



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 14 OF 2011 (MURDER)

REPUBLIC..... PROSECUTION

VERSUS

MARTIN KINYUA NANCY.....ACCUSED

J U D G M E N T

1. The accused faces a charge on murder contrary to Section 203 as with Section 204 of the Penal Code. He pleaded not guilty to the offence.
2. The prosecution's case was made up of 13 witnesses. PW1 testified that on 28/4/2011 at 7.30 p.m. he was selling meat and samosa at his Skyway hotel which is located at Manyatta market. The accused came and requested to be served with something to eat. He was told to wait as PW1 was attending other customers. The accused decided to help the PW1 with work as he waited to be served.
3. PW1 further testified that the deceased then came and ordered a samosa from the accused who told him to wait. The deceased moved closer and told the accused that he had been looking for him and had now found him. The deceased immediately slapped the accused on the cheek. The accused then stabbed the deceased with a knife he had placed on the table. Immediately the deceased left the premises and collapsed beside the road. The accused took himself to Manyatta police station where he was locked in and later charged. According to PW1, the deceased was a very rough boy and was a drunkard.
4. It was the evidence of PW2 that on 28/4/2011 he was at Manyatta Shopping centre where he found that the deceased had been taken to hospital. He recovered the knife believed to be the murder weapon from the accused and handed it over to the OCS Manyatta. He knew both the deceased and the accused prior to the incident.
5. PW3 stated that on 28/4/2011 she left home to go to work while the deceased was to go to Manyatta market. At around 7.00 p.m. she got a call and was informed that the deceased had been stabbed. The deceased was a form four student at the material time. She said that she was not aware that the deceased was a trouble maker or even a drunkard.
6. PW4 and PW5 did not witness the incident. They were the father and schoolmate of the deceased respectively. Neither did PW7 witness the incident. He found the deceased holding his chest after the stabbing.
7. PW6 said that he was at the scene at the material time when he saw two young men come to the hotel and started causing trouble. The accused was hit by one of them on the cheek prompting him to take a kitchen knife and stab his assailant with it. PW6 said that it was the deceased who attacked the accused.
8. PW8 Cpl. Jerida Nyatich of Manyatta police station testified that she recovered the murder weapon from the hotel and arrested the owner and another employee. She was accompanied by other officers including Officer Commanding Station and one CI. Zalika Osman Kiptoo.

9. PW13 a medical doctor at Embu PGH stated that he conducted postmortem on the body of the deceased and established that he died due to shock after massive bleeding in the heart caused by a wound on the left side of the chest. PW9 examined the accused at the same hospital and found him fit to plead.
10. The accused gave a sworn statement and said that he used to do menial jobs to earn a living. At the material time he was working in a hotel at Manyatta owned by one Bosolo Kinyua where he used to sell meat. The deceased was a customer at the hotel and on 25/8/2011 he came to the hotel and ordered meat worth Shs.30/= but did not pay for it.
11. On 27/8/2011 the deceased came to the hotel and was drunk. He found the accused with a customer and ordered some meat. The accused reminded him that he had a debt of Shs.30/= and demanded that he pays before being served.
12. It was at this juncture that the deceased hit the accused with a fist. The accused said that he was holding a knife which he threw at the deceased injuring him. He denied fighting the deceased and said he was defending himself.
13. Outside the hotel the accused was informed that the deceased was seriously injured. He decided to go to Manyatta police station to report the matter and later learnt that the deceased had died. The accused was arrested and was later charged with the offence. He stated that the deceased was drunk and acted unreasonably and further that he did not attack the deceased.
14. The State Counsel Ms. Nandwa submitted that the evidence of PW1 was corroborated by that of PW6. She cited the case of **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] eKLR** where the elements of the offence of murder were listed as follows:-

(a) *the death of the deceased occurred;*

(b) *that the accused committed the unlawful act which caused the death of the deceased;*
and

(c) *that the accused had malice aforethought.*

15. It was further submitted that it was clear from the evidence that the accused stabbed the deceased on the chest with a kitchen knife which was produced as an exhibit. The postmortem report indicated that the cause of death was hemorrhage due to shock secondary to massive bleeding from the left side of the heart which was caused by a sharp object. The post mortem report corroborated the evidence of PW1 and PW6.
16. The prosecution stated that the unlawful act by the accused led to the death of the deceased. It was also argued that the case was proved beyond reasonable doubt and that malice aforethought was established. The accused knew the kind of damage that the weapon would cause.
17. The prosecution relied on Section 17 of the Penal Code which provides that the use of force in the defence of person or property shall be determined according to the principles of English common law. The applicant cited the case of **ROBA GALMA WARIO VS REPUBLIC [2015] eKLR** where the Court of Appeal cited the case of **MOHAMMED OMAR & 5 OTHERS [2014] eKLR** and the case of **DPP V MORGAN [1975] 2 ALL ER 347** where it was held that:-

The essential element of self defence is that the accused believed that he was being attacked or in imminent danger of being attacked but this belief should be based on reasonable grounds. The ground of self defence also fails as evidence on record does not bring out that the appellant faced any kind of danger that made him fear for his life.

18. In the instant case, it was argued by the State that the deceased only slapped the accused and this could not amount to an attack. Further that the accused also introduced the defence of provocation which is provided for under Section 207 and 208 of the Penal Code.
19. Provocation was discussed in the case of **TEI S/O KABAYA VS REPUBLIC [1961] EA** where the court held:-

In consideration whether the defence of provocation was sufficient to reduce the offence to manslaughter it is material to consider the degree of retaliation as represented by the

number of blows and the lethal nature of the weapon used.

20. In the instant case, it was argued by the State that the deceased was unarmed. A mere slap could not have provoked a person to lose control. The accused had an option of retaliating with a blow. He instead used a knife because he had the intention of killing the accused.

21. The defence counsel Mr. Nduku Njuki submitted that of all the prosecution witnesses only PW1 and PW6 witnessed what transpired between the deceased and the accused. PW1 testified that the deceased went straight to where the accused was and told him that he had been looking for him before he slapped him.

22. PW6 testified that he saw the accused stab the deceased without any altercation. Malice aforethought has not been proved. The evidence of the accused is that he was attacked and had to react in self-defence. The murder weapon was what the accused used it as a tool of trade and that he acted out of extreme provocation. The defence argued that the prosecution has failed to prove any premeditation on the part of the accused.

23. Section 203 of the Penal Code provides:-

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

24. Section 204 provide that:-

Any person convicted of murder shall be sentenced to death.

25. Section 206 on Malice aforethought states:-

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.

26. Section 17 of the Penal Code which states as follows;

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.

27. The evidence of PW1 was that he saw the accused stab the deceased with a knife after being slapped by the deceased. This evidence was corroborated by Pw6 who was an eye witness. He said that the accused was hit by the deceased on the cheek. The accused then took a kitchen knife and stabbed the accused. In his defence the accused admitted that he stabbed the deceased as he was defending himself. The evidence on record proves beyond any reasonable doubt that the accused did the unlawful act which caused the death of the deceased which involved stabbing him with a knife.

28. I now proceed to determine whether the accused had the intention to kill the deceased. The ingredients of murder were explained in the case of **ROBA GALMA WARIO VS REPUBLIC**

[2015] eKLR where the court held that;

For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.

29. Malice aforethought was defined in the following cases;

(a) **NZUKI VS REPUBLIC [1993] KLR 171** where the Court of Appeal held that before an act can be murder it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- *Intention to cause death*

- *Intention to cause grievous bodily harm*

- *Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused 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.*

(b) In the case of **DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR)** cited in the case of **REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR**, BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

30. The accused raised the issue of self defence saying that he was defending himself. There is evidence from the prosecution witnesses that the deceased is the one who attacked the accused by slapping him on the cheek. The deceased was demanding to be served with meat by the accused and could not wait for the accused to finish what he was doing. It is also in the evidence that the accused stabbed the deceased with the knife that he was using as a tool of trade.

31. The issue of self defence was discussed in the case of **AHMED MOHAMMED OMAR & 5 OTHERS VS REPUBLIC [2014] eKLR** where the court held as follows;

*What are the common law principles relating to self defence? The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in **PALMER VS R [1971] AC 818**. The decision was approved and followed by the Court of Appeal in **R VS McINNES**, 55 Lord Morris, delivering the judgment of the Board, said:*

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or

by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

32.The Court of Appeal further held that;

*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.*

33.The accused said he was holding a knife he was using in the course of his work and that he threw it at the deceased causing him injury. The question is whether the accused faced imminent danger of further attack after he was slapped to justify using the force that he applied in hitting back.

34.In assessing “reasonableness” of the act of the accused, it is important to consider the circumstances of the case. The prosecution relied on the case of **ANTHONY NDEGWA VS REPUBLIC Criminal Case No. 352 of 2012 [2014] eKLR** which discussed the burden of proof regarding the defence of intoxication. I find this case not very helpful since the accused relied on different offences.

35.In the Court of Appeal case of **NJERU VS REPUBLIC [2006] 2 KLR 46**, the court in dealing with self defence held:-

1. A killing of a person can only be justified and excusable where the action of the accused which caused the death was in the course of averting a felonious attack and no greater force than was necessary was applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.

2. In this case, it was not in dispute that the appellant, being a police officer on duty, had shot the deceased and killed him. It was therefore upon the appellant to show that at the time of the shooting he was in the course of averting a felonious attack and that no greater force than necessary was applied. The appellant was bound to show that he was in immediate danger or peril arising from a sudden and serious attack by the deceased.

3. By virtue of Section 17 of the Penal Code, the principles of the English common law were applicable in determining criminal responsibility for the use of force in defence of the person or property. Under those principles, a person who attacked may defend himself but he may only do what was reasonably necessary. Everything would depend on the particular facts and circumstances.

36.The prosecution argued that the accused in his defence did not satisfy the court that he was in imminent danger or was averting an immediate danger or peril arising from a sudden or serious attack by the deceased. Further that the deceased was not armed and posed no imminent danger or peril to the accused. The State concludes that the accused used excessive force in the circumstances and the defence cannot therefore succeed in this case.

37.In his submissions the accused raised the defence of provocation. He said that he was extremely provoked when he stabbed the deceased. The defence of provocation is provided for and defined under Section 207 and 208 of the Penal Code.

38. Section 207

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

39. Section 208

1. The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

2. When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

3. A lawful act is not provocation to any person for an assault.

40. In the Court of Appeal case of **OKWANY & ANOTHER VS REPUBLIC [2005] 1 KLR 833** the court held that was provocation where the confronted the accused and another armed with a rungu and uprooted crops from a disputed portion of land which the accused had planted.

41. It was held:-

1. The fact of the case raised an issue of provocation which ought to have been put to the assessors and considered by the trial judge himself. In the circumstances, the conviction for murder could not be sustained.

2. The appellants were guilty of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and liable to imprisonment for 10 years.

42. In this case, the accused was carrying on with his day to day duties at the hotel serving customers when the deceased came and demanded to be served. He had no patience to wait and moved to where the accused was and slapped him. The act of the deceased annoyed the accused who used the knife he was holding and stabbed the deceased.

43. The accused did not move from his working table to procure the weapon. He used what was in his hands to hit the deceased.

44. Although the deceased was not armed with any weapon, his action must have been prompted the accused to act at the spur of the moment and used what he was holding to stab the deceased. From the facts of this case, the deceased was the aggressor and this demonstrates that the accused acted in the heat of passion. The evidence on record does not support any premeditation on the part of the accused.

45. During the moment which followed, after the slap, the accused acted suddenly and had no time to ponder over his action in order to assess its consequences.

46. I am of the considered view that the defence of provocation is supported by the evidence on record. The accused has shown that he acted on the heat of passion on being attacked by the deceased.

47. In view of the foregoing, I find that the charge of murder cannot be sustained against the accused.

48. I find the accused guilty of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

49. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF APRIL, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Appellant present

Mr. Onjoro for State

Mr. Nduku for accused