



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 21 OF 2013

REPUBLIC.....PROSECUTOR

-VS-

HARRISON MWENDA.....ACCUSED

JUDGMENT

The accused, Harrison Mwenda was charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code.

Particulars are that on 11th February, 2013 at Kuirikio village, Sorio sub-location, Amugaa location in Tigania East District within Meru County murdered Nathan Kimathi.

Evidence by Philomane Kanambu(PW1) and Doris Makena (PW2) is that the accused person herein cut the deceased on the neck when he broke into the house where PW2 and the deceased were sleeping at midnight. The deceased was rushed to Kiirua Mission Hospital but he succumbed to the injuries. The accused presented himself to police and reported he had killed the deceased. According to PW1 and PW2, the accused person ran away while bragging that he had killed the deceased and dared them to do whatever they wished.

PW1 said the accused person was not related to the deceased or PW2 but was generally a bad person who had no cordial relationship with anyone in the village. That on the way to hospital, the deceased and PW3 passed by Mikinduri Police Station where a report was booked against the accused. PW4, the current IO stated that the accused surrendered to the police on 13th February, 2013. He produced a statement of the initial investigating officer, the investigations diary, blood stained blanket and a blood stained brazier. PW5, Dr Maria Mwangi produced the Post Mortem report on behalf of Dr. Njuguna dated 14th February, 2013. She told the Court that the cause of death was severe haemorrhage due to injury to the carotid artery following a deep cut to the neck.

In defence, the accused alleged that after a drinking spree he returned home to find his house locked from outside as he had left it earlier on. However, on entry a man he found in bed with his wife attacked him and he in turn cut the person with a panga. The accused admitted having cut the deceased and presented himself to the police station on 13th February, 2013 after committing the offence on 11th February, 2013.

The fact of death was confirmed by PW1, PW2, PW3 who were with the deceased at the last hours of his life and PW4 and PW5 who ascertained the death through the police and post mortem reports. The accused did not deny cutting the deceased with a panga which establishes that the deceased's death was as result of his action. From the evidence on record, the issue for determination is whether the prosecution has proved that the deceased person's death arose out of actions and or omissions that were as a result of malice aforethought.

PW1 stated that the accused was not the husband of PW2 and that PW2 cohabited with the deceased. PW2 also denied having any relationship with the accused and stated that the accused had sworn to hurt the deceased who claimed that he had stolen his pumpkin. PW1 and PW2 recognised the accused person's voice and identified him in open court. The accused defended himself by saying that he found the deceased in his house with his wife which provoked him to cut the deceased. Section 208 of the Penal Code defines provocation as follows -

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 the 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 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 the latter provocation for an assault."

Provocation was discussed in the case of *TEI S/O KABAYA VS REPUBLIC [1961] EA* where the court held:-

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

However, in this case, the accused went to the house of the deceased, broke in and caused the injury. Further, PW1 and PW2 deny that PW2 was a wife to the accused. The defence of provocation cannot stand.

This court finds in the circumstances that the prosecution witnesses have proved the charge against the accused person beyond all reasonable doubt. The accused person is guilty as charged and is convicted under Section 215 of the Criminal Procedure Code.

HON. A. ONG'INJO

JUDGE

1.10.2018

Before Adwera Ong'injo J

Penina – C/A

Mrs Mwathi for state

Accused: Present in person

Ms Muna Advocate for Accused.

Court

Judgment delivered, dated and signed in court on this day 1/10/2018.

Mrs Mwathi for state:

We don't have past records. Accused may be treated as 1st offender.

Mr Muna Advocate mitigating for accused person

Accused person is remorseful and seeks leniency.

Order

Victim Impact Report on 29.10.2018

HON. A. ONG'INJO

JUDGE