



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 32 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

YUSUFU ABDULLAHI CHUTE.....ACCUSED

JUDGMENT

Yusufu Abdullahi Chute faces a charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The allegation against the accused is that on 2/4/2013 at Shauri Yako Village in Marsabit Central District, murdered **Paul Dabaso Okicha**. He denied the offence and the case proceeded to full trial. The prosecution which was led by Learned Counsel Mr. Mulochi, called a total of 6 witnesses.

In his defence the accused testified on oath. He had no other witness and was represented by Mr. Otieno Advocate.

Rufo Okicha (PW1) is the mother of Paul Dabaso Okicha, the deceased. She recalled that on 2/4/2013, at about 1.00 a.m., she was sleeping in her house which was about 30 metres from her son's house when she heard screams, went out with a torch. When she came out of her house, she flashed her torch and saw Yusufu Chute, the accused, come out of the son's house. She said that the accused found her standing at the door, hit her on her shoulder, she fell but he ran off. She had known the accused for 2-3 years. She started to scream and people came. She said that the accused lived with deceased and that deceased had tried to evict him but he resisted; that the accused also used to ask for food from the son. Police came and took the deceased's body away and later came to inform her that the accused had been arrested. PW1 said that police carried away shoes and deceased's clothes. She also noticed that the bed on which the son slept was broken and the mattress had several cuts.

PW2 Sgt. Richard Kipchumba of Marsabit Police recalled that on 2/4/2013, about 2.00 a.m., he was on duty when he received a call from one Galgalo who informed him of a murder at Shauri Yako Village; he proceeded to the scene, found people gathered, the deceased's body was on the ground with blood oozing from the mouth and neck; that PW1 informed him that she had seen a person ran away from the house, hit her and he ran off; He observed deceased's house which was disturbed showing signs of a struggle, blood was splashed all over, the bed was broken and shoes which PW1 denied that they belonged to the deceased. He took possession of the shoes. He noticed that the body had a stab wound on the left neck and left side of the mouth; that on the way to taking deceased to mortuary, he met a cousin of the accused, Said Nassir Chute in company of 3 ladies. He picked him up, interrogated him and he denied knowing of the incident and they asked Said Nassir to take him to his house and he led the police to Majengo. As Nassir looked for the keys, PW2 noticed that the door to the house was broken and was open. On

entering the house, they found the accused sleeping in the bed, a bed sheet was on the floor with clothes wrapped in it; that accused was fast asleep, he found a blood stained dark blue coat, a checked shirt and that the accused was wearing a brown trouser which was also blood stained; that in the accused's right trouser pocket, he found a pen knife which seemed to have been washed but still had some blood stains; accused had white socks that were muddy. He collected all the items and took them to police station as exhibits and later took them to Government Chemist for further analysis.

PW2 produced the post mortem report that was prepared by **Dr. Mwanzia PW5**. The Doctor observed that the deceased had a deep cut wound on the left side of neck, which severed the left jugular vein and carotid artery; a deep cut on the left angle of the mouth and the whole body was soaked in blood. He formed the opinion that the cause of death was hypovolaemic shock due to massive haemorrhage. He took a sample of deceased's blood and hair for DNA sampling. PW2 was recalled to produce the items he had forwarded to the Government Analyst, Dark blue coat PEX. No.5; brown trouser PEX.No. 6; checked shirt PEX.No.7; brown trouser PEX.No.8; Pen knife PEX.No. 9.

PW3 PC Hillary Ruto accompanied the Investigations Officer, PW2 to the scene. He reiterated what PW2 told the court, that they found the deceased dead in a pool of blood, recovered boots from the house, took the body to the mortuary; they later arrested the accused in his cousin's house on the same night; recovered blood stained clothing for further investigations.

PW4 Cpl Edward Barasa was also with PW2 and PW3 when they visited the scene and arrested the accused.

PW6 Henry Kiptoo Sang is a Government Analyst. He received some items from Marsabit Police Station for examination together with police memo form (EX.No.1). After the analysis, he prepared a report PEX.No.3. He found that blood samples from the coat (EX.5) and shirt (PEX 7), matched the DNA profile of the deceased. PW6 was not able to generate DNA profiles from the blood stains on the T-shirt (PEX. No. 8) and long trouser PEX. No. 6.

After the close of the prosecution case, the court was satisfied that a prima facie case had been established against the accused to warrant him to defend himself. He stated on oath that he used to work and reside in Nairobi but used to visit Marsabit where he used to do farming; that on 1/2/2013, after working on his farm, he went to Pale Pale Bar to drink from 6.00 p.m. to 7.30 p.m. when deceased who was his friend joined him there; the deceased used to work for his uncle in Nairobi as a shop attendant; that he went together with deceased to the next bar where they continued to drink and between 10.30 to 11.00 p.m., he informed the deceased that he would spend the night at the said bar but the deceased convinced him to go and sleep at his home where he had a room; that he retired to bed and slept but was woken up by the deceased who was removing his trousers and was naked and he believed that the deceased wanted to sodomise him because he had started to kiss him; that he got up, a lantern was on, he started to dress and told deceased to stay away from him; that the deceased got hold of his neck, started to strangle him, held him on the neck that he could not breath; a scuffle began as he tried to free himself. He removed a pen knife which he had in the trouser pocket, pushed it towards deceased and that at that time the bed broke, the light went off and they fell and he realized that the deceased was no longer holding him; that he fell on his right hand and he pushed the deceased away. He got up and started to run and that deceased threw a bottle at him but it smashed the door as he opened the door. He went to his cousin's place at Majengo where he was later arrested; that when leaving the deceased's house, the mother stood at the door. He denied having intended to kill the deceased.

In the closing submissions, Mr. Otieno submitted that the prosecution failed to prove its case to the required standard; that the defence was watertight; that the accused was provoked and acted in self defence and that in the act of defending himself, the deceased was injured; Counsel urged that the evidence of PW2 and 4 corroborated the defence in the state in which they found the house i.e. that the bed was broken and things were strewn all over the house. Counsel relied on the decisions of **Rep v David Kinyua (alias Mboi) Ntongai, CRC 67/2000** and **Rep v Joseph Kamande Mau and 3 other CRC 249/2003**.

In reply, Mr. Mulochi urged that the accused never disputed any part of the prosecution evidence, and he admitted killing the deceased. Mr. Mulochi also submitted that the accused claims to have been intoxicated and the question he posed is whether that defence is available to him under Section 13 of the Penal Code. Counsel further urged that possession of a pen knife is in itself evidence of malice aforethought.

The death of deceased is not in issue having been admitted by both the accused, and confirmed by PW1 and Dr. Mwanzia PW5, who carried out the post mortem.

The accused admitted having been with the deceased on the fateful day, was at the deceased's house and that there was a scuffle between them. They were only the two of them and since the dead do not speak, we only have the word of the accused.

PW1 testified that the accused used to stay with deceased in his house, used to get food from the son and she knew him as Chute's son and that she saw him on that night when her son was murdered. Indeed, the accused admitted after the scuffle with the deceased, PW1 came out of the house and he passed by her as he ran away. I have no doubt that PW1 was a credible witness and had not seen the accused once as alleged by the accused but knew him well as he used to come to eat and sleep in deceased's house. PW1 was cross examined at length and it was never suggested that the accused had been to PW1's home only once and that he never used to frequent deceased's house. PW1 was a credible witness and I totally believe her testimony.

The offence was committed at night but identity of the accused is not in question because the accused admitted to having had a scuffle with the deceased; that he was armed with a pen knife and did not deny that it is during the scuffle that deceased was injured.

The only issue for determination is whether the prosecution has proved that the accused had the intention to do grievous harm to deceased or to kill.

As earlier observed, the accused and deceased were alone on the fateful night and it is only the word of the accused that will have to be considered and examined alongside the prosecution evidence as to the circumstances surrounding the death, to determine whether indeed, the accused was provoked as alleged and hence acted in self defence. Self defence as a defence is available to an accused under **Section 17 of the PC**. **Section 17** reads:

"17. 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".

Section 207 of the Penal Code provides for the defence of provocation. In the case of **Mungai v Rep (1984) KLR 85**, the court had occasion to consider **both defences of provocation and self defence**. The court said:

"However, notwithstanding the fact that Section 17 of the Code statutorily requires that criminal responsibility for the use of force in defence of person or property shall be determined according to English Common Law, it does appear that the doctrine is recognized in East Africa that the excessive use of force in the defence of person or property may lead to a finding of manslaughter: see Rep v Ngoilale (supra) and R v Shaushi [1951] 18 EACA 198, the latter of which was cited with approval of Hau s/o Akonaay v Rep [1954] 21 EACA 276 in which, at pages 277 and 278, the following passage occurs:

"In the circumstances covered by the Common Law rule cited above and in the circumstances of the instant case there exist elements of both self-defence and provocation. This Court has already in Rep v Ngoilale and Rep v Shaushi s/o Miya [1951] 18 EACA 164 and 198, indicated its view that Section 18 is wide enough to justify the application of any rule which forms part and parcel of the Common Law relating to self-defence and in the latter said (at p 200):-

“No doubt this element of self-defence may, and, in 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 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 or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.”

In this case, the accused graphically explained how the scuffle began till he took out the pen knife and that the deceased fell on the knife. From the description of the events, the accused wants this court to believe and find that the deceased fell on the knife, but the Doctor’s findings that the deceased suffered two deep cuts on the mouth and neck which severed the jugular vein and carotid artery to be unbelievable. The weapon was a pen knife and from the above injuries, it seems the injuries inflicted were deliberate. I believe PW1’s testimony that the accused used to frequent her home for accommodation and food and I do not understand how come the deceased had never made a move to sexually assault the accused till this fateful day. There was indeed a scuffle in that house but I have doubt as to whether the accused told the truth to the cause of the scuffle.

However, if for any reason what the accused told the court was the truth, then the act of deceased trying to sexually attack him was most provoking that his reaction to fight back was not abnormal.

The accused testified that he had been at Pale Pale Bar with the deceased drinking alcohol most of the day from about 11.00 p.m. till that late evening. The investigations officer, PW2 also testified that when they found the accused asleep in his cousin’s bed, he looked drunk. Intoxication is not a defence in a criminal case, unless the conditions set out in **Section 13** of the Penal Code are met. The Section reads as follows:

“13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

The defence of intoxication is very narrow in its application. Section 13 (4) has to be read together with **Section 13 (2), (a) and (b) of the Penal Code**. In the case of **Chamingwa v Rep (1955) EACA 450**, the then East African Court of Appeal said:

“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”.

In **Kupele Ole Kitaiga v Rep (2009) eKLR, CRC 26/2007**, the court said as follows when considering a defence of intoxication:

“A clear message must also go out to those of the appellants’ ilk who deliberately induce drunkenness as a cover up for criminal acts. Unless a plea of intoxication accords with the provisions of Section 13 of the Penal Code, it will not avail an accused and does not avail the appellant in this particular case.”

In this case, the accused never attempted to bring himself within the provisions of **Section 13 (2) (a) and (b)**, that he was temporarily insane due to the drunkenness at the time of assaulting the deceased, that he did not know what he was doing was wrong or that the intoxication was caused without his consent by the malicious or negligent act of another person. The accused said he willfully went to the bar till he got drunk. However, having alleged to have been drunk which was confirmed by PW2, this court cannot ignore the fact.

The essence of the crime of murder is malice aforethought. In the instant case, the accused may have been provoked and acted in self defence. Even if he was not provoked, he was intoxicated and these two were sufficient to cause loss of control, then the inference of malice is rebutted and the offence is therefore reduced to one of manslaughter.

I am satisfied that the accused may have killed the deceased in the heat of pressure upon being provoked or his judgment may have been impaired due to his drunkenness. For the above reasons, I find that the prosecution has proved that the accused committed the offence of manslaughter. I therefore **substitute the offence from murder contrary to Section 203 of the PC to that of manslaughter contrary to Section 202 of the PC**. I find the accused guilty of the substituted charge of manslaughter and convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF OCTOBER, 2016.

R.P.V. WENDOH

JUDGE

6/10/2016

In the Presence of:

Mr. Mulochi for State

Mr. Mutiga Holding Brief for Mr. Otieno

Penina, Court Assistant

Accused, Present