



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 56 OF 2015**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**BENARD NTHIWA MAKAU ..... ACCUSED**

**JUDGEMENT**

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 10<sup>th</sup> day of May 2015 at Kibagare slums within Kangemi, Nairobi County murdered **JOSEPH KARANGA alias BABU**.

2. He pleaded not guilty to the said charges and to prove its case the prosecution called and examined a total of six (6) witnesses, whose evidence was that the accused was a carpenter within the area where the deceased was also staying with his mother and sister. According to **PW1 TERESIO MURITHI NJERU** a village elder and a member of 'Nyumba Kumi', the accused on 10/05/2015 at 2.00 p.m. went to his house and reported that a group of youths had broken one of the chairs he was making for a customer. He went to the road side where they were and found three (3) youths sitting on the said seat. Two of the youths stood up and said they had committed the offence and asked for forgiveness and offered to repair the chair.

3. It was his evidence that the deceased started to beat up the accused in his presence and he mediated the said fight and advised the accused to take up his tools of trade and repair the said seat. The accused then went to his house to get his tools and the deceased also left the scene. Shortly thereafter, he saw the deceased running after the accused while bleeding from his face. The accused then left the scene and hid at a place where the deceased could not see him. He advised the accused to report to the police. In cross-examination he stated that he had known the deceased since childhood and that he was not of good character.

4. **PW2 SAMUEL GITHINJI MUTHEMBA** stated that he found five (5) youths at the accused workshop whom he apprehended. The accused was inside his workshop while the youths were stepping on the chair outside. The rest of the youths left leaving the deceased who was armed with a kitchen knife in his hand, who started to fight the accused who was holding a hammer in his hand. It was his evidence that there was electric light which enabled him to see very well and that he saw the accused hit the deceased on his head with the hammer before reporting to the village elder's place. After two weeks he heard people saying that the deceased had died and they attacked the accused. He called a police officer known as Momanyi who came and rescued the accused. He confirmed in cross-examination that the accused and the deceased had fought after the deceased and his group had broken his chairs and that it is the deceased who went to the house of the accused.

5. **PW3 MARY WANJIRU NGORONGO** the mother of the deceased testified that on 10/05/2015 she was in her house when the accused reported that the deceased had broken his chair. She stated that the accused and the deceased had fought and she took the deceased who had beaten the accused to her house and urged them not to fight. She shortly thereafter saw the deceased running after the accused and he later fell down. She did not know how he had left the house and he later told her that the accused had hit him with the hammer. It was her evidence that the deceased did not follow the gate but went through their *mabati* wall into the accused's house. They took him to the clinic where he was treated and discharged until 12<sup>th</sup> May 2015 when he was taken to Kenyatta National Hospital where he was admitted for two weeks before he died on 22/05/2015.

6. In cross-examination she confirmed that she had seen the accused and the deceased fight earlier and saw the village elder **PW1** with them and that it is the deceased who went to the accused's workshop. She confirmed that she saw the deceased running after somebody and she later on saw him coming from the accused's house with blood all over his body saying that the accused had hit him with a hammer and that in the first fight, it is the deceased who had first hit the accused.

7. **PW5 CATHERINE WAMBUI** a sister of the deceased testified that on 10/05/2015 she found the accused and the deceased arguing, with the accused telling the deceased that he had broken his chair and left them at the scene. Later on the deceased was brought into their house by their mother and a friend and locked in. She then went out and sat at the gate. Shortly thereafter she saw the deceased chasing the

accused and when he was unable to get the accused sat down crying that he had been hit with a hammer by the accused. The deceased was then taken to Upendo Clinic where the wound was stitched and went back home. On 12<sup>th</sup> his condition became worse and was referred to Kenyatta National Hospital where he was treated and admitted on 13<sup>th</sup> and died on 24<sup>th</sup>. In cross-examination she confirmed having seen her brother, the deceased, chasing the accused with a wooden rod.

**8. PW4 PETER SHIVACHI SHIVAIRO** the chairman of the Area 'Nyumba Kumi" stated that he had been called by one Inspector Nicholas Memusi from Loresho Police Post at 10.00 p.m. with information that there was a problem in the area. When he went to the scene he found a mob assaulting the accused whom they rescued together with a police officer called Momanyi from Loresho. **PW6 INSP. NICHOLAS MEMUSI** stated that on 22/05/2015 he received a call from **PC Momanyi** with information that the accused was being subjected to mob injustice having been accused of murder. He called the Chairman of *Nyumba Kumi* and village elder and passed to them the said information. The accused was rescued and locked up at the police post. On 23<sup>rd</sup> he met the accused at the post with bruises on his face and was referred for medical attention. It was his further evidence that that at 08.10 a report was made by the mother of the deceased in which she confirmed an earlier fight between the accused and the deceased.

**9.** It was his further evidence that from his investigations he confirmed that after settlement of the fight, the deceased went back to the workshop of the accused and started hitting him with a wood only for him to come out crying that he had been hit with a hammer. He produced a post-mortem report confirming that the deceased had injury on the head caused by a blunt object. In cross-examination he confirmed that it is the deceased who began the fight and was unremorseful. He stated that even when the accused had left the scene, the deceased followed him into his house and was therefore the aggressor.

#### **DEFENCE CASE**

**10.** When put on his defence the accused stated that he had on 10/05/2015 made a chair for a customer which he had put outside his workshop and when he came back from Kangemi found it was broken by the deceased and his group. He reported to the village elder **PW1** who called the boys who admitted that they had broken the chair but the accused declined to make any admission. He then came and hit him on the cheek causing him to fall down before being taken away by his mother **PW3**. When the accused went to his house to change clothes, the deceased waited for him at the door and hit him again. In the process to gain exit out of his house he threw a hammer at the deceased. He then went to report to the police station but was advised to get the deceased.

**11.** It was his further evidence that on 22/05/2015 while coming from Kikuyu where he had gone for work at 10.00 p.m. a group of youths came from nowhere and attacked him on account that the deceased had died. He was subsequently rescued by the police and later on charged with the offence before the court.

#### **SUBMISSIONS**

**12.** At the close of the defence case, it was submitted by Mr. Uvyu for the accused that the State did not prove its case against him beyond reasonable doubt. It was contended that it is the deceased who first attacked the accused and thereafter followed him into his house and started to assault him. It was his submission that he only threw the hammer at him to get an avenue of escape and therefore malice aforethought was not proved. The accused only threw the hammer with a force which was reasonable in the prevailing circumstances as the event took place on the 10<sup>th</sup> and the deceased died on the 22<sup>nd</sup> of May. The case of **REPUBLIC v HENRY OBISA AUKO [2017] eKLR** was submitted in support.

**13.** It was further submitted that the accused was provoked by the deceased and therefore his action was justifiable for which the cases of **ANTONY NJUE NJERU v REPUBLIC [2016] eKLR** and **JKM v REPUBLIC [2006] eKLR** were submitted in support. It was therefore submitted that the offence of murder was not proved and the accused should therefore be acquitted.

**14.** On behalf of the State Mr. Naulikha submitted that the accused had already interacted with the deceased and was therefore a bitter man and in view of the provisions of **Section 206** of the **Penal Code** malice aforethought was developed along the way. It was submitted that there was an alternative way to settle the existing dispute and that the force used was excessive.

#### **ANALYSIS AND DETERMINATION**

**15.** To sustain a conviction on a charge of murder it is now well settled that the prosecution is under both legal and evidential obligation to prove the following elements of the offence:-

*a) The fact and cause of death.*

*b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.*

*c) That the accused had malice aforethought – the mental element to cause death.*

**16.** The fact and cause of death of the deceased were not disputed. All the prosecution witnesses confirmed that the deceased died at Kenyatta National Hospital some days after he had fought with the accused who was later on assaulted by members of the public when the news of the death of the deceased was received. The cause of death was confirmed as head injury due to blunt force trauma through the post-mortem report produced by **PW6 NSP. NICHOLAS MEMUSI** the Investigating Officer. It therefore follows that the fact and cause of death was proved by the prosecution beyond any reasonable doubt.

**17.** The fact that the said death was caused by an act of commission on the part of the accused is also not in dispute. There is evidence on record which was not disputed by the accused in his defence to the effect that there was a fight between the deceased and the accused which

was mediated upon by **PW1** the village elder and that thereafter the deceased followed the accused into his house from where he threw an hammer at him hitting him in the head. The deceased was later on attended to at a local clinic before being taken to Kenyatta National Hospital some days later and on 22/05/2015 died out of the injuries inflicted upon him by the accused. I therefore find and hold that the death of the deceased was caused by the accused who was positively put at the scene.

18. The only issue in dispute in this cause is whether the said death was caused with malice aforethought, put differently whether the accused had the intention to cause death of the deceased and whether the twain defence of self defence and provocation is available to him. It is not in dispute that the deceased and his group of boys went to the workshop of the accused and destroyed or broke one of the sofa sets he was making for a customer. This was confirmed by **PW1 TERESIO MURITHI NJERU** the Chairman of local 'Nyumba Kumi'. As a result of the incidence a fight broke out between the accused and the deceased who was the author of the said fight. There is uncontroverted evidence that when the said elder mediated over the fight and advised the accused to go to his house and get his tools so as to repair the said chair after the deceased had been taken by his mother and sister **PW3** and **PW5** and locked into their house, the same broke through the *mabati* wall of their house and went to attack the accused who was in his house.

19. It is clear from the evidence tendered before the court that the deceased was the aggressor. There is evidence that the accused tried through all possible means to avoid the fight but the deceased kept on pursuing him and having been attacked in his house the accused was reasonably expected to defend himself and it was not unreasonable on his part to use the only weapon which was available to defend himself. As stated in the case of **JKM v REPUBLIC [2006] (supra)** it was for the prosecution to establish that the accused was not provoked. Unfortunately for the prosecution all their witnesses confirmed that the deceased had provoked the accused first by breaking his customer's chair and in refusing to offer an apology when asked by **PW1**. The deceased further pursued the accused into his house and thereby continuing his act of provocation. I am therefore satisfied that the accused proved to the required degree that the defence of provocation was available to him.

20. The final issue for determination is whether the defence of self defence was available to the accused:- Justice T.W. Cherere discussed the defence of self defence in the case of **REPUBLIC v HENRY OBISA AUKO [2018] eKLR** as submitted by the accused to which I have nothing useful to add as follows:-

*“19. The issue of self defence was discussed in the case of AHMED MOHAMMED OMAR & 5 OTHERS v REPUBLIC [2014] eKLR where the court held as follows;*

*“What are the common law principles relating to self defence” The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in PALMER VS R [1971] AC 818. The decision was approved and followed by the Court of Appeal in R VS McINNES, 55 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.”*

20. The Court of Appeal further held 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 in imminent danger of being attacked but also that such belief was based on reasonable grounds.”*

*The accused said he took the panga from the deceased, slapped her with it causing her the fatal injury. The question is whether the accused faced imminent danger to justify using the force that he applied in hitting back.*

21. In assessing “reasonableness” of the act of the accused, it is important to consider the circumstances of the case. In the Court of Appeal case of **NJERU v REPUBLIC [2006] 2 KLR 46**, the court in dealing with self defence held:-

1. Killing of a person can only be justified and excusable where the action of the accused which caused the death was in the course of averting a felonious attack and no greater force than was necessary was applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.

2. In this case, it was the duty of accused to show that at the time of the cutting deceased's neck, he was in the course of averting a felonious attack and that no greater force than necessary was applied. Accused was bound to show that he was in immediate danger or peril arising from a sudden and serious attack by the deceased.

**3. By virtue of Section 17 of the Penal Code, the principles of the English common law were applicable in determining criminal responsibility for the use of force in defence of the person or property. Under those principles, a person who attacked may defend himself but he may only do what was reasonably necessary. Everything would depend on the particular facts and circumstances.”**

21. From the material placed before me I would agree with the accused that he acted in self defence. The deceased attacked him in his one roomed house and as per his evidence in defence, to gain exit out of the situation created by the deceased, he had to use the weapon which he had in his hand. I am further persuaded that the force used by the accused was not unreasonable as the deceased was still able to run out of the accused house still in pursuit of the accused who was running away from him. The deceased did not die instantly from the attack but died some days later.

22. Having found that the force used by the accused was not reasonable, it logically follows that the prosecution has failed to prove beyond reasonable doubt all the elements of the offence of murder and consequently find the accused not guilty as charged and is therefore acquitted and discharged. The accused shall be set free forthwith unless otherwise unlawfully held.

23. The State has right of appeal and it is so ordered.

**Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of October, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Ms. Gikonyo for the State*

*Mr. Mutinda for Uvyu for the Accused*

*Accused present*

*Court assistant- Karwitha*