



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 8 OF 2017

REPUBLIC.....PROSECUTOR

-VERSUS-

DICKSON KENYAN.....ACCUSED

JUDGMENT

1. It is settled that one **Reuben Angosi** (hereinafter referred to as '**the deceased**') lost his life on 07/02/2017 as a result of an engagement with the accused person herein, **Dickson Kenyan**. That happened at Rayudhi village in Suna-North Location in Migori County.

2. The accused person was employed by one **Robert Akivaga (PW3)** as a farm-hand who mainly worked as a herder and lived with his employer at his homestead within Rayudhi village in Suna-North Location. PW2 lived next to his brother, the deceased herein. Resulting from the events of 07/02/2017 the deceased lost his life and the accused person raised the defence of provocation. Since such discussion will call for a look at the facts and circumstances of the case it is imperative to look at the evidence first.

3. The accused person was formally charged with the murder of the deceased on 23/02/2017. He denied the information and a trial was ordered. Seven witnesses testified in support of the information facing the accused person. **Florence Mmbone Suna** testified as **PW1**. She was a neighbour to PW3. **PW2** was a village elder for Ugari village in Kakrao Sub-Location within Suna-North Location. **PW4** was **No. 100897 PC(W) Judith Ater** attached at Migori Police Station. **PW5** was one **Samwel Lusaga Chumbugo** a resident of Bware Sub-location in Uriri Sub-County. **Dr. Vitalis K'Ogutu** testified as **PW6**. The investigating officer **No. 70665 PC John Mwithia** 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.

4. The prosecution's case is fairly straight forward. In the afternoon of 07/02/2017 PW1 who was at her home heard screams from the home of the deceased which persisted for a while. She rushed there to find the accused person assaulting the deceased with a big stick. The deceased lay on the ground naked. PW1 shouted at the accused person to stop assaulting the deceased and instead the accused person pursued PW1 while holding the stick and some stones. PW1 raised alarm as she ran away and was rescued by PW5 who repulsed the accused person. The accused person went back and continued hitting the deceased who was still on the ground with the stick on the head. PW1 followed the accused person from a distance and raised alarm again. The accused person pursued her once again and he was held by the neighbours who had responded to the call by PW1. The accused person was tied using ropes as PW3 rushed to Migori Police Station and reported the incident. PW2 was also among the people who gathered at the homestead of the deceased.

5. PW4 who was on patrol with PW7 and other officers were then called by the OCS, Migori Police Station and informed of the incident. They rushed to the scene and found the deceased already dead while the accused person tied. PW4 and PW7 collected the body of the deceased, the accused person, the stick which was used to hit the deceased and a stone which had some blood. The body of the deceased was taken to Migori County Referral Hospital Mortuary for preservation whereas the accused person was taken to the station.

6. PW6 conducted the post mortem examination for the deceased and opined that the cause of death was subdural haemorrhage secondary to head injury due to assault by blunt injury. He produced the Post Mortem Report as an exhibit. PW7 investigated the case. He recorded statements from several witnesses and attended the post mortem examination after which he charged the accused person. PW7 escorted the accused person for mental examination and produced a sketch map of the scene, the stick and the stone as exhibits.

7. At the close of the prosecution's case, the accused person was placed on his defence. He opted to give unsworn testimony without calling any witness. The accused person stated that the deceased was drunk and attacked him with a stick, that he snatched the very stick from the deceased and hit him once and the deceased collapsed. That, the accused person who was the aggressor was aged and that he did not intend to injure him at all.

8. At the close of the defence case, Counsel for the accused person filed written submissions where he dealt with the defense of provocation at length in submitting that malice was not proved. Counsel further submitted that the accused person ought to have been charged with the offence of manslaughter instead.

9. It is from the foregone evidence that this Court is now called upon to determine whether the defence of provocation holds in this case as it also determines if the ingredients of the offence of murder have been proved. The offence of murder carries three ingredients which are: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the 'mens rea' of the offence.

I will consider each ingredient separately.

(a) Proof of the fact and the cause of death of the deceased: -

10. There is no doubt that the deceased died. That fact was attested to by all the witnesses. The first limb is hence answered in the affirmative.

11. As to the cause of the death of the deceased, PW6 produced a Post Mortem Reports which he personally filled in after conducting the autopsy. The report opined that the possible cause of the death of the deceased was subdural haemorrhage secondary to head injury due to assault by blunt injury. Since there is no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:
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12. As stated above, the accused person stated in his defence that he indeed assaulted the deceased after he was provoked. I will consider the defence of provocation in the next ingredient. For now I now find that it is the accused person who caused the death of the deceased as a result of assault. The second ingredient is also proved against the accused person.

(c) Proof that the said unlawful act was committed with malice aforethought:

13. Unless it is proved that the accused person caused the death of the deceased with malice aforethought, the offence of murder is not proved. The prosecution must prove the intention on the part of the accused person to kill the deceased. In doing so I will revisit the evidence as I look at the defence of provocation.

14. The starting point is the law. Sections 207 and 208 of the Penal Code states as follows: -

'207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

208. (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 affected 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.'

15. In his unsworn testimony, the accused person stated that he was attacked by the deceased with a stick and that the deceased was drunk. That, he snatched the stick and hit the deceased once. PW1 who was an eye witness does not tend to agree with the evidence of the accused person. According to PW1 the accused person assaulted the deceased severally and so continued even when the deceased lay helplessly on the ground. That, PW1 witnessed the accused person assault the deceased with a stick on two occasions. The first one was when PW1 arrived at the homestead of the deceased and the second instance was when the accused person had pursued PW1 and was repelled by PW5. On each instance, PW1 witnessed the accused person hitting the deceased severally with the stick. The evidence of PW1 was corroborated by PW6 during the post mortem examination. PW6 confirmed that the body of the deceased had several injuries on the head and nose. Further corroboration was from all the other witnesses who saw the deceased at the scene with multiple injuries.

16. In interrogating the defence of provocation, a Court must also consider the degree of retaliation if at all any. In the case of **Tei s/o Kabana vs. R. (1961) EA**, the Court of Appeal for Eastern Africa held that:

‘...In considering whether provocation was sufficient to reduce offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and lethal nature of the weapon used.’

17. By placing the defence of the accused person and the prosecution’s evidence side by side I find the prosecution evidence credible, well corroborated and believable. The defence is hereby rejected and this Court finds and holds that the defence of provocation is not available to the accused person in the circumstances of this case.

18. I will now ascertain if there was malice aforethought on the part of the accused person. **Section 206** of the **Penal Code** defines ‘malice aforethought’ as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) An intent to commit a felony.

(d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.

19. The Court of Appeal has also dealt with this aspect on several occasions. 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).**

20. 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 of 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 conviction 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.”

21. In this case no evidence was led as to what exactly prompted the accused person to attack the deceased. PW1 who was the first person to reach the scene found the accused person assaulting the deceased but did not know why. That being the case, I find no evidence of malice aforethought in this case and the third ingredient of murder fails.

22. Afortiori, the foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

23. 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 analyzed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

24. As I come to the end of this judgment I must apologize to the parties for the late delivery of this decision which was caused by this Court's engagement in the hearing and determination of election petition appeals in the month of July and the August recess which followed soon thereafter.

DELIVERED, DATED and SIGNED at MIGORI this 4th day of October, 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Mwita Kerario, Counsel for the Accused person.

Joseph Kimanthi, Senior Principal Prosecution State Counsel.

Evelyne Nyauke – Court Assistant