



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 15 OF 2015

REPUBLIC PROSECUTOR

VERSUS

LUCAS MASABA SAYO.....ACCUSED

JUDGMENT

1. The Accused person herein, **LUCAS MASABA SAYO** was arraigned before this Court on 23/03/2015 and faced an information of murder. The particulars of the offence were as follows;-

“On the 20th day of March 2015 in Kuria West District within Migori County in the Republic of Kenya murdered SAMWEL MWITA RANGE”

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 information. They were two minors **R M** and **M N** who testified as **PW1** and **PW2** respectively. They were aged 11 years old and 10 years old respectively. The wife of the deceased one **ESTHER WEGESA MATINDE** testified as **PW3** whereas a cousin to the deceased one **DANIEL GATI MARWA** testified as **PW4**. **WILSON NYAMOHANGA MARUA** who was a neighbour to the deceased testified as **PW5**. One of the brothers to the deceased **NYAMOHANGA RANGE MUSAMBA** testified as **PW6**. The employer to the deceased one **JAMES NYAMEGAE GESOGWE** testified as **PW7** whereas **No. 81670 Cpl. HELEN KOECH** of the DCI Kuria West who was the Investigating Officer testified as **PW8**. The accused person and the deceased were neighbours. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except otherwise stated. The said **SAMWEL MWITA RANGE** who died will henceforth be referred to as **‘the deceased’**.

3. The prosecution's case was very scantily put forth. That is because those who were to testify as the principal eye-witnesses although they had recorded such statements with the police gave completely different evidence in Court. They were **PW1** and **PW2**. They denied ever seeing the accused person or the deceased on the fateful day and did not aid the prosecution at all. I however formed an opinion that **PW1** and **PW2** were not truthful to the Court. **PW3**, **PW4**, **PW6**, **PW7** and **PW8** did not witness what happened that led to the death of the deceased. Infact all of them were variously called after the deceased had long died.

4. The only evidence from the prosecution's side that tended to come near attempting to potray what happened was that of **PW5**. That evidence however remained uncorroborated. It was the testimony of **PW5** that in the morning of 20/03/2015 the deceased left his cows in his care as he attended a funeral of one of his relatives. On returning in the evening, **PW5** gave back the cows to the deceased who then led them to the nearby river to drink water. **PW5** then went to his home. After a while, **PW5** heard loud screams near his home and peeped through the window but did not see anything. He then rushed out and

went towards the direction of the screams. He then met the accused person on the way holding a blood-stained panga from the direction of the screams. PW5 greeted him but the accused person did not respond. PW5 proceeded further and found out that it was wife of the accused person who was screaming. When PW5 looked around, he saw a body lying down near the cows which the deceased had given him to look after in the morning. He rushed there only to find that it was that of the deceased and it was lifeless. It had a big cut across the chest and was bleeding profusely. PW5 then rushed to the home of the deceased to report but did not find any one at home. He rushed to one of the neighbor's of the deceased one **Kerose** (not a witness) who called and informed PW3 of what had happened. PW5 then returned to the scene and among many other villagers witnessed the police arrive and eventually collecting the body. He later on recorded his statement with the police.

5. That was the much the prosecution availed in terms of its evidence and it eventually closed its case after PW8 had testified and produced *inter alia* the Post Mortem Report which was filled by a Doctor after conducting an autopsy which PW8 witnessed and the Mental Assessment Form for the accused person as exhibits.

6. 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 centered on what had allegedly happened. According to the accused person, he had returned home from grazing his cows and since it was during a dry spell he asked his younger brother **P M S** (not a witness) then aged 17 years old and his son to further graze the cows in the farm of PW7 which was generally used for such purposes. The two obliged and left the homestead with the cows.

7. After sometime, the accused person heard his said brother and son crying at the nearby river. He then rushed there only to find his brother having fallen down unconscious as the deceased stood next to him while armed with a panga and a stick. The deceased was very angry. The accused person then asked the deceased what the matter was but instead the deceased charged at him armed with the panga and ready to attack the accused person. A struggle broke out and the accused managed to get the panga from the deceased. The deceased then used the stick and hit the accused person on the hand that had the panga intending to also disarm the accused person. The accused person's wrist was injured by the stick and the accused person knew that he had to act in order to save his life. With an intention of only scaring off the deceased, the accused person cut him once and the deceased collapsed. He then returned to his home where he stayed until when he was arrested by the police.

8. At the close of the defence case Counsel for the accused person submitted briefly that the offence of murder was not proved and that the accused person acted in a spur of the moment and in self-defense. He prayed that the information be dropped. The State relied on the evidence on record.

9. 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 information of murder.

10. 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:

11. As to whether the deceased indeed died, the prosecution availed PW3, PW4, PW5, PW6, PW7 and PW8 in such proof. All those witnesses saw the lifeless body of the deceased. The Court also saw some photographs of the lifeless body of the deceased at the mortuary during the post mortem examination. I am hence certain and find as a fact that indeed the deceased herein died.

12. On the cause of the death of the deceased, PW8 produced a Post Mortem Report which was prepared by a **Dr. Ndege, J.O.** upon conducting the examination which he witnessed and saw the Doctor fill in the report. The said report gave the probable cause of death of the deceased to have been a penetrating cardiac injury and splenic injury causing massive peritoneal haemorrhage and haemopericardium. 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.

13. 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. PW5 did not witness the fight and neither was any other witness. That being so, the only evidence this Court will have to rely on in respect to that aspect is that of the accused person.

14. I have revisited the evidence of the accused person else where above on what happened that led to the death of the deceased. The events occurred in a short period of time and in a highly charged environment. The deceased had beaten the brother to the accused person until he was lying unconscious on the ground and he stood armed near him while very angry. He was armed with a panga and a stick. When the accused person asked the deceased what the problem was, it was the deceased who charged at him wanting to cut him with the panga. In the struggle that ensued, the deceased was disarmed. Not relenting, the deceased used the stick and attacked the accused person by hitting and injuring him on the wrist aiming to disarm him. The accused person then retaliated with a single cut using the panga he had taken from the deceased and the deceased fell down. That was the fatal injury. The accused person now contends that he did not act unlawfully but in self-defense.

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. In fact had the accused person not overcome and disarmed the deceased then most likely he would have become the victim. The accused person was not armed at all when he responded to the cries for help from his brother and son at the river. He only found himself in a near-death situation and naturally one would attempt all ways to save one's life. 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 echos 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. Be that as it may, in upholding the accused person's defence that he so acted in self defence, this Court now 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.

19. As I come to the end of the consideration of this issue, I wish to reiterate that the prosecution seemed to have had gathered cogent evidence on how the events leading to the death of the deceased unfolded but for the change in the testimony of PW1 and PW2. That benefitted the accused person greatly.

20. Having therefore 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 **SAMWEL MWITA RANGE**

and is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of April 2017.

A. C. MRIMA

JUDGE