



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 22 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

BENJAMIN DIXON ORLALE.....ACCUSED

JUDGMENT

1. Benjamin Dixon Orlale 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 25th day of August, 2019, at Kamato Pundo village, Mbita Sub County of Homa Bay County, murdered Joseph Kimko Orlale.
3. On the fateful day, the prosecution contended that the accused and the deceased engaged in a heated argument over several family issues, the major one was the relocation of the accused from their home to Ahero. The argument turned physical and the accused slashed the deceased to death.
4. The accused in his defence concedes that indeed there was a disagreement which had arisen the previous night over his presence in the home. The deceased and others wanted him to relocate but he resisted. The disagreement spilled over to the fateful day. As they were removing his items from his father's house, he wrestled some of the property the deceased was holding from him and a fight between the two ensued. This is when he fatally cut the deceased with a machete.
5. The issues for determination are:
 - a) Whether the accused was provoked or not; and
 - b) Whether the offence of murder was established.
6. The accused in his defence contended that when his brothers were moving him from his father's house to a "simba" he felt provoked. According to him, he had more right than the worker whom his siblings wanted to move to their father's house.
7. Martin Juma Orlale (PW5) the brother of both the accused and the deceased, testified that the deceased felt that the accused was to be relocated to Ahero, for his own safety. They however agreed to move the worker to a smaller house ("simba"). After they had completed removing the items of the worker to the "simba", he heard some screams from the main house. He went there and found the deceased lying on the floor and was bleeding profusely. The accused had a machete and was in a rage.
8. What is provocation? Section 208 (1) of the Penal Code defines the term provocation as follows:

The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

In the case of **Peter King'ori Mwangi & 2 others vs. Republic [2014] eKLR**, the Court of Appeal while addressing provocation as a defence had this to say;

We start from the premises, that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So what is provocation? In the case of Duffy

(1949) I ALL ER 932; provocation was defined as “some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...

9. In the instant case, I find that the version tendered by the accused is an exaggerated version of the events. By the time of the attack, the worker was being moved from the main house to the “simba”, contrary to the contention that it was he (accused) who was being moved from the main house. Though the deceased and the family were acting in the interest of the safety of the accused, he did not see it that way. He therefore felt provoked by their action. This defence is therefore available to him. It reduces the offence of murder to that of manslaughter.

10. I have been urged to make a finding that there are contradictions in the prosecution case to warrant an acquittal of the accused. My careful perusal of the record does not reveal any. After considering the entire evidence on record, I find that the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I acquit him of the charge of murder. I therefore 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 5TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE