



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 62 OF 2015

REPUBLIC.....ODPP

VERSUS

WESLEY KIPKURUI RONO.....ACCUSED

J U D G M E N T

1. The accused person is charged with **Murder Contrary to Section 203 as read with Section 204 of the Penal Code**. It is alleged that on 2nd October 2015 at Kesikene Village Kuresoi District within Nakuru County he murdered Isaac Cheruiyot Koskei.
2. The accused took plea on 23rd October 2015 when he pleaded not guilty before *Hon. M. O. Odero J.* He was represented by Mr. Orege Advocate.
3. The matter was fixed for hearing several times but the record shows that the prosecution expressed difficulty in obtaining attendance of witnesses among other challenges.
4. The record shows that the Accused was briefly out on bond from 25th July 2017 but on 9th July 2019 the surety withdrew. The hearing took off on 30th January 2020.
5. The case for the prosecution was set out by **PW1 Kipskei Arap Sigilai, father to deceased, PW2 Joseph Kipketer Sang, PW3 Gilbert Kiprono Rotich and PW4 Alex Kiprotich Mutai.**
6. It is the prosecution's case that the deceased and his wife were selling chang'aa in their home. On the material date the accused person who was in the company of others took some chang'aa and paid for it with a Kshs. 200/= note. He was given change but there was a balance of Kshs. 30/=. When he demanded this change, the change was not available and a fracas ensued. He had drunk chang'aa and so had the deceased. It is the case for the prosecution that this fracas was between him, the deceased and the deceased's wife. In that push and pull a brother to the deceased rushed to the house and came with a knife. Either the deceased took the knife and tried to stab the accused or this brother tried to stab the deceased, and in the process the accused grabbed the knife from the one who was trying to stab him. Those who were nearby everyone scattered, and that is when the accused stabbed the deceased.
7. The deceased's father PW1 said he actually saw the accused stab the deceased and throw the knife away and run. That he shouted for help and that is when those who were around and had taken off went after the accused. He said he picked the knife and later handed it over to the authorities. Shown the knife in court he said he could not tell whether it was the same knife he had recovered.
8. He also had difficulties recalling his deceased's son's name saying that when one dies we forget their names. It was evident that the lapse of time between the incident and the hearing had affected his memory.
9. PW2's testimony was that the deceased wanted to stab the accused but the accused over powered him took the knife and stabbed him.
10. That after the accused stabbed the deceased they both fell, PW1 arrived, asked for the knife, accused handed it over and left. He identified the knife in court.
11. PW3 arrived at the scene after hearing screams. He found the stabbing having taken place. He identified the knife. He confirmed that the deceased died as they were taking him to hospital.
12. PW4 on his part testified that he was rang by one Jackson to join him to take a person to the police station. He took a motor bike and

went to where the said Jackson was. He found the accused there and they went to Kuresoi Police Station together. He said that accused said to him; “*Sijui kama nimeua mtu au nini*”. Something to the effect that accused was wondering loudly whether he had killed a person. The witness said they took accused upto the Police Station and on the way he told them about the quarrel over Kshs. 30/= and the attack by the deceased with a knife.

13. **PW5 No. 65754 PC Joakim Daya** was the **Investigating Officer**. He testified that the report that was received at the Police Station was that some people drinking in illicit brew in a chang’aa den had fought and one had been killed. He testified that he and his colleagues were instructed by the OCS to go to the scene, collect the body and effect arrest. Before they left they were told that the person who had stabbed the other had escaped to Bomet Forest. However soon thereafter one Nyumba Kumi Person rang the police and told them that the suspect had rang him, telling him that he was ok, but that he had stabbed a person but was not sure whether that person was ok. This Nyumba Kumi and his colleagues went to the forest, found the suspect where he was and took him to Kuresoi Police Station, where they later found him.

14. At the scene they found that the body had been removed from where the incident had happened because it was raining. He observed a stab wound on the left side above the heart. He took over the knife, which he produced in court as exhibit.

15. From his investigations the Investigating Officer he confirmed that there was indeed a chang’aa den ran by the deceased. The accused had paid for his alcohol with Kshs. 200/= and the deceased had his Kshs. 30/= change. The deceased told the accused he did not have the Kshs. 30/= and a fracas ensued. According to the investigating officer the accused began to beat the chang’aa seller when he was told he would not get his Kshs. 30/= change. That the brother of the deceased rushed to the house, brought a knife, but in the process the accused person over powered them, and stabbed the deceased who was on the ground.

16. The investigating officer told the court that intention of the brother of the deceased who came with the knife was not known.

17. On cross examination the investigating officer told the court that all the information he gave the court he got from the witnesses. He said the deceased was a chang’aa seller not brewer, that the brother of the deceased who brought the knife was among the drinkers, that there were five (5) drinkers, and he had been able to interrogate two (2) as witnesses. Asked whether the brother of the deceased who brought the knife was a witness in this case the investigating officer said no. Asked whether this brother had been arrested, the investigating officer told the court that the case before court was a murder case and that person who had brought the knife had not committed the murder. Asked why this person, who had brought a knife, threatened the accused had not been arrested, the investigating officer responded that the police do not act on hearsay but on reported cases. This response drew the question whether he was saying that the whole story about a brother of the deceased bringing a knife to the fracas between the accused and deceased was hearsay, he responded, that, no, it was not “*but nobody came to complain.*” He was asked whether he would have taken action if a report had been made over the person who had brought the knife, and he said yes, he confirmed that as per his investigations the person who brought the knife was not drunk. That this is the same person who witnessed the post mortem. It was put to the Investigating Officer that according to his own testimony, there were these two (2) brothers, who were not drunk, one armed with a knife, who attacked the accused person, he responded that it was the accused who had began the fracas prompting the introduction of the knife into the mix. He said it was possible that the brother brought the knife to threaten the accused to leave the deceased alone. He said he could not call this person as a witness because following the death of his brother he had become traumatized leading to mental illness. He said he did not have proof of that, and it was not in his statement.

18. The **pathologist, Doctor Rodgers Namisi** was **PW6**. Upon examination of the body in postmortem he found one stab wound in the chest of the deceased about 4cm penetrating wound to the lungs and heart. He formed the opinion that the Cause of death was the penetrating wound to heart and lungs leading to blood loss.

19. At the close of the case from the prosecution, the accused person was put on his defence. He testified on oath. He told the court how on 2nd October 2015 he visited a chang’aa den at Kesikenik area located where is a place between the farms and the forest referred to as “cutline”. It was a field. The deceased was selling. He took chang’aa from 9.00 a.m. to 1.00 p.m. He wanted to leave. He had paid and the chang’aa seller had his change of Kshs. 30/=. He demanded it only to be told he had no change. A fracas ensued. The brother of the deceased came there and told him he had no change. He slapped the accused. A struggle ensued. It is then that the deceased came with a knife and tried to stab him. Accused ducked. Deceased got hold of him. They were on some kind of slope. They fell down and deceased fell on the knife. He said he had no grudges with the deceased.

20. On cross examination by Ms. Murunga for state he said he was drinking with accused, his brother and other people but none of them were his friends. He said that after the incident he went to Nyumba Kumi and reported, they went together to police station where he reported the fight.

21. The issue for determination is whether the prosecution had proved the charge of **Murder Contrary to Section 203 as read with 204 of the Penal Code beyond a reasonable doubt.**

22. The prosecution has established and it is not denied by the defence that there was a fight, that the accused and the deceased were involved, and consequently the deceased died. It is not in dispute that the accused person was not armed. It is also conceded by the prosecution through the investigating officer that the knife was brought to threaten the accused. The scenario of the two (2) brothers, one armed with a knife, the other not armed, attacking the accused person for demanding his change has been set up by the prosecution. That scenario does not paint a picture that fits into the provisions of **Section 206 of the Penal Code** on malice afterthought. It creates a scenario which fits simply with the accused persons defence that what happened was a fight which started as a quarrel between him and the deceased over his change but developed into a fight where the deceased and his brother introduced a weapon to threaten him and as a result the deceased was stabbed, with fatal outcome.

23. The father to the deceased told the court that he saw the accused stab the deceased. He says he was as a bit far, and did not hear the conversation. He however covered up for the fact that there was chang’aa selling by the deceased. PW2 a prosecution witness actually saw and testified that the knife was used to threaten the accused, who overpowered whoever was threatening to stab him and stabbed that person. Both of them fell down. This witness however stated that the moment the accused disarmed his attacker the onlookers ran away, so it is not

clear from his testimony whether when the others ran away, he too ran away, did not see the actual stabbing of the deceased. However, it is very clear from his evidence that he saw the accused being threatened with the knife by the deceased.

24. The accused person explained in his defence what happened. He had no intention of stabbing the deceased, that the death occurred accidentally out of the fight that ensued when the deceased's brother attacked him for demanding his Kshs. 30/=.

25. The circumstances of this case fit into the words of the court in **Robert Kinuthia Mungai vs Republic (1982 – 1988) KAR 611** and **Section 207 of the Penal Code** which states:

“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. and Section 208 of the Penal Code

“(1) 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 a 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.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.”

In **Tei S/o Kabaya vs Republic [1961] EA** the court held;

“In considering whether provocation was sufficient to reduce offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used.”

26. It is evident from the evidence on record that what was going on before the knife was produced was an exchange over the accused's money. The deceased's brother's entry into the exchange with a weapon aggravated the situation and it turned into an attack against the accused. Clearly this act was an act of provocation not anticipated by the accused in the prevailing circumstances. It created a situation where he was confronted by two (2) persons; one armed with a knife, and naturally he had to defend himself in circumstances envisaged by **Section 17 of the Penal Code**.

“Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”

See **Ahmed Mohammed Omar & 5 Others vs Republic [2014] KLR, DPP vs Mergan [1975] 2 All ER 347.**

27. I am persuaded from the circumstances of this case, and the law that the accused person acted in the moment, and had no intention at all to kill the deceased. He can only be guilty of **Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code**.

28. I find that the accused person is guilty of the lesser charge of **Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code** and convict him accordingly.

DATED, DELIVERED AND SIGNED AT NAKURU THIS 1ST DAY OF DECEMBER, 2021.

MUMBUA T. MATHEKA

JUDGE

IN THE PRESENCE OF:-

COURT ASSISTANT EDNA

FOR STATE: MS MURUNGA FOR ACCUSED: N/A

ACCUSED PRESENT