



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

HIGH COURT CRIMINAL CASE NO. 06 OF 2015

REPUBLIC PROSECUTOR

VERSUS

HASSAN GUYO SHUNE ACCUSED

JUDGMENT

HASSAN GUYO SHUNE is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that on the 31st day of December, 2012 at **Manyatta Konso**, Dakabaricha location in Marsabit Central District of Marsabit County, he murdered **HUSSEIN ABDIKADIR**.

The prosecution case is that the accused confronted the deceased while armed with a sword and fatally wounded him.

In his defence the accused contended that he acted in self defence.

The issues for determination are as follows:

1. Who of the two was the aggressor,
2. Whether the stab wound by the accused was the cause of the death; and
3. Whether the stabbing amounted to murder.

We have gathered from the evidence on record that the accused and the deceased were competing for the love of one woman. It has emerged that this woman was married to the deceased but it would appear all was not well between them. They constantly quarreled and when family members intervened, they found out that the deceased was complaining of her liaison with the accused. This is what **Philip Wario Guyo (PW5)** testified to. He said he was invited severally whenever the deceased and his wife had differences. Most of the time the quarrel was over the accused. On his part **CPL. Mohammed Abdikadir (P.W7)**, a brother of the deceased, testified that at the time of the incident, the accused was cohabiting with the wife of the deceased.

This background information will greatly assist in establishing who of the two was the aggressor. This is because when the incident occurred, nobody else was nearby to be able to give an account of what actually transpired.

The scene was outside the shop of **Ganno Guyo (P.W2)**. This lady testified that the accused went to her shop and bought bananas and some milk. After selling to him, she went back to her kitchen. While in her kitchen after about 30 minutes she heard her shop's gate being banged. She went to check. when she looked across the counter, she saw the accused and the deceased fighting. The deceased cried and said he had been stabbed. They were inside the shop compound. She went out of her shop and moved near them. She found the deceased bleeding from the left thigh. She screamed and ran away.

On his part the accused contended that the scene was at the shop's verandah where he was taking bananas and some milk. This was where the deceased found and started to insult him. When he asked him why he was insulting him, he told him that he was going to see. He stood up and called the shopkeeper. Before she could come, the deceased held him from behind and knocked him down. The deceased beat him and held him by the throat while sitting on him. This is when he stabbed him on the thigh.

The scene of the incident was not at the shop's verandah as the accused would want the court to believe. This is borne out of the evidence of **Ganno Guyo (P.W2)** and **Wario Guyo Godana (P.W1)** who separated the duo. **P.W1** testified that the accused threw the knife he had used into some bushes while he (P.W1) was still holding him. Since in that position he could not manage a good throw, I make a finding that the scene was not at the verandah. My finding is bolstered by the evidence of **Bashiro Abdullahi Hassan (P.W3)** and that of **Chief Inspector Charles Mwangi (P.W8)** on where the knife was recovered. Ganno Guyo said the incident took place at her shop's gate.

If one person is sitting on another during a struggle like the one that gave rise to this case, it is unlikely for the knife to get to the inner aspect of the thigh of the person on top. If it does the injury would be very superficial. Had the deceased sustained a stab wound on the outer aspect of the thigh, then his version would be convincing. He must have stabbed the deceased while standing the way the prosecution witnesses testified to.

Self defence was defined in the case of **REPUBLIC v ANDREW MUECHE OMWENGA [2009] eKLR** as follows:

Self defence on the other hand, as the term itself suggests, is defence of self. It is the use of force or threat to use force to defend oneself, one's family or one's property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

The evidence on record does not suggest that the deceased was armed. Though we may not be able to tell between the two who the aggressor was, for each had a motive to be, the accused used a lethal weapon against the deceased. The defence of self defence is not available to him.

Murder is defined under section 203 of the Penal Code as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

In the case of **REPUBLIC V ANDREW MUECHE OMWENGA [2009] eKLR** Maraga J (as he then was), referring to the above Penal Code definition went on to say:

" It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought"

What is malice aforethought? Section 206 of the Penal Code defines malice aforethought as follows:

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 flight or escape from custody of any person who has committed or attempted to commit a felony.

It is clear from the onset that the accused does not deny that he did stab the deceased. The evidence of **Dr. Irungu Karuga (P.W6)** on his observation of the tongue and the eyes, is that he found them pale almost whitening. He opined that this signified massive loss of blood. Though he did not open up the body due to the religious beliefs of the family of the deceased he formed an opinion that the death was caused by the massive bleeding secondary to the stab wound on left inner aspect of the thigh. This was the only abnormality he noted on the body.

The prosecution did not adduced any evidence to establish malice aforethought. The evidence on record indicate that the accused and the deceased engaged in a fight. We have evidence that before the accused had been attacked by enraged members of public, he had an injury on the forehead. Though he used a sword, I am persuaded to make a finding that his choice of where to stab the deceased was only intended to inflict pain. Though this resulted in death, I make a finding that he had no malice aforethought. I therefore reduce the charge under the provisions of section 179 of the Criminal Procedure Code to that of manslaughter contrary to section 202 (1) of the Penal Code that states:

Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

This is the that the prosecution has proved beyond any reasonable doubt against the accused. I find him guilty and accordingly convict him of this lesser offence.

DATED at MARSABIT this 16th day of February 2017

KIARIE WAWERU KIARIE

JUDGE