased saying that he had been stabbed by the subject. Both PW1 and PW3 testified that the deceased was stabbed when he had fallen to the ground. PW1 and PW3 however gave contradictory evidence as to the circumstances under which the deceased was stabbed. Whereas PW1 testified that the deceased was stabbed by the subject when he was trying to separate them, and after the deceased and himself had attempted to disarm the subject, PW3 testified that the deceased and the subject fell to the ground after which he heard the deceased scream that he had been stabbed. It was PW3's testimony that the deceased had hit the subject on his back with a rungu prior to the incident leading to the fatal stabbing of the deceased. Having evaluated this evidence, and in light of the evidence which was adduced by PW2 Dr. Tony Njoka that the subject had an injury on his back, I do hold that the version of events as narrated by PW3 appears to be the truth.

What happened is that the deceased and the subject quarrelled. PW1 and PW3 testified that the two abused each other. PW3 recalled that the two called each other uncircumcised. In the community where the deceased and subject come from, such an abuse, is the worst form of abuse. No wonder the two started fighting. The deceased hit the subject with a rungu and attempted to ran away. The subject chased him and caught up with him when he fell to the ground. There was struggle after which the subject stabbed the deceased, thus fatally injuring him. Immediately after the deceased was stabbed, PW1 and PW3 heard him say that he had been stabbed by the subject.

Although it was at night and visibility was poor, I have no doubt in my mind that it was the subject who stabbed the deceased causing him fatal injuries. The eye witness account of PW1 and PW3 is corroborated by the evidence of PW5 who testified that after he had confirmed that the deceased had died, he went to look for the subject. He found the subject sleeping about 300 metres from his house. When he questioned him, he admitted that he had fought with the deceased. When PW5 asked him where the knife was, the subject told him that the knife got lost when he was running away from the scene where he fought with the deceased. Based on this information, PW5, on the following morning, went to the house of the subject and was able to recover the knife which was produced as prosecution's exhibit No. 3. The evidence of PW5 connects the subject with the knife which fatally injured the deceased. There is no evidence to suggest that the said knife belonged to the deceased. In fact PW1 testified that the deceased was only armed with a rungu. The knife that was used to fatally stab the deceased, obviously belonged to the subject.

Upon evaluating the evidence adduced by the prosecution, I am convinced beyond a shadow of a doubt that it is the subject who fatally stabbed the deceased. I have considered his defence. Although he denies that he fatally stabbed the deceased, he admits that he was at the scene when the said fatal stabbing took place. I have analysed the evidence that the subject offered in his defence, and I am not persuaded that it dents the otherwise strong evidence adduced against him by the prosecution.

The issue to be determined by this court is therefore whether the facts of this case disclose that the subject killed the deceased with malice aforethought or whether it was unintentional. I have evaluated the evidence adduced and I am of the opinion that the subject killed the deceased unintentionally. The circumstances of this case reveal that it was the deceased who was the aggressor and who first attacked the subject with a rungu. The subject reacted by stabbing the deceased thus fatally injuring him. The subject however used excessive force in dealing with the threat that was posed to him by the deceased. The deceased was armed with a rungu. The subject reacted by stabbing him with a knife. I will grant the subject the benefit of doubt due to the fact that the entire incident took place at night. He could not therefore be certain whether the deceased was armed with a lethal weapon or not.

In any event, there is evidence that the subject stabbed the deceased while he was lying prostrate on the ground. The subject had an opportunity to withdraw from the scene but he did not do so. For that reason I find him guilty of the lesser but cognate offence of manslaughter. The two assessors who assisted this court during the hearing of this case were divided on their opinion on whether the subject was guilty or not. Whereas one assessor was of the opinion that the subject was guilty of the lesser charge of manslaughter, the other assessor formed the opinion that the prosecution had not proved its case beyond reasonable doubt. Having analysed the evidence above, I am in agreement with the assessor who found that the subject is guilty of the lesser charge of manslaughter.

Before concluding this judgment, I will address the legal point that was raised by Miss Magana to the effect that the proceedings against the subject ought to have been discontinued and the subject acquitted due to the fact that the trial took more than the twelve months provided by the rules. Miss Magana was referring to the provisions of **Rule 12 (3) & (4) of the Child Offenders Rules** made under **the Children Act**. For the clarity of record, I will reproduce the said rules. They provide that:

“(3) where, owing to its seriousness, a case is heard by a court superior to the children’s court, the maximum period of remand for a child shall be six months, after which the child shall be released on bail.

(4) where a case to which paragraph (3) of this rule applies is not completed within twelve months after the plea has been taken, the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence.”

If I followed Miss Magana’s argument correctly, it is her submission that since the proceedings in this case took more than twelve months from the date that the subject took plea on the 17th of November 2003, this court should therefore dismiss the case against the subject.

With the greatest respect to Miss Magana, I will humbly beg to disagree. The above rules were promulgated so that cases involving children in conflict with law should be expeditiously disposed of. That is an ideal that is laudable and this court has tried its best to abide by the requirements of the said rule by fast tracking cases involving children in conflict with the law. However, even with the best intentions, the court cannot deal with the said cases within the stipulated period due to the overwhelming number of cases which are still pending. As it were, the court has enabled cases involving children to jump the queue to enable them to be speedily disposed of.

I think courts should always use a common sense approach in interpreting laws that stipulate that courts should undertake certain proceedings within a certain period. This would only be applicable in a situation whereby the courts are adequately manned. To dismiss a case, as the present one, where the subject had been charged with the serious offence of murder, just because twelve months had expired since plea was taken as stipulated by the rules, irrespective of whether the guilt or the innocence of the subject has been established, in my view would be a travesty of justice. My interpretation of the said rule is that courts should strive to expeditiously dispose of cases involving children in conflict with the law. It does not mean that children in conflict with the law should not face justice just because of the technicality of time limits. The rules provide a safeguard for the delay in the hearing of such cases by granting courts jurisdiction to grant bail pending the hearing and disposal of such cases. I think I have said enough in that regard.

I therefore enter a finding of guilt on the lesser charge of manslaughter against the subject.

It is so ordered.

DATED at NAKURU this 2nd day of June 2006.

L. KIMARU

JUDGE