



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 89 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DANIEL NJUGUNA MWICIGI.....ACCUSED**

**JUDGMENT**

Daniel Njuguna Mwicigi, the accused, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code in that on the 21<sup>st</sup> day of September 2014 at Matimbei Area in Lari District (*sic*) within Kiambu County he murdered J N K. The accused, represented by Mr. Omari, advocate, has denied committing this offence.

Twelve (12) witnesses have testified for the prosecution and two for the defense. In summary the deceased J N K, described by his relatives as a person with mental problems, went to the home of Stephen Gathuru Wathika (PW5) on the night of 21<sup>st</sup> September 2014 and lit a fire. The deceased had met Stephen on 20<sup>th</sup> September 2014 and had told him that he would go to his (Stephen's) farm to harvest some potatoes. Stephen had told him to go ahead. It seems the deceased did so and perhaps lit the fire to warm himself and to roast some potatoes. Evidence shows that at the scene where the deceased lit the fire there was evidence of roasted potatoes.

In the same compound of Stephen's homestead lived Samuel Wathika (PW4) and Anne Muthoni Wathika (PW2). At around 10.00pm, Anne heard someone calling her name. She started screaming fearing that the person had bad intentions. Anne told the court that she had been a victim of robbery earlier and that this made her apprehensive when she heard someone calling her name. The person identified himself as Kamaru. Anne identified the accused in court as the person whom she referred to as Kamaru and told the court that the accused was also called Njuguna. She further testified that she recognized accused's voice and asked him what he wanted. She told the court that the accused told her that he had seen a fire lit in the compound near a house and feared it might ignite the house. Anne told the accused to put out the fire and tell N to leave. Shortly thereafter, Anne heard the accused shouting "*Njoroge umeniuma kidole*" (Njoroge you have bitten my finger"). Anne was at the time dressing up so that she could go outside. Immediately she heard the shouting from the accused, she heard a commotion and also the voice of Samuel Wathika her nephew. She said that she was not able to get the words spoken by Samuel. Anne put on security lights and went outside. She saw that the accused had been injured on his finger and it was bleeding. She told the court that both Samuel and the accused left the compound. At the time Anne did not see the deceased.

Samuel testified that he was asleep in his house at about 11.00pm on 20<sup>th</sup> September 2014 when he heard noise of two people arguing about 40 metres from his house. He said he went out and found out that it was the accused and the deceased fighting. The accused told Samuel that he had been bitten on the finger by the deceased and he showed him the injured finger. Samuel told the court that he noted that the accused person's the finger had been cut. He said that the accused was pushing the door to open while the deceased was resisting. According to Samuel the two fought furiously and this scared him because the accused had been injured on the finger and the deceased was not mentally well. He said he tried to separate the two and escorted the accused to hospital for treatment in company of brother to the accused known as Njoroge. Samuel testified further that after treatment, the accused escorted him home and that they went to check on the deceased whom they found alive. He said that the accused told the deceased that he had bitten his finger and showed him the injured finger. He said that the accused kicked the deceased on the ribs and left. On cross examination Samuel said that he did not know how serious the deceased was at the time until the following morning when he found the deceased dead.

The death of the deceased was reported to his relatives including deceased's sister M N K (PW1), his brother E M K (PW10) and the area Assistant Chief Robert Kago Mburu (PW6). It was also reported at Lari Police Station. Police visited the scene and conducted investigations. CPL Hudson Tapukai (PW7) photographed the scene. He produced the 32 photographs showing different views of the body and the scene. The photographs were produced in evidence as exhibits 2 to 32. The body of the deceased was removed from the scene and taken to the City Mortuary. On the same morning, the accused went to report about the incident of his injured finger at the Lari Police Station on 21<sup>st</sup> September 2014. He was detained by the police. After the matter was investigated by CPL Leonard Busuru (PW12) the accused was charged with this offence.

The accused was placed on his defense. He testified under oath as DW1. He told the court that on 20<sup>th</sup> September 2014 he closed his bar business at 11.00pm and went home; that before reaching home at about 200 metres from his home he saw a fire lit at his neighbour's homestead; that he went to the homestead and saw that the fire was near a door; that he called Anne who did not answer but started

screaming when the accused knocked at the door; that the accused introduced himself to Anne and she stopped screaming; that he told Anne about the fire and Anne told him to put out the fire. He testified that by this time he had not seen the deceased; that he went near the fire and saw the deceased collecting rubbish and putting it in the fire to keep it burning; that he told him to stop and held him; that the deceased held accused's hand and placed his index finger of the right hand in the mouth and bit it cutting it off; that the accused started screaming in pain; that Samuel Wathika joined them and both Samuel and the accused put out the fire; that the deceased entered inside the house on seeing Samuel; that both the accused and Samuel tried to remove the deceased from the house; that they called Anne who put on security lights and came out of her house; that the accused showed her the injured finger and told her what had happened; that in company of Samuel the accused went to accused's home where a relative took the accused to hospital.

The accused denied beating the deceased. He said that he defended himself by picking a piece of wood and hitting the deceased with it to make him let go of his finger. He testified that after the treatment he took Samuel home and found the deceased alive. He said the deceased was his first cousin and that he (the deceased) had mental problems. He denied that he had planned to kill the deceased or to assault him. The accused denied attacking the deceased a second time after he returned to the scene from hospital.

The accused called David Mburu Wainaina (DW2) as his witness. Wainaina's evidence was aimed at establishing that the deceased was a violent man. Wainaina testified on how the accused attacked him after Wainaina went to the market where the deceased was selling vegetables harvested from Wainaina's farm. Wainaina also testified to an incident when the deceased had gone to the District Officer's Office and lowered the National Flag and he was beaten by administration police officers.

Both the prosecution and the defense counsels made final submissions. It was submitted by Mr. Omari for the accused that it is not disputed that the accused hit the deceased but existence of *mens rea* has been denied. The defense is relying on self-defense, submitting that the accused hit the deceased after the deceased bit his finger and refused to let go of the finger. It was submitted that the accused had no intention of assaulting the deceased and did not know he would meet the deceased that night. It was submitted that the deceased was alive when the accused and Samuel Wathika left him to go to hospital; that the accused acted reasonably and used necessary measures to protect himself from the deceased and the danger he faced was imminent and serious enough to require an action to avert it.

The defense relied on several authorities including **Ahmed Mohamed Omar & 5 others v. Republic [2014] eKLR** and **Republic v. Martin Kinyua Nancy [2016] eKLR** to support the accused's defense of self-defense. It was submitted that the law recognizes self-defense as an absolute defense in criminal trials absolving the accused from criminal liability. It was submitted that the prosecution has failed to prove that the death of the deceased was caused by an unlawful act or omission of the accused and that there is no direct evidence linking the accused to the death of the deceased. The defense asked the court to acquit the accused.

On the other hand, the prosecution submitted that the prosecution has proved the offence of murder against the accused; that the prosecution has tendered evidence that places the accused at the scene; that *mens rea* has been proved by evidence showing that the accused assaulted the deceased before and after coming back from hospital; that the accused used excessive force on the deceased and that his actions can only be taken to mean that his intention was to kill the deceased. The prosecution urged that this court finds the accused guilty of the offence of murder.

I have examined all the evidence adduced by both the prosecution and the defense. I have read and considered the submissions from both sides and the cited authorities. It is my duty to consider this evidence and determine whether the murder charge against the accused has been proved beyond reasonable doubt. As submitted by the defense, the court will be determining whether the prosecution has proved beyond reasonable doubt the fact of the death of the deceased; whether that death was caused by an unlawful act or omission on the part of the accused and whether in causing that death the accused had malice aforethought. The definition of malice aforethought is contained in Section 206 of the Penal Code and includes an intention to cause the death of or to do grievous harm to any person, whether that person is the one actually killed or not and knowledge that the act or omission causing the death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not.

From the outset, it is clear to me that there is no dispute that the accused went to the homestead of Stephen Gathuru Wathika on the evening of 20<sup>th</sup> September 2014. The purpose of his going there as testified in defense was to investigate a fire he saw burning near a house. It is not disputed that the accused called Anne who before recognizing that it was the accused calling her thought it was someone with bad intentions and started screaming. It is not disputed that the deceased was at the homestead of Stephen Gathuru and that he had lit a fire. Evidence shows that he was suspected to be mentally unstable. The purpose of lighting that fire was probably to warm himself. There is also evidence that he had been roasting potatoes on that fire. It is not disputed that the accused confronted him over the fire issue. The evidence of the accused is that he feared that the fire might ignite the house in which were sleeping children. There is no evidence from the prosecution to show what exactly happened after the accused got to the scene of the fire. Available evidence from the defense is that the accused told the deceased to stop adding rubbish to the fire, approached him and held him. The deceased is said to have held the accused's hand and bit his finger and failed to let go of the finger. This commotion woke up Samuel who went out to investigate the source of the noise.

There is no other evidence to show that after the accused and Samuel went to hospital any other person went to the compound. Anne, who was the only witness at the scene, did not testify to hearing or seeing any other person at the scene. The accused and Samuel returned to the scene after the hospital. The accused denied assaulting the deceased a second time but Samuel told the court that the accused kicked the deceased on the ribs. After the accused left to go home, there is no evidence from Anne that any other person went to the scene or that anyone assaulted the deceased.

In the morning, the deceased was found dead. He was found in a sitting position leaning on the door/wall of the house. He was described as wearing a trouser and no shirt. His death is not in dispute as there is sufficient evidence on this issue. Dr. Charles K. Muturi (PW3) confirmed the death of the deceased. The doctor's evidence in court and his findings captured in the post mortem report produced as exhibit 1 shows the extent of the injuries suffered by the deceased. They are extensive injuries and these injuries are as follows:

- (i) 3 deep lacerations on the scalp (parietal region measuring 6cm x 2cm, 4cm x 1cm and 4cm x 1cm).

- (ii) Bruises on the face and scalp.
- (iii) Bruises on both upper limbs with a fractured distal forearm on the left side.
- (iv) Fractured right upper tibia and fibula.
- (v) Multiple lacerations on left leg.
- (vi) Multiple bruises on the back
- (vii) Fractured ribs 6<sup>th</sup> to 8<sup>th</sup> on the left side and 9<sup>th</sup> to 10<sup>th</sup> on the right side.
- (viii) Accumulation of blood, 50ml, in the chest cavity.
- (ix) Pleural adhesions on right side.
- (x) Congested brain with perichial haemorrhages and signs of increased intracranial pressure.

The opinion of the doctor after the examination of the body was that the deceased died as a result of severe head injury due to blunt force trauma. Having considered the evidence of the doctor, it is my considered view that this evidence proves beyond reasonable doubt that the death of the deceased occurred. It was an unlawful death resulting from head injuries and inflicted by blunt object. Other than the head injuries the deceased had other numerous injuries including broken limbs and ribs.

As to the identity of the person who inflicted these injuries leading to the death of the deceased, it is my considered view that evidence shows that it is the accused. I have no other evidence to show that any other person participated in assaulting the deceased. The accused has admitted assaulting the deceased. He however pleads self-defense. Anne did not tell the court what she heard from her house. Samuel testified to this and his evidence is captured below:

***“On 20<sup>th</sup> September 2014 I was asleep between 9.30pm and 11.00pm. I heard noise of people disagreeing. I thought it was people at the road. I heard iron sheets being hit. I woke up and found people fighting. The quarrel was about 40 metres from my house. I went to the place. I found it was 2 people Daniel and Njoroge fighting. Daniel is accused and Njoroge is deceased. Njoroge had lit the fire and Daniel thought he would burn the house. Njoroge was roasting potatoes. Daniel told me he had been bitten on the finger. I saw Daniel’s finger had been cut. Njoroge and Daniel were pushing each other. It was around 10.00pm – 11.00pm. Daniel was pushing door to open and Njoroge was preventing it. They fought furiously. I was scared because Daniel had been injured and Njoroge was not mentally ok. I let them fight it out. Njoroge pushed the door and came out after door broke. I tried to separate them. Accused said he would discipline deceased and beat Njoroge. I thought it was excessive. Deceased could not escape because his legs had been broken. Accused was also bleeding from the finger. Blood also splashed on me.”***

Samuel testified that after coming back from hospital where Samuel had taken the accused for treatment, the accused assaulted the deceased again. His evidence is captured as follows:

***“He was treated and we went home. We were also with Daniel’s brother called Njoroge. They took me home. I told accused we check on deceased. We found him alive leaning at a different place. Accused told him he had bitten his finger and showed him. Accused kicked him once at the ribs and we left.”***

On cross examination, Samuel said that the accused had kicked the deceased twice on the ribs.

From this evidence it is clear to me that by the time Samuel came out of his house after hearing the commotion of the fight, the accused had been bitten on the finger and the deceased had gone into the house and pushed the door closed. Samuel told the court in cross examination that he found the deceased inside the house preventing the accused from entering and that the accused was pushing the door to enter. I have noted the evidence of the accused to the effect that it is Samuel who entered inside the house where the deceased had locked himself in and removed him. This evidence is at variance with that of Samuel who testified that the accused was pushing the door to open and the deceased was preventing it from opening and that the door broke and the accused came out. I note however that the accused did not implicate Samuel in assaulting the deceased.

To settle the issue as to whether it is the accused who assaulted the deceased occasioning him the multiple injuries that consequently led to his death, it is my finding basing on the recorded evidence that it is the accused that did it. He does not deny hitting the deceased. However, from his evidence one gets the feeling that he did not come out clearly about the extent of the beating. He said he hit the deceased to make him let go of the finger. This evidence is at variance with the extensive injuries suffered by the deceased. The accused revokes the defense of self-defense to justify assaulting the deceased. Is this defense available to the accused?

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 defense of person or property shall be determined according to the principles of English Common Law.***

The principles of the English Common Law referred to in Section 17 of the Penal Code are to be found in decided cases. The classic example is the case of ***Palmer v R [1971] A.C 814*** by the Privy Council. This case was cited with approval in the English case of ***R v McInnes [1971]***

3 All ER 295. The two cases have been cited by the Court of Appeal in Ahmed Mohammed Omar & 5 others case (supra) where the following quotation is cited:

***“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 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 action. 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 necessary defense. .... The defense of self-defense either succeeds so as to result in an acquittal or it is disproved, in which case as a defense 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.”***

In the case of Ahmed Mohammed Omar (supra) the Court of Appeal quashed a conviction in respect of the six appellants who had gone to that court challenging a conviction by the High Court in a case where the appellants had raised a defense of self-defense. The Court of Appeal applied the subjective test to the defense of self-defense raised by the appellants and faulted the High Court for applying the objective test. The position in the English Common Law in respect to the defense of self-defence prior to the decision of the House of Lords in DPP v. Morgan [1975] 2 All ER 347 changed from application of an objective test to that of a subjective test.

Going back to the question I posed above, is the defense of self-defense available to the accused in this case? The circumstances on the evening of 20<sup>th</sup> September 2014 have been narrated in this judgment. The accused told the court that he picked a piece of wood and hit the deceased with it to make him stop biting his finger. If this version of the events is correct, then the accused hit the deceased before the deceased ran into the house to hide. Samuel said the deceased was pushing the door to resist opening it. Given that the evidence from the pathologist shows that the deceased had broken upper limbs, was he in a position to push the door to prevent it being opened by the accused? The sequence of events may not have happened the way the accused wants this court to believe. In my view it was not a one off hitting to stop the deceased from biting the accused’s finger. I am of the view, given the evidence of Samuel, that the assault took more than one hitting. The assault must have continued even after the deceased came out of the house and even after the accused came back from hospital. I have captured in detail the evidence of Samuel elsewhere in this judgment. He described the fighting between the accused and the deceased as vicious and the beating of the deceased by the accused as excessive in the circumstances.

In my considered view, the defense of self-defense is justified in this case up to the extent that the accused hit the deceased to make him stop biting his finger. He succeeded in making the deceased let go of his finger and the deceased ran into a house to hide. In my considered view, any other action taken by the accused in assaulting the deceased after the deceased let go of accused’s finger is unjustified and unnecessary under the circumstances. In the latter case, the defense of self-defense ceases to apply. By hiding inside the house the deceased was no longer a threat to the accused. He posed no danger to him at all. Yet it seems to me that the accused continued to inflict more beating and kicking long after the deceased had let go of his finger.

The injuries I have enumerated above in this judgment as captured by the pathologist attest to the viciousness of the attack. The deceased had five broken ribs, three on the left side and two on the right side. He had multiple deep lacerations on the head with swelling in the brain. He had broken leg and broken arm and multiple injuries all over his body. The accused was someone enraged. According to Samuel the accused said he would discipline the deceased and the deceased could not escape because his legs had been broken. In other words the deceased was helpless as the accused rained blow after blow on him. This cannot have been self-defense!

As stated in the citation I have captured above from the cases of Palmer v R and R v McInnes the moment of crisis was over after the deceased let go of the accused’s finger because the attack (biting of the finger) had stopped. There was no danger to the accused save for the pain from his injured finger. Therefore the employment of excessive force by accused was not necessary and can only be termed as revenge and punishment to the deceased for having bitten the accused’s finger. In my view, in accused’s actions after the deceased stopped biting his finger, there was no longer any link with a necessary defense. Having considered the circumstances pertaining at the time of the assault on the deceased and the grave injuries inflicted on him even after he had stopped biting the accused’s finger, my view is that the defense of self-defense is not available to the accused and I must reject his defense as I hereby do.

One can argue on some element of provocation. The defense did not pursue that line of argument. Provocation may not assist the accused. It is not lost to this court that it is the accused that held the deceased first leading to the reaction of the deceased to bit the accused’s finger. The excruciating pain the accused must have experienced after his finger was bitten and cut would deprive anyone of the power of self-control and induce him to commit the assault. Had the accused hit the deceased just once to stop him from biting him and stopped at that, provocation would have been available to him as a defense. However, the circumstances in this case are different. The severe injuries sustained by the deceased bear testimony to the viciousness of the attack by the accused. Evidence shows that the deceased had broken limbs and could not defend himself. Evidence shows that even after the deceased escaped into the house the accused pursued him and pushed the door to reach him. Evidence shows that even after coming from hospital the accused went for the deceased again and kicked him.

Having rejected the defense of self-defense, I pose the question as to whether the prosecution has proved all the ingredients of murder to persuade this court to find the charge of murder against the accused proved. Having considered that the accused went to the homestead of Stephen Gathuru with intentions of stopping the fire from spreading to the house situated nearby it is my finding that his intentions were not to commit a felony. My view on this issue is that the prosecution has not proved malice aforethought on the part of the accused. It is unfortunate that the accused behaved the way he did but to my mind his intentions were not to harm the deceased. Events that followed his holding the deceased took an ugly turn after the deceased reacted and bit accused’s finger cutting part of it off. It is clear to me therefore that all the ingredients of murder have not been proved beyond reasonable doubt.

Before I make conclusions I wish to state that I have considered the evidence carefully and find that the involvement of Samuel in assaulting the deceased has not been established although he is not an accused person before me. I say this because the defense seemed to portray Samuel as having taken part in beating the deceased or even having gone back and assaulted him after the accused had left. Samuel's clothes were blood stained. He has explained how blood got to his clothes and I have no reason to doubt his evidence given that evidence shows he tried to separate the bleeding accused and the deceased. I have also considered the evidence and the report (Ex. 36 (a)) prepared by Elizabeth Onyiego (PW11). It confirms that the deceased's blood was found on accused's right shoe, socks and jacket.

My final view on this matter is that the offence of murder has not been proved beyond reasonable doubt against the accused and I hereby acquit him of murder. However, having rejected the accused's defense of self-defense and having found that there is no evidence to prove malice aforethought it is my finding that a charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code has been proved beyond reasonable doubt against the accused. Consequently, the accused, Daniel Njuguna Mwicigi, is guilty of manslaughter and is hereby convicted of the same. Orders shall issue accordingly.

**Delivered, dated and signed this 5<sup>th</sup> day of April 2018.**

**S. N. Mutuku**

**Judge**