



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 93 OF 2013

REPUBLIC.....PROSECUTOR

-VS-

JOHN MURURU KUBAI.....ACCUSED

J U D G M E N T

1. **John Mururu Kubai (“the accused”)** is charged with the offence of murder contrary to section 203 as read with **section 204 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence are that on the 14th September, 2013, at Antuambui village, Kiguru Location, Igembe South District within Meru County, the accused murdered **Gerald Kinyua Kubai (“the deceased”)**.

2. The accused denied the charge with the prosecution calling a total of 4 witnesses to prove its case. **PW1 was Marrietta Mukoncheme**, the mother of both the accused and the deceased. She testified that on the material day at about 6am, she was in her house at Antuambui when her sons John Mururu (accused) and Gerald Kinyua (deceased) started to fight over land.

3. It was her evidence that the deceased started to complain that the accused had been given his land and that he would not allow him to occupy it. It is during the fight that the accused hit the accused with a stick on the head and the deceased fell down. He woke up and went away Nchung’wa to where he was living. Two days later, the deceased came home and complained that he was unwell. She took him to Mutiokiamia Health Centre where he was treated and given medication. He continued to take the medicine but died two days later at home.

4. **PW2 was Irene Makena**. It was her evidence that on 14th September 2013, she was at home in Antuambui with her husband and mother in-law (PW1). They were inside the house when a fight broke out between the deceased and the accused. The cause of the fight was the allegation by the deceased that the accused was not born by his father and that the accused had had sexual relationship with their mother. This incensed the accused who hit the deceased with a club on his head and the latter fell down.

5. The deceased woke up and went away to his residence at Nchung’wa. He did not return until 3 days later when he came back complaining that he was unwell. They took him to hospital where he was treated and came back home, where he died on 20th September 2013.

6. **PW3 was Joseph Masango**, the investigations officer. It was his evidence that on 22nd September 2013, he was on duty with Inspector Ndegwa when he received a report about the death of the deceased. The incident was reported by (**PW1**) she reported that on 14th September, 2013 at about 6am, the accused hit the deceased on the forehead with a rungu and fell. That the accused fled after the incident. She took the deceased to Mutiokiamia dispensary for treatment where he was treated and discharged but later died at home on 21st September 2013. In the company of his colleagues, he proceeded to the scene where he saw the body. It had an injury on the forehead and blood was oozing from the nostrils. The accused was later arrested and charged with the current offence.

7. **PW4 Dr. Njeru Charles Muchangi** testified and produced a medical report prepared by Dr. Guantai on 10th October 2013. According to the post mortem report, the body had a bruise on the left side of the forehead with a fractured nasal bridge. Internally, the head had a fracture of the frontal bone, intra cerebral haematoma and the brain matter was lacerated. The doctor formed the opinion that the cause of death was

severe head injury due to blunt force trauma to the head.

8. When called to defend himself, the accused gave sworn evidence. He told the court that, on the material day, he left home to go and pluck miraa at Ntherune. While on the way he met the deceased at the homestead of his mother. The deceased insulted him that he was having a sexual relationship with his mother. That the deceased started chasing him with a knife whereby he ran into the house of his other brother, picked a piece of wood and threw it at the deceased. It hit the deceased on the head. That he locked himself inside and remained in the house for about 25 minutes.

9. On the 3rd day, **PW1** informed him that the deceased was unwell and his wife gave **PW1** Kshs.500/= to take the deceased to hospital. He later learnt that the deceased had died. That he had thrown the piece of wood to ward off the deceased as he was chasing him with a panga. That each one of them had his portion of land and that on the material day the deceased came home drunk.

10. Ms Nyaga for the accused submitted that the deceased provoked the accused by insulting him of having a sex with his mother. That the insults were hurled in the presence of **PW1** and **PW2**. That this was disrespectful and capable of provoking any reasonable/ordinary person. Counsel therefore urged the court to note that the accused only acted in the spur of the moment as the deceased was clearly the aggressor. That the accused threw a stick at the deceased in self defence. The prosecution did not file any submissions.

11. The accused is facing a charge of murder. From the definition of the offence of murder as contained in **section 203 of the Penal Code**, four ingredients need to be proved. These are; the fact of death, the cause of death, that the death resulted from an unlawful act on the part of the accused and that the accused acted with malice aforethought. It is for the prosecution to prove these ingredients beyond any reasonable doubt.

12. On the first and second issue of fact and cause of death, the evidence of **PW1 and PW2** was that, on the morning of the material day, a fight broke out between the deceased and the accused. That the accused hit the deceased with a club on the head and the deceased fell down. Three days later the deceased complained of illness and was taken to hospital. He was treated but died on 20th September, 2013. **PW3 and DW1** also told the court of the altercation between the two. **PW3** collected the body from the scene and took it to the mortuary.

13. **PW4** testified and produced the postmortem report prepared by Dr. Guantai of Meru Referral and Teaching hospital on 10th October 2013. According to that report, the body had a bruise on the left side of the forehead with a fractured nasal bridge. There was a fracture of the frontal bone, intra cerebral haematoma and the brain matter was lacerated. It was opined that cause of death was severe head injury due to blunt force trauma to the head.

14. On the foregoing, I am satisfied that the prosecution was able to prove the fact and cause of death to the required standard.

15. The next issue is whether the death was caused by the wrongful act of the accused. **PW1 and PW2** were the only eye witnesses. They told the court how the deceased came on the morning of the material day from where he had rented a house and started to quarrel the accused. He complained that the accused should not get land as he was not born of his father. He also insulted the accused as sleeping with his mother.

16. It is then that a fight broke out between the two whereby, the accused hit the deceased with a club on the head and he fell down. When he recovered, he went away to Nchung'wa where he was living only to return 3 days later complaining of illness. He was taken to hospital where he was treated and left to go home where he died three days later. The postmortem report showed that the cause of death was severe head injury due to blunt force trauma. This pointed towards the blow metted on the deceased from the club used by the accused. The evidence of **PW1 and PW2** was consistent and corroborative of each other.

17. In his defence, the accused admitted that on the material day, he met the accused at the homestead of their mother (**PW1**). That the deceased insulted him. That he the accused had sexual relations with his mother. This was in the presence of his mother and sister in law (**PW1 and PW2**) This infuriated him and a fight broke out. The deceased started chasing him with a panga whereby he ran to the house of his brother in law, picked a piece of wood which he threw at the deceased. It hit the deceased. That he was provoked by the insult and was defending himself from the deceased from the deceased who had attacked him with a panga.

18. **Section 207 of the Penal Code** provides: -

“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 he is guilty of manslaughter.”

19. Section 208 (1) of the Penal Code defines the term provocation as follows: -

“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 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.”

20. In the case of **Republic v Hussein S/O Mohamed [1942] EACA at pg 66** the Eastern Court of Appeal held that: -

“When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst

the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation.”

21. In the case of **Peter Kingori Mwangi & 2 Others v Republic [2014] eKLR**, the court stated that, for provocation to exist two conditions must be established; these are, the subjective condition that the accused was actually provoked so as to lose his self-control and the objective condition that a reasonable man would have been so provoked.

22. In the present case, both **PW1 and PW2** were in agreement that it is the deceased who started the quarrel. **PW2** and the accused stated that the deceased insulted the accused that he had a sexual relationship with his mother (**PW1**). This allegation was made in the presence of the accused's mother (**PW1**).

23. The court notes that, the accused is an African man. He was insulted to be having sex with his mother in her own presence and that of his sister-in-law. That is a grave and serious insult for an African man. To this court's mind, that insult must have aroused passion that might have been so irresistible so as to deprive the accused the power of self-control and attack the deceased. Consequently, I find that the defence of provocation is available to the accused to reduce the offence to that of manslaughter.

24. **PW1 and PW2** testified that there was a fight between the accused and the deceased. The accused was armed with a club at the time. **PW1** was categorical that she saw the accused hit the deceased with a club on the head which fell him. The accused admitted that he threw a piece of wood at the deceased. The post mortem report produced by **PW4** confirmed that the cause of death was severe head injury due to blunt force trauma to the head.

25. It is not in dispute that the deceased was attacked on 14th September, 2013. He died on the night of 20th September 2013, 6 days from the date of the attack. It was not in dispute that the deceased had fallen ill between the date he was attacked and the date that he finally died. In **R Vs. Cheshire [1991] 1 WLR 844**, the court stated: -

“Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act contributed significantly to that result... Occasionally, however, a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a causa sine qua non of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim's death, thereby relieving the accused of criminal responsibility. Such intervention, if it has such an effect, has often been described by lawyers as a novus actus interveniens. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English, though no simple translation has proved satisfactory, really because the Latin term has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused.”

26. This court's opinion is that the alleged sickness of the deceased between the date of the attack and death did not contribute to the death of the deceased. His death was clearly caused by the fatal blow inflicted on his head by the accused.

27. The accused pleaded self defence. He stated that the deceased attacked him with a panga. It should be noted that both **PW1 and PW2**, who were eye witnesses, did not allude to the fact of the deceased being armed. Further, the fact of the deceased being armed was not put to them when they testified for them to confirm or deny. In this regard, I reject that defence as an afterthought.

28. From the circumstances of this case, even if the deceased was said to have fallen ill from the time he fought with the deceased to the time he eventually died, the contents of the post mortem report remained clear that he died as a result severe head injury due to blunt force trauma to the head. Consequently, I am satisfied that the cause of death of the deceased was solely out of the accused person's actions.

29. Having come to the conclusion that it was the accused who caused the death of the deceased, but out of provocation, I need not consider the fourth ingredient of the offence of murder.

30. Accordingly, I substitute the offence against the accused from murder contrary to **section 203** to manslaughter contrary to **section 202** as read with **section 205** of the Penal code. I find the accused guilty of the substituted lesser charge of manslaughter and convict him under **section 322 of the Criminal Procedure Code**.

DATED and DELIVERED at Meru this 20th day of November, 2018.

A. MABEYA

JUDGE