



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCR NO. 94 OF 2017**

**FORMERLY MACHAKOS HCCR NO. 19 OF 2016**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**SHADRACK KYALO NDAMBUKI.....ACCUSED**

**JUDGMENT**

1. **Shadrack Kyalo Ndambuki** the accused stands charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that the accused on the night of 8<sup>th</sup> and 9<sup>th</sup> day of April, 2016 at Munathi village, Kituluni sub-location, of Kathonzwani sub-county within Makueni county murdered **Mutinda Ndambuki**.

2. He denied the charge and the case proceeded to full hearing with the prosecution calling eight (8) witnesses. It is worth noting that the accused and the deceased were brothers. The deceased had arrived home from Mombasa where he had been for years. This was on 8<sup>th</sup> April 2015. According to their nephew Bernard Muema (Pw1) who lived with his grandfather he was home with his grandfather and the deceased on 8<sup>th</sup> April 2015 at 8.00 p.m. when they were joined by the deceased at 9.00 p.m.

3. After a while the deceased escorted the accused upto the gate and returned. Few minutes later the accused was back and entered Pw1's room asking him if he knew he was a thief. The deceased heard what the accused had said and came to Pw1's room and asked the accused to stop disturbing him. The accused complied and later the two brothers and their father went to the mzee's house.

4. The mzee remained at the doorstep while the accused sat on a chair outside. The deceased entered their father's house and came out with photos which he showed the accused. The photos showed the accused with injuries on the head.

5. The deceased then entered the house and returned with a catapult and started chasing the accused. The accused entered mzee's house as the deceased asked Pw1 to get him drinking water. Before the deceased could drink the water the accused emerged with a jembe and both accused and deceased fell down.

6. The deceased took off running with the accused in hot pursuit and when he reached him he hit him with the jembe on the head and he fell down. The accused continued hitting him more than ten times with the jembe. Pw1 got scared and ran away to a neighbour's for the night.

7. In cross examination he said there was no electricity at the home. He was not sure whether accused, deceased and their father were drunk but they had taken alcohol. He also confirmed that the deceased had thrown stones at the accused using the catapult.

8. **PW2 Esther Kamene Kioko** had on 08/04/2016 at 10.30 p.m. been called by Pw1 and told to go and separate the fighting brothers. Soon thereafter the accused knocked at her bedroom window. He told her he had beaten her son. He talked as if he was drunk. She told him to go and sleep. She communicated with Nicholas Kyalo (Pw3) who told her that the accused had injured the deceased with a jembe. She got a motor vehicle to take him to hospital but he died on the way. The accused was arrested the next day when he came to see his mother (Pw2).

9. **PW3 Nicholas Kyalo Kioko** testified that on 8<sup>th</sup> April 2014 he left home for the market and met his cousins (accused and deceased) and their father at Malelo bar. The accused was on a different table from the rest. They drank alcohol upto 9.30 p.m. He left alone carrying two take away bottles. The accused followed him, and took away one of his bottles which he struck down saying he would kill somebody. He mentioned he would kill Pw2 and somebody else. He asked him if he was serious as he was drunk.

10. The accused left and Pw2 returned to the bar just to find the deceased and father had left. He then took a bodaboda and left for home. He was called at 1.00 a.m. by Pw2 and asked to go and see the deceased, as the accused had reported to her that he had killed the deceased. He

went to the scene and found the deceased lying in a pool of blood, with injuries on both hands, and head and he was only able to sit. He asked Pw3 for water.

11. A neighbour assisted to transport him to hospital, after reporting at Kavumbu police post. Unfortunately, he died on the way before reaching the hospital. The accused was arrested the next day. In cross examination he said the deceased told him the accused had injured him with a jembe.

12. **PW5 Erastus Kithuku** received a report of the attack on the deceased by the accused. This was on 9<sup>th</sup> April 2016 at 4.00 a.m. he went to the home and found the deceased lying 40 meters from the gate. He had a deep cut on the head with both hands broken. He recovered the broken blood stained jembe (EXB2) and took the victim to hospital where he was pronounced dead on arrival.

13. At 10.00 a.m. the accused was brought and booked in at Kavumbu police post. **Pw4 Nicholas Mwenga** and the assistant arrested the accused at his aunt's home (James Kioko's) after they received a tip off. He wore a white blood stained shirt (EXB 1).

14. **PW8 P.C. Lucy Achikhongo** was at Kavumbu police post on 9<sup>th</sup> April 2016 at 4.00 a.m. when Pw3 made a report of this incident. Pw5 and another visited the scene. Later at 6.21 hours she visited the scene with I.P. Sifuna the officer in charge of the post. The scene had a pool of blood. A jembe (EXB2) was recovered from there. The shirt (EXB1) which the accused was wearing when he was arrested had blood stains. It was recovered from him at the police station.

15. **PW6 Dr. Alex Makau** produced the postmortem report (EXB3) on behalf of Dr. Emmanuel Loiposha after the defence confirmed it had no objection to its production. The deceased had the following injuries;

- Fracture on left hand (visible).
- Right hand crushed.
- Scalp cut 6cm long.
- Fractured skull right
- Haematoma 4x6x3cm on the head.

Finally the cause of death was found to be severe head injury subject of a sharp object.

16. The deceased's body was identified for postmortem by **Pw7 Fred Mutuku Ndambuki** his brother on 13<sup>th</sup> April 2016.

17. When placed on his defence the accused elected to give a sworn statement without calling any witness. He testified that he used to work for Mwololo as a workman. On the day in issue he was working when his sister Jane Mueni Mdambuki came and reported to him that they wanted to see him. He told her he would go later as he was busy.

18. At 4.00 p.m., he went to Munavi market and when the deceased saw him he called him. They went to Maendeleo bar from where they took alcohol "Vienna" a spirit. They drunk upto midnight and he was too drunk such that he was unable to go to his place of work. So he slept wherever he was.

19. When he finally went home he found the deceased there hiding behind the kitchen wall with a catapult which he used to hit him with a stone on the head. As the deceased looked for the stone the accused appeared and he got hold of the catapult and told him he was hurting him. The deceased ordered him out of the place, and ran to the store from where he removed a jembe. He ran to the house and then out to go to his place of work. In the process he hit a drum and fell down. It is then that the deceased appeared with a jembe with which he hit him.

20. They struggled over it and he fell down. When he rose up he hit the deceased with the jembe and he fell on the fence. After this he went and reported to his aunt Esther Kioko who advised him to go and report. He instead ran to his place of work and slept. He went back to his aunt's place from where he was arrested. It's his evidence that he had been attacked and acted in self defence.

21. In cross examination he admitted that Pw1 is his nephew while the deceased was his elder brother. He denied seeing Pw1 on that night of incident. Later he says that Pw1 saw him being hit with a stone on that night. He claimed to have left the deceased seated after hitting him. While answering to questions by the court he said he had hit the deceased on the head with the sharp part of the jembe. He did not know however if the deceased bled. He also said he did not bleed after being hit with a stone by the deceased.

22. Counsel for both parties filed written submissions setting out the evidence adduced in court. Mrs. Owenga finally submitted that from the observations it was clear that the accused had a clear intention to kill or cause grievous harm to the deceased. That the defence of self defence cannot stand as the injuries he inflicted on the deceased were not proportionate to the danger he was facing.

23. She therefore submitted that the prosecution had proved its case, by establishing all the ingredients in a charge of murder. She relied on the **Kajiado High Court Criminal case No. 4 of 2016 Republic -Vs- Ismail Hussein Ibrahim** where Nyakundi J. while quoting the decision of the court in the famous case of **Privy Council Palmers -Vs- Republic [1971] I ALL E.R.** observed as follows;

***“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do so, but he may only do, what is reasonably necessary. If there has been an attack so that the defence is reasonable necessary, it will be recognized that a reasonable person defending himself cannot weigh to nicety, the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what honestly and instinctively thought necessary, that will be most potent evidence that only reasonable defensive action has been taken. But everything will depend on the particular facts and circumstances it may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous others may not.”***

24. Mr. Hassan for the accused submitted that the actions leading to the occurrence of the incident were at the spur of the moment and there was no *mens rea* to commit murder. That the accused did not have time to escape the attack or reflect on what was happening as he was drunk. He contends that the accused was attacked using a jembe after being assaulted with a catapult. He defended himself using the same weapon of his attacker. He argues that the accused’s action was not unreasonable and he would have been the one killed had the deceased gotten a chance.

25. Finally he submitted that;

- i. ***That*** the prosecution did not satisfy the ingredients of the preferred offence.
- ii. ***That*** the prosecution did not discharge their legal and evidential burden of proof.
- iii. ***That*** the prosecution did not prove its case beyond reasonable doubt.
- iv. ***That*** the prosecution case should fail and the accused acquitted.

26. The accused faces a charge of murder contrary to section 203 as read with section 204 of the penal code. Section 203 of the Penal Code defines murder as;

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

Three elements arise and which must be proved in a charge of murder. As was laid out in the case of **Republic –Vs- Nicholas Onyango Nyolo [2014] eKLR** the elements to be proved are;

- a) *Proof of the fact and the cause of death of the deceased.*
- b) *Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the “actus reus” of the offence.*
- c) *Proof that the said unlawful act or omission was committed with malice after-thought which constitutes the “mens rea” of the offence.*

27. On the first element there is no dispute that Mutinda Ndambuki (deceased) died on the night of 8<sup>th</sup> & 9<sup>th</sup> of April 2016. Pw7 his brother identified the body for postmortem and Dr. Loiposha carried out the postmortem. Other witnesses who confirmed death were Pw2, Pw3 & Pw5. The postmortem report (EXB1) clearly outlines the injuries sustained by the deceased and the cause of death. The deceased did not die a natural death.

28. The second issue which is the *actus reus* is supported by the evidence of Pw1, Pw2, Pw3 and the accused himself. Pw1 saw the accused assault the deceased with a jembe. He called his grandmother (Pw2) and informed her. Pw3 went to the scene and found the deceased lying in a pool of blood unable to stand. He told him it is the accused who had injured him with a jembe. The accused himself admitted having hit the deceased on the head with the sharp part of the jembe.

29. The cause of death was found to be the head injury which was the subject of a sharp object. My finding on this issue is that it’s the accused’s commission that lead to the injury, causing the deceased’s death.

30. The third issue is whether the accused acted with malice aforethought. Did he have the intention to kill or cause grievous harm? It is this intention to kill that constitutes the *mens rea*.

31. Malice aforethought is defined under Section 206 of the Penal Code as follows;

- (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.***

32. There is no dispute that the accused, deceased, their father and PW3 had taken alcohol at their local market. According to Pw1 the deceased and his father arrived home at around 8.00 p.m. The accused joined them shortly thereafter. PW3 however said they left the drinking place at about 9.00 a.m.

33. It was while at their father's home that a confrontation occurred between the accused and deceased. It is the evidence of Pw1 and the accused that the deceased was the aggressor. What did he do? Pw1 said the deceased took a catapult and started chasing the accused and throwing stones at him. Thereafter he asked Pw1 to get him water.

34. Before Pw1 could get him the water the accused who had entered their father's house, emerged with a jembe and attacked the deceased and both fell down. The deceased rose up and started running with the accused in hot pursuit. The deceased fell down and that's when the accused hit him severally with the jembe.

35. The accused claims to have been so drunk that he could not go back to his employer's home nor even cook the stuff he had bought. He even slept where he was. He was however able to go to his home where he was attacked and assaulted by the deceased using a catapult and a jembe. He then acting in self defence hit the deceased on the head with the sharp part of the jembe (EXB2), fatally injuring him.

36. What then is self defence? Section 17 of the Penal Code states thus;

***“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.”***

Further Section 207 of the Penal Code states thus;

***“When a person who unlawfully kills another under circumstances which, but of 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.”***

37. In the case of **Roba Galma Wario –Vs- Republic (2015) eKLR**, the court of appeal cited with approval the case of **Mohammed Omar and 5 Others (2014) eKLR** and the case of **DPP –Vs- Morgan (1985) 2 ALL ER 347** where it was held that;

***“The essential element of self defence is that the accused believed that he was being attacked or in imminent danger of being attacked but this belief should be based on reasonable grounds.”***

38. The case of **Palmers –Vs- Republic (Supra)** explains what self defence is and adds that everything will depend on the particular facts and circumstances of each case.

39. The court of appeal in the case of **Mungai –Vs- Republic (1984) KLR 85** dealt with this issue of self defence and provocation. At page 98 it held thus;

***“However notwithstanding the fact that section 17 of the Penal 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 E. A. that the excessive use of force in the defence of person or property may lead to a finding of manslaughter. See Republic –Vs- Ngoilale (Supra) and Republic –Vs- Shaushi (1951) 18 EACA 198, the latter of which was cited with approval in Hau S/O Aronaay –Vs- Republic (1954) 21 EACA 276 in which at pages 277 & 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 Republic –Vs- Ngoilale & Republic –Vs- Shaush S/O Miya (1951) 18 EACA 164 & 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 page 200):-***

***“No doubt this element of self defence may, and in most cases will in practice, merge into the element of provocation and it matters little whether the circumstances relied on are regarded, as acts done in excess of the right of self defence of person or property or as acts done under the stress of provocation. 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 to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.”***

***We have no doubt therefore that in the instant case, the learned trial judge should have directed himself in accordance with the rule of common law which we have cited.”***

40. In the case before me it is clear that both accused and deceased had been drinking alcohol at their nearby market. Their level of drunkenness is not known. The accused was escorted by the deceased upto the gate but he returned and that's when he had a confrontation with the deceased. Pw1 who appeared a neutral and credible witness said the deceased had entered the grandfather's house and came out with photos of the accused with injuries on the head. He showed these photos to the accused person.

41. The accused again entered the house with a catapult and started chasing the accused. It is not known what these photos were about but their confrontation started from there. Using the catapult, the deceased threw stones at the accused. There is however no evidence of injury suffered by the accused as a result of the stone throwing.

42. It was PW1's evidence that the accused got a jembe (EXB2) from the house and chased the deceased and hit him on the head and he fell but he did not stop at that. He continued hitting him with the jembe (EXB2). The postmortem report (EXB3) has outlined all the serious injuries that the deceased suffered.

43. The accused in his defence explains that the deceased was the first to hit him with stones then the jembe. It is true that in spite of the alleged assaults by the deceased he did not suffer any injury at all. He further states that he first hit the deceased with the sharp part of the jembe on the head.

44. One would have forgiven him if he stopped at that. According to PW1 he went on and on hitting the deceased with the jembe. He ended up crushing the deceased's right hand; fracturing his left hand; cutting him on the scalp 6cm long; injury 4x6x3cm on the head and fractured skull.

45. There is no evidence of the accused person having suffered any injuries. It has been confirmed by Pw1 that indeed the aggressor was the deceased. Pw3 has also confirmed that the accused, the deceased and their father (who never testified) had been at a local bar drinking upto around 10:00 pm. The level of the soberness of both the accused and deceased is not known.

46. Taking into account the fact that both the accused and deceased were drunk and that it is the deceased who was provocative, I find that the accused acted out of the spur of the moment though very irresponsibly.

47. I therefore find the prosecution to have proved the offence of manslaughter against the accused. I substitute the information from murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 as read with section 205 of the Penal Code.

48. I find the accused guilty of the substituted charge and convict him accordingly.

**Delivered, signed & dated this 8<sup>th</sup> day of May 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**