



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL CASE NO. 51 OF 2017

REPUBLIC.....PROSECUTOR

VS.

LAWRENCE JUMA MARENDE.....ACCUSED

JUDGMENT

1. **LAWRENCE JUMA MARENDE** is charged with the offence of murder. **Section 203** of the Penal Code defines murder as:-

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

2. The elements of murder as discussed in the case **ANTHONY NDEGWA NGARI VS. REPUBLIC (2014) eKLR** are:-

a) *The death of deceased occurred;*

b) *That the accused committed the unlawful act which cause the death of the deceased; and*

c) *That the accused had malice aforethought.*

3. Prosecution’s case was that the accused hit the deceased with a metal bar which caused him grievous injuries and subsequently he succumbed to his injuries and died. Accused’s defence was that while he was on his bed, in his house, he heard someone attempting to open his door. That person did gain access into the house and a struggle ensued when Juma said he got hold of the metal bar that the intruder had with him. He used it to hit the intruder and a lady whom he later realised was his estranged wife. The intruder subsequently died whilst receiving treatment.

4. Death of the deceased was confirmed by his mother, **Lucy Njeri Gichoya**, by **Susan Wangina Nyagah (Susan)** and by the doctor who produced the post mortem namely, **Doctor Maina Wachira**. The post mortem recorded that the deceased had several sutured lacerations on the scalp, on the right hand, and on the cheek bone and right occipital. The injuries were mainly on the deceased head. The report showed that the deceased had fracture on his skull. Death was caused by extradural hematoma due to blunt force injuries consistent with blows to the head with objects.

5. I will consider the other two elements of murder together, that is whether the accused committed an unlawful act which caused the death of the deceased and if so whether he had malice aforethought.

6. Susan and the accused lived together as husband and wife for five years. By October, 2017 they had separated. Susan said that the marriage was strained by the presence of her niece who joined them in their home. When Susan and accused separated the accused moved to Witeithie area whilst Susan lived in Kiganjo.

7. Susan stated in evidence that on 16th October, 2017 the accused called her at 6.00 am and requested her to take to him the sim card of his cell phone. Susan went to accused’s home on that day at 6pm to take his sim card. She did not find the accused at home. In her evidence, she said:-

“As accused not (sic) home I slept and waited. It was dark in the house. Then the accused came and asked: “have you brought the sim card?”

8. Susan gave the sim card to the accused whereupon the accused asked her for her phone. According to Susan, accused on getting her phone he refused to return it to her. Susan said accused sent her away and said that Susan should refund him Kshs.3500 he spent on Susan's nieces training before she could get back her phone.

9. Susan said she went to the Administration Police (AP) post where she reported to **APC Jackline Njeha, (PW3)**. PW3 telephoned accused and after several trials the accused answered his phone. Susan stated that the accused refused to attend the AP post and accordingly PW3 wrote a letter or summons which was given to Susan to take to accused. Susan stated in evidence:-

“All I wanted is to get back my phone.”

10. Susan continued in her narration of the happenings of that evening and stated that on getting the letter or summons from the **AP, (PW3)**, she went to accused's house. This is what she stated:-

“I got a letter from AP and went to plot (sic) where accused lived. There was a butchery close by. A young man accompanied me to accused's room. He (Juma) did not answer when I knocked. I pushed the letter under door (sic). But suddenly, door (sic) opened and accused got out and hit the young man.”

11. The young man Susan referred to is the deceased.

12. Susan further stated that she screamed and fled. That the accused pursued her and struck her with a metal bar he had. Susan and the deceased were taken to a clinic and later to Thika hospital. Susan produced a P3 form which showed that she suffered soft tissue injury to the neck, back, lower limb and a black eye. She was treated with analgesics.

13. On being cross examined, Susan stated that the deceased accompanied her to accused's house to deliver the AP's letter or summons. Susan denied that the deceased had a metal bar. It was her testimony that the accused came out of his room and struck the deceased. Susan denied that she went to accused's house with a mob and she denied a mob attacked accused.

14. **Lucy Njeri Gichoya** was mother of the deceased. On the material night, at 9.00 pm, she was selling meat at her butchery when she heard a woman scream. Her butchery faces the plot where she heard the screams. Deceased's mother said:-

“I heard a woman's screaming (sic) and sound of running feet. I was standing outside and saw the people.”

15. She was able to see the incident unfold because there was a high sentry light (commonly referred to as 'mulika mwizi') and because she had "strong electric light" at her butchery. She said she saw accused carrying a metal bar and was striking a young man who was on the ground. Further, that accused attempted to flee whereupon she screamed and members of the public pursued the accused and caught him with a metal bar.

16. Deceased's mother stated that the young man, her son, the deceased was taken to hospital and was in a coma for six days thereafter he passed away. She attended the post-mortem and identified deceased's body.

17. PW3, the AP Officer confirmed that Susan went to the A.P. Post on the night in question at 7.30 pm. This is what PW3 said of Susan:-

“The PW1 (Susan) came in at 7.30 pm in an agitated state to report that her husband (Juma) had taken her phone forcefully.”

PW3 spoke of how she telephoned accused who told her that she, PW3, should write him a letter. PW3 confirmed writing a letter which she gave to Susan requested Susan to deliver to the accused through the care taker of accused's apartment. PW3 stated that Susan returned 30 minutes later to say that accused refused to open the door and she threw the letter/summons through the door. At 11PM Susan went to the A.P. post accompanied by members of public escorting the accused who had the metal bar and Techno phone. PW3 placed accused in the cell.

18. The prosecution has an obligation to prove the accused guilty beyond reasonable doubt, of the offence of murder. A relevant case, which is wish to cite is **BENSON MBUGUA KARIUKI VS. REPUBLIC (1979) eKLR** as follows:-

“The correct direction which a judge should give himself and the assessors in a criminal case is that it is for the prosecution to prove that the accused is guilty, such proof being beyond reasonable doubt. There is no onus whatsoever on the accused of establishing his innocence; and if in respect of any matter; the evidence raises a reasonable doubt, then the benefit of that doubt must go to the accused. This applies also to matters of defence such as alibi, provocation, self defence or accident. It is for the prosecution to establish that an accused was present when the crime was committed, or that he was not provoked, or that he was not acting in self defence, or that whatever happened was not accidental; and the prosecution must discharge this burden beyond all reasonable doubt. An accused, whether challenging the case put forward by the prosecution or raising matters in his own defence, assumes no onus in these respects; and if any reasonable doubt arises in respect of any matter, the prosecution has failed to discharge the burden which it must discharge.”

19. I reiterate that Susan and the accused cohabited as husband and wife for five years prior to the incident of the night of 16th October, 2017. Their relationship broke down and they separated. The accused resided in Witeithie area while Susan lived in Kiganjo.

20. Susan stated that on 16th October, 2017 she went to accused's house to deliver a sim card as she had been requested by the accused. She

did not find him in. She however seemed to have had access to his house because she entered and waited for him inside. She slept as she waited for him.

21. When he arrived, she gave him his sim card and she stated that he forcefully took her Techno phone. Susan said that the accused asked her to leave his house until she was able to refund Kshs.2,500/= he had paid for training of Susan's niece.

22. It will be recalled that PW3 stated at 7.30 pm, that night, Susan went to report at the AP Post that the accused had retained her phone. PW3 noted Susan was very agitated.

23. Prosecution did not enlighten the court whether Susan was agitated about being sent away by the accused or by the alleged loss of her phone.

24. One thing is however clear that from 7.30 pm Susan returned to report to PW3 that accused had refused to open his door and she had slipped through the accused's door the A.P's letter/summons.

25. Prosecution failed to adduce evidence on the whereabouts of Susan from 7.30 pm to 11 pm when the crowd escorted the accused to the AP Post with a metal bar and a Techno cell phone.

26. Accused raise a defence, which was consistent in the cross-examination of prosecution's witnesses that he was provoked to use force because someone gained access into his house as he slept. The one who opened his door had a metal bar which accused said he used to defend himself against that intruder and he also gave chase to someone else who was running away from the scene and it was not until he hit that person he realised it was Susan his estranged wife.

27. It is noteworthy that deceased's mother said that she heard screams then she heard "sound of running feet". How many people went with the agitated Susan to recover her phone from the accused? Prosecution, in my view, left gaps in the evidence in that regard. This is because immediately the deceased's mother screamed, a crowd of members of public restrained the accused and took him to A.P. Where did the crowd suddenly come from at 11pm? None of those people who apprehended accused testified. The ominous question that comes to mind is why didn't that crowd testify, not even one of them? Is it possible that those who apprehended the accused were in the company of Susan to assist her to get her phone from accused? Accused stated that he reacted to the threat he felt when he struck the deceased.

28. My consideration of the evidence adduced brings me to conclude that Susan was agitated by two issues; firstly, the accused, her former husband, had chased her away from his house. It seems she was very comfortable in his house when he arrived; and secondly, she was agitated that the accused had forcibly taken her phone. PW3 noted that she was agitated when she reported at AP Post. She reported at that AP post at 7.30 pm. She was given a letter/summons to deliver to the caretaker of the accused's apartment. She did not take it to the caretaker, she took it herself and she said, when the accused refused to open the door, she slipped the letter through the door. The court is left to conjecture about what Susan did thereafter. Is it possible that Susan, on seeing the report at AP Post did not result to her favour, in getting back her phone, she may have looked for help elsewhere? Could she have gotten men, which included the deceased to assist her in her quest to get her phone from the accused? Could those men be the ones who arrested accused after he struck the deceased? Most importantly, why did her evidence not coincide with that of PW3? PW3 said Susan returned to AP Post within 30 minutes and said the accused refused to open the door so she slipped the letter under the door. Susan however said she slipped the letter at 11pm when accused attacked them.

29. The evidence before court leads the court to find that there was possibility that the accused was provoked. Having reached that conclusion, I will refer to **Section 207** of the Penal Code which describes killing on provocation as follows:-

"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."

30. Provocation is defined under **Section 208(b)** of the Penal Code as follows:-

"The term "provocation" means and includes, 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 who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in 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."

31. Justice D.S. Majanja, in the case **REPUBLIC VS. JOHANNA CHEPKWONY KIPKORIR (2019) eKLR** considered Section 208 of the Penal Code and had this to say:-

"10. The implication of section 208 of the Penal Code is that an unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation. It is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation (see WERO V REPUBLIC [1983] EA 549). Furthermore, while the accused does not shoulder the burden of proving the defence, the prosecution must marshal evidence to disprove the defence beyond reasonable doubt (see KENGA V REPUBLIC [1999] 1 EA 141)."

32. The Court of Appeal in the case **V.M.K. VS. REPUBLIC (2015) eKLR** also considered provocation and stated:-

“Accordingly, it is the appellant’s case that this served to provoke him into killing the deceased.

Provocation was defined in the case of DUFFY [1949] 1 ALL ER 932 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 ...’

As deduced by this Court in PETER KING’ORI MWANGI & 2 OTHERS V REPUBLIC [2014] eKLR, the above definition requires that two conditions be satisfied for the defence to be made out, namely:-

a. The “subjective” condition that the accused was actually provoked so as to lose his self-control; and

b. The “objective” condition that a reasonable man would have been so provoked.”

33. I am satisfied that the accused was provoked by person or persons who accompanied Susan to recover her phone from the accused. Susan was not candid to say why she needed the deceased and perhaps others to escort her to accused’s house when in fact she did not testify that the accused had previously been violent towards her. Why then did she need to be accompanied? Was it more probable that Susan and the deceased, amongst others, were the aggressors towards the accused?

34. It is because of the above findings that I find that the accused committed an unlawful act which caused the death of the deceased but the accused did not have malice aforethought.

35. It is because of the above that I find that the information of murder should be reduced to manslaughter contrary to **Section 202 as read with Section 205**.

DISPOSITION

36. Accordingly, **Lawrence Juma Marende** is hereby convicted of manslaughter of **Joseph Thuo Migwi** deceased.

JUDGMENT DATED, SIGNED AND DELIVERED AT KIAMBU THIS 14TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant :

Accused:

For the Accused : no appearance

For the Republic : Mr. Kasyoka

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE