



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 16 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

STEPHEN MAROA MBATE.....ACCUSED

JUDGMENT

- 1. Stephen Maroa Mbate**, a minor and the accused herein, was charged with the murder of his elder brother one **Paul Chacha Maroa** (hereinafter referred to as '**the deceased**') on 26/06/2018 at Nyakehomo village in Kuria East Sub-County of Migori County.
- The accused denied committing the offence and the case was set for hearing. The hearing took place at Kehancha Law Courts with a view of expediting the trial and also to reduce the distance the witnesses had to cover to attend Court at Migori Law Courts. I am indeed grateful to the support accorded by the prosecution, the police and the Defense Counsel **Mr. Muniko** which enabled the trial to be completed in a record time.
- Seven witnesses testified in a bid to prove the prosecution's case. **PW1** was the wife of the deceased. She was one **Evelyn Kayasi Maroa**. A neighbour to **PW1** one **Christina Boke Maroa** testified as **PW2**. The father to the deceased one **Maroa Nyambogai Ngiti** testified as **PW4** whereas a brother to **PW4** one **Mwita Busunkwi Ngiti** testified as **PW3**. **Michael Maroa Gikaro** testified as **PW5** and he was a cousin to the deceased. **Dr. Awinda Victor Omollo** who conducted a post mortem examination on the body of the deceased testified as **PW6** and **No. 76880 Corp. Weldon Kiplangat Byegon** attached at DCI Kuria East and who was the investigating officer testified as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.
- In his defense the accused stated that he engaged into a disagreement with the deceased after the deceased had taken his Kshs. 2,000/= in the morning of the fateful day and promised to refund in the evening but instead kept on claiming that he did not have any money. That at one point the deceased chased the accused with an iron rod when he persistently demanded for the refund and the accused had to be rescued by his elderly grandmother. On another encounter and in self-defense the accused then cut the deceased on the head with a panga and he died. The accused stated that he never intended to kill the deceased.
- PW1** witnessed the incident. She narrated that as she lay outside her house she saw the accused (armed with a panga) walking into her compound with her husband (the deceased) as the accused demanded money from the deceased. That, the deceased told the accused that he did not have any money at that time. That, in a flash of a second **PW1** heard a loud bang of a panga cut and on looking at the direction the sound came from she saw the accused cutting the deceased on the head with the panga twice. She raised alarm as the deceased fell. **PW2** responded to the distress call and she was the first one to arrive at the scene only to find the deceased already dead. The deceased had three deep cut wounds on the head and the accused had by then disappeared. The body was later collected by the police.
- According to **PW1** the deceased was not armed but the accused. There was also no evidence at all that the deceased was armed. This Court therefore finds that the deceased was not armed but it was the accused who was armed with a panga. There is as well no evidence of confrontation at all between the deceased and the accused. According to **PW1** the two engaged in a conversation. Weighing the foregone evidence against the provisions of **Section 17** of the **Penal Code** Chapter 63 of the Laws of Kenya and the subjective approach in instances of self-defense as discussed by the Court of Appeal in **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** I am not convinced that the accused acted in self defense. There was no threat at all to the life or person of the accused to warrant such a reaction. The defense of self-defense therefore fails. I therefore find that it was the accused who unlawfully killed the deceased.
- As to whether the accused acted with malice aforethought I as well do not find any evidence in such support. The incident was an isolated one. There was no evidence of running bad blood between the deceased and accused who were blood brothers. Infact there is evidence that the deceased lived with and took care of the accused since the demise of their mother. Whereas the accused may have acted with anger but that alone is inadequate to infer the intention and preparedness to commit such heinous crime. In reaching the foregone finding I am guided by **Section 206** of the **Penal Code** which defines '**malice aforethought**' and *inter alia* the following decisions of the Court of Appeal. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently

constituted) in the case of Nzuki vs R (1993) KLR 171, held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

i. The intention to cause death;

ii. The intention to cause grievous bodily harm;

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975)AC 55”. (emphasis added).

8. In the case of 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.”

9. As the foregoing evidential analysis does not therefore support a conviction in respect of the information of murder, the accused is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, it is clear that the deceased lost his life as a result of the actions of the accused, but of course without any malice aforethought.

10. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is accordingly convicted accordingly.

11. As I come to the end of this judgment I must apologize to the parties for the late delivery of this judgment which was caused by several challenges beyond my control and my involvement in a Multi-Judge Bench matter at the High Court in Mombasa.

12. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Muniko Counsel instructed by the firm of Messrs. Muniko & Company Advocates for Accused.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyn Nyauke – Court Assistant