



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL CASE OF 4 OF 2013

REPUBLICPROSECUTOR

VERSUS

SADI BAHARI KIRAO.....ACCUSED

JUDGMENT

1. The accused person, SADI BAHARI KIRAO is charged with murder contrary to section 209 as read with Section 204 of the Penal code.
2. The particulars being that on the 24th day of January, 2013 at Mapawa village in Kilifi County within Coast Region, murdered **ROBERT MWANGORI**.
3. The plea was taken on 12th March, 2013, whereby accused pleaded not guilty to the charge. The trial commenced on 8th may 2013 and finalized on 1st April 2016.
4. The state was led by state counsel while the accused person was represented by Mr Tindi.
5. To prove their case, the prosecution called a total of nine (9) witnesses.
6. Pw1, Florence Mawaka is the deceased's wife. She told court that at on 26th January, 2013 she and her husband who is the deceased herein, ROBERT MWANGORI, left with panga and hoe to prepare their shamba. And at about 5.00 pm, a neighbour by the name CHIRAO came out and called the deceased by his name, Robert. The deceased went to check why he was being called. Pw1 then said that she suddenly heard screams she decided to go and check. She found the deceased had been hit on the head with sticks and he was bleeding. She also said there were people who came and found her holding her the deceased's head. They took the deceased to hospital. Pw1 identified the piece of wood to court. She said that she did not see the accused hit her husband as the house is situated on a hill top. She further stated that they went to the police station where they found the accused person having handed himself to the police. She said that she had never heard of a grudge between the accused and her deceased, husband.

In cross examination, Pw1 said that she was not present at the scene of crime. She also said that she did not hear what they were saying. She admitted that her husband left while carrying a panga. She found two ladies whose names she could not recall, at the scene (herein after referred to as Pw4 and 5).

7. PW2 SALIM MWAMBA NYUNGU, told court that he was a nephew to the deceased who was his uncle. He stated that on the evening of 29th January, 2013, he was on his shamba when he heard screams from the neighbor's house. He went to the scene and found the wife of the deceased and other ladies. They told him that accused had hit the deceased with pieces of wood. He said that he saw the deceased

lying on the ground with wounds on his head. The accused had escaped but Pw2 said he found the piece of wood which had been used to hit the deceased. He identified the piece of wood to court, (exhibit P 1) Pw2 also said that they took the body to the mortuary after reporting the matter to the police station. Pw2 denied having a grudge against the accused.

In cross examination, Pw2 said he was shown the piece of wood which was lying next to the body. He also said that he did not know the names of the ladies who reported about the incident to him.

8. PW3 CHARLES NABUNGE testified that on 24.1.2013 at about 5.00pm he was in his house when Salim Mwamba (Pw2 herein) went and told him that his uncle has been beaten by the accused. Pw3 went and saw the deceased who had wounds on the head. They took him to hospital and later he recorded a statement with the police.

When cross examined, Pw3 said that he did not know whether the accused and deceased had a grudge against each other.

9. PW4 ALICE SADU told court that she was a neighbor to the deceased. And that on 24.1.2013 at about 5.00pm, she heard commotion outside the house. She got out and saw the accused running while holding a Mnazi drink (palm wine) with a tapping knife. she also said she saw he was being chased by Mwangori (the deceased) who was armed with a panga. She further said that she saw the deceased try to hit the accused with the panga but he evaded and pushed him aside. She saw the accused pick a piece of wood and charge at the deceased. That he then hit the deceased with the piece of wood once and he fell. The accused disappeared into the bush, as they gave the deceased first aid.

According to Pw4, the dispute was about a shamba but she did not know whether it had been taken to the chief or the police but it had been taken to the village elder.

On being cross examined, Pw4 stated that it is the deceased who was chasing the accused. That she saw the accused who is a wine seller carrying a tapping knife. The deceased was carrying a panga and saying that he could finish the accused. The accused then picked a piece of wood and hit the deceased with it.

10. PW 5 FRANSISCA PENDO ZIRU told court that he was a granddaughter to the accused and the deceased was her neighbor. She went on to state that on 24.1.2013, her grandfather, the accused had gone to tap wine. He returned while being followed by Kirao who asked him to come out. Her grandfather, the accused herein, picked a piece of wood and hit the deceased on the head. They screamed for help and members of public came to his rescue by giving him first aid.

According to Pw5, there was a land dispute where the accused was claiming ownership of the land in question. She said that the deceased was carrying a panga but did not use it on the accused the deceased wanted to fight the accused over the land dispute.

In cross examination, Pw5 said she saw the accused hit the deceased three (3) times but did not see them chase each other.

11. Pw 6 SAUMU KAINGU was stepped down as she was indicated to have appeared unwilling to testify.

12. Pw 7, DR LAWRENCE OGUDA introduced himself as principal Government Chemist. He indicated that he had a degree in chemistry and post graduate diploma from Punjab. He testified that on 4th February, 2013 he received three samples from Julius Njoka of Kijipwa police station. He identified the marked samples to court as;

“A” Blood stained piece of wood’

“B” Blood sample of the deceased

“C” Blood sample of accused

He said the “A” was stained with human blood. He then generated DNA profile which he found on the piece of wood matched with the blood samples of the deceased. He prepared and signed the report which he produced as exhibit P3.

13. Pw8 GABRIEL MWANGOLE is a medical officer at Coast general Hospital. He testified as to how he conducted a post mortem examination of the deceased at the said hospital’s mortuary after it was identified to him by Florence and James Mwabu.

Pw8 said that upon examining the deceased’s body it revealed a bruise on the back and the left ear of the head. He found all other systems to be normal. He observed haematoma on the left side and a large fracture on the back of the head. He also found a collection of blood under the skull.

Pw8 concluded that the deceased had died due to traumatic head injury. He then produced the post mortem report which he had filled and signed, as exhibit P4.

14. Pw9, IP CHRISTINE AMAYO told court that she was the investigating officer in this matter which had been pending since 2013, having been instructed to investigate a case of murder. P9 went on to state that on 25.1.2013, the wife to the deceased (herein referred to as Pw1) took him to the police station where they made a report of assault. It was alleged that on this day, the deceased was hit with a piece of wood on the head. That he died while undergoing treatment.

Pw9 went on to state that he recorded witnesses statements on 21.1.2013 and then proceeded to the scene of murder. There she recovered the murder weapon which was outside the house of the accused. This was identified by the deceased’s wife (Pw1) herein. She kept it as an exhibit.

Pw9 then said that the accused person took himself to the station where she caused him to be charged with the offence of murder. She produced the piece of wood exhibit P1.

In cross examination, she said that there was a dispute over the land the deceased was cultivating.

At the close of prosecution case, the accused was found to have a case to answer and he was placed on his defence.

15. The accused person elected to make a sworn statement in defence in which he denied causing the deceased’s death.

16. The accused person, SADI BAHARI KIRAO, testified in his unsworn defence that on 24.1.2013, he was at home where he left at 3.00 pm to go and tap palm wine. He returned to his home at about 5.00 pm, he got into his house and after a short while, he heard a knock on his door. The accused said he kept the palm wine and knife, then got out. There, he saw the deceased outside his house, holding a panga. That the deceased told him that he had come to finish him and aimed the panga at him, in an attempt to cut him on the neck. The accused persons evaded by God’s assistance. The accused said that the deceased did this to him thrice.

The accused person told court that there was a lady who was preparing vegetables who screamed and was joined by another lady.

He said that he did not run away but kept moving backwards with the deceased following him. And when he reached his son’s collapsed hence, he found a piece of wood which he threw at the deceased when he tried to hit him again that he fell down. The accused left the deceased lying down and ran towards the Kipibwa police station to report the matter. He however did not reach the said police station in as it was late in the night. He went back home where he learnt that the deceased had been taken to hospital.

The accused went on to state that he woke up the following morning and went to inform his brother,

Mpoyani what had happened. He then boarded a motorcycle and went to Kijibwa police station where he explained to the police what had happened the previous night. The police informed him that the deceased had died. He was then locked up.

According to the accused person he did not call the deceased from his home since his home is far from the deceased's. He also said that he did not intend to kill the deceased. He further told the court that it is the deceased who attacked home at his home.

17. The accused person's advocate submitted that Pw1 and 2 only heard screams and found he deceased on the ground. Pw3 only heard of the incidence from somebody else and arrived to find the deceased on the ground. None of the witnessed the incident. It is only Pw4 and 5 saw the accused hit the deceased on the head with a wooden stick.

18. He also submitted that the circumstances of the case were such as to raise the question of provocation which would justify a verdict of manslaughter instead of murder as there is evidently lack of malice aforethought on the part of the accused.

19. He further submitted that the issue of self defence is evident from the prosecution's witness as it is clear that accused attacked the deceased in circumstances that he reasonably believes that his life was in danger and was entitled to use force to repel the attack.

20. He submitted that accused was innocent of the charge of murder and ought to be acquitted.

21. In the instant case, the accused person is charged with the offence of murdering Robert Mwangori contrary to section 203 as read with section 204 of the penal code.

22. The issue for determination, therefore, is whether the prosecution has proved beyond reasonable doubt that the accused person did murder the deceased.

23. Murder is defined under Section 203 of the penal Code as;

“Any person, who of malice afterthought causes death of another person by an unlawful act or omission, is guilty of murder”.

24. For a charge of murder, the critical ingredients that must satisfactorily be proved by the prosecution are:

(i) proof of the facts of death of deceased and cause of that death;

(ii) proof that the death resulted from the unlawful act or omission of the accused person (Proof of mens rea).

(iii) proof that the said unlawful act or omission was committed with malice aforethought (proof of “new pea”).

25. Upon going through the evidence of the prosecution's witness and the defence, I find that it is not in dispute that the deceased in this case died. It was Pw2's evidence that they took the deceased's body to the mortuary after reporting the matter to the police station. A person's body is taken to a mortuary when they are dead.

26. Pw8, Gabriel Mwangore, is the medical officer who conducted a postmortem examination on the deceased's body. A post mortem examination can only be conducted for a dead person.

27. Pw 9, the investigating officer gave evidence in which she stated that the deceased died while undergoing treatment.

28. From the evidence which has not been disputed, the prosecution has proved beyond reasonable doubt that the deceased, Robert Mwangori died. The next question is, what cause the deceased's death?
29. According to Pw1, she heard screams and on going to check, found her husband, the deceased having been hit on the head with sticks and was bleeding. She however said that she did not see the accused or person who hit him.
30. Pw2, told court that he heard screams from the neighbours house and on going there, found the deceased's wife and two other ladies who told him that the accused had hit the deceased with pieces of wood. He saw deceased lying on the ground with wounds on his head.
31. Pw3 told court that he was informed by Pw2 that his uncle had been beaten by the accused. He went and saw the deceased with wounds on the head.
32. Pw4 said that she saw the deceased try to hit the accused with the panga but he evaded and pushed him by aside. She then saw the accused pick a piece of wood, charge at the accused and hit him with it once.
33. Pw5 also said that she saw the accused pick a piece of wood with which he hit the deceased on the head.
34. Pw 8, the medical officer upon conducting a postmortem examination on the deceased, concluded that he had died due to traumatic head injury (exhibit P4).
35. Again, the prosecution has proved beyond reasonable doubt that the deceased died after being hit on the head with a piece of wood.
36. The next issue to be determined is whether the deceased's death was as a result of and unlawful act or omission of the accused person.
37. It was the evidence of Pw1 that she and her husband, the deceased, were preparing their shamba when the accused person called him and the deceased left to go and check why he was being called while carrying a panga. A few moments later, Pw1 heard screams and rushed to the scene, where she found the deceased lying in a pool of blood having been hit on the head with sticks and was bleeding. And in cross examination, pw1 said that she was not present at the scene of crime.
38. Pw2 also said he heard screams from the neighbour's house and then went to the scene. He found the deceased lying on the ground with wounds on the head. That he was informed by the deceased's wife and two other ladies that the accused had hit the deceased with pieces of wood. It is clear from the evidence of Pw2 that he also did not witness the incident.
39. Pw3 said that he was told by Pw2 that the deceased had been beaten by the accused and he saw him with wounds on his head. He also did not witness the incident and only heard of what was supposed to have happened from Pw2.
40. Pw4 testified that she saw the accused running while carrying a Mnazi drink and a tappers knife. She also said she saw the accused being chased by the deceased who was arrested with a panga. She further said that she saw the deceased trying to hit the accused with a panga but he evaded and pushed him aside. She then saw the accused pick a piece of wood, charged at the deceased and then hit him with the said wood.
41. Pw5 also testified that she saw the accused pick a piece of wood and hit the deceased on the head.
42. Apart from the evidence of Pw1, 2 and 3, who did not witness the said incident, Pw4 and 5 said they saw the accused hit the deceased on the head with a piece of wood. This evidence was again not disputed by the defence.

43. In his unsworn defence, the accused told court that the deceased went to his house while wielding a panga and told him that he had gone there to finish him. That, the deceased tried to cut him on the neck thrice but he evaded. He then kept running backwards as the deceased followed him. And when he reached his son's collapsed house where he found a piece of wood which he picked and threw and pierced at the deceased when he tried to cut him again.

44. From the evidence of both sides, it has been shown that the deceased died after being hit on the head with a piece of wood by the accused person in this case.

45. But was the act by the accused, of killing the deceased unlawful?

The act of hitting another by any object or means is unlawful unless it can be proved otherwise. This then brings me to the issue of whether the said unlawful act was committed with malice aforethought,

46. Malice aforethought which forms one of the ingredients that need to be proved in the offence of murder, is defined under section 206 of the penal code as follows:

“Malice aforethought shall be declared to be established by evidence proving any occurrence of the following circumstances:

(a) an intention to cause the death or to do grievous harm to any person whether the person is the person actually killed or not;

(b) knowledge that the act or omission causing of death will probably cause the death of or do grievous harm to some person, whether that person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not or by a wish that may not be caused;

(c) an intent to commit a felony;

4 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.

47. From the evidence of the prosecution's witness, it clearly came out that Pw1, 2 and 3 did not witness what happened. In fact Pw 1 in cross examination told court;

“I was not present at the crime scene I did not hear what they were saying”

In cross examination, Pw3 also said that

‘I found when the deceased had already been beaten’.

48. Pw4 and pw5 testified that they saw the accused hit the deceased on the head with a wooden stick. In his evidence, Pw4 stated that;

“ I came out and saw the accused running holding his drink mnazi. He was not carrying a knife for tapping. He said that he was being chased by Mwangole. I saw Mwangole armed with a panga he said that he was to kill him. He aimed to cut the accused with the panga who evaded it and pushed Mwangole aside.

The accused managed to get out. The accused picked a piece of wood and chased the deceased and hit him with it”.

In cross examination, pw4 told court that;

“it is the deceased who was chasing the accused. The accused was a wine tapper. He was

carrying the tappers knife. He placed the knife inside his house. The deceased was saying that he would finish him. The accused picked a piece of wood and hit him with it. The deceased had tried to cut the accused with a panga but the accused evaded the same.”

49. Pw5, on the other hand said in his evidence;

“he returned while being followed by Kiraro who told him to come out. My grandfather picked a piece of wood and hit the deceased on the head.....the accused hit the deceased on the head.....”

.....The deceased was carrying a panga. He did not use it on the accused. The deceased wanted to finish the accused.....it is the one he used to the deceased three times. I did not see them chase each other.....”

And in cross examination , Pw5 said ;

“ The accused was being chased by the deceased who was carrying a panga. The accused hit the deceased with the piece of wood on the hand and head. The deceased was armed with a panga. When his head was hit with a piece of wood, the panga fell off....”

50. A piece of wood cannot be said to be a dangerous or offensive weapon unless it is adapted for use for causing injury to the person.

51. It is undisputed evidence that the accused used a piece of wood to hit the deceased, which action, resulted into his death.

But can it be said that the accused committed the act with malice aforethought?

52. Pw1, wife of the deceased said that she heard the accused call her deceased husband and he went to check on why he was being called. Could it, be said that the accused called the deceased with the intention of harming or murdering him.? There was also evidence that the two had a longstanding land dispute mens rea? Could this form means

53. Pw4 and 5 testified that they saw the deceased chase the accused while armed with a panga and try to cut him severally. That the accused who kept evading, then picked a piece of wood and hit the deceased, a result of which he fell down.

54. In his defence, the accused said that the accused attacked him and though he chose to evade, the deceased pursued and attempted to cut him on the neck severally. It is then that he picked a piece of wood and hit the deceased.

55. And although the accused does not say where he hit the deceased, it is clear, from the evidence of the prosecution’s witness that he hit him on the head.

56. It is worth noting that considering the type of weapon that was used and where it was used on the deceased, it cannot be said that the accused did not know that his action would cause the deceased harm or grievous harm. But did he have the intention of murdering the deceased?

57. In his unsworn defence and submissions by his counsel, Mr Martin Tindi, the defence pleaded provocation and self defence

Under section 207 of the penal code, provocation is said to be

“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 herein after defined, and before there is time for his passion

to cool, be guilty of manslaughter only”

58. Section 208 of the Penal code defines provocation to mean or include: except as thereafter stated;

“any wrongful act or insult of such nature as to be likely when done to or in the presence of another 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 servant, to deprive him of the power of self control the trial and to induce him to commit and assault of the kind which the person charged committed upon the person by whom the act or insult is done or offender.”

59. According to Pw1, (wife to the deceased,) she and the deceased went to plough their shamba with a panga and hoe. That at about 5.00pm she heard the accused call her deceased husband. The next thing she heard were screams and on running to the scene, found her deceased husband lying on the ground with cuts on the head.

60. Pw4 and 5 testified that the deceased who was armed with a panga chased after the accused person while threatening to finish him. They also said they saw him trying to cut the accused person. They then saw the accused person pick a piece of wood with which he hit the deceased and he fell.

61. Their evidence corroborated the evidence of the accused person in his unsworn defence where he said that the deceased came to his home while holding a panga and told him that he would finish him. Then he aimed at him thrice but the accused evaded. He kept following him as the accused person moved backwards. The accused then saw a piece of wood which he picked and threw at the deceased when he tried to hit him.

62. It is not in dispute that the incident happened at the accused person's home. As to whether the accused called the deceased to his home or the deceased went there on his own, is an issue that is neither here nor there.

63. It is also not in dispute that the deceased was armed with a panga. Pw1 could not tell what transpired between the accused and her deceased husband after he went to accused's home. It is Pw4, and Pw4 5 and the accused who said that he threatened to finish him and tried to cut him with the panga a result of which the accused picked a piece of wood and threw at the deceased.

64. In this case, provocation was in the deceased going to the home of the accused while holding a panga with which he tried to cut him several times.

65. The act of trying to cut the accused was a threat to his life. By picking the piece of wood and throwing at the deceased as he tried to cut him, the accused will be said to have been acting self defence.

66. Section 17 of the penal code defines defence of a person or property 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 a person or property shall be determined according to the principles of English common law”

67. The said principles are;

(a) the defendant must prove out that reasonably believed that his act was necessary to defend himself. This defence is available even if it turns out that the defendant did not actually need to defend himself. As long as he reasonably believed that he needed to defend himself, hence be able to use this defence;

(b) the defendant must show that he reasonably believed that he was being threatened with physical harm;

(c) the defendant must show that the threatened harm is imminent;

(d) the defendant must show that he reasonably believed that the threatened harm was unlawful.

(e) the defendant must show that the threatened harm was of such a nature that it actually required level of force that the defendant used;

68. These requirements of the English common law clearly shift the burden of proving self defence to the accused/defendant.

69. Having considered the circumstances of this case, I find that the deceased provoked the accused by going to his home while holding a panga and pursuing him while threatening to cut him and telling him that he would finish him. The accused person had a tapper's knife which he could have used as a quick and easier option. He instead picked a piece of wood that he threw at the deceased to defend himself from the attack by the deceased, which was unlawful, imminent and threatened to cause him physical harm.

70. He actually required to use a certain level of force to defend himself from the actions by the deceased and this cannot be said to have been a result of malice aforethought.

71. Clearly the principles of the English common law have been satisfied from the circumstances as of this case.

72. Self defence is a complete defence and where it is successfully raised, an accused will be acquitted. However this is a murder trial where by self defence is and in competent defence which does not entitle an accused to an acquittal but instead reduces the charge of murder to a lesser charge of manslaughter.

73. In the case of REPUBLIC VS SHAUSHI s/o MIYA (1951) 18 EACA 200. The court stated:-

“ No doubt this element of self defence may, and on most cases will in practice, merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self defence of a person or property or as acts done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack in threat of attack. Which is near enough and serious enough to cause loss of control, then the inference of malice is resulted and the offence will be manslaughter”.

74. I am satisfied upon my own consideration and evaluation of the evidence on record that the accused acted in the heat of passion upon provocation and threat to his life which was imminent and serious enough as to rule out malice aforethought. The prosecution has, hence proved the offence of manslaughter against the accused.

75. I, therefore substitute the information from that of murder contrary to Section 203 of the penal code to that of manslaughter contrary to Section 202 of the penal code.

76. I find the accused guilty for the substituted charge of manslaughter and convict him accordingly.

Dated, signed and delivered 14th day of September 2016.

D .O. CHEPKWONY

JUDGE

In the presence of:

M/s Mutua or state – Present.

Accused – Present

C/clerk- Kiarie