



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL CASE NO. 18 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

ANN KARIMI.....ACCUSED

J U D G M E N T

A. Introduction

1. The accused faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence was that on 4/09/2017 at Kangaru market within Embu County murdered James Muriithi Mugo. She pleaded not guilty to the charge necessitating the matter to proceed to full trial.

2. A total of seven (7) witnesses testified in support of the prosecution's case. PW 1 testified that on the material day at around 10.00pm he heard one Benard Kinyua call his mother and he went out only for the said Benard to tell him that his uncle the deceased herein had been seriously injured at Kangaru. The two men used a motor cycle which Benard had come with and went to the deceased' home near area the Chief's Office and found the deceased lying behind his house with injuries on the neck and that he could not talk. One of the police officers told him that the deceased was already dead and the police officers took the body to the mortuary after attending to the scene. PW 2 testified that on the material day at around 10.00pm, he was at his home and a boda boda rider came and told them that his brother the deceased had been stabbed with a knife and seemed like he had succumbed to the injuries. PW2 then sent his son PW1 to go to the scene and find out what had happened.

3. PW3 Dr. Moses Njue Gachoki testified that he carried out autopsy on the body of the deceased on 11/09/2017 and found he had injuries on the neck with a penetrating wound measuring two (2) centimeters long and internally a major blood vessel was cut through. That the left lung had collapsed but all the other systems were normal. That he formed an opinion that the cause of the death was the penetrating wound which severed major artery causing collapse of the left lung.

4. PW4 testified to the effect that on the material day at around 10.00pm he was informed by one Derrick that his father had been killed near his house. He went to the house of the deceased and confirmed what he had been told and saw the said body. The accused later came to the scene with the police officers from Kangaru Police Post. PW5 Cpl. Martin Kilimo testified that on the material day he was directed by the OCS Embu Police Station C.I. Ngotho to accompany the accused to Kangaru area where he found a body of a person and a crowd at the scene. The body of the deceased was lying facing upwards and had injury on the left of the back. There were blood stains both at the door and inside the house of the deceased who

lived with the accused as his wife. The households were scattered all over the room which led him to conclude there was struggle before the deceased died. Further that the accused had an injury on the left side of the head and the headscarf she wore was blood-stained.

5. PW6 Cpl. Stella Chepkoech the Investigating Officer testified that after being allocated the case to investigate she visited the scene together with PW5 and in the 2nd room of the house, there was blood on the wall of the house and at the doorstep. Further that outside the house, there was dry blood and she learnt that the deceased was found lying at that place the day before. She was informed by the neighbours that the accused had fought with the deceased the previous night and the fight resulted to the death of the deceased. PW6 further testified that she proceeded to interrogate the accused and also noticed that she had a wound on the left side of the head and on the upper lip.

6. PW6 produced the sketch plan of the scene of crime and a scarf which had been recovered from the scene by PW5. PW6 further stated that she did not recover the murder weapon at the scene. The accused informed PW6 that she had a quarrel with the deceased who was her husband and that they fought. In cross examination, she testified that the wound on the head was fresh and that the upper lip was bleeding a day after the incidence. Further that the household items and the clothes in the house of the accused were scattered. PW 7 Dr. Joseph Thuo a psychiatrist testified that on 21/11/2017 he examined the accused herein and found her mentally sound and fit to plead to criminal charges.

7. In her sworn defense, the accused DW1 told the court that on the material day, the deceased came home and started abusing her and later took a stick from outside and started beating her with it. He hit her on the left side of the head and on the hip. That he then picked a knife and threatened to kill her. That the accused got hold of the deceased in an attempt to protect herself and he two struggled together. That during the struggle inside the house, the accused held the knife the deceased had and she stabbed him on the neck. She added that she did not intend to stab the deceased but was in self-defense. The accused said that she then called the police who came and took the deceased and arrested her. That she was injured on the head and the lip and she was issued with a P3 form.

8. DW2 Dr. Phyllis Muhonja testified that she examined the accused and found that she had a laceration wound on the left side of the skull and the upper lip, an abrasion on the distal region of the left arm (the outer side), bleeding inside the skin on the outer side of the right humerus and swollen right ankle joint. She testified that the probable type of the weapon was due to blunt object on the skull and so was on the right ankle. That on the left hand, the injuries were due to defence to an attack.

9. The defence in its submissions reiterated on the fact that the death was not intended but occurred from a struggle or a fight and thus the stabbing of the deceased was not intentional.

B. Issues for determination

10. I have considered the evidence tendered before this court by both by the prosecution and the defense. The accused herein was charged with the offence of murder. It is trite law that the prosecution in any criminal case has the burden of proving every element of the offence an accused is charged with and in this case the offence of murder (see **Woolmington –Vs- DPP (1935) AC 462**) and further that the said elements must be proved beyond any reasonable doubt (See **Miller vs. Ministry of Pensions, [1947] 2All ER 372**). It is my opinion therefore that the main issue for determination is whether the prosecution proved the offence of murder to the standards required.

C. Analysis of the law and determination

11. **Section 203 of the Penal Code** defines murder in the following terms: -

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

For the prosecution to secure a conviction on the charge of murder, it has to prove the following key

ingredients which constitute the offence of murder. These ingredients were set out by the Court in Nyambura & Others vs. R [2001] KLR 355 as: -

a) the death of the deceased and the cause of that death

b) the accused committed the unlawful act which caused the death of the deceased; and

c) that the accused had harboured malice aforethought

(See Ali Salim Bahati & another v Republic [2019] eKLR).

The question therefore is whether the above ingredients were proved to the required standards?

12. PW1, PW2, PW4 and PW5 all testified that they saw the lifeless body of the deceased at the scene. The doctor PW3 testified that he conducted autopsy on the body of the deceased and established the cause of death. The death of the deceased is therefore not in question.

13. The prosecution's evidence was on the basis that there was no eye witness to the killing of the deceased. However, the accused in her defense testified that the deceased died as a result of having been stabbed on the neck as the couple were fighting in their house and that she did not intend to stab him but in defending herself the deceased was fatally injured. PW3 produced a Post Mortem Report which he prepared upon conducting the autopsy. The said report gave the cause of death as the penetrating wound to the neck followed by blood loss and lung collapse. It is my opinion therefore that the evidence by PW3 confirmed that the cause of the death was indeed as a result of blood loss and subsequent collapse of the lung was caused by the penetrating injury to the neck. This confirms the testimony by the accused that she had stabbed the deceased with a knife in self-defence.

14. As to whether the act or omission causing death was unlawful, the evidence by PW3 demonstrated that the deceased herein did not die as a result of natural causes. Article 26 of the Constitution of Kenya protects the right to life. Under this article, life can be taken away authorized by the same Constitution or any other written law. Therefore, every homicide is unlawful unless authorized by law or excusable under the law. In Guzambizi Wesonga v Republic [1948] 15 EACA 63 it was held that: -

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.” (See also Sharm Pal Singh [1962] EA 13).

The accused herein raised the defense of self-defense when put to her defense.

15. The account of what happened at the scene preceding the death of the deceased was from the accused herself. It was the accused' evidence that on the material day, the deceased came home and started abusing her and later took a stick from outside and started beating her with the same and in doing so hit her on the left side of the head and on the hip. That he then picked a knife and threatened to kill her with it. That the accused got hold of the deceased in an attempt to protect herself and they struggled together. During the struggle inside the house, the knife stabbed the deceased on the neck.

16. The accused further said that the deceased attacked her and that she defended herself was corroborated by the evidence of DW2 the doctor who examined the accused and found that she had a laceration wound on the left side of the skull and the upper lip, an abrasion on the distal region of the left arm, bleeding inside the skin on the outer side of the right humerus and swollen right ankle joint. DW2 testified that the probable type of the weapon was due to blunt object on the skull and so was on the right ankle. She further stated that the injuries on the left hand were due to defence to an attack.

17. The defense of self-defense when established and proved does not only have the effect of justifying an act causing death of a deceased person and which act is unlawful but it has the effect of disproving malice

aforethought. A finding that the accused herein acted in self-defense will not only disprove the issue as to the act causing death being unlawful but will also disprove the issue of the accused having acted with malice aforethought. As such, the question which needs to be answered is whether the contention that the accused acted in is self-defence plausible.

18. Section 17 of the Penal Code states that: -

“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.”

19. The Court of Appeal in Ahmed Mohammed Omar & 5 Others V. Republic [2014] eKLR in recognizing these principles (principles of English Common Law) held as thus: -

“What are the common law principles relating to self defence? The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in PALMER v R [1971] A.C. 814. The decision was approved and followed by the Court of Appeal in R v McINNES 55 Cr. App. R. 551. Lord Morris, delivering the judgment of the Board, said:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

According to ARCHBOLD – Criminal Pleading, Evidence and Practice 2002, paragraph 19-42, the test of whether force used in self defence was reasonable is not purely objective.

“There is no rule of law that a man must wait until he is struck before striking in self defence.” R v DEANA, 2 Cr. APP. R. 75, CCA.....

20. The Court, after discussing several cases among them Robert Kinuthia Mungai –vs- Republic (1982-88) 1 KAR 611, Beckford –vs- R [1987] 3 ALL ER 425, DPP –vs- Morgan [1975] 2 ALL ER 347, R –vs- Williams [1987] 3 ALL ER in regards to the came to the following conclusion in regard to the aforesaid principles: -

“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 in imminent danger of being attacked but also that such belief was based on reasonable grounds.....

.....It is 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. See also SMITH AND HOGAN'S CRIMINAL LAW, 13th Edition, Page 331.....

*.....Just as the Privy Council did in **BECKFORD v R (Supra)**, we must also dispel the fear that “the abandonment of the objective standard demanded by the existence of reasonable grounds for belief will result in the success of too many spurious claims of self-defence.” Each case will have to be determined on its own merit and peculiar circumstances.....”*

21. In the instant case, the accused raised defense to the effect that she was defending herself against an attack by the deceased using a stick and was hit on the left side of the head and on the lip before he picked a knife and threatened to kill her with it. The accused said that in the course of defending herself she stabbed the deceased with the knife he was armed with. DW2 confirmed these injuries on the accused some of whose nature was a defence to an attack.

22. It is my considered opinion that the accused has established that she held a reasonable belief that her life was in danger. The nature of the injuries she sustained indicates that the deceased intended to harm her or even to kill her. It is my view that had the deceased gotten the opportunity he needed, he would definitely have harmed the accused during the struggle. In **Ahmed Mohammed Omar & 5 Others –vs- Republic (Supra)** the Court of Appeal placing reliance on **Beckford V. R (Supra)** 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 the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.”

23. The burden in a case where the defense is raising self-defense, the burden of proof does not shift from the prosecution. The duty of the accused is to lay before the court facts upon which the defense of self-defense is based in order to enable the court and the prosecution to rebut the self-defence with other evidence as was held in the case of **Chan Kau v R (2) (1955) W.L.R. 192** that was cited with approval in **Morris Mungathia Vs Republic Criminal Appeal No. 212 Of 2006 Court Of Appeal at Nyeri.**

24. From the evidence on record, the prosecution has not adduced evidence to establish that the accused, in stabbing the deceased, was not acting in self-defense. No such rebuttal evidence has been adduced. For those reasons, I am led to the conclusion that the act by the accused was excusable and justifiable and thus not unlawful. The defence therefore comes to the aid of the accused person since the prosecution has failed to show that the accused person acted beyond the parameters of self-defense.

25. Once the defence of self-defense is established by the accused, it does not only have the effect of justifying an act causing death of a deceased person and which act would be otherwise be unlawful but also has the effect of disproving malice aforethought. Upon considering the issue of malice aforethought, it is my finding that the accused had no malice aforethought as defined under section 206 of the Penal Code.

26. Section 179 of the Criminal Procedure Code provides that a court may convict of a lesser offence. It provides: -

1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but he remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

27. This section was applied by the Court of Appeal in the case of **Rashid Mwinyi Nguisya and**

Another –vs- Republic [1997] eKLR where it was held that: -

“In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial.....Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code.”

28. In **Kalu –vs- Republic (2010) 1 KLR** the Court of Appeal in discussing situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence observed that as thus: -

“..... Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder...”

29. In **Robert Mutungi Muumbi v Republic [2015] eKLR** the Court of Appeal stated: -

“.....An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171 and WACHIRA S/O NJENGA V. REGINA (1954) EA 398).

Spry, J. explained the essence of the first consideration as follows in **ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294**, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

“Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.....(emphasis mine)”

30. Section 202(1) of the Penal Code defines manslaughter in the following terms: -

“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.”

31. I have considered all the evidence on record and I find that the prosecution have proved the lesser offence of manslaughter contrary to Section 202 of the Penal Code against the accused person.

32. I find the accused guilty of the offence and convict her accordingly.

33. It is hereby so ordered.

DELIVERED, DATED and SIGNED at EMBU this 15th day of October, 2020.

F. MUCHEMI

JUDGE

Judgment delivered through video link in the presence of

Ms. Mati for State,

Mr. Okwaro for Accused and the Accused