



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO. 2 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RAMA KALUME CHENGO.....ACCUSED**

**JUDGEMENT**

1. On 10<sup>th</sup> January, 2014 the accused person, Rama Kalume Chengo went to hunt in Black Marlin forest at Bofa Village in Kilifi County. He was in the company of his friends namely PW2 Uwezo Kazungu Mramba, PW3 Mwalimu Charo Katana, PW5 Elvis Charo Katana and PW6 Samuel Rama Peter. The hunt was successful as they managed to kill a bushbaby. As they were trying to coax a second bushbaby down a tree, the deceased Ian Chimera Ndegwa arrived with two dogs. He started throwing stones at the bushbaby on top of the tree forcing two of the accused's friends who had climbed up the tree to come down. The deceased thereafter grabbed the bushbaby that had been killed and sprinted with it towards the forest. The accused gave chase and a fight ensued between him and the deceased. In the course of the fight, the accused stabbed the deceased on the right thigh. The deceased was rushed to Kilifi County Hospital where he died while receiving treatment.

2. Dr. Busra who carried out post-mortem on the body of the deceased concluded that the cause of death was severe haemorrhage as a result of the deep cut on the right thigh. The post-mortem report was produced as an exhibit by PW1 Dr. Hassan Bachu.

3. The accused is before this court charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He has denied committing the offence. His case is that the deceased pushed him wanting to stab him and in the process the deceased was cut by the knife he wanted to use to stab him. Counsel for the accused did not make any submissions urging the court to reach its decision based on the evidence on record.

4. The prosecution's case is straight forward. PW2, PW3, PW5 and PW6 all stated that the accused person is their friend. They went hunting together. They managed to kill a bushbaby and as they were trying to kill a second one the deceased arrived. The deceased who was older than them started throwing stones at the bushbaby atop the tree forcing PW2 and PW3 to climb down the tree.

5. At that juncture the deceased grabbed the carcass of the bushbaby and sprinted with it to the forest as the accused chased him. The accused was discouraged from pursuing the deceased who was older and bigger than them but he nevertheless went after him. Inside the forest a fight ensued between the two. The accused was heard crying and even as they emerged from the forest he was still crying. The deceased had taken the accused's catapult. It was then that the accused stabbed the deceased on the right thigh.

6. Among the people who arrived at the scene was PW7 Mary Kadzo Tsori. She testified that she found the accused holding a knife. The boys told her that the deceased wanted to snatch the bushbaby from them and he was injured as they struggled. The mother of the deceased also arrived at the scene and together with PW7 they organized for him to be taken to hospital. The accused and his friends were arrested and taken to Kilifi police station.

7. The accused's case is that the deceased went after him as he stood up to him. The deceased wanted to beat him and even stab him with a knife he had. As they struggled he pushed off the deceased and the deceased was cut on the knee with the knife he had.

8. Looking at the evidence adduced, it is difficult to believe the accused's claim that the injury to the deceased was accidental. His friends stated that he stabbed the deceased. PW3 stated that **"Rama took a knife which he had and stabbed the deceased."** Upon cross-examined PW3 stated that **"[w]hen Rama found that he was being subdued he took a knife and stabbed the deceased."** PW5 stated that **"Rama had a knife"**. He also testified that the accused (Rama) is the one who stabbed the deceased.

9. The evidence therefore overwhelmingly show that the accused's unlawful act of stabbing the deceased resulted in the death of the deceased. This was confirmed by the medical evidence.

10. The only question is whether the defence of provocation is available to the accused in the circumstances of this case. Provocation is defined by Section 208 of the Penal Code as follows:

**208. Provocation defined**

**(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.**

**(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.**

**(3) A lawful act is not provocation to any person for an assault.**

**(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.**

**(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.**

11. Section 207 of the Penal Code provides that where a person who is provoked kills another “**before there is time for his passion to cool**” such a person is guilty of manslaughter only.

12. The circumstances of this case shows that the deceased was a big boy who went and took away a carcass of a bushbady that had been killed by the accused and his friends. That was provocation in itself. The deceased then went ahead and took away the accused’s catapult. A fight ensued between the deceased and the accused resulting in the accused stabbing the deceased. It is the deceased who started the fight and engaged in provocative acts. The defence of provocation is thus available to the accused in the circumstances of this case. The accused cannot be said to have murdered the deceased.

13. In the circumstances of this case, I find the accused guilty of the lesser charge of manslaughter contrary to Section 202(1) as read with Section 205 of the Penal Code. I convict him accordingly.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of July, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**