



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL CASE NUMBER 23 OF 2012**

**REPUBLIC OF KENYA.....PROSECUTOR**

**VERSUS**

**BRIAN KIRWA BOWEN .....ACCUSED**

**JUDGMENT**

1. The accused, **Brian Kirwa Bowen** was charged with the offence of **Murder Contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that on the 1<sup>st</sup> April 2012 at Sawich village in Koibatek District within Baringo County, murdered **Joseph Kipkosgei Bowen**. He pleaded not guilty and the case proceeded to hearing.

2. The sum total the six prosecution witnesses is that the accused and the deceased, Joseph Kipkosgei Bowen are brothers. That on the fateful day, at about 7.00p.m., they met at their mother's kitchen where they were served with food. She did not think they were drunk though they used to drink. The deceased came into the kitchen carrying vegetables where he found the accused already seated in the kitchen.

3. That before finishing eating his meal, the accused woke up, locked the door and windows of the kitchen and without saying a word picked up some piece of firewood and a *panga* that was in the kitchen under the chair and attacked the deceased cutting him on the neck and forehead. Meanwhile, the mother to the two, ran out in fear screaming, attracting neighbors who answered the screams. That while the deceased was lying down, the accused then picked up a log of fire and torched the grass thatched kitchen roof while standing next to the deceased and when the fire became intense, he walked out of the kitchen and started chasing away people who had gathered outside but he was subdued beaten unconscious and only woke up in hospital in pain.

The deceased was burnt to death in the kitchen. The post mortem performed by the pathologist did not reveal the precise cause of death as it stated that he could have died from severer burns, cuts or shock. The mother of both the deceased and the accused was the only eye witness to the act.

The accused was charged with the offence of murder.

4. **Section 203 of the Penal Code** defines murder as the unlawful homicide committed with “**malice aforethought**.” It is the killing of a human being by another with malice aforethought.

The Section reads:

**“Any person who of malice aforethought causes death of another person by any unlawful act or**

*omission is guilty of murder.”*

**Malice Aforethought** is deemed to be established by evidence proving any one of the following circumstances:

*Section 206(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 happen.*

*(c) an **intent to commit a felony***

*(d) an **intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony.***

5. PW3 was the mother of the accused and the deceased and the only eye witness.

From the record, her evidence was brief. That at about 7.00p.m. on the fateful day, the accused came into her kitchen while she was cooking and asked him to wait for food. As he was eating the deceased too came in carrying vegetables. According to her, her sons did not appear drunk, She served both with food. While they were eating the accused suddenly woke up, closed the door and windows of the kitchen, picked up a piece of firewood and *panga* and cut the deceased and also set the house on fire. She ran out in screams that attracted the neighbours. According to her testimony, the two did not quarrel nor did they have difference. She could not think of any reason why the accused attacked the deceased.

6. Prosecution witness number one(PW1) was brother to both the deceased and the accused. He answered the screams from his mother's kitchen. It was his testimony that he found the kitchen bolted from inside and gained entry after it was broken and found deceased lying on the floor with burns on the body while the accused was standing beside him, and not armed. He did not enter the kitchen.

7. **Prosecution witness number 2(PW2)** too answered the screams and found the accused chasing PW1 inside the kitchen. He saw the deceased lying in the kitchen with a cut on the neck. The accused came out of the kitchen and started chasing people.

8. **Prosecution witness number 4(PW4)** was the investigating officer one Judith Majimbo Ag. Inspector. She found the deceased lying dead in the burning kitchen and the accused was lying outside having been attacked by the mob. After taking witness statements she made the opinion that the accused had killed. It was her statement that she retrieved the burnt body of the deceased and the *panga* the murder weapon from the burning kitchen, which was still burning at the time she arrived at the scene.

Dr. Magani Ikenga, a pathologist, conducted a post mortem on the body of the deceased. It was his findings that the body was burnt beyond recognition. He formed the opinion that the death was caused by severe burns but added on cross examination that it was difficult to say the specific cause among the three causes – severe burns, cuts and shock.

9. The above is the prosecution evidence upon which the accused was put on his defence.

10. In his sworn evidence in defence before the court, the accused testified that on the material day, from 11.00a.m., he was out on a drinking spree with the deceased, his bother, that at about 5.00p.m., he left the deceased and went home when at about 7.00p.m. he met his mother PW3 in

her kitchen cooking. While seated in his mother's kitchen, the deceased walked in with a walking stick and asked him why he had damaged his house in the *shamba* upon which he told him that it was their mother who had instructed him to remove it. Thereupon, and before further explanation, the deceased hit him on the eye with the walking stick. He fell down with a lot of pain and bitterness. While down, he saw a *panga* under the chair. At that point and in extreme anger, it was his evidence that he picked up the *panga* and cut the deceased on the forehead. Upon seeing this, the mother shouted and ran out screaming attracting neighbours who came and beat him up unconscious.

He testified that he had no intention of hurting or killing his brother, the deceased, but acted out of severe anger and pain. He sought for forgiveness and stated that he had no dispute with the deceased, that he did not know why he did so, that he was drunk and so was the deceased. It was his evidence that if he was not drunk he could not have killed his brother. On cross-examination, he stated that it was the deceased who hit him first on the eye with the walking stick, and that the stick was not brought to court. He confirmed that their mother cooked and served them with food before the deceased hit him with the walking stick. He did not mention anything about the fire in the kitchen.

11. In his submissions, Advocate for the accused poked holes in the prosecution evidence, and finally submitted that the prosecution did not prove its case against the accused beyond reasonable doubt.

12. I have considered the defence submissions by counsel. It is at great variance with the prosecution and defence evidence on record. At no time did the prosecution witness PW3, and mother of both deceased and accused testify that there was a misunderstanding or quarrel between the two brothers. Indeed it is on record that the accused told the court that he had no disagreement at all with the deceased. PW3 too testified that she was not aware of any disagreement between her two sons. PW3 the accused mother did not testify that she walked out of the kitchen to get milk when the deceased hit the accused stabbing him on the left eye, nor is there testimony of a fight between the two brothers as submitted by counsel. The defence of self defence is therefore misplaced. The accused did not testify that he acted in self defence when he cut the deceased with a *panga*. He stated that he actually thought about hitting the deceased, and did it.

13. I am constrained to dismiss the accused's advocate submissions as baseless and a distortion of material facts.

14. The accused defence as may be deduced from his short evidence was one of provocation and intoxication.

He stated that he did not have the intention to kill his brother but due to intense anger and pain inflicted upon him on the eye by the deceased, he picked up the *panga* and cut him on the forehead. He stated that he was drunk at the time he committed the offence and would have not committed the offence if he was not drunk.

15. The **defence of provocation** is defined under **Section 207 and 208** of the Penal Code as follows:

**Section 207:**

*“When a person who unlawfully kills another under circumstances which, but for the provision 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.*

**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 of in the presence of an ordinary person to another 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 some or offered.*

*(2) When such an act or insult is one 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 the latter provocation for an assault.”*

The above definition was given in the case **Republic -vs- Chivatsi & Another (1989) e KLR.**

16. In the Court of Appeal decision in **R.C -vs- Republic (2005) e KLR** the court stated that:

*“it is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of passion caused by grave and sudden provocation when the killing was done.”*

17. The court has analysed the prosecution evidence and the accused defence.

The accused's defence in its totality is that he acted in extreme anger and pain when he was hit on the eye by the deceased and without any intention killed the deceased.

PW3 testified that there was no bad blood between the brothers before the incident therefore no question of cumulative provocation arises.

The question is therefore whether the events of the fateful night were sufficient to cause a reasonable person to lose control and react in the manner the accused did resulting to the death of the deceased.

18. In **Stephen Kipkeror -vs- Republic (2002) e KLR** it was held:

*“In other words if in the heat of the moment or passion a person strikes another person when insulted to a degree which would deprive an ordinary person of the power of self-control an act of killing resulting from such striking could amount to manslaughter rather than murder.”*

19. **PW3** testified that the accused locked up the door and windows of the kitchen before attacking the deceased with the *panga*. The evidence was collaborated by **PW1** who found the kitchen door bolted from inside and had to remove the grass to see inside the kitchen. The kitchen was on fire. The only other person who was in the kitchen was the deceased who was lying down and burning after the accused was seen by his mother, **PW3** torching the kitchen grass thatched roof with a burning firewood as she looked from the window from outside.

These acts by the accused, of locking up the kitchen from inside and torching the kitchen while the deceased was lying inside helpless negate the defence of provocation. Those cumulative actions of the accused, show that the said actions were not as a result of sudden anger or provocation, but were premeditated, with an intention to kill or cause grievous harm to the deceased. See **Section 206 and 207** of the **Penal Code**. The act of torching the kitchen after the deceased was helpless after the assault was not explained at all. The accused did not even mention the fire in the kitchen in his defence. All prosecution witnesses testified that they found the kitchen on fire, and **PW3** saw the accused torch the kitchen grass thatched roof while the deceased was inside.

20. Counsel for the accused in his submissions did not dispute the cause of death of the deceased or the fact that the deceased died in the hands of the accused. It is the circumstances that

lead to the death that was disputed. It is his submission that the fire at the kitchen may have been caused by the deceased himself or was accidental, that the prosecution evidence was contradictory and not credible and did not prove the ingredients of murder and in particular that the accused had malice aforethought at the time he committed the offence. It was his further submission that the accused closed the kitchen door and windows as a security measure and that the accused had not premeditated when he used the *panga* to attack the deceased.

21. To prove “malice aforethought” the prosecution is mandated to prove:

- (a) *the fact and cause of death of the deceased person.*
- (b) *that the death of the deceased was as a result of an unlawful act or omission on the part of the accused persons.*
- (c) *that such unlawful act or omission was committed with malice aforethought.*

The fact of the death is not in dispute and was adequately proved by admission by the accused himself that he killed the deceased. As to the cause of the death, the doctor who performed a postmortem on the body of the deceased that was burnt beyond recognition, was that no precise cause of death was made and was either due to severe burns, cuts or shock. The above notwithstanding, the accused admitted that he inflicted the cuts on the deceased with a *panga* and actually admitted killing the deceased. The cuts were inflicted with the *panga*. Burns were occasioned by the fire. The ingredients of malice aforethought as stated above were thus proved.

22. The accused raised a defence of intoxication when he testified that had he not been drunk, the act of murder could not have taken place.

**Section 13(2) of the Penal Code** states that “intoxication shall be a defence to a criminal charge if by reason therefore the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and,

- (a) *the state of intoxication was caused without consent by malicious or negligent act of another person, or*
- (b) *the person charged was by reason of intoxication, insane, temporarily or otherwise, at the time of such act or omission.*

23. A Defence on intoxication is considered for purposes of determining whether the charged person had formed any intention, specific or otherwise in the absence of which he would not be guilty of the offence. The accused testified that he was out on a drinking spree with the deceased on the material date upto 5.00p.m. However, PW3 the accused mother, in whose presence the offence was committed testified that the two sons used to drink but on the material date and time they both did not appear drunk, when she served them with food in the kitchen where the offence took place and in her presence.

**PW3** was the only eye witness. Her immediate reaction when the accused attacked the deceased was well captured. She ran out screaming and met PW1, another brother to the deceased and informed him that the accused had hit the deceased and that she saw him torch the kitchen.

24. The court is to consider whether the accused was so drunk that he was driven by temporary insanity to commit the offence as charged. The circumstances prior to and after the act do not persuade the court that the accused did not know what he was doing.

It was his testimony that when he fell down after allegedly being hit at the eye by the deceased with a walking stick, out of anger and extreme pain, he thought of hitting him and when he saw a *panga* under the seat, he picked it and actually cut him, and stood beside him. The accused

actions of locking up the kitchen door and windows followed by the attack and the further act of torching the kitchen when the deceased was lying down helpless after he cut him negated all his defences. Those acts were, in my considered opinion premeditated, deliberate and intentional, for the sole purposes of inflicting grievous harm and or killing the deceased. Such acts can not be interpreted by an ordinary person to have been done out of intoxication, provocation or any possible defence. The court finds that the defence of intoxication and provocation by the accused cannot be available to him in view of the circumstances. See **Njoroge -vs- Republic (2002) e KLR.**

25. **PW3** was the only eye witness to the commission of the offence. She is the mother of both the deceased and the accused. Her first hand information to those who came to answer her screams is consistent and was not shaken at all during cross-examination and by the defence. Her evidence was corroborated by **PW1** and **PW2** who rushed to the scene to find the kitchen on fire with the deceased inside, and the kitchen door bolted from inside. **PW4** retrieved the deceased's burnt body from the said kitchen.

26. In its totality, the court finds that the prosecution evidence was credible, accurate and truthful and represents what took place and in particular **PW3's** evidence as to what took place in her presence. Given the circumstances leading to the commission of the offence, and the admission by the accused that he indeed killed the deceased, the court dismisses the accused's defences of provocation and intoxication, and finds that the act of killing was wrongful, and was not due to some act or series of acts or words spoken which would have caused the accused a sudden and temporary loss of self control rendering him subject to passion so intense as to make him not know what he was doing. **PW3's** evidence was not shaken at all. No reason was advanced as to why she would have been making false allegations against her own son when she had lost the other during the incident. The only inference is that she was honest and truthful.

27. For those reasons, the court finds that the cumulative actions of the accused prior to and after the act were premeditated and were so committed with intention to kill or cause grievous harm to the victim, the deceased.

All in all, the court is satisfied that the prosecution has proved the charge of **Murder Contrary to Section 203 of the Penal Code** as charged, beyond any reasonable doubt. I therefore find him guilty as charged and convict him accordingly.

28. Counsel for the accused is to address the court on why the accused should not be sentenced in terms of **Section 204 of the Penal Code** on a date to be taken in court.

**Dated, signed and delivered in open court this 2<sup>nd</sup> day of June 2016.**

**JANET MULWA**

**JUDGE**

**LANGAT:** We seek a date for mitigation

**COURT:** Mitigation and sentencing on the **6<sup>th</sup> July 2016 at 12.00noon.**

**JANET MULWA**

**JUDGE**