



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

LODWAR HIGH COURT CRIMINAL CASE NO. 7 OF 2015

REPUBLIC PROSECUTOR

VERSUS

CHARLES JUMA ESIRU Alias NAIROBIAN ACCUSED

JUDGMENT

The accused **Charles Juma Esiru** alias Nairobiian 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 are that on 27th day of April, 2015 at **Kalokoi Trading Centre within Turkana County murdered David Ekaie Idan**.

The case for the prosecution is that on 27/4/2015 **Selina Asurut** the wife of the deceased **David Ekale Idan** was at Kalokoi market at 6.00p.m. She was putting on earphones and listening to music from her phone. On the way she met one Reuben and other young men. The young men snatched the headphones from her. When she reached home she informed her husband the deceased. She then led him to where accused was and deceased asked accused for the head phones. The accused denied having the headphones and deceased told him the accused knew the boys who had taken them. They went to the market and on the way back deceased met accused and asked him the headphone again. They then started fighting. Accused then took a knife from a boy who was near there and stabbed the deceased who sustained injuries and later died. **PW5 Dr. Benjamin Nzomo** produced the post-mortem report prepared by Dr. Victor Okoth which showed that the body had wound 4cm long on left side of the chest and 5th rib was broken. He also found that there was massive air in the lungs, a penetrating lung injury at the left wall and blood in the heart. He formed opinion that the cause of death was due to cardio-pulmonary arrest due to a penetrating injury. The accused was then arrested by Kenya Police Reservist, **PW2 John Ewaton** and **PW4 Esiyen Lore Ewoi** and later handed over to police and charged with the present offence.

The accused gave unsworn evidence. He testified that on 27/4/2015 he went to visit his grandmother who sent him to buy provisions for the herdsmen. He went to Kalokol market and while in the shop he heard a commotion outside but did not join them. He went to the grandmother’s home. While there deceased and his wife went to him and deceased asked him for the headphones. He denied knowledge of the same. They went away. The accused then later went to the market to collect his phone when he met the deceased who asked him to produce the headphones again. The deceased then started hitting him with fists. Deceased then fell then accused down and the accused also fell him down and ran away. He went to where the herdsmen wee and gave them food. Later on 29/4/2015 he was arrested by Kenya Police Reservist and taken to the police station where he was charged with present offence. The offence of murder is defined in section 203 of the penal code as follows;

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

For the prosecution to establish the offence of murder, it must prove all the ingredients of the offence. The prosecution must prove 1). The fact of death of the deceased. 2). that the accused is the person who caused the death 3). There was malice aforethought as defined in section 206 of the penal code or 4). That the accused caused the death by an unlawful act or omission on the part of the accused.

PW2 Selina Asurut testified that she was with the deceased when they met the accused and upon the deceased asking him to produce the headphone, they started to fight; using fists. The accused then picked a knife from a boy who was near and stabbed the deceased. The accused in his defence admits to the fight but conveniently evaded the issue whether he stabbed the deceased.

From the evidence the incident occurred during the day; and in the presence of PW1 and I am satisfied that she was saying the truth in her evidence that is accused who stabbed the deceased during the course of the fight.

PW5 Dr. Benjamin Nzomo testified that during the post-mortem, it was established that there was a cut wound leading to a penetrating heart injury and that the cause of death was due to cardio-pulmonary arrest due to a penetrating injury to the heart. The doctor therefore confirmed that there was a stab wound as PW1 stated in her evidence. I am therefore satisfied that the fact of the death of the deceased has been proved and the cause of death established by the post mortem report.

Having proved the fact and cause of death of the deceased the prosecution has to establish that the accused is criminally capable for that act leading to the death of the deceased. The prosecution must prove the 'actus reus' which is the voluntary and wrongful act or omission that is the physical components of a crime (see **Websters New World Law Dictionary**).

PW3 Selina Asurut the wife of the deceased who was present stated

“When coming back we met accused again. My husband asked him again. They started fighting. The accused then picked a knife from a boy and stabbed the deceased. I saw accused stab deceased only once. It was at around 6.00pm. It was still during the day”.

It is therefore clear from the evidence of the witness that the accused did stab the deceased with a knife on the chest once. It was during the day; she was present and was able to see clearly that accused did stab the deceased; which act caused the death of the deceased.

The prosecution having established the actus reas, must also establish mens rea for the offence of murder to be proved. The prosecution must establish malice aforethought. Section 206 of the penal code defines malice aforethought as

206 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 a grievous harm to some person, 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.

The prosecution therefore must prove that the accused person had the intention to cause death, of or do

grievous harm to any person, that he had the knowledge that his act or omission would probably cause the death either of the person intended or to some other person; that he had intent to commit a felony and/or that the intention for the act or omission was to facilitate the escape from custody of any person who has committed or attempted to commit a felony.

The accused in this case picked a knife and stabbed the deceased on the chest. He knew or ought to have known that such act would cause death or grievous harm. In this case the intention was to cause a death or grievous harm which act was achieved by the accused act.

I am therefore satisfied that the prosecution has sufficiently established that the accused intended to kill or cause grievous harm which is the required mens rea for the offence of murder.

Under the provisions of section 207 of the penal code an offence of murder can be reduced to manslaughter if certain factors are proved. Section 207 provides

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”.

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 the latter provocation for an assault.

In this case was there provocation?

The evidence of PW3 was that the headphones were taken away by people who were with the one Reuben. It was not taken away by accused. When she reported to the deceased, they went to look for accused and when asked the accused denied knowledge, but the deceased told him he (accused) knew the boys who had taken them.

After coming back from the market the deceased asked the accused again to produce the headphones. That is when they started fighting and that is when accused picked a knife from a boy and stabbed him. The accused in his defence admits that there was a fight as a result of the demand by deceased for him to produce the headphones. It is clear however that the accused is not the one who took the headphones but some boys who were with him. This allegation of theft and the fighting started by the deceased would in my view amount to provocation as defined in section 208 of the penal code. Although the accused did not plead provocation, that does not preclude the court from finding from the evidence that the defence of provocation was available to the accused. Having found that there was provocation based on the allegation of theft the accused stabbed the deceased in the course of the fight and in the heat of passion

After considering the whole evidence, I am satisfied that the accused unlawfully killed the deceased in the heat of passion caused by provocation. I therefore reduce under section 179 of the criminal procedure code the offence of murder to manslaughter under section 205 of the penal code. I find the accused guilty of the offence of manslaughter contrary to section 205 of the penal code and convict him accordingly.

Dated and signed at Lodwar this 12th day of September, 2016.

S N RIECHI

JUDGE