



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 28 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

SAMUEL WAMBURA SIPORA.....ACCUSED

JUDGMENT

1. The Accused person herein, **SAMUEL WAMBURA SIPORA** was arraigned before this Court on 21/08/2015 and faced an information of murder. The particulars of the offence are as follows;-

“On the 28th day of July 2015 at Mturio village in Kuria West District within Migori County in the Republic of Kenya murdered MUKIRA MUKUBO CHOMBA.”

2. The Accused person denied committing the offence and the case was set for hearing. The prosecution availed eight witnesses who testified in support of the charge. They were **LEONARD KIBURE GATI (PW1)** who was an eye-witness and a neighbour to both the accused person and the deceased, **MUKIRA MUKUBO CHOMBA**. **PW2** was **DAVID MOROGA** who was a Pastor and a neighbour to the accused person and the deceased as well. **STEPHEN CHOMBA MUKUBO** who testified as **PW3** was a brother to the deceased as well as **PW4** one **MORONYA MUKUBO CHOMBA** who testified as **PW4**. **No. 82050099 AP Corp. ROBERT OKINDO** of Masangara AP Post testified as **PW5**. The Doctor who conducted the post mortem examination one **Dr. RUWA SAMMY MWATELA** testified as **PW7** whereas **Dr. GEORGE SANGAI MARWA** who assessed the mental status of the accused person testified as **PW6**. The Investigating Officer **No. 49084 Sgt. SAMSON KATAKA** testified as **PW8**. The accused person and the deceased were neighbours.

3. The prosecution's case was very brief and straight forward. On 28/07/2015 at around 04:00pm the deceased herein, **MUKIRA MUKUBO CHOMBA**, was in the company of PW1 and one **JOHNSON SAMUEL** (not a witness). The three were walking along a road in Mturio village in Kuria West District. Suddenly the deceased went into a bush leaving the two on the road. The two walked ahead but stood after a short distance to wait for the deceased. As the two so stopped, the accused person who had been walking towards the three reached where the two were and they exchanged greetings. The accused person even asked PW1 to accompany him to a nearby local primary school to watch a football match. PW1 however declined since he wanted to rush to his home so as to take care of his cows.

4. The accused person then passed the two and proceeded towards where the deceased had gone into the bush. Shortly thereafter PW1 heard some noise from the direction where he had left the deceased and upon looking back he saw the deceased and the accused person fighting. PW1 was about 10 metres away and he rushed to where the two were. They were by then on the ground with the deceased being on top of the accused person. PW1 then saw the accused person holding a knife and the deceased was bleeding. He separated them. The accused person then ran into the nearby bush and since some villagers had began

gathering at the scene in response to the noise which PW1 made, PW1 mobilized them and they arrested the accused person whom they took to the Masangora AP Post as some villagers accompanied PW3 and took the deceased to hospital.

5. The deceased was rushed to a hospital in Isebania before he was transferred to Pastor Machage Memorial Hospital in Migori. He died the same day as he underwent treatment. A post mortem examination was conducted by PW7 after the body was identified by PW3. PW8 witnessed the examination. The deceased was later on buried at his home in Mturio village.

6. PW8 proceeded on with the investigations. He visited the scene and drew a rough sketch. He also went to the AP Post and collected the accused person from PW5. He also managed to get the knife which was alleged used to stab the deceased. He accompanied the accused person to hospital where PW6 carried out a mental assesment and confirmed that the accused was fit to stand trial. The current information was then preffered against the accused person.

7. The prosecution then closed its case and by a ruling of this Court, the accused person was placed on his defence. He opted to give sworn testimony without calling any witness. Whereas the accused person admitted that there was a fracas between him and the deceased he denied that he intentionally caused the death of the deceased. His testimony was almost similar to that of PW1 save that he maintained that the deceased is the one who had the knife throughout the struggle and that all what he did was to act in self defence as the deceaseed was hell-bent to finish him. He expalined that it was the deceased who suddenly ambushed him from a bush while dangerously armed with a big double-edged knife saying that he was going to kill him and that he could not run away as he was so near the deceased such that had he so attempted the deceased could have instead stabbed him. The only option he had was to restrain the deceased from stabbing him and in the process the deceased was injured. The accused person closed his case without calling any witnesses.

8. At the close of the defence case Counsel for the accused person filed written submissions and the State called upon the Court to be guided by the evidence on record. It is on the basis of the above evidence that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder.

9. The offence facing the accused persons is an information of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

(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 afterthought which constitutes the ‘mens rea’ of the offence.

I will now consider the above issues as follows: -

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

10. As to whether the deceased indeed died, the prosecution availed PW1, PW2, PW3, PW4 and PW7 in such proof. All those witnesses saw the lifeless body of the deceased. The Court therefore finds as a fact that indeed the deceased herein died.

11. On the cause of the death of the deceased, PW7 produced a Post Mortem Report which he prepared upon conducting the examination himself. The said report gave the possible cause of death of the deceased to have been severe acute haemorrhage secondary to penentrating stab wound to the leg with soft

tissue injury. Since there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

12. I will now turn to the second ingredient as to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person. There is no doubt that the deceased died out of the injury he sustained in the struggle with the accused person. The two indeed fought. PW1 was the only eye-witness and could not tell how the fight started. He only heard some noise and on looking back he saw the two in a fierce fight. The only explanation on how the fight arose can only be that of the accused person: that it was the deceased who attacked him with a double-edged sword.

13. That being so, was the accused person then entitled to defend himself and if so can he rely on the defence of self-defence? I have reiterated the events in details that led to the fight elsewhere in this judgment. The attack was sudden and the weapon that was used was no ordinary house knife; it was a double-edged sword. The knife was produced in evidence and the Court has had a closer look at it. It is by no means an ordinary knife and if it is drawn on one then that signifies a serious attack. The accused person also told the Court that had there been a way out he could have run away from the deceased he could have surely done so just to avoid a possible fight. Since the circumstances did not accord such an opportunity the accused person then had to just deal with the issue by restraining the armed deceased. That position by the accused person seems to be true since when he was eventually separated from the deceased by PW1, the accused person ran away from the deceased and into the bush and he was only brought back by the villagers. The accused person had just shortly met the two companions of the deceased and they exchanged greetings. He even asked PW1 to accompany him to watch a football match at the local primary school. PW1 did not indicate that the accused person appeared to have been up to doing something illegal. As the accused person left the two companions of the deceased, he least expected any confrontation with anyone.

14. A look at the coincidence that the deceased on seeing the accused person approaching the three of them had to get into a bush to answer a call of nature and only came out of the bush at the very time the accused person was passing that place only reveals the great possibility that the deceased had purposed to lay a sudden ambush on the accused person and his act of going into the bush can reasonably be seen as towards such preparation. Despite the attack having been sudden, the deceased was equally armed. I say so because PW1 did not categorically deny that the deceased had a knife. There was a struggle that followed. So fierce such that PW8 described the accused person's T-shirt as ***'it was torn as a sign of a struggle'***. This Court had a opportunity of seeing the T-shirt which was produced in evidence and is in agreement with PW8 that there must have been a struggle from the way the T-shirt was torn. Indeed when PW1 reached where the two were fighting he found that the accused person had been overpowered and was on the ground while the deceased was at the top and the deceased was bleeding.

15. Those are the circumstances that prevailed. But what does the law say on the aspect of self-defence? **Section 17** of the **Penal Code** Chapter 63 of the Laws of Kenya states as follows:

"17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."

16. The common law position has evolved with time from an objective approach to a subjective one. The Court of Appeal in **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** dealt with the aspect of self-defence in great detail. I fully concur with the analysis in that decision not only because the decision is binding upon this Court but also given that the legal position was rightly and clearly settled. I will herein below reproduce how the Court of Appeal expressed itself in allowing the appeal on the ground that the appellants acted in self-defence thus:

"The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v. MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being

attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v MORGAN (supra) it was held that:

“.....if the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

In BECKFORD v R (supra) it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.

In R. v WILLIAMS [1987] 3 ALL ER 411, Lord Lane, C.J. held:

“In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistaken was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”

It is acknowledge that the case of DPP v MORGAN (supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also SMITH AND HOGAN'S CRIMINAL LAW, 13TH Edition, Page 331.

Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test.'

17. By applying the subjective test and in taking the particular circumstances of this case, this Court is convinced that the accused person acted in self-defence. There is ample evidence that the accused person was attacked by the deceased who was armed and in such circumstances that the only way out was for the accused person to engage the deceased. The accused person stated that he had wanted to even run away but that was not possible. The defence therefore comes to the aid of the accused person since the prosecution has failed to show that the accused person acted beyond the parameters of self-defence. In so finding this Court echoes the holding in the case of **Palmer v. Regina (1971) All ER 1077** where the Court stated that:

“Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence.”

18. Apart from the issue of the self defence, there really exist a vacuum on the prosecution's part as to how the deceased was injured. PW1 did not say that he saw the accused person stab the deceased. He only witnessed the fight and separated the two. He even did not know who the owner of the knife was. Since the prosecution cannot rely on the defence to fill in its gaps, the only evidence which this Court can reasonably act upon in filling the said gaps is what was said by the accused person. In the absence of the defence case this Court can only assume that the deceased was injured in the fight. Unfortunately the law does not allow the Court to make such an inference without a sound basis. That position in itself creates such a doubt as to puncture the prosecution's case.

19. Be that as it may, in upholding the accused person's defence that he so acted in self defence, this

Court finds that although the deceased died out of the fight between himself and the accused person, the accused person did not commit any unlawful act that went towards causing the death of the deceased. The accused person therefore acted within the parameters of self-defence. The second ingredient is hence not successfully demonstrated.

20. Having failed to prove the second ingredient it goes without say that the accused person cannot be seen to have acted with malice aforethought. In fact a consideration of the last ingredient will not serve any purpose in this matter.

21. I hence come to the conclusion that the information of murder facing the accused person has not been proved. The accused person is hereby found not guilty of the murder of **MUKIRA MUKUBO CHOMBA** and is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 06th day of February 2017.

A. C. MRIMA

JUDGE