



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 46 OF 2020

BETWEEN

REPUBLIC.....PROSECUTOR

AND

GEOFFREY MUNENE KIAMBI.....ACCUSED

JUDGMENT

1. **GEOFFREY MUNENE KIAMBI (Accused)** is charged with the offence of Murder Contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the charge are that

On 17th August, 2020 at Itumbine village, Kiamweri Location in Imenti Sub-County within Meru County murdered MORRIS GIKUNDA KIAMBI

PROSECUTION CASE

2. On 17.08.2020, Damaris Murugi, sister in law to accused and Morris Gikunda Kiambi stated that the two brothers had earlier that day quarreled concerning the ownership of their late mother's sewing machine. It was her evidence that she saw Morris leave his house armed with a panga and proceeded to the direction where accused was working. That shortly thereafter, he heard screams and rushed to the scene to see accused running away and Morris who was barely alive lying down with serious injuries on his body. Gladys Maiti stated she saw accused and Morris fighting and when she later went to the scene saw accused running away and Morris lying dead with serious injuries on his neck. Jane Mugure, aunt to accused and Morris heard accused say he had killed a trouble maker only to later find Morris lying dead. Cyprian Miriti M'Ndegwa Senior Chief Kiamweri Location was informed that someone had been killed. He rushed to the scene and found Morris Gikunda Kiambi who was alleged to have been killed by his brother lying dead. After the incident, Accused sought refuge at the home of his aunt Jerusha Nkuene who persuaded him to surrender to police which he did on 20.08.2020 to PC Patrick Gichuki. CPL Evans Onsongo investigated the case and caused Accused to be charged. He tendered as exhibits 10 photographs of the scene which confirmed that Morris had suffered a cut on the head and neck.

DEFENCE CASE

3. The accused gave a sworn statement. He stated that his brother Morris who had previously threatened to harm him went to where he was working armed with a panga and attempted to cut him. That they struggled and his brother fell and it was then that he realized his brother had been injured. His witnesses Wilson Muriithi Kirigia and Jacinta Kinanu were not at the scene of crime and did not know how Morris met his death.

4. **Section 203** and **204** of the **Penal Code** under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:

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

204. Any person who is convicted of murder shall be sentenced to death.”

5. The offence of murder is complete when, “*malice aforethought*” is established if, pursuant to **section 206** of the **Penal Code** evidence proves 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.”

6. When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under **section 202 Penal Code** which is punishable under **section 205 Penal Code** by a term of imprisonment extending up to life.

ANALYSIS AND FINDINGS

7. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of Morris; that Accused caused the death and that he was actuated by malice.

(a) The death of the deceased

8. The postmortem form **PEXH. 1** reveals that the Morris died of severe head injury secondary to deep cut on the head with disruption of brain substance.

(b) Proof that accused person committed the unlawful act which caused the death of the deceased

9. Whereas the Accused does not forthrightly concede that he caused the injuries that led to the death of Morris, the Law requires a person last seen with the deceased, whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased and the onus is always on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased (**See Stephen Haruna v The Attorney General of the Federation {2012} LPELP 782**).

10. Accused explains that he was fighting with his brother Morris when Morris fell and it was then that he realized his brother had been injured. Being the only person that was with Morris at the time, it would be correct to conclude that he was the one that caused the injuries that resulted in the death of his brother Morris.

c) Malice aforethought

11. Regarding malice aforethought, it has been shown that Morris and Accused had a quarrel concerning the ownership of their late mother's sewing machine. It is on record that Morris went to where Accused was working armed with a panga and threatened to harm him and the two engaged in a fight. had quarreled with PW1's family over the trespass by the family members into his land. There was trespass by animals into accused land just before he shot the deceased. The deceased reported the trespass to PW1 and PW2.

12. The question is whether the threat on Accused's life amounted to provocation as to reduce the charge from murder contrary to section 203 of Penal Code, to manslaughter contrary to section 205 of the Penal Code.

13. Section 207 of the Penal Code provides for 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, is guilty of manslaughter only.”

14. In **Ahmed Mohammed Omar & 5 others v Republic [2014] eKLR**, the Court of Appeal cited with approval **ROBERT KINUTHIA MUNGAI v REPUBLIC (1982 – 88) 1 KAR 611**, and delivered itself thus:

“... we think, in view of the earlier East African cases we have considered, and the more recent English decision in R v SHANNON Crim. LR 438 1980, that, the true interpretation of the judgment of the privy Council in PALMER v R is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered.”

15. **MUNGAI V. REP [1984] KLR 85** at page 98, KNELLER, HANCOX JJA and NYARANGI Ag. J.A. held:

“However, notwithstanding the fact that section 17 of the Code statutorily requires that criminal responsibility for the use of force in defence of person or property shall be determined according to English Common Law, it does appear that the doctrine is recognized in East Africa that the excessive use of force in the defence of person or property may lead to a finding

of manslaughter: see *R v Ngoilale (supra)* and *R v. Shaushi [1951] 18 EACA 198*, the latter of which was cited with approval in *Hau s/o Akonaay v R [1954] 21 EACA 276* in which, at pages 277 and 278, the following passage occurs:-

“In the circumstances covered by the Common Law rule cited above and in the circumstances of the instant case there exist elements of both self-defence and provocation. This Court has already in *R v Ngoilale* and *R v. Shaushi s/o Miya [1951] 18 EACA 164* and *198*, indicated its view that section 18 is wide enough to justify the application of any rule which forms part and parcel of the Common Law relating to self-defence and in the latter said (at p 200): -

16. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.

17. From the circumstances of this case, I find that the act of Morris arming himself with a panga and threatening to harm Accused was a provocative act. I find that the provocation acted on the accused mind causing him to cut the deceased in defence of his life. There was a direct link between the threats on Accused's life and the injuries caused on Morris. I find that the circumstances of this case shows that Morris was cut in the heat of sudden threat to Accused's life and however unreasonable the perception of the threat, Accused cannot be considered to have formed the necessary malice aforethought to commit murder.

18. Having come to this conclusion I substitute the charge against the accused from murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 of the Penal Code. I find the accused guilty of the substituted charges of manslaughter contrary to section 202 of the Penal Code and convict him accordingly.

DELIVERED AT MERU THIS 2ND DAY OF DECEMBER 2021

T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Accused - Present

For the Accused persons - Mr. Thangichia Advocate

For the State - Ms. Mwaniki