



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 92 OF 2010

REPUBLIC.....RESPONDENT

VERSUS

SHADRACK MUTONGA MAINA.....1ST ACCUSED

JOHN MAINA CHEGE.....2ND ACCUSED

JUDGMENT

The accused persons namely **SHADRACK MUTONGA MAINA** (hereinafter referred to as the 1st accused) and **JOHN MAINA CHEGE** (hereinafter referred to as the 2nd accused) have jointly been 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 4th day of September, 2010 at Mirangine Village in Nyandarua District within the Central Province jointly with others not before court murdered KAMAU KOMU MUKERA”

The two accused persons were arraigned before the High Court in Nakuru on 6/9/2010 and they both pleaded ‘**Not Guilty**’ to the charge. Their trial commenced on 7/7/2011. The prosecution led by the learned State Counsel called a total of 14 witnesses in support of their case. My learned senior brother **Hon. Justice Anyara Emukule** heard the evidence of all 14 prosecution witnesses and thereafter on 20/11/2014 he placed both accused persons on their defence.

Following the transfer of **Hon. Justice Emukule** to the Mombasa High court I took over the conduct of the trial. Section 200(3) of the Criminal Procedure Code was explained to the accuseds and both elected to proceed with the hearing. I then recorded their defences and heard the evidence of the two (2) defence witnesses. The matter is now pending for judgment.

The brief facts of the case are as follows:

The 1st accused was a son to the 2nd accused. The family of the deceased and the family of the accused persons had been embroiled in a long-standing land dispute one which had even come before the courts in Nakuru for adjudication.

PW2 DAVID MBURU KAMAU and **PW6 JOSEPH GAITHO KAMAU** both sons of the deceased state that on 4/10/2011 at about 5.32pm they went to the local Rai Shopping Centre to buy items. As they walked home they heard sounds of people wailing and screaming. They hastened back to their home in

Mirangine where they found their father (the deceased) being assaulted by the two accused persons and other members of their family. The witnesses state that the attackers who were armed with crude weapons like pangas and crow bar hit and cut the deceased. The two rescued their father and rushed him to Ndundori Health Centre and later to Nakuru PGH where he died whilst undergoing treatment. After the attack the two accused persons ran away.

PW3 MIRIAM WANGARI KAMAU was a daughter to the deceased. She told the court that on the material day she was at the family home engaging in her normal chores. At about 5.00pm her father (deceased) left the house to go and repair their fence and to bring in their cattle. Shortly thereafter **PW3** heard shouts of 'ua' 'ua' ie 'kill' 'kill'. She rushed out and found the 2nd accused and his sons attacking the deceased. They hit the deceased with a stone and he fell down. As he lay prostrate the assailants continued to hit and cut the deceased and even poured acid on him. A crowd of neighbours gathered and the assailants ran away. The charged crowd burnt down the 2nd accused's house. **PW2** and **PW6** both came back from the local shopping centre while the attack was in progress. They lifted deceased who was in a critical condition and rushed him to hospital. The deceased unfortunately died whilst undergoing treatment.

The incident was reported to police who launched investigations. They later arrested the 2 accused persons and charged them with this offence of murder.

Both accused's were ruled to have a case to answer and were placed on their defence. They both opted to make unsworn defences in which they each denied any role in the death of the deceased person. It is now the duty of this court to critically examined the evidence on record and decide whether the charge of murder has been proved beyond reasonable doubt.

Section 203 of the Penal Code defines the offence of murder thus

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

From this definition derives three essentials ingredients of the offence of murder all of which must be proved beyond reasonable doubt in order to establish guilt on the part of the accused(s). These three ingredients are:-

- (1) The fact and cause of death of the deceased
- (2) Proof that the deceased met his death due to an unlawful act or omission on the part of the accused(s).
- (3) Proof that said unlawful act or omission was committed with malice aforethought

Regarding the death of the deceased there can be no controversy. **PW2**, **PW3** and **PW6** who are all children of the deceased confirm that the deceased died at PGH Nakuru whilst undergoing treatment for injuries sustained during an assault. **PW5 JEREMIAH MWANGI KAMAU** told the court that on 8/7/2010 he went with police to the mortuary where he identified the body of the deceased. **PW5 PETER NDUNGU KAMAU** another son of the deceased also confirms the death of his father. All these witnesses who knew the deceased well identify him as '**Kamau Komu Mukira**'

Evidence regarding the cause of the deceased's death was tendered by **PW1 DR. TITUS NGULUNGU** a consultant pathologist attached to PGH – Nakuru hospital. **PW1** told the court that on 8/9/2010 he conducted an autopsy on the body of the deceased. Upon examination of the body **PW1** noted a compound skull fracture with brain matter exposed, incision through skull, fracture of lungs and lacerations. He opined that the cause of death was "**severe chest and head injury due to multiple application of blunt force**"

PW1 filled and signed the post-mortem report which he produced before the court as an exhibit. **P. Exb**

1. This was expert medical opinion evidence and was neither challenged nor controverted by the defence. I therefore find that it has been proved that the deceased met his death due to a brutal assault on his person.

Having proved the fact and cause of death the prosecution must go further and adduce evidence to show that it was one or both of the accused's who so viciously attacked the deceased causing these fatal injuries. This is what is termed as the unlawful act or the *actus reus* of the offence of murder.

This incident is alleged to have taken place on 4/9/2010 at 5.30pm. It was broad day light and therefore visibility was good. PW3 who was an eyewitness told the court that on that day, she heard 2nd accused shouting 'ua' 'ua'. She then saw 1st accused and others attack the deceased. PW3 in her evidence is not very clear on what role each accused played in the attack. She appears uncertain as to who exactly cut/hit the deceased.

PW3 makes no mention of the 1st accused Shadrack having assaulted the deceased. In her evidence in chief she states that 1st accused was at the scene of commotion. Under cross-examination PW3 states

“Shadrack Mutonga chased me with stones and hit me on the back”

Later PW3 says it was 2nd accused who hit the deceased on the head with a panga and 1st accused hit him with a crow-bar. This witness appears inconsistent in her narration of events.

On his part PW2 says that when he came he found his father already lying injured on the ground. He did not see exactly who hit/cut or in any other manner assaulted the deceased. Indeed under cross-examination PW2 says

“I found the incident when the incident had finished. But I saw them (the two accused persons) with weapons”

Although PW2 stated in his evidence in chief that he saw 2nd accused holding a panga and the 1st accused was holding a crow-bar, PW2 goes on to admit that he did not in his written statement make mention of the fact that he found the two accused's armed with weapons. PW2 says

“My statement does not include any reference to carrying of weapons....”

This was a crucial piece of evidence. Why would PW2 omit to include it in his statement to the police.

Similarly PW6 who was with PW2 at the time did not witness the actual assault on his father. He stated that he arrived to find the 1st accused standing over the deceased holding a crow-bar in his hands.

PW4 ANN NDERITU the wife of the deceased told the court that she witnessed the commotion. She stated as follows in her evidence in chief

“Mutonga (1st accused) is the one who pierced my husband with that iron bar in my full sight on his head. John Maina slashed him on the head with the panga....”

PW12 OBADIAH NJOROGE KARANI was a neighbour to the deceased. He told the court that on the material day he heard a commotion and went to check. He found the 2nd accused and his sons attacking the deceased. In his evidence PW12 says

“They were attacking the deceased. John Maina (2nd accused) was holding a panga. Shadrack (1st accused) was holding a metallic crow-bar..... John Maina hit Mzee thrice on the head. I saw with my own eyes Mutonga hit the deceased on the head with the crow-bar...”

This was evidence from a neighbour an independent witness, one who was not involved in the land dispute between the two families. **PW12** had nothing to gain by lying to court. In my own view he was an honest witness. **PW12** remained firm even under cross-examination by defence counsel and stated as follows:

“It is correct that despite seeing me the accused went ahead to cut and hit the deceased with the panga and metal bar. The accused ran away after cutting the deceased. I was very shocked”

His evidence corroborates that of **PW4** and **PW3** placing the two accused’s at the scene of the murder.

Each accused persons gave an unsworn defence and each denied any involvement in the fatal attack on the deceased. The 2nd accused told the court that on that day 4/9/2010 he was at work as a plant operator employed by the Ministry of Agriculture. The 2nd accused states the he worked the whole day at Lake Nakuru National Park until 5.30pm. He then left to town, had a meal with friends before setting off for home. He arrived at his home at about 8.30pm long **after** the incident had occurred to find that his house had been burnt by irate villagers.

The 2nd accused called two (2) witnesses in support of his defence. **DW3 ANDREW MACHUKE MOMANYI** told the court that he also worked with the Ministry of Agriculture and was a colleague to the 2nd accused. **DW3** told the court that on 4/9/2010 he and the 2nd accused worked together grading the road at Lake Nakuru National Park the whole day. He produced the work ticket Serial No. K634/76 **P. Exb 2**. This work ticket indicated that on that date the driver of the grader Regn. No. GK A137T was John Maina Chege (the 2nd accused). I have myself carefully perused the said work ticket. It indicated that on 4/9/2010 driver No. 1 whose name is given as John M. Chege was driving the grader from 8.00am to 5.00pm.

DW3 JOHN GATHURO KANYURWE told the court that he too worked with the Ministry of Agriculture as an Assistant Plant Operator. **DW3** stated that on 4/9/2010 he was on duty together with the 2nd accused at Lake Nakuru National Park from 8.00am to 5.00pm. He confirms that after work he and 2nd accused walked to Langalanga and then went to Nakuru Town where they shared a meal at Shirikisho Hotel. They parted company at 6.30pm.

The 2nd accused had presented credible evidence in support of his *alibi* defence. There is evidence by way of a work ticket showing that the 2nd accused was on official duties from 8.00am to 5.00pm away from his home. **DW3** states that he and accused took a meal together at Shirikisho Hotel in Nakuru at about 5.30pm. Both witnesses corroborate the defence of the 2nd accused. Failure to produce a receipt for the meal they took does not weaken this defence. It is not uncommon for people to dispose of meal receipts immediately after leaving the hotel or kiosk. The prosecution have not produced any rebuttal evidence to disprove this defence. It is not unusual for colleagues who have worked together the whole day to enjoy a drink or meal together at the end of the day before dispersing for home.

If the 2nd accused was with his colleagues in Nakuru Town up to 6.30pm. He could not at the same time have been at Mirangine attacking the deceased. The defence raised casts doubt on the placement of the 2nd accused at the scene of attack. The court is obliged to grant the 2nd accused the benefit of such doubt. I find that that the *actus reus* for the offence of murder has not been proved as against the 2nd accused and I hereby acquit him of this charge of murder.

With respect to the 1st accused however the situation is different. Several prosecution witnesses including **PW2, PW3, PW4, PW6** and **PW12** place him at the scene of the attack. Whilst **PW2** and **PW6** did not witness the actual assault as they arrived home to find their father already lying prone on the ground both witnesses say they saw the 1st accused standing over the deceased holding a crow-bar. **PW3** is very categorical in her cross-examination when she says

“..... It is Mutonga (1st accused) who had the metal bar talimbo and hit him three times on the

head. I saw. It is true Mutonga hit dad three times....”

Even when **PW3** was re called on 13/4/2014 for purposes of cross-examination she remained firm that

“They had a metal bar – which was held by Shadrack Mutonga. He was hitting my father with it on the head”

PW7 is equally emphatic in her identification of the 1st accused and the role which he played in the attack. She identified the 1st accused (Mutonga) as the one who pierced the head of deceased using an iron bar.

Finally on this point there is the testimony of **PW12** whom I have found to have been an uninvolved and independent witness. He was also categorical about the presence of the 1st accused at the scene and stated that he was armed with an iron bar (crow bar) with which he hit the deceased on the head.

All these eye-witnesses identify the 1st accused in court. As stated earlier the incident occurred in broad daylight. It was 5.30pm. The 1st accused as a neighbour and relative was a person well known to these witnesses and they recognized him. They knew him by his name – ‘**Shadrack Mutonga**’. I find that no possibility existed for a mistaken identity. The eye-witnesses all corroborated each other. All state that the 1st accused hit the deceased on the head with a crow-bar. Post mortem report indicated that the direct cause of the deceased’s death was chest and head injury due to multiple application of blunt force. The hitting of the deceased on the head with a crow bar is one of the factors that led to the death of the deceased by causing the compound fractures to his skull. This fatal blow as per the evidence was inflicted by the 1st accused.

The 1st accused in his defence conceded that he was at the scene at the material time. He told the court that the commotion was instigated by the deceased and his family who were cutting down trees from the disputed land and destroying property. There is ample evidence to show that these actions were reported to the police vide OB No. 5 of 4/9/2010 which was produced in court as an exhibit **D. Exh 1** The first accused denies that he attacked the deceased at all. He states that he only ran to separate **PW3, PW7** and others who were fighting. It is quite evident that the attack on the deceased was not an unprovoked attack. It is in evidence that there was bad blood between the two families. My finding is that on the material day a fight erupted between the two families over their differences. However I do not accept the claim by 1st accused that he did not attack the deceased. There exists ample evidence from several eyewitnesses that it was the 1st accused who hit the deceased on the head using an iron bar. Indeed in his defence the 1st accused honestly admits

“I was also involved in the fight”

I therefore reject his defence and I am satisfied that the evidence proves that it was the 1st accused who fatally assaulted the deceased. It was the blow that he landed which caused the death of the deceased. The *actus reus* of the offence of murder has been proved as against the 1st accused.

Having proved the ‘*actus reus*’ the prosecution must proceed to prove the *mens rea* for the offence of murder. *Mens rea* is the mental element or intent which is defined in law as ‘**malice aforethought**’ which is defined by section 206 of the Penal Code.

In this case the court has already found that it was the 1st accused who fatally struck the deceased. However the circumstances under which this assault took place cannot be ignored. There was evidence of pre-existing bad blood between the families. On this day an all out fight erupted between them. The deceased was not the passive victim of an unprovoked attack. There is proof that on 3/9/2010 and on 4/9/2010, ‘**Ruth Mwhiki**’ the mother of the 1st accused made reports to police regarding the pulling down of their fence and the act of cutting down their trees by members of the family of the deceased. It was this that led to the fight.

Given the environment at the time, I find that the 1st accused did not act due to a preconceived intention to kill the deceased, rather he acted in the heat of the moment as the result of provocation.

The term provocation is defined by section 208 (1) of the Penal Code as follows:-

“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 he 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 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 later provocation for an assault.

(3)

The scenario in this was a fight which had been brewing. The mother of 1st accused had made complaints to the police regarding provocative acts on the family land by the family of the deceased. On that day all hell broke loose. As witnesses describe it members of the two rival families became combatants. People armed themselves with crude weapons sticks and stones were flying about. It is in this scenario that the 1st accused hit the deceased on the head. I have no doubt that the 1st accused could not sit back and watch this family and his land being attacked. He acted to protect himself, his family and their land. Unfortunately his actions resulted in the death of the deceased. Land in Kenya is a very emotive issue. I find that the 1st accused acted in the heat of the moment before this there had been ample time for passions on both sides to cool down. The 1st accused did not have the *mens rea* necessary for murder.

Section 207 of the Penal Code provides –

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute a 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, is guilty of manslaughter only”

I find that this section applies squarely to the facts of this case. I find that the charge of murder had not been sufficiently proved and instead I convict the 1st accused on the lesser charge of manslaughter contrary to section 202(1) of the Penal Code.

Dated in Nakuru this 2nd day of September, 2016

Maureen Odero

Judge

Mr. Chigiti - We do not have any prior records, treat 1st accused as a 1st offender.

Court – Mitigation on 29/9/2016. 1st accused remanded in custody.

Maureen Otero

Judge

2/9/2016