



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 31 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

E M M.....ACCUSED

J U D G M E N T

1. **E M M**, the Accused is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **1st** day of **June, 2011** within the **Kitui County** she unlawfully killed **K M** (Deceased).

2. Facts of the case are that the Accused and the Deceased herein were siblings. On the **1st** day of **June, 2011**, PW1, **M S** their grandchild who was asleep was woken up by noise at about **7.00 p.m.** He saw the Accused hitting the Deceased with a stick. PW2, **Nzioki Mwenda** a neighbour who was passing by found the Deceased on the ground and witnessed the Accused hitting him. On enquiring what was happening, the Accused explained that the Deceased intended to rape her. He left.

3. In the meantime the Accused went to wake up PW3 **R K M**, their elder sister seeking help. She declined to assist her. She went back home and sent PW1 to call PW4, **M M**. She went to the Accused's home and found the Deceased having fallen down. The Accused alleged that the Deceased wanted to rape her. She advised her not to assault him and left. At about **1.00 a.m.** PW1 went to her home and informed her that the Deceased had passed on.

4. Following the unfolding events the Accused went to report the matter to the police. PW6 **No. 219732 C I Leonard Ndutta** interrogated her. He was led to the scene of the incident by the Accused where he found the body of the Deceased. He recovered sticks that he suspected to be murder weapons and a petticoat that the Accused was wearing when she was accosted by the Deceased. He interviewed witnesses who confirmed that the Deceased used to molest the Accused sexually. He caused the body of the Deceased to be escorted to the mortuary. PW4 **Dr. Allan Barongo** conducted an autopsy on the body and formed an opinion that the cause of death was cardiopulmonary arrest secondary to serious head injuries as a result of blunt force on the head, multiple injuries on the torso and limbs – soft tissue injuries.

5. When put on her defence, the Accused gave sworn evidence where she stated that she was asleep at her house when the Deceased her younger brother went knocking at the door. He hit the door which gave way and entered the house. When she woke up the Deceased hit her. She fought back. The Deceased pushed her down as he touched her private parts. She fought back and picked a stick that was on the floor which she used to hit the Deceased. Thereafter she ran to her sister's place to seek assistance but she declined to be involved. She later reported the matter to the Administration Police. She denied having

harboured any intention to kill the Deceased.

6. It is not in dispute that the Deceased passed on. Evidence adduced by **Dr. Allan Barongo** confirmed the fact and cause of death being severe head injury which resulted from a blunt force on the head. There were other multiple soft tissue injuries on the limbs and torso. Further, it is not in dispute that the Accused herein did cause the stated injuries on the person of the Deceased.

7. The issue to be determined is therefore whether the unlawful act that caused the death of the Deceased was committed with malice aforethought. Malice aforethought is defined as:

“(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.” (vide Section 206 of the Penal Code).

8. In her defence the Accused denied having acted with an intent to cause the death of the Deceased. None of the witnesses could tell what prompted the Accused to assault the deceased. The explanation of what transpired was given by the Accused. In his testimony the Investigating Officer, PW6, stated that following his investigations he established that the Deceased used to harass the Accused sexually. He visited the scene and per his observation, the door to the Accused’s house was broken. It was forcibly opened. There was evidence of a struggle in the house.

9. The issue of the Deceased having molested the Accused previously was an open secret. According to PW2 the Deceased had been warned to desist from wanting to rape the Accused. PW2 was aware of the Deceased’s bad character of harassing people after drinking but she could not tell if he used to make sexual advances at the Accused as they used to drink together. PW4 on the other hand was aware that in the year **2000** the Deceased had attempted to rape the Accused and was warned by their father.

10. The Accused while denying having intended to kill the Deceased stated that she fought back on being hit by the Deceased who was touching her private parts. What she did according to her was to act in self defence.

11. Section 17 of the Penal Code states that:

“Subject to any express provision 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”.

12. The general principle in common law in respect of self defence is that the law allows only reasonable force to be used in the circumstances and, what is reasonable is to be judged in light of the circumstances as the Accused believed them to be (whether reasonable or not). In assessing whether a Defendant (Accused) had used only reasonable force (**See Palmer vs. Republic (1971) AC 814**).

13. In the case of **Republic vs. Ngoilabe s/o Lenjaro (1951) 18 EA CA 164** the court stated that:

“..... if a man acting in good faith exceeds the power given him by law to defend himself and kills his assailant, the resultant homicide whilst not justifiable may yet be excusable, so that his

offence can be regarded as manslaughter and not murder”.

14. In another case – **Robert Kinuthia Mungai vs. Republic (1982 – 88) 1 KAR 611** the court held that it is a doctrine recognized in East Africa that excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter.

15. On cross examination the Accused stated that the door to her house was weak and made of iron sheets. The Deceased was drunk. In his drunken stupor he hit her with a fist and kicked her. She reacted by screaming but nobody went to her aid. Consequently she pushed him and he fell onto the table. She picked a piece of wood and hit him severally, an act that resulted into his death. Considering the nature of injuries the Deceased sustained, namely: multiple bruises on the body, haematoma of the head, on both the parietal and frontal lobe, the Accused overreacted and ended up using excessive force in her defence which makes the offence manslaughter as she did not harbour the intention to kill.

16. Having considered evidence adduced in totality I find the Prosecution having proved the charge of manslaughter against the Accused as provided by **Section 203** of the **Penal Code**. Accordingly, I reduce the charge of murder to that of manslaughter for which I find the Accused guilty and convict her accordingly.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 12th day of July, 2016.

L. N. MUTENDE

JUDGE