REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 35 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JONES CHACHA NYAMOHANGA.....ACCUSED

JUDGMENT

1. **JONES CHACHA NYAMOHANGA** hails from the Nyabirongo village in Kuria West District within Migori County of the Republic of Kenya. He described himself as a humble, hardworking and a peace-loving young man. When he was initially charged with the murder of his uncle one **CHARLES MOGAYA RIOBA** (hereinafter referred to as **'the deceased'**) on 02/02/2016, he readily admitted to the information and a plea of guilty was entered.

2. Facts were then tendered and even though the accused person so admitted them, this Court on analysing them found that a plea of not guilty was instead suitable. The case was then ordered to be tried.

3. The prosecution called a total of seven witnesses whose evidences were taken in a record one day; that is the 12/01/2017. **PW1** was one **CHACHA RIOBA NYAGETA** who was the father to the accused person and a brother to the deceased. **IRENE ACHIENG CHACHA** testified as **PW2**. She was the wife to the accused person. **PW3** was one **JOHN MAGABE** who was also a brother to both the deceased and PW1 and an uncle to the accused person. **JACKSON MOTERA MATIKO** the Assistant Chief for Nyagonge Sub-location who called the police upon receiving the information that the deceased had been killed. He testified as **PW4**. **PW5** was the sister to the accused person one **TERESIA KEMUNTO**. **JACKSON MAKURI** who was a neighbour to the family of the deceased testified as **PW6**. The Investigating Officer **No. 82026 Cpl. CHRISTOPHER SAMOEI** testified as **PW7.** He as well produced the Post Mortem Report and the Mental Assessment Form as exhibits.

4. The brief facts of this case are that in the afternoon of 13/11/2015 the accused person returned to their homestead while drunk. He went to PW1 and requested that he be allowed to plant some trees at a certain place. That place was just next to a public road. PW1 accompanied the accused person and went to see the place. Since the place was infact part of a road reserve PW1 declined to allow the accused person to plant the trees and asked him to identify another place away from the public road. The accused person became adamant and insisted that he would go ahead and plant the trees regardless of what PW1 had told him. The accused person went ahead and started digging the holes. As PW1 was fearing possible action from the administration he decided to raise alarm so that the villagers and the village elder would gather and see what the accused person was doing and may persuade him otherwise. Truly, people gathered. One of them was the wife to the accused person, PW2. On seeing what was happening, PW2 asked PW1, his father-in-law, who was furiously shouting at the accused person to go back to his house as she would convince the accused person otherwise. PW2 had to take PW1 back to his house. PW2 told PW1 that she would take the accused person away as he was only but drunk.

5. The deceased had also heard of the commotion by the road side. On learning what the matter was, he went and called out his brother, PW1, from his house and asked him to accompany the deceased to the scene. PW1 obliged. The deceased was armed with a *panga* and had also carried a sharpening file. Reaching the scene, the accused person was still digging the holes and the deceased started abusing the accused person. He asked the accused person what he was doing and before answering the deceased slapped the accused person. The deceased told the accused person that he was going to slaughter him using the panga he had in his hand as the accused person was a nuisance in the village.

6. Sensing that the deceased was that furious, the accused person surrendered and knelt down. He raised his hands up and pleaded with the deceased for forgiveness. The deceased retreated and removed a sweater he had worn and gave it to another person together with the sharpener. He then held his panga ready to attack the accused person. PW1 attempted to intervene and restrain the deceased but he was pushed by the deceased who was furiously saying that he would kill the accused person. PW1 fell down. As the deceased was charging towards the accused person, PW2 stood on the way between the deceased and the accused person. The deceased harshly told PW2 go give way as he was holding the panga. PW2 became afraid and got out of the way. The deceased then charged at the accused person. The accused person then got up from kneeling down and encountered the deceased. They struggled for the panga. Both fell down and the struggle continued. The accused person managed to overcome the deceased and sat on his back. He also took the panga from the deceased. He then

used it to cut the deceased severally on the head and the other parts of the body before the accused person disappeared. The accused person later on surrendered to the police.

7. The deceased died on the spot. The police were called and collected the body of the deceased to the mortuary for preservation and post mortem examination. The Post Mortem Report confirmed a total of 14 cut wounds ranging from the head to the upper part of the body. The probable cause of death was severe haemorrhage due to severed carotids and jugulars. The accused person was then mentally assessed as further investigations were undergoing. When proved to be fit to stand trial, the accused person was charged accordingly.

8. At the close of the prosecution's case the accused person was placed on his defence. He opted to give an unsworn statement. He reiterated the prosecution's case and claimed that he killed the deceased in self-defense.

9. The foregone are the facts upon which this judgment is premised on. I have carefully considered the evidence on record as well as the exhibits. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(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 therefore consider each of the issues independently.

10. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by all the prosecution witnesses. The first limb is hence answered in the affirmative.

11. As to the cause of the death of the deceased, the Post Mortem Report which was produced upon conducting a post-mortem examination on the deceased's body gave the probable cause of death to be severe haemorrhage due to severed carotids and jugulars. 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. The accused person does not deny causing the death of the deceased, but raises the defence of self-defense, I will hence refer to the prevailing legal position on the issue. **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."

13. 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 alowing the appeal on the ground that the appellants acted in self-defence thus:

''The common law position regarding the defence of self-defense 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 acknowledged 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-defense 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.'

14. By applying the subjective test and in taking the particular circumstances of this case, this Court is not convinced that the accused person acted wholly in self-defence. There is ample evidence that the accusd person overpowered the deceased with ease, sat on his back and disarmed him. Having done so there was no need for the accused person to cut the deceased over ten times. Further, the accused person would have easily called for the on-lookers to restrain the deceased instead of undertaking the cuts. His action went over and above what would be dedscribed as reasonable apprehension of danger. The defence of self-defence, being a complete defence, does not therefore come to the aid of the accused person. (See the case of Palmer v. Regina (1971) All ER 1077).

15. The defence having not seen the light of the day, the second ingredient is hereby proved in the affirmative.

16. On the third ingredient of whether there was malice aforethought, this Court has carefully revisited the events as they unfolded. The deceased and the accused person did not plan to engage into any fight. It was a spontaneous act which went overboard. That alone cannot constitute malice aforethought or *mens rea* for murder.

17. I will now have a look at the law on malice aforethought. **Section 206** of the Penal Code defines *'malice aforethought'* as follows:

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

18. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR,** the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171,** held as follows: -

"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975)AC 55". (emphasis added).

19. In the case of **Nzuki vs. Republic (1993)KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed: -

"There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the

fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him gracious harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."

20. The foregone analysis perfectly fits the case before this Court. I therefore find that the ingredient of malice aforethought was not proved in the circumstances of this case.

21. The foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased. However, it is clear that the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

22. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed herein before, this Court however finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is accordingly convicted accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 30th day of March 2017.**

A. C. MRIMA

JUDGE