



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL CASE NO. 26 OF 2017[MURDER]**

**STATE.....PROSECUTION**

**VERSUS**

**EMMANUEL OLUOCH NGESA.....ACCUSED**

**JUDGMENT**

1. The accused person **Emanuel Oluoch Ngesa** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the charge as per Information dated 2<sup>nd</sup> November 2017 signed by Eliphias Ombati prosecution Counsel on behalf of Director of Public Prosecutions are that on the 21<sup>st</sup> Day of October 2017 at Muhuyu Village, Ting'are East Sub location, in Ugunja Sub County within Siaya County he murdered **Julius Opiyo Odundo**.
2. The accused person took plea before Hon Justice Makau on 8/12/2017 and denied the charge. Hearing commenced on 30<sup>th</sup> October 2018 before myself.
3. The prosecution called five (5) witnesses to establish a prima facie case against the accused person who opted to give sworn statement of defence and called no witness.
4. **PW1 Beatrice Auma Opiyo** from Muhuyu testified on oath and stated that she knew the deceased Julius Opiyo Odundo who was her husband. She recalled that on 21/10/2017 at about 10.00 pm, the accused person Emmanuel Oluoch Ngesa emerged and started beating his mother and that the deceased Julius Opiyo Odundo tried to intervene. That Emmanuel refused to stop beating the mother so the deceased Julius returned to the house and left Emmanuel beating his mother. That the accused then went with a metal bar and that Julius Opiyo told Emmanuel to keep away the metal bar so that they could fight with fists. That Emmanuel went to his home with the metal bar then returned shortly saying, "nataka tochi yangu-" meaning "I want my torch," but that at that time the accused person was not carrying any weapon, whereas the deceased was holding a rechargeable torch which was alight, and that Emmanuel was demanding for the torch from Emmanuel.
5. She stated that Julius lifted the torch and used it to hit Emmanuel and asked Emmanuel whether it was the torch he was asking for. That the deceased then hit the torch onto the ground and broke it. He then entered the house and picked a jembe and followed Emmanuel Ngesa to where the latter had gone. That at that time, the witness was in her house seated when Julius left the house with a jembe.
6. Later, Stephen Oduor the brother in law to the witness called her and informed her that her husband Julius Opiyo Odundo had been killed. (the witness broke down and wept as she testified). She stated further that she left her house screaming and followed where Julius was and found him in a pool of blood. That she saw the deceased injured on the ears, legs and back. Later Stephen went to report to the police and she remained at the scene of murder. The police went and photographed the body of the deceased showing the injuries suffered by the deceased. The body was then removed to Siaya Hospital Mortuary and she was called upon to go and identify the body to the Doctor for post-mortem
7. PW1 further testified that when the accused Emmanuel Ngesa went to her house he stood at her door side with a metal bar. The witness also identified the jembe that she claimed the deceased Julius carried and the autopsy form. She also identified the accused person in the dock.
8. On being cross examined by Mr. Oduor Advocate, the witness stated that when her husband, the deceased arrived at their house, he was drunk. Further, that when Emmanuel went to her house the second time, he was not carrying any weapon. She also stated that she did not witness Emmanuel assault his mother. She stated that her husband's body was found next to Ngesa's (accused) person's house. She also stated that when Julius picked the jembe and followed Ngesa, the accused had already left.
9. **PW2 Margaret Mutindi Ngesa** a resident of Muhuyu testified on oath and recalled that on 21/10/2017 at about 7.30 pm she was in her house preparing food (dinner) when her brother inlaw, 'Songa' the deceased went to her house accompanied by her son Emmanuel Oluoch Ngesa the accused herein and that they both asked her for food, saying that they were hungry. That she told them that she had cooked maize and beans which was ready but the deceased said that he wanted Ugali not maize and beans. That all that time Emmanuel was quietly seated

on a chair and that the food remained on the table where she had also placed a glass lamp. Suddenly the lamp was hit and it went off. She remained in the darkness. She then ran out to her mother-in-law's house (the deceased's mother) and found her mother in law, Stephen and two of her co-wives and asked them to help her because she had left Emmanuel and Julius misbehaving in her house, damaging items. She stated that she did not get assistance from her mother inlaw and those she found there as they told her to go back and sort out the matter by herself so she returned to her house and found Emmanuel and Julius still fighting in darkness and household items were scattered all over the house.

10. She therefore ran away and stayed out for some time and only returned under the escort of a certain young man. She found when the two had left her house so she got into her bed and started praying.

11. She then closed her door and then she heard noises and voices of the deceased Julius who was her brother in-law saying he had a match box and that he would burn her house. On hearing this, she called her son Francis Omondi who was in Nairobi and informed him of what was happening and he advised her to stay calm in the house as he had called the police.

12. At around 11pm, while in her house, PW2 heard some sounds of hitting hard on the ground from outside and it all went quiet then she heard a neighbour, Achieng call Stephen on phone saying something bad had happened at Mama Mkamba's home but that she was scared of going there. That she said that someone had died. PW2 remained in her house until police officers from Sigomere Police Station arrived at midnight and that before that, Stephen went and told her through the window that his brother had died so PW2 should eat the corpse.

13. That when she got into her sitting room she found her household items not only scattered but that there was blood splashed all over. The following day which was a Monday she went to record a statement at Ugunja Police Station.

14. **PW3 Mary Atieno Ngesa** a resident of Muhuyu and staying in Busia testified that on 21/10/2017 at about 10.00 pm she was called by her mother PW2 Margaret Mutindi who told her that there was a problem (war) a home. She closed her work place and proceeded to her home on a motor cycle and on arrival at about midnight, she found a body lying near the door of her young brother Emmanuel Oluoch Ngesa. That the body was that of her Uncle 'Songa,' Julius Opiyo.

15. **PW4 No. 105984 PC Kelvin Mutiso** attached at DCI HQ, Forensic Department and formerly of Ugunja DCI Divisional HQ recalled that on 21<sup>st</sup> October, 2017 at around 11.40 pm, he was called by Mr. Tiampati then DCIO and informed of a murder scene at Ting'are, Muhuyu village. They proceeded to the scene and found Area Sub-chief and family members of the deceased. They secured the scene where they entered the home and found Julius Opiyo dead. They were informed by family members that the deceased died after a fight with his nephew Emmanuel Oluoch Ngesa the accused herein. They also found the deceased's mother and Emmanuel Ngesa who told them that the deceased and the accused had been drinking together and when they reached home, the mother gave them food - *githeri* - maize and beans but Emmanuel refused to eat and hit the mother with a club as she ran away and left the two in the house. The two later dispersed then the mother returned to her house and the deceased moved from his house to the accused's house to demand for his torch which he had given to the accused. That the accused person on realising that he was being followed, came from his house and saw the deceased armed with a jembe, threatening to beat the accused so they started a fight. That the accused went and picked a crowbar. Both of them were armed so they engaged in a very dangerous fight. The accused disarmed the deceased, took away the jembe which he used to hit the deceased on the head several times. The deceased had 7 deep cuts on the head. The scene was processed but we could not trace the accused. The body was removed to the mortuary. They recovered a crowbar which the accused used when he killed the deceased. The witness produced the crowbar as PEx1 and the jembe which they recovered the following day as PEx2.

16. **He stated that** both weapons had blood stains. The crowbar had blood stains at the sharp end while the jembe also had blood stains at the sharp end. The body was lying in a pool of blood. It was removed to Siaya Level 5 Mortuary for post-mortem. He then summoned several people who were at the scene and who recorded statements on 22/10/2017.

17. **Later he learnt that the** accused appeared at Butula Police Post and surrendered the jembe which had blood stains and that his forehead too had bloodstains and he was in the company of his sister. The police at Butula arrested him and recovered the jembe which the accused claimed the deceased attacked him with. The DCI was notified and the accused was handed over together with PEx 2 the jembe. He identified the accused in court. They then arranged for post mortem to be performed on the deceased's body and charged the accused person with Murder.

18. **He stated that the** Doctor performed an autopsy and found the cause of death to be severe head injury due to trauma to the head from a blunt object leading to subdural haematoma.

19. **On cross examination by Mr Oduor Advocate for the accused, the witness stated that he** found that the fight took place at night between the deceased and the accused. Further, that there were two fights and that in the first fight, the mother to the accused was hit and she ran away. She never witnessed the deceased and accused engage in the second fight.

20. **PW5 Dr. Gabriel Juma**, a Medical Officer at Siaya County Referral Hospital for 2 years and with qualifications of Bachelor of Medicine and Bachelor of Surgery, Moi University 2013 testified and produced a post mortem report done by Dr. Omondi his former colleague who was said to be out of the country undertaking studies. He stated that on 27/10/2017. Dr. Omondi carried out an autopsy on the body of the deceased identified by Beatrice Auma Opiyo and Stephen Oduor Odundo on 27/10/2017 at 10.45 pm. It was a body of a black African male, apparent age of 27 years, height of 5'8". Externally, there was a cut wound on the left side of the ear extending to the left region of the head. Internally, the head was opened and skull fracture on the left parietal region extending to the occipital – back side. There was subdural haematoma on the left side of the head. Other areas were normal. In conclusion, the doctor formed the opinion that the cause of death was severe head injury due to blunt trauma on the head leading to subdural haematoma (collection of blood in the brain). He issued a death certificate No. 0756489 and signed. Samples were collected. He produced the autopsy report as PEx 3.

21. In cross examination by Mr Oduor Counsel for the accused person, the witness stated that there was remark on page 1 that the deceased was intoxicated but the date of death was 21/10/2017 and post-mortem was done on 27/10/2017 so one could not tell if the deceased had

alcohol in his body due to preservatives. He stated that severe head trauma gave rise to fracture of the skull and bleeding in the brain.

22. Placed on his defence the accused opted to give sworn testimony and identified himself as Emmanuel Oluoch Ngesa from Muhuyu village. On being asked by his counsel whether he knew why he was in court, he answered in the affirmative and stated that he was charged with the murder of Julius Opiyo and added that he was angry and was defending himself when the incident took place.

23. The accused person recalled that on 21/10/2017 at 10pm, he was at a market place with Julius the deceased and that they went home together and the accused person found his mother and he asked her what she had cooked. His mother replied that she had cooked Githeri (maize and beans) and tea. That the deceased then told the accused not to accept tea and he slapped the accused person on the cheeks and took a lamp and hit the accused in the face until it broke. That the two started fighting. The accused person's mother then ran out and the accused also ran out of the house but the deceased followed him and they went up to the home of the deceased, with the accused asking the deceased to surrender the torch which belonged to the accused.

24. According to the accused, the deceased entered his house, picked a torch and hit the accused in the face. As they quarrelled, the deceased hit the torch on the ground, breaking the said torch. The accused stated that he then went to his house and slept. He added that suddenly, the deceased appeared again at the house of the accused, opened the door and he hit the accused person with a jembe on his left side of the head at the eye. The accused person retreated but the deceased followed him, wanting to hit him. And that the accused grabbed the said jembe and used it to hit the deceased and threw it inside the house. (This court observed that *Accused had a healed scar on the left side of the head above the eye*). That the deceased again wanted to use the jembe to hit the accused but the accused held the jembe and the deceased fell down then the accused heard the deceased's brother asking as to what was happening.

25. The accused person further stated that he hit the deceased in self-defence as his life was in danger. The accused then ran away and surrendered to the police and did not know what happened to the deceased after he fell.

26. In cross examination by Mr. Okachi, the accused stated that the deceased was his uncle, a younger brother to his father. He conceded that he fought with the deceased at his mother's house and that the deceased followed the accused to his house and that is where the fight continued but that he could not know if the deceased died at the scene. He also admitted hitting the deceased with a jembe.

27. Asked about the testimony by Beatrice Opiyo, the accused stated that he did not follow the deceased. He maintained that it was the deceased who was the aggressor by breaking the torch and hitting the accused with a jembe. He stated that the police never took him to hospital although he was injured.

## SUBMISSIONS

28. Counsel for the accused person filed written submissions on 20<sup>th</sup> January 2020. He reiterated the evidence adduced by the prosecution witnesses and on the defence, counsel submitted that ***“For the accused person, he gave sworn testimony and whilst he makes an admission to having killed the deceased raised the defense of provocation and self-defence. We need not reproduce the facts of the same.”***

29. Therefore, counsel's submissions were around the defence of self-defence, urging this court to find that the prosecution had not proved its case against the accused person beyond reasonable doubt that the accused had malice aforethought when he hit the deceased with a jembe in self-defence. Counsel urged the court to find that the accused acted in self-defence or provocation and acquit the accused person of the charge of murder.

## ANALYSIS AND DETERMINATION

30. I have considered the evidence adduced by the prosecution witnesses, the defence tendered by the accused person and submissions by his counsel supported by case law and statutory provisions. In my humble view, the main issue for determination is whether the prosecution has proved the charge of murder against the accused person beyond reasonable doubt. To answer this question, the elements of murder must be set out and explained.

31. The burden of proof always lie with the prosecution throughout the trial to prove the charge against the accused beyond reasonable doubt. To sustain a conviction for murder, the prosecution must prove the following elements **beyond** reasonable doubt. These elements 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 afterthought which constitutes the ‘mens rea’ of the offence, which is the proof that the accused intended to cause death or cause grievous bodily harm.***

32. ***On Proof of the fact and the cause of death of the deceased***, the prosecution adduced evidence through a post mortem report produced by Dr Opidi that the deceased died and that prior to the post mortem his family members identified the body to the doctor.

33. ***On Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused***, again the accused person readily admits in his defence and his counsel's submissions that the injury inflicted by the accused was the operating and substantial cause of death of the deceased. The only issue that the accused person raises is that such death cannot, however, be said to have been unlawfully caused.

34. There was direct evidence from the mother to the accused of the existence of a physical fight between the accused and the deceased in the house of PW2. However, there was no eye witness to the last fight which took place in the accused person's house, after both the accused and the deceased had left the house of PW2. PW2 only heard some noise which according to her, signalled some fighting/someone being beaten. PW4 indicated that he recorded the accused person's version of the events but did not indicate in his examination in chief what the account was. There is evidence led by both PW1 and PW4 that the deceased was armed when he followed the accused person to their homestead after breaking the accused's torch. Whilst PW1 mentioned that the accused person carried a crow bar to their homestead, she further stated that he took back the crowbar and came back bare handed and asked the deceased for his (accused's) torch.

35. PW4 (the Investigation officer) testified that the accused wrestled the jembe from the deceased and he also confirmed that the accused had an injury on the forehead at the time the accused surrendered himself to the police and he was taken into custody. He was carrying the jembe which he claimed the deceased had used to hit him on the head and which he in turn used to hit the deceased with.

36. As correctly submitted by counsel for the accused, this court can, in the foregoing, only go by the account given by the accused as to what transpired after the deceased and the accused left the house of PW2 and went to continue their fight from outside. This account is to be assessed in light of the evidence from PW2 indicating that the accused together with the deceased were unruly on the material night, that they were drunk and that despite PW2 going to her in-laws' homestead to seek for assistance to separate the accused and deceased who were fighting, she did not receive any help to stop the fight from escalating between two very close relatives, an uncle and a nephew, who were both intoxicated. According to the evidence of PW1 the wife to the deceased, the accused took material steps towards de-escalation of the feud he had with the deceased but that the deceased kept following the accused wherever he went.

37. The accused person pleaded self-defence. What therefore falls for determination is whether the circumstances of this case permits raising of the same. Section 17 of the Penal Code Cap 63 Laws of Kenya provides:

***‘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.’***

38. The Court of Appeal in **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** stated that the common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in **DPP v. MORGAN [1975] 2 ALL ER 347**, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or is in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in **DPP v MORGAN** (supra) it was held that:

***“If the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”***

39. The Court, referring to the English case of **R versus Beckford** further stated that where self-defence is raised by the defence, the prosecution was obliged to disprove the defence so raised. In **R versus Williams (1987) 3 ALL ER 411** also cited by the Court of Appeal in **Mohammed & 5 Others v R** (supra) it was held that:

***“In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”***

40. The Court of Appeal in **Mohammed and 5 others v R(Supra)** further stated:

***‘It is to be acknowledged that the case of DPP v MORGAN (supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one.’***

41. Drawing upon the above jurisprudence to the instant case, I am persuaded that the accused person in the circumstances of this case acted in self-defence, which defence was not negated by the prosecution. There is basis to conclude that the accused was attacked by the deceased and that the only means that the accused would have warded off an attack was to engage the deceased who was armed whilst the accused person was not, at that particular moment, armed with any lethal weapon. In my humble view, the threat to the accused's life was urgent and imminent, and the force applied by the accused in taking the jembe out of the deceased's hand when the deceased attacked the accused for the second time was reasonable and proportionate to the gravity of the threat he so faced on the occasion of the incident.

42. There is evidence that the accused was injured following an attack by the deceased as PW4 (Investigation officer) adduced evidence to the effect that the accused had injuries at the time he was booked in custody. The said injury was later confirmed by the accused in his defence and the court did make those observations during the hearing that the accused had scars on the head which scars were visible.

43. As stated in the authorities cited above, once the accused had laid evidential basis for the self-defence, the burden of refuting the same beyond reasonable doubt rested with the prosecution. This was the holding in **Palmer v. Regina (1971) All ER 1077** approved by the Court of Appeal in the **Mohammed and 5 others versus Republic** case. The English court opined that ***where the evidence is sufficient to raise the issue of self-defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of***

*self-defence.”*

44. The import of the above holding is that the self-defence so raised need only be plausible in the circumstances to oblige the prosecution to disprove the same beyond reasonable doubt.

45. In the instant case, the prosecution did not disprove the self-defence defence raised by the accused. This was so in spite of the fact that the state was well aware in advance that the defence could be raised as PW4 and PW1 had led evidence which at the very least had suggested that the deceased had confronted the accused after asking the deceased for his torch.

46. **Section 208(1) of the Penal Code** defines the term provocation as follows:

*“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.”*

47. The essence of the defence of provocation is that whilst the accused person can be said to be prima facie culpable of murder, the extenuating circumstances in which the offence was committed means that the charge ought to be reduced to that of voluntary manslaughter. Assuming without deciding that in the circumstances the accused person cannot avail himself of self-defence, there is ample evidence that he had lost his powers of self-control. We, for example, know of the deceased’s action of going off with the accused’s torch only for the accused to be challenged to a duel by the deceased who broke the torch on the accused coming back to ask for his torch for the second time. The deceased thereafter followed the accused with an offensive weapon and actually made his way to the accused person’s house, attacking the accused with the jembe even after the accused had dislodged the jembe from the deceased’s hands in the first instance. These actions could have made any reasonable person to lose his self-control and perform the acts so performed by the accused who was to say the least, intoxicated.

48. In **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed:

*“There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”*

49. Accordingly, I am persuaded that the prosecution has not disproved the self-defence defence tendered by the accused. In the end, I find and hold that the accused person herein **Emanuel Oluoch Ngesa** is **NOT GUILTY** of the offence of murder as charged and he is hereby discharged from the Information dated 2<sup>nd</sup> November, 2017.

50. However, as a life was lost, as a result of the actions of the accused person, but of course without any malice aforethought, in its place, I find and hold that the prosecution has proved beyond reasonable doubt that the accused unlawfully killed the deceased. I proceed and invoke section 179 of the Criminal Procedure Act and convict the accused person **Emanuel Oluoch Ngesa** with a lesser offence of **Manslaughter** contrary to section 202 of the Penal Code.

**Dated, Signed and Delivered at Siaya this 5th day of May 2020**

**R.E. ABURILI**

**JUDGE**