



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 30 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

GILBERT KEMOI LORIEN ALIAS TUNGULU.....ACCUSED

JUDGMENT

1. Gilbert Kemoi Lorien alias Tungulu is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 8th day of August, 2019, at Wakondo village, Mbita Sub County of Homa Bay County, murdered Meshack Okoth Owigo.
3. The prosecution case is that the accused suspected that the deceased was having an affair with his inherited “wife.” He fatally injured him.
4. In his defence the accused contended that when he returned to his house from the lake where he was fishing, the deceased attacked him. He however overcame him and in the process fatally injured him.
5. The issues for determination are:
 - a. Whether the accused acted in self defence or not; and
 - b. Whether the offence of murder was established.
6. According to the evidence of Everline Auma Ogwen (PW1), the deceased approached her for assistance in getting a house after his previous landlord had evicted him. She in turn approached Rose Auma. The latter gave him accommodation in a house she was no longer using. This was a house she had previously occupied with the accused who had inherited her. The deceased started to occupy the house of Rose Auma on 6th August, 2019. This witness escorted him to the house.
7. On 7th August, 2019 at about 3 a.m. Okoth called her on phone. He was seeking assistance after alleging that he had been injured. She woke Rose Auma up and both went to where the deceased was. They found him having bled profusely. He said that he had been injured by Tungulu, the accused.
8. In his defence the accused contended that he returned from the lake where he was fishing. When he knocked at his door, the deceased went out armed with a machete. A struggle ensued but he managed to overcome the deceased and snatched the machete from him. He cut him with the machete severally. He claimed he had erected the house with Rose. He however conceded that he did not go to hospital to seek treatment where he said the deceased injured him.
9. The contention by the accused that he was still occupying the house where the deceased was fatally injured was not supported by the evidence on record. When Everline Auma Ogwen (PW1) testified that the house was vacant when the deceased moved in went unchallenged.
10. Though the accused pleaded self-defense, the circumstances of this case do not support this contention and the same is dismissed.
11. In order to found conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black’s Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent

to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called “abandoned and malignant heart”), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

12. In the circumstances of this case, we do not know what happened between the accused and the deceased that led the accused to inflict the fatal injuries to the deceased. We however know that the accused was laboring under suspicion that the deceased was having an affair with Rose Auma. I therefore, find that the prosecution has not proved the offence of murder against the accused. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit him of the charge of murder. I find him guilty and convict him for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED AND SIGNED AT HOMA BAY THIS 6TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE