



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

HIGH COURT CRIMINAL NO. 7 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

JACOB MUNJIRO MUKHWANA.....ACCUSED

J U D G M E N T

Introduction

1. The accused person in this case, Jacob Munjiro Mukhwana was first brought to court on 04.02.2009 on allegations that he had committed the offence of murder. For reasons that are not clear from the record, the accused person did not take plea until 09.03.2009 before Hon. Mr. Justice Fred Ochieng. The accused is charged with murder contrary to section 203 as read with Section 204 of the Penal Code, the particulars being that on the 18th January, 2009, at shihungula village Mundeku Sub location, Kisa Central Location Kisa west Division Butere District within Western Province, [he] murdered wellington Ochillo Mukhwana. The accused denied the allegations, prompting the state to call 6 witnesses to testify against the accused person.

The Prosecution Case

2. Because of its age, this case has been heard by 3 different judges. Hon. Mr. Justice Kimaru heard the evidence of 3 prosecution witnesses, namely Miriam Amiro Ochillo, PW1, James Amateshe Luchera PW2 and Moses Were Wambani, PW3. After the transfer of Hon. Justice Ochieng, Hon. Mr. Justice S. A Chitembwe heard the evidence of PW4, Dr. John Tolo Austine. This court heard the testimonies of Benjamin Oundo Odingo, PW5 and Number 232812 inspector Aloice Tom Mboya who testified as PW6. This court also heard Counsel's final submissions.

3. From the record, the prosecution case appears very straight forward. The accused and the deceased persons are brothers. On 18.01.2009 at about 8.00am, the deceased herein was in his home after he had tethered his cow. In the shamba. The shamba belonged to another brother of the deceased by the name Tongola, but it was the accused person who was using it. At that time too the deceased's daughter, Miriam Amiyu Ochillo PW1(Miriam) was at home preparing breakfast when her father asked her for an axe and after he had used it, the deceased returned it to her. He then asked her for a panga so that he could go and cut grass for the animals. After she had given her father the panga, Miriam heard the accused asking the deceased why he had tethered the cow in Tongolo's shamba despite his (accused's) prohibition. At that time too, the deceased was going towards the home where he was to get the grass, but on realizing that the accused person who was armed with a panga that he had asked his child to fetch him was about to cut the cow, the deceased cut short his journey, threw down the panga he had in his hand and

confronted the deceased, asking him why he wanted to cut the cow. A quarrel ensued and soon there was a fight. The two struggled and fell down to the ground.

4. The accused person then cut the deceased on the head. When Miriam ran to the scene in an effort to intervene, the accused person also tried to cut her as he chased her away. The accused person did not manage to cut Miriam because the accused's wife appeared at the scene and stopped him from causing any further injury.

5. After a while, Miriam returned to the scene but did not find her father there because he had been taken to Butere District Hospital for medical intervention. At about 9.00am on the same day of the attack, PW5 Benjamin Oundo Odongo was at the home of the area Assistant Chief of Mundeko sub-Location when the latter received a report through a telephone call concerning the attack on the deceased by the accused person. Soon after the telephone call, the assistant chief also received a personal report from an elderly lady who told them that the deceased was lying somewhere on the side of shamba bleeding profusely, though not dead.

6. PW5(Oundo) together with the Assistant Chief, James Amateshe Luchera who testified as PW2, rushed to where the deceased was lying. Though the deceased was alive he was bleeding profusely from the top of the head. Oundo put the deceased in his (Oundo's) vehicle and drove him to Butere District Hospital where the deceased was treated, stitched and then admitted. After the deceased was taken to the ward, Oundo and Moses went to Butere Police station to record their statements.

7. Oundo and Moses Later returned to the hospital but Oundo went home and left Moses at the hospital for a longer period. On his way from the hospital, Oundo met Jared Tongola, Miriam also went to the hospital about 1.00pm, to check on her father. She was able to speak to him but at about 5.30pm. the deceased died from the injures. Miriam confirmed to the court that it was the accused person who cut the deceased on the head with a panga.

8. The post mortem examination on the body of the deceased was conducted on 19.01.2009 at about 2.00pm by Dr. Stanford Ochango after the body was identified to him by Moses Were Wambani and Philip Nyanyo Oluchina. The post mortem report was produced by Dr. John Tolo Austine who testified as PW4. According to the post mortem report – Exhibit 1. The deceased who was about 48 years of age, 5'6" tall, well build and of fair nutrition had a deep cut wound on the scalp, at the parietal occipital region, penetrating into the cranium. The wound measured 12CM by 0.25cm. The deceased had no other injury. As a result of the examination, Dr. Ochango formed the opinion that the cause of death was cardiopulmonary arrest, due to haemorrhage and brain injury contrary to a deep penetrating cut wound.

9. Number 233812 Inspector Aloice Tom Mboya testified as PW6. He was the in charge of Butere Police Station, Crime Branch at the time of the alleged murder. He testified that he received the report of the murder and booked it as OB/13/18/01/2009. On 19.01.2009 he received another report that the deceased had died the previous evening. He visited the scene, but did not recover any exhibits. During investigations, PW6 established that Miriam had witnessed the attack. He also said he had established hat the genesis of the quarrel between the deceased and the accused as that the accused did not want the deceased's cow tied in the plot which he (accused) was cultivating and that the accused person had cut the deceased when the deceased tried to stop the accused from cutting the cow.

10. PW6 also stated that when the accused person started chasing Miriam, the deceased also tried to run away, but he fell down on the road where Oundo Moses and the area assistant chief found him.

11. PW6 also testified that when the police went to the accused's house on 19.01.2009 after Miriam had told them it was him who had assaulted the deceased, they did not find him at the house. PW2, James Amateshe, informed the Assistant Chief who in turn informed the police of the accused person's where about in Khwisero. Finally, the accused person was fished out from his hideout in Khwisero. Upon examination, the accused person was found medically fit to stand trial as per the P3 form – Pexhibit 2. The prosecution then closed its case.

The Defence Case

12. At the close of the prosecution and after due consideration of arguments put forward both by the state and the defence, this court reached the conclusion that the prosecution had established a prima facie case requiring the accused person to be put on his defence. After the court complied with Section 306 of the Criminal Procedure Code, the accused person elected to give sworn evidence. He had no witnesses to call.

13. In his sworn statement the accused person testified that on material date he woke up early and went to the shamba where he found one animal tied in his shamba which had maize, Mtama and vegetables. He then called out to the deceased who was the owner of the cow and when the deceased appeared the accused asked him to untether the cow and take it away, but the deceased did not do so. The accused then went to report the matter to James (Pw2) but when he did not find him he returned to the shamba found the deceased's cow still grazing in the shamba. When the accused tried to untie the cow, the deceased jumped on him and held him by the neck, and threatened to cut him if he dared touch the animal.

14. There was a struggle and the two of them fell down and according to the accused, the deceased fell on his own panga. The accused person then stood up and the deceased also got up and took the panga again and went home. There was no blood on the deceased as he left the scene. The accused did not see the deceased again.

15. Some 4 days after the scuffle the accused person was taken to the police station by his parents. He also stated that the deceased died on that very day of the fight. The accused person denied killing the deceased.

16. During cross examination, the accused person stated that the deceased had threatened to plant the same shamba which accused was using, but he stated further that though the deceased fell down, he did not see him fall on his (deceased's own) panga. The accused also conceded during cross examination, that he had no grudge with Miriam. He denied that he had a panga. He added that though he had no grudge with Miriam, Miriam had been coached to tell lies against him. Finally, the accused stated that though the two of them fell down, he did not see the deceased fall on the panga, the accused then closed his case.

The Final Submissions

17. Mr. Munyendo advocate who appeared for the accused person submitted that the prosecution had failed to prove the charge of murder against the accused person. He submitted that the whole fracas emanated from a long standing land dispute between the accused person and the deceased and that on the material morning, the deceased provoked the accused person by tethering his animal on the portion of land that was being utilized by the accused person. Counsel also submitted that the deceased was also armed with a panga and that in the circumstances, there was no mens rea. Counsel urged the court to make a finding that what occurred between the two brothers on the fateful morning happened on the spur of the moment and to acquit the accused person accordingly.

18. Prosecution counsel, Mr. Oroni submitted that the state was relying on the evidence on record and contended that even if the deceased had tied his animal on the accused person's shamba, the course taken by the accused person was not the solution to the problem. It was counsel's submission that the prosecution had established the charge of murder against the accused person beyond any reasonable doubt and urged the court to so find any to convict the accused person accordingly.

Analysis of the Evidence.

19. It is not in dispute that the accused person and the deceased are brothers. It is also not in dispute that on the morning in question, the accused found the deceased's cow tied in the portion of land which the accused person was cultivating. What is not clear is whether there were still any crops on the shamba or not. Whereas Miriam says that the accused person had already harvested his crops, the accused alleges the

shamba had maize, millet and some vegetables. It is also not in dispute that there was some misunderstanding between the deceased and the accused person over the use of the piece of land which belonged to Jared Tongole, a younger brother to the deceased and the accused person. There is also no dispute that the accused person and the deceased were engaged in a fight, and that the accused person cut the deceased on the head with a panga. Whose panga was it that was used to cut the deceased? According to Miriam, the deceased had his own panga which she had earlier given to him when he wanted to go and cut grass for the animals, but she also stated that the accused sent his son to fetch a panga for him and that it was that panga which he (accused person) used to fatally injure the deceased. The evidence clearly shows that the deceased succumbed to the injuries he suffered, the very same day that he was cut on the head.

Issues and Determination

20. From the evidence on record, the issues for determination are whether the deceased died, and whether he died as a result of the unlawful acts or omission of the accused person. If the answers to the preceding questions are in the positive were the acts/omissions of the accused person pre-meditated or was what he did something done in the heat of the moment? In the case of **Wero-vs- Republic [1983] KLR 549**, decided by the Court of Appeal at Nakuru (madam Kneller JJA, Chesoni AG JA) the Court heard that the appellant who was charged with murder was convicted of the offence of manslaughter on his own plea of guilty and sentenced to 8 years imprisonment.

21. On appeal, he admitted he had pleaded guilty, but claimed that that the evidence of the prosecution had been fabricated. The facts were clear that the appellant who had had a quarrel with the deceased struck him(deceased) with a walking stick and about an hour later, he and his co-accused went to deceased's home and dragged him away and threw him in a lake. The post mortem revealed the deceased had died from skull fractures. The state counsel told the court that the appellant who believed the deceased was a wizard, also believed that it was alright for the appellant to kill a wizard who was believed to have had occult powers which he used to harm the appellant's children.

22. After hearing the appeal, the learned appeal JJ held inter alias, that "where a person accused of killing another raises the defence of provocation, it is a question of fact whether the accused in all the circumstances of the particular case, was **acting in the heat of passion caused by grave and sudden provocation when he killed that person.**" Emphasis is mine.

23. In the instant case, the defence of provocation has been raised only during the final submissions, and even then in a very veiled manner. Nonetheless, the evidence shows that the cow was tethered in the accused's person's portion of land and whether or not there were crops still standing on the shamba or not is a fact that was not proved beyond the competing testimonies by Miriam and the deceased. I will give the benefit of the doubt to the accused person and make a finding that the shamba where the deceased's cow was tethered still had growing crops. I also make a finding that the deceased confronted the accused person, though Miriam says that by that time, the deceased had placed his panga on the ground. Miriam also testified that there was a case concerning the land and in the circumstances of this case I am satisfied that, the situation of the deceased's cow being tethered on the accused person's land to eat growing crops was grave and the same caused sudden provocation to the accused person in the heat of that passion, the accused person fatally wounded his brother the deceased.

24. What then am I saying? What I am saying is that the accused per son killed the deceased by cutting him on the head, but that the killing was as a result of the provocation caused by the deceased whose animal was tethered in such a manner and the aim of destroying the accused person's crops of maize, millet and vegetables.

25. I also find that though it was annoying for the deceased to tether his animal on the accused person's shamba, the accused person had no right whatsoever to take away the life of the deceased. The action of the accused person was unlawful.

Conclusion

26. The upshot of the above is that I find the accused person guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the penal code and convict him accordingly.

It is so ordered.

Judgment delivered, dated and signed in open court this 20th day of February, 2017.

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Jamsumba (present).....for the State

.....Mr. Munyendo (present).....for the Accused

.....Polycap.....Court Assistant