



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCR NO. 73 OF 2018**

**FORMERLY MACHAKOS HCRC NO. 12 OF 13**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**FESTUS MUSEMBI LOKO.....ACCUSED**

**JUDGMENT**

1. **Festus Musembi Loko** the accused herein faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on 7<sup>th</sup> day of March, 2013 at Mwaani village, Mwaani sub-location, Kilungu district within Makueni county murdered **David Mwendwa Mbithi**.

2. The accused denied the charge and the case proceeded to full hearing. The prosecution presented three witnesses who testified on its behalf. **Pw1 Felister Ndeto Mwendwa** a widow to the deceased testified that the family had lost a sister to the deceased. On 7<sup>th</sup> March, 2013 8:00 am the deceased arrived home for a meeting for the burial preparations for his deceased sister Loko. The said Loko was the mother to **Festus Musembi Loko** the accused herein.

3. A family meeting was held on 7<sup>th</sup> March 2013 from 10:00 am to 2:00 pm. The deceased who had another wife was rotating between his parents' home and his 2<sup>nd</sup> home. He returned to the main home where the funeral was between 6:00 – 7:00 pm. After interactions and having dinner the deceased left for his home at 9:00 pm. Later he came into the house holding his side of head saying he had been cut and asked to be taken to hospital. Pw1 saw blood and screamed. Shortly thereafter, the accused appeared and cut the deceased and pulled him from behind and he fell. He continued cutting him saying **"I told you I will kill you"**.

4. She ran to the chief's and uncle's homes but found them asleep. She returned with her uncle's son called Musyoka Masila, and found the deceased dead. The accused had lit a huge fire at his late mother's home. When Musyoka asked the accused why he did that he responded saying: **"There was nothing else I could do."** Police came the next morning and took away the accused together with the body.

5. In cross examination, she said the deceased had said Loko should be buried at the cemetery. She did know who started the fight and there was no electricity at the scene. She confirmed that the accused had injuries on his head and his face had blood. She confessed that the deceased could never stomach people talking badly or rudely to him or to be slighted. She was not aware of any incident where the deceased may have attacked anyone.

6. **Pw2 Ana Mwili Mbithi** is a sister to Loko and the deceased. On 7<sup>th</sup> March 2013 after preparations she went to her home at 4:00 pm. She later heard screams from the burial place and went there. She met the accused holding a panga. On asking what it was, he responded that he would do what he wants. That the panga was smelling blood. She snatched the panga from him and kept it. Her son came and told her the accused had killed the uncle (David Mwendwa Mbithi). She slept and went to the scene the next morning, but never viewed the body. The police went away with the panga. She identified the panga as MFI 1.

7. In cross examination she said Pw1's children had been sending messages to the deceased saying they would kill him. These children of Pw1 used to beat the deceased.

8. **Pw3 Laban Musyoki** is a pastor and son to Pw2, and the deceased was his uncle. After the meeting at 6:00 pm he left with Pw2 for their home. While there, they heard screams from the funeral place. They left for the place with his mother ahead. She met the accused who had a panga, which he lifted to cut her and she screamed. He was using his phone (Samsung) light. The accused slipped on mango leaves and fell. The panga got out of his hands and Pw2 took it. The accused told them he would kill two people then himself and he ran away.

9. He went to the scene and saw the deceased's body, which had a lot of blood. Later in the morning the police came after accused had been

arrested on the chief's orders. He said he would not identify the panga used though it was similar to MFI -1.

10. Pw2 and Pw3 testified that the accused never used to have a problem. The actions of that day were unlike him.

11. In his sworn defence the accused testified that on 2<sup>nd</sup> March 2013 they had a funeral at home having lost his mother, whose body was lying at Makueni General Hospital Mortuary. The deceased was at their home and he returned to Nairobi on 03/03/2013. He called and told Pw2 to inform them not to light a fire at home. He inquired from Pw2 why this was so, and on 4/03/2013 he lit a fire.

12. On 07/03/2013 the deceased came home and he found him in his house and requested for a meeting. He was on inquiry told about the hospital bill by the accused. A meeting comprising of the deceased and his wife, accused and his sister and deceased's son was held. They explained the programme but the deceased refused to listen and said the expenses were high. He further told them his mother would be buried in Wote.

13. At that moment he told him to leave them alone to bury his mother. He further told the deceased that his family had defeated him. Accused then left to go and look for money. He returned at 6:00 pm and went to his house. At 8:00 pm he heard a knock at his door which he opened and found the deceased there. The deceased held him by the shirt and pulled him outside. He was asking why the accused had abused him. He struggled to get back and the deceased lifted his hand which had a panga. He held the deceased's hand. They struggled over the panga and the deceased cut him on the head.

14. Accused took over the panga and the deceased ran away to the accused's mother's place. He left for his mother's house and when the deceased saw him there, he held him again. They struggled and he fell. He denied having pushed him. He left for Pw2's place, but met her on the way.

15. She held him and screamed. She was holding the panga they had struggled over. Pw3 came and found him standing aside. After going to Pw2's house with her he returned home to find Pw1 and his cousin Pw3 who did not want to talk to him. He went to his house and slept till morning.

16. As he left his house, he was arrested and handcuffed by two people who placed in a police vehicle. He was taken to the scene where he saw the deceased. Lastly he said the deceased had wanted his mother buried at a place unknown to them.

17. In cross examination, he said they are five siblings brought up by their mother single handedly without a father. His uncles and aunties live on the same land of their grandmother, measuring ten (10) acres. They lived well even with the deceased and his family. He denied having insulted the deceased.

18. He explained that when the deceased came to his house he was armed with a panga and he was too angry. He was however not treated for the injuries he suffered. He did not see the deceased bleeding. He denied saying he would kill four people and kill himself. He admitted that the deceased died as a result of the fight between them.

19. In its submissions the prosecution through learned counsel Mrs. Owenga stated that the prosecution had proved its case as one of murder. It relied on the case of **R –vs- Samuel Muigai Chege Kajiado HCCR Cause No. 17 of 2018 (2019) Eklr**, which cited the case of **Woolmington –vs- DPP 1935 AC** and **Miller –vs- Minister of Pensions (1947) 2 ALLE.R 372** where

Lord Denning in Miller case stated with respect to the state's burden on standard of proof that:

**“The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof of beyond reasonable doubt does not mean beyond shadow of doubt.”**

20. Mr. Kamanda for the accused submitted that Pw2 stated that the accused pulled the deceased to the darkness but she did not see anything thereafter. Pw3 gave conflicting evidence with Pw2 about the accused's attempted attack on Pw2. He submitted that there is evidence that the accused was mumbling and talking to himself an indication that he was disturbed. There was also an aspect of the deceased not wanting the accused's mother buried in their parent's land.

21. Counsel contends that all these issues stirred emotional *rolacoster* which coupled with the altercation by the deceased a few days after the death of the accused's mother and emotional instability of the accused led to the deceased's undeserved death. The deceased's entry into the accused's house while armed with a panga made things worse.

22. He further submits that the prosecution has failed to prove *mens rea* on the part of the accused. That accused reacted upon provocation by the deceased.

23. The accused faces a charge of murder, which is defined as follows :

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

24. It follows that the ingredients to be proved for a charge of murder to succeed are: -

i. The fact and cause of death.

ii. Actus reus – The connection between the accused and the commission/omission of what caused the death.

iii. Whether there was malice aforethought/intention/mens rea in the commission of the offence.

**Issue no. (i) The fact and cause of death**

25. The evidence of Pw1, Pw2, Pw3 and the accused indeed confirms that indeed David Mwendwa Mbithi (deceased) died. The next issue is what the cause of death was. According to Pw1 the deceased was first injured on the head. Thereafter the accused cut him several times. Pw2 only saw an injury on the head as she did not want to observe the body. On the other hand, Pw3 did not mention anything about the injuries.

26. The post mortem report could have come out clear in explaining on the real cause of the deceased's death. It's not known whether the deceased suffered one injury or several injuries. If they were several which one or which ones caused the death? What is however clear is that the deceased died on the same night of incident. He never had the opportunity of being taken to hospital. Is failure to produce the postmortem report fatal to the prosecution case in the circumstances of this case?

27. In the case of **Ndungu –vs- R, Nairobi Criminal Appeal No. 171 of 1984, (1985) eKLR** the court stated thus in respect to unproduced postmortem reports:

**“Where the body is available and the body has been examined a post-mortem report must be produced the trial court having informed the prosecution that the normal and straightforward means or seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the medical officer who performs the postmortem examination is cross-examined. Here no post mortem report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstances inexplicable and was unhelpful to the prosecution and to the judge.”**

28. Referring to the case of **R –vs- Cheya (1973) E.A 500** the Court of Appeal had this to say:

**“The judgment in Cheya gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be obvious that the absence of a postmortem report would not necessarily be fatal. But even in such cases medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem report is performed and a report prepared, signed and kept in safe custody but the doctor is not availed some other medical expert could give general evidence as an expert on the basis of the report as to whether the findings of the report as consistent with the case for the prosecution. Even where the doctor is available, it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class.”**

29. The same decision was applied in **Chengo Nickson Katana –vs- R (2015) eKLR**.

In both cases the deceased died two days after the attack. There was no postmortem report produced in the two cases, though postmortems had been conducted. The court observed the following:

**“Our next consideration is failure by the prosecution to tender medical evidence regarding the death of the deceased. On record, there is evidence that following the death of the deceased, a post mortem examination was conducted on his body on 7<sup>th</sup> February, 2011 by Dr. Otieno of Coast General Hospital and a report thereof prepared. However, attempts to introduce the same in evidence faltered on account of Dr. Otieno's failure to turn up in court severally for unexplained reasons. Therefore, the prosecution closed its case without the postmortem report being placed on record. The effect of such an omission is that the death and the cause thereof was not established beyond reasonable doubt. The deceased did not die immediately. Indeed, he died two days later whilst undergoing treatment at Coast General Hospital where he had been transferred, as Lamu District Hospital was ill equipped to manage his condition. It is also important to note that before being transferred to Coast General Hospital as aforesaid, he was first treated at Mokowe Health Centre and Lamu District Hospital. The treatment records from all these institutions could but were not availed. In the absence of these documents indicating the exact treatment which he received, it is not possible to tell whether the death could have been as a result of the injuries sustained or by any other cause.**

30. The court then concludes that save in very exceptional cases, it is necessary that death and the cause thereof be proved beyond reasonable doubt, which can only be achieved by production of medical evidence which in particular is the postmortem examination report of the deceased. Considering all the three cases cited above, I am guided as to the critical importance of the postmortem examination for proof of death and its cause.

31. In the present case the deceased could not even be taken to hospital and he died before that was done. Pw1 – Pw3 and the accused acknowledged that the deceased died as a result of the injury/injuries he suffered on that night. I therefore find that the injury suffered on the night of 7<sup>th</sup> November, 2013 caused the deceased's death. I further find this to be one of those special circumstances where the cause of death can be established without the post mortem report.

**Issue no. (ii) Actus reus – The connection between the accused and the commission/omission of what caused the death.**

32. It is clear from the evidence of Pw1 and the accused himself that there was an encounter between the deceased and the accused on the material night. A panga though not produced was at the centre of the altercation between the accused and deceased. As a result of all this the deceased was injured and died. I am satisfied that the accused has been identified as the person who injured the deceased as a result of which he died.

**Issue no. (iii) Whether there was malice aforethought, intention, mens rea in the commission of the offence.**

33. The most critical question to be answered is whether the attack was premeditated. In the case of **Woolmington –vs- DPP (supra)** it was stated that malice aforethought may be express or implied. It is implied whenever it is proved that there was an intention to unlawfully cause grievous bodily harm (see **DPP –vs- smith (1961) AC 290**). It is express when it is proved that there was an intention to kill unlawfully (see **Beckford –vs- R (1988) AC 130**).

34. Section 206 Penal Code defines Malice aforethought as:

**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.**

35. In this case, it is so surprising that in spite of the many people who were in the home for the funeral of Loko the accused's mother only Pw1 (deceased's wife) came to testify. Pw2 and Pw3 were not present when this incident occurred. They came to the scene after the fact.

36. Pw2 is said to have recovered a blood stained panga from the accused. The said panga though identified in court by only Pw1 was never produced as an exhibit. It is not clear whether it was ever taken to the government chemist for forensic analysis of the blood it allegedly had. No analysis report was produced.

37. Pw1 said she was in the house at night when the deceased came holding his head saying he had been cut. Shortly thereafter the accused came and started cutting him severally and uttering threats. She does not first of all state whether this was outside or inside the house and whether she was with any people or she was alone.

38. She does not also say what weapon the accused was using to cut the deceased, and where he cut him in particular. She does not state how she was able to see all this and it was at night. In cross examination, she said there was no electricity at the home. She could not tell where the deceased had emerged from.

39. The accused has indicated that the deceased attacked him while armed with a panga. They struggled over it at his house and later at his late mother's home, and the unfortunate thing happened. He is in other words saying he was provoked and acted in self defence.

40. In the case of **Robert Kinuthia Mungai –vs- R (1982 – 88) I KAR 611** the court of Appeal held that:

**“It is a doctrine recognized in E.A that excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter. But if the defence is upheld, a conviction for murder cannot be sustained.”**

41. Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the code or any other law in operation in Kenya. The current position of the English common

Law as regards the defence of self defence is as stated in the case of **DPP –vs Morgan (1975), 2 ALL E. R 347**.

42. Prior to this decision the view had been that it was an essential element of self defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable ground. But in **DPP –vs- Morgan (supra)** it was held that:

**“..... if the Appellant might have been laboring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was on an objective view, reasonable or not. The reasonableness or unreasonableness so far as guilt or innocence was concerned was relevant”**

43. In **Beckford –vs- R (supra)** it was also held that if self defence is raised as an issue in criminal trial it must be disproved by the

prosecution. This is because it is an essential element of all crimes of violence that the violence or threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.”(underlining mine)

44. Considering the principles outlined above and applying them to the present case, I find a lacuna in the prosecution case. The accused has raised a formidable self defence. First of all, there was an existing tension between the accused and the deceased following the way the deceased was handling the issue of the accused’s deceased mother. This was confirmed in cross examination of his wife Pw1 when she stated:

“My husband said Loko to be buried at public cemetery.... Accused wanted his mother to be buried at the grandfather’s place. I did not know why my husband went to accused carrying same panga and insulted him. Accused and his mother lived on the same land”

45. The accused, his siblings and mother had lived on their maternal grandfather’s land which was the deceased’s fathers land their whole life. It was therefore already hurting for the accused to have lost his only existing parent and ontop of that being told he could not bury his mother on the only land they knew as home. The person causing all this was the deceased herein.

46. It has not been disputed by the prosecution by way of evidence that the deceased went to the accused’s house armed with a panga. There is no evidence from the prosecution indicating how this altercation started. Pw1 had no idea on how it started. She did not know whether the aggressor was her husband (deceased) or the accused. There is even no evidence to show who the owner of the murder weapon (which was available but never produced) was.

47. The allegations by Pw1 that her husband was cut several times is neither here nor there in the absence of a postmortem report. Pw1 confirmed that the accused had a bloody face and injuries on the head. It means he too was injured. Those who may have witnessed the incident from the beginning to the end never came to testify.

48. After considering all this evidence, I have come to the inevitable conclusion that the prosecution has failed to disapprove the accused’s defence of self defence. I uphold his defence and find that the offence of murder cannot be sustained.

49. For my part I find the accused not guilty and acquit him forthwith under section 322(1) Criminal Procedure Code. He shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed & dated this 18<sup>th</sup> day of December 2019, in open court at Makueni.**

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**H. I. Ong’udi**

**Judge**