



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 38 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**KOIN OLE KINKUTIA.....ACCUSED**

**JUDGEMENT**

**INTRODUCTION**

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased, Maxwell Musyoka Kimuli.
2. The accused pleaded not guilty to the charge.
3. The prosecution called six witnesses in support of the charge.
4. The accused in his defence made an unsworn statement and called two witnesses in his defence.

**The case for the prosecution**

5. The prosecution called Paul Njoroge Waratho (PW 3), who is the only eye witness. PW 3 is a boda boda rider. He testified that on 19/8/2017 he was at the boda boda stage at the mosque at 8.30 p.m. He then descended towards the bridge. Ahead of him twenty-two paces away, he saw two people at the bridge next to the road. At that place, there was security light and light from the head lamps of his boda boda. He saw a slightly taller man remove a rungu from his loins and struck the short plumb man on the head. The short and plumb man fell down.
6. Furthermore, the taller man then took a ten-inch-long stone and hit the short plumb man three times on the head as he lay down. The taller man who is now the accused escaped carrying that stone. PW 3 chased him on foot from Maendeleo house to textile building. He raised an alarm and as a result, other boda boda riders joined him in arresting the accused.
7. PW 3 explained to the boda boda riders on what had happened. He persuaded the boda boda riders not to assault the accused and instead to take him to the police station.
8. In the meantime, a brother of the deceased namely Sammy Kimuli Kasyoki (PW 1), arrived at the scene, following information received from another boda boda rider. PW 1 upon arrival at the scene saw the accused surrounded by people. Thereafter he proceeded to Narok Referral Hospital, where his deceased brother had been admitted in the casualty section for treatment.
9. PW 1 found his deceased brother bleeding from the head and was unconscious. The condition of his brother worsened. As a result, the clinical officer, namely Jesse Leteipa Kimojinu (PW 4) referred the deceased to be treated at Tenwek hospital.
10. PW 1 with the assistance of his father namely Jonathan Kimuli Ndamange (PW 2) took the deceased to Tenwek hospital, where he died on 25/8/2017, while undergoing treatment. PW 2 was informed of his injured son by Samwalla Albert (PW 4) who led him to the scene of the attack, but they found he had been taken to Narok referral hospital.
11. Following the death of the deceased, both PW 1 and PW 2 identified the body of the deceased to doctor Langat Robert, who performed a postmortem examination on that body.
12. According to the postmortem report, which was produced as prosecution exhibit 2 by consent, the body had the following injuries. Bleeding from the right ear. A surgical incision noted on the left temporal region of the head. In respect of the head, there was a left sided subdural haematoma with severe base of skull fractures. According to doctor Langat Robert, the cause of death was due to severe head

injury with left sided epidural haematoma.

13. Finally, the prosecution called No. 88380 PC Daniel Owuor (PW 6), who took over the investigations from PC Jepha. It was his evidence that P.C. Jepha had charged the accused with the assault as a holding charge in the Chief Magistrate's court in criminal case No.1001 of 2017, Republic versus Koin Ole Kikuntia. He found that the deceased had been admitted to the intensive care unit (ICU) at Tenwek hospital, where he died on 25/8/2017. He also found that only one witness (PW 3) saw an on-going fight between the accused and the deceased. He also took the accused for treatment at Narok referral hospital.

### **The case for the Defence**

14. In his unsworn statement, the accused testified that he was attacked by seven robbers including the deceased. The robbers took from him a lot of money from his lottery machine. After taking the money, the robbers left leaving behind two of their accomplices.

15. It was his evidence that the robbers were armed with Maasai rungu and maasai swords. In the course of the attack, the accused was injured above the right ear. It is his further evidence that those two robbers, who remained behind continued to assault him. He struggled fighting with the two robbers. In the course of the struggle, the accused got an opportunity and hit one of them.

16. Finally, it was his evidence that the same robbers had threatened him during the 8/8/2017 general elections between 10<sup>th</sup> and 13<sup>th</sup> August, 2017, which he reported to Narok police station. He testified that one of those robbers was Paul Njoroge (PW 3). He was unable to identify the other robbers since all of them wore face masks.

17. In addition to his evidence, the accused called two witnesses namely Naponu Kurrumwa (DW 1) and Mithika Baingoni (DW3). The evidence of DW 1 was that she heard screams. She then saw five people fighting. She also testified that it was a campaign period. Furthermore, when she went near to the scene, she saw two people, one of whom was sitting down and was covered with blood. The one who was lying down appeared dead. She also saw three persons escape from the scene of fighting.

18. Finally, she testified that she was the first to arrive at the scene, where people were screaming that they had been attacked by robbers. In addition to DW 1, the accused called Mithika Baingoni (DW 2), who was a prisoner warder. He had sold miraa worth shs.2,000/= to the accused. He testified that he was told of fighting that took place on 19/8/2017.

19. DW 2 continued to testify that he saw the accused at Narok police station, whose neck was swollen. He also testified that the accused in addition to his miraa business, also operated Mpesa business. While under cross examination, DW 2 testified that the goods of the accused had been removed from his shop, by people whom he did not know.

### **Issues for determination**

20. I have considered the prosecution and defence evidence. I have also considered the submissions of Mr. Masikonde for the accused. His submission is that the accused acted in defence of both his property and his person. He cited the authority of *Republic v. Ismael Hussen Ibrahim (2018) eKLR*, in which Mr. Justice Nyakundi cited several authorities in respect of defence of person and his property. As a result, I find the following to be the issues for determination.

1. Whether or not it is the accused who caused the death of the deceased.
2. Whether or not the evidence discloses murder or manslaughter.
3. What are the appropriate orders to be made?

### **Issue 1**

21. I believe the direct evidence of Paul Njoroge Waratho (PW 3) that he saw the accused striking the deceased with a rungu and hitting him with a stone. I also believe his evidence that he chased the accused on foot and with the assistance of other boda boda riders, he arrested the accused.

22. Furthermore, I find from the totality of the evidence that the person the accused fought with, was the deceased. The cause of death was due to severe head injury with left sided epidural haematoma, which I find is consistent with the weapons the accused used in inflicting the fatal head injuries. I therefore find that it is the accused who caused the death of the deceased.

### **Issue 2**

23. The next issue for consideration is whether the evidence discloses murder or manslaughter. This raises the issue as to whether the accused was entitled to defend his person and property. The law in section 17 of the Penal code recognizes the defence of person and property. It 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.*"

24. In this regard, under common law, a distinction is drawn between a felonious attack and a non-felonious attack. In a felonious attack, the attacker intends to kill or cause grievous harm or to commit robbery. In such an attack, the person attacked according to *Selemani son of Ussi v. Republic (1963) EA 442* is entitled to use force to repel the force and if he kills the attacker, the killing is justified, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or

reasonably apprehended from the attacker is really serious. That court pointed out that in such a case there is no duty to retreat, although questions of opportunity of avoidance or disengagement would be relevant to the question of reasonable necessity for the killing.

25. In the light of the above pronouncement of the common law position, it is clear that the accused was entitled to use force to repel the felonious attack by the deceased and his accomplices.

26. The only question to be determined is whether the force used by the accused to repel the deceased and his accomplices was reasonable. In this regard the evidence of the prosecution through PW 3 is that the accused first struck the deceased on the head as a result of which he fell down. The accused then proceeded to get a ten-inch-long stone with which he hit the deceased three times as he lay down. It is important to point out that the prosecution did not lead evidence in respect of how the fight started and what caused it. The resulting gap has been filled by the defence. I find the defence evidence to be plausible. It is equally important to point out that the burden of proving self defence or defence of property lies upon the prosecution. It does not shift to the accused.

27. It is clear from the foregoing that the accused had the opportunity to disengage after he struck the deceased with a rungu, as a result of which the deceased fell down. I therefore find that it was not necessary for the accused to go and get a ten-inch-long stone, with which he hit the deceased three times on the head as he lay down.

28. It therefore follows that the accused used excessive force in the circumstances of this case. The accused is therefore responsible for using excessive force in terms of section 241 of the Penal Code. I therefore find that he is guilty of manslaughter contrary to section 202 of the Penal Code.

### **Issue 3**

29. In the light of the foregoing finding of guilty, I hereby convict the accused of manslaughter pursuant to the provisions of section 322 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

30. The issue of sentence is hereby deferred subject to a pre-sentence hearing.

**Judgement dated, signed and delivered in open court at Narok this 2<sup>nd</sup> day of April, 2019** in the presence of Mr. Omwega for the state and Mr. Masikonde for the accused.

**J. M. Bwonwonga**

**Judge**

**2/4/2019**