



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HCR 61 OF 2012

REPUBLIC..... PROSECUTOR

VERSUS

GEORGE MWENDA ACCUSED

JUDGMENT

George Mwenda Baariu (the accused) is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on the 29/8/2012 at Antubeiga Village in Miathene Location of Tigania, murdered **David Mwiti**.

The prosecution was led by Learned Counsel, Mr. Mulochi who called 6 witnesses in support of their case while George was represented by Learned Counsel, Mr. Gitonga. In his defence, the accused testified on oath but did not call any other witness.

PW1 Cypriano Baariu is the father of George (the accused). He recalled that on 18/8/2012, about 3.00 p.m., he was seated at the door to his house when David Mworira, the deceased went to the gate, while armed with a *panga* and stick. David called PW1 and PW2, Zipporah Gacheri, PW1's wife, to go and see their family member who had been killed on the road but they refused to go. They feared David because he was armed and looked drunk. PW1 told David to leave the gate but he refused saying he could not leave till he found George. PW1 denied having seen George that day; that his other son Tony Mungathia came and had to jump over the fence to enter the house and tried to threaten David with a stone but he refused to leave; that just then, George arrived from outside while carrying a piece of wood, hit David's hand and both the *panga* and stick fell; that George picked the *panga*, cut David on the forehead. PW1 and Tony intervened and David fell. He denied seeing where else George cut David; that after David fell, George stopped cutting him. David got up with his face covered in blood and ran, jumped the fence. He did not know where David ran to but later police came to enquire from him what happened and he explained. PW1 further stated that George and David were the best of friends since childhood and he has no idea what had happened between them that day.

PW2 Zipporah Gacheru is the mother of George. She also told the court that David came to their gate, said he was looking for George, he to enter as he normally used to do; that David was armed with a *panga* and walking stick; PW2 told him to go home since he looked drunk; that David left for a while but returned; that his other son Tony was forced to use the rear entrance, threatened David with a stone but he did not heed; that just then George arrived at the gate with a stick, hit David's hand, the *panga* fell, accused took it and cut David, who then ran away. PW2 also said David was like her son because he was a friend to George.

PW3, Pastor Gregory Kilemi testified that on 29/8/2012 about 3.00 p.m., he was at his home when he heard his father call him to go and see his neighbour. He went to the father's compound and found David

Mworia who had been injured and needed assistance to be taken to hospital. PW3 saw a cut on David's forehead, ear and hand. He was helped by a worker to carry David near his home. Meanwhile, he had sent a report at the police post, police came with a vehicle and took David away. Next day, he heard that David had died while undergoing treatment.

PW5, Cpl John Mathenge of Miathane Police Post, received a call from Antuabetwe Police Post informing him of an injured person. He proceeded to the scene in a hired vehicle; found the injured had a deep cut on the head with brain exposed, the neck, right ear and he told him he was cut by George and Antony; they rushed him to Nyambene District Hospital, but were referred to Meru General Hospital. Next day, he received a report that David had died. He visited the scene next day and found that David had been cut while at accused's gate; that there were some blood stains all the way from where David fell to accused's gate and outside accused's house.

PW6 PC Peter Mwangangi, the Investigations Officer went to the scene where David was injured with PW5. PW6 in addition recorded statements of witnesses. From the statements, he gathered that George and David had been drinking together, a quarrel broke out between David and the friend; that George intervened, hit David on the head; that David went away, armed himself with a *panga* and stick and went to George's home and informed PW1 and 2 that he was looking for George; that George's parents persuaded David to go away but he refused until George found him there, disarmed and assaulted David. PW6 drew a sketch map of the scene (PEX No.3). He attended post mortem and on 7/9/2012, George surrendered to the Police Station. On 9/9/2012, he went to accused's home where he recovered the walking stick which David had (PEXNo.1).

PW4 Dr, Kathiri Gacheri produced the post mortem report which was prepared by **Dr. Nguyo** who did the post mortem. The Doctor formed the opinion that cause of death was bleeding into the brain.

In his sworn defence, George said that on 29/8/2012, he left home for the canteen. While there, he left to go to Antubeiga with Sammy and Kanchoo to take alcohol. When passing by David's home, he joined them and they went to Riiri's home where they took '*Marua*' (alcohol) till 11.00 a.m. They left for another village where they continued to drink till 2.30 p.m. when they left to go back home. On the way, he was ahead with Kanchoo while David was with Sammy behind and they started fighting. He intervened and Kanchoo left with Sammy while he was left with David. David turned on him and said it is him he was looking for, hit him with a fist and they fought with fists; that David was stronger than him so he ran to Selesio's home. David left and promised to be back but George used another route to go home. George went to his house and heard David making noise saying he would kill him that day. David refused to go away despite PW2's plea; that David entered the home and threatened to kill somebody if he did not get George and that is when George came out, hit David's hand, the *panga* fell; that David hit him with a walking stick and a struggle ensued; that he managed to pick the *panga*, cut David on the head, the struggle continued and he cut David 5 times till he fell. He took the *panga* and stick to his house and left David but on looking back, saw David jump the fence. George left for Isiolo where he was supposed to do some work. His brother informed him that David had died, he came back home, learnt that police were looking for him and he surrendered himself to the police. He denied having intended to kill David but wanted David to leave him alone; that David had been his best friend.

Mr. Gitonga, in his final submissions urged that George acted in self defence; that it is David who went to George's home while armed and threatened to kill him and that George used reasonable force; that George and David had taken alcohol together and that the prosecution has not proved its case as is required of it. He relied on the decision in **Njeru v Rep (2006) 2 KAR 44**.

In reply, Mr. Mulochi, Learned Counsel for the State urged that the case was proved to the required standard; that PW1 and 2 saw what occurred; that George continued to inflict injuries on David's head even after he was subdued and that the force was disproportionate in the circumstances.

The prosecution has the duty to prove beyond reasonable doubt:

1. The death of the deceased;

2. That the accused caused the death through an unlawful act or omission;

3. That the accused had malice aforethought.

In the instant case, George has admitted that he is the one who caused the death of David. The only question left for determination is whether George acted in self defence and was justified in killing David. George also alluded to having been drinking alcohol earlier that day together with the Accused. The question is whether he was under the influence of alcohol that may have influenced his actions.

PW1 and 2 were eye witnesses to the offence. They did not know what had happened prior to David coming to camp at their gate demanding to see George. It is only George who told the court what happened. Although PW8, the Investigations Officer told the court that he gathered from other witnesses what had happened there before, he did not bother to call those people who informed him what transpired, before David camped at George's gate, as witnesses. We only have the word of George that they had been drinking with David since morning and had disagreed on their way back home and that David was incensed and went to arm himself and came to camp at George's gate awaiting for his arrival.

According to PW1 and PW2, George found David at the gate, approached him from the back, hit the *panga* that David had, it fell and he then picked it up. Indeed, George confirmed that he heard the mother persuading David to go away to no avail. The way George approached David means he was aware of what was happening, that David was waiting for him. George admits to have cut David 5 times after he snatched the *panga*. Most of the injuries were inflicted on the head. These were very serious injuries. The issue then is whether he was justified in using such force and was the force reasonable in the circumstances?

The court in the *Njeru case Supra* said as follows: (Paragraph 4 Page 46)

“A killing of a person could only be justified and excusable when 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.”

Section 17 of the Penal Code sets up the defence of self defence. It reads:

“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.”

In the English case of *Palmer v Reginam (1971) 1 ALL ER 1077*, the Privy Council held:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances It may in some cases be only sensible and clearly possible to take some simple avoiding action. 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 action 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 imminent danger he may have to avert the danger by some instant reaction.”

In *Beck Ford v Ford (1987) 3 ALL ER 425*, the test for self defence was that a person could use such force in the defence of himself or another as was reasonable in the circumstances as he honestly believed them to be. The test for self defence is therefore a subjective one rather than objective, because it

depends on the facts and circumstances of each case.

In this case, David had camped at George's (accused's) gate armed with a *panga* and stick. He had refused to leave despite persuasion. George was justified in disarming David and using some force to make David leave the gate. However, once he disarmed David, he should not have continued to inflict so many cuts on David.

In this case, David had camped at George's gate while armed with a *panga* and stick, waiting for him and threatening to kill him. PW1 and 2 told the court that David seemed to be drunk. That may be the reason why he acted as he did. In my considered view, George sensed imminent danger to his person and even his family. In the state in which he was, David would have harmed him. He was sufficiently provoked by the David's actions. However, I find that George used unreasonable force in the circumstances. The Doctor found that David suffered a deep cut wound on the scalp, frontal area 14 cm, the right ear 5 cm deep, occipital region exposing the brain tissue, upper neck and cause of death was found to be severe head injury with extradural haemorrhage secondary to penetrating trauma. George had agreed to have cut David 5 times. In my view, George used excessive force.

PW1 and 2 knew David as a friend to George and George did admit that David was his best friend. George and David had been drinking together that morning before this incident. Even the Investigations Officer (PW8) established that fact from his investigations. George said they had been drinking the whole morning till 2.00 p.m. If David was acting drunk, I believe that George too, must have been under influence of alcohol and that may also have influenced his judgment and may explain his actions in continuing to inflict injuries on David even after he was subdued. The defence did not raise the defence of intoxication but the court cannot ignore this evidence. Under **Section 13 of the PC**, intoxication is not a defence in a criminal charge but there are instances when an accused can be availed the defence. In **Cheminingwa v Rep, EACA CR 450/1955** the East African Court of Appeal stated as follows:

“It is of course correct that if the accused sets up a defence of insanity by reason of intoxication, the burden of establishing the defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court vary the onus of establishing this upon the accused”.

Even though George did not plead insanity due to intoxication, there is ample evidence on record that he had been drinking with the deceased and this court cannot ignore the fact that George's judgment may have been impaired by alcohol.

I also find that George must have been influenced by the alcohol he had taken earlier that day such that his judgment was blurred by the said alcohol. Malice aforethought cannot therefore be imputed against George. I find that George killed David unintentionally due to provocation and possible influence from alcohol. I find George guilty of the lesser offence of manslaughter under **Section 202 as read with Section 205 of the PC**. I convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF SEPTEMBER, 2016.

R.P.V. WENDOH

JUDGE

8/9/2016

PRESENT:

Mr. Mulochi for State

Mr. Kaumbi Holding Brief to Mr. Gitonga J. G. for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused