



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**Criminal Case 38 of 2003**

**REPUBLIC.....PROSECUTOR**

**TOR**

**VS**

**SIMON WAFULA**

**MAKOKHA.....ACCUSED**

**JUDGMENT**

Simon Wafula Makokha is before this court on the information of the Attorney General on behalf of the Republic dated 27<sup>th</sup> June 2003 charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. It is alleged that on the 23<sup>rd</sup> day of November 2002 at Namboko Village, Milima Sub-location, Naitiri Location in Bungoma District of the western Province murdered Wekesa Matala.

It is the prosecution's case that sometimes before the 22<sup>nd</sup> day of November 2002, the accused took his radio to the deceased for repairs. When he came back for it he found out that the deceased had damaged it. In a fit of anger the accused snatched a radio speaker from the deceased. On the 22<sup>nd</sup> day of November 2002, Nicholas Wanjala (P.W1) said he found the accused and the deceased fighting over the aforesaid radio speaker. The same story was narrated by Fredrick Nandaberwa (P.W4)). P.W.4 said he saw the duo quarrel over a damaged radio on 22.11.2002 and that he managed to reconcile the duo before leaving to attend a funeral in his neighbourhood. It is the evidence of Simon Nyongesa Matala (P.W3) that he warned the accused on 23.11.2002 to desist from assaulting the deceased and the other family members in the house of Fredrick Nandaberwa (P.W4) before leaving for his house. P.W.3 said he left while P.W4, the deceased and the accused were quarrelling. At 2.00 p.m. P.W3 said he rushed to Naitiri Health centre to visit the deceased when he received information that the deceased was critically injured having been assaulted by the accused. P.W3 said the deceased told him that the accused had fulfilled his threat to kill. P.W4 said he visited the house of the deceased in the evening of 23.11.2002 whereby he found the deceased had a stitch on his head and was unable to talk. P.W4 said that the family decided to take the deceased to Misikhu Hospital when his condition got worst. The investigating officer, Francis Opondo (P.W.12) told this court that his investigations revealed that the accused and the deceased quarreled over a damaged radio and over non-payment of a hen given to the deceased. P.W.12, produced the postmortem report on behalf of Dr. Kubasu which report indicated that the deceased died as a result of severe brain injury due to assault.

The accused, Simon Wafula Makokha, denied intentionally killing his uncle, Wekesa Matala (deceased) in his sworn testimony. The accused said he lent his radio to the deceased on 19.11.2002 but he found out that the deceased had damaged it when he went to collect it on 23.11.2002. The accused said he quarreled with the deceased when the deceased failed to give a satisfactory explanation on 22.11.2002. They exchanged blows before being separated by Joseph Matala Nandaberwa (P.W6) and the deceased's widow, Christine Nafula. The accused said he left for the house of his other uncle Fredrick Nandaberwa (P.W4). The accused further told this court that at 8.00 a.m. on 23.11.2002 the deceased found him at a water point where he had gone to fetch water for P.W.4 upon which the

deceased, accused him of being disrespectful to him the previous day. The accused said that the deceased forcefully took away his bicycle and he had to disengage himself before running to P.W4's house. P.W.4 is said to have taken back the accused to the water point where he attempted to reconcile the duo before leaving to attend a funeral. The accused said he went to bath in a nearby river between noon and 1.00 p.m. and that is when he saw the deceased charging towards him while armed with something which looked like a hockey stick. He said he fled to P.W4's homestead but he was closely pursued by the deceased. He claimed the deceased threw the hockey stick at him which he picked and threw it at him upon it back at him upon which he fell down. D.W.1 said he fled the scene and P.W4's homestead for fear of his life when he discovered that the deceased had fallen down having been critically injured. The accused said he acted in self defence having been provoked by the deceased. He said he had no intention to kill him.

At the end of the evidence, Mr. Kraido, counsel for the accused person made detailed submissions which are on record. Mr. Kraido was of the view that the offence of murder had not been proved by the evidence tendered. It is the learned counsel's argument that there was no proof of malice aforethought on the accused's part. It is also argued that the accused was provoked by the deceased and that the accused acted in self defence when he hit the deceased once with a stick which was in the deceased's possession.

Counsel for the prosecution on his part was of the view that the evidence tendered proved the ingredients of murder. It is the contention of Mr. Onderi, learned Principal State Counsel that the accused was not in a state of danger so as to act of self defence could be invoked. He urged this court to find that the accused's conduct of fleeing and hiding from the homestead meant that the accused had a guilt conscience.

At the conclusion of the submission, I summed the evidence to the assessors and directed them on the applicable legal principles. That summing up is on record and I do not intend to repeat it. I then asked for the assessors' opinion. The assessors were unanimous that the accused was not guilty of murder because there was no proof of malice aforethought on the accused's part.

Having considered the evidence, the submissions and the assessors' opinion, I have formed the following view of the case. The evidence clearly disclose that the accused actually assaulted the deceased over a dispute over a damaged radio. The fact is admitted by the accused in his defence. The element of *actus reus* has therefore been proved beyond reasonable doubt. What remains is whether or not there was malice aforethought. The evidence shows that the deceased and the accused picked up a quarrel which ran up for two days i.e. on 22<sup>nd</sup> and 23<sup>rd</sup> November 2002. In both occasions there is evidence that the duo fought. There was no evidence laid by the prosecution as to what weapon was used to inflict the injuries on the deceased. The accused's evidence that he hit the deceased using a stick in his possession was not controverted. I believe his evidence that he used a hockey stick to injure the deceased in self defence while the deceased was charging on him. It is clear that the accused at that time was aged 20 years while the deceased was aged 27 years. The fatal blow against the deceased was inflicted at the homestead of Fredrick Nandaberwa (P.W4) where the accused had fled to seek refuge as the deceased pursued him. I find that there was no malice aforethought on the accused's part. I believe his assertion that he was provoked by the deceased to act in the manner he did. I am also convinced that the accused's other uncles added more fire to the dispute when they attempted to resolve the dispute by favouring the deceased instead of fairly listening to the accused. In the end, I am in agreement with the opinion of the assessors that the accused is not guilty of the offence of murder. The evidence tendered established that the accused committed the offence of manslaughter contrary to section 207 of the Penal Code, consequently, the accused is acquitted of the offence of murder. He is however convicted on the lesser charge of manslaughter under section 179 (2) of the Criminal Procedure Code.

Dated and delivered this 11th day of September 2006.

J. K. SERGON

JUDGE

COURT: Assessors are hereby discharged and should not be summoned to serve again as such until the lapse of 12 months from the date hereof.

J. K. SERGON

JUDGE