



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL CASE NO. 13 OF 2015
(CORAM: J.A. MAKAU – J.)
REPUBLIC PROSECUTOR
VERSUS
KENNEDY CHARLES SHIOSO ACCUSED
JUDGMENT

1. **KENNEDY CHARLES SHIOSO** 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 26th day of December 2011, near Bondo University College within Bondo Township, Bondo District within Nyanza Province Murdered **MICHAEL MWASA WAFULA**.

2. The Prosecution case was led by Mr. E. Ombati and Mr. Gesire both Learned State Counsel, whereas Mr. Ooro Learned defence Counsel, led the defence case.

3. The Prosecution called four witnesses. The facts of the Prosecution's case is that the deceased Wafula and cousin of his Dora Owino had on 25th December 2011 at 9.30 a.m. hired a handcart from PW1 Ibrahim Ongongo Eboso to transport firewood from the home of the brother of the accused who was not present then. They carried one trip and decided to go for some more wood, when the accused Charles Shioso, who was in company of Otieno Nyangola, called his brother through a telephone call, enquiring whether he had allowed Wafula, the deceased to pick his firewood. PW1, told Wafula had been told by brother not to let Wafula carry any firewood from his home. The deceased stated the firewood had been sold to him by Jared, the brother to the accused and he would carry the firewood. PW1 told Wafula that they should wait for Jared but he refused saying he cannot wait and that he was going to carry the firewood, to which the accused objected. The deceased and the accused started struggling, as Wafula was putting the firewood in the handcart and the accused was removing them. The process continued for about 30 minutes as PW1 and others at the scene were separating the two till PW1 and the others got tired and left the two to fight. That as the two were charging at each other, collided and both of them fell down. Wafula, the deceased got up and fell down again. PW1 and others put Wafula aside while the accused got up and walked away. PW1, reported at Kings where Wafula worked and was given KShs.3000/= to take Wafula to Hospital. PW1 and wife of the deceased amongst others took Wafula to the Hospital where he was pronounced dead. The body was taken to Bondo Sub-District Hospital Mortuary.

4. The accused denied the offence and said that on 26th December 2011, he visited his brother, Jared Kuboka at Bondo while on his holiday. That at 11.00 a.m. he went to his brother's house where he saw three boys namely, Michael Wafula, David Otieno and Ibrahim entering into his brother's home and

proceeded to where his brother had gathered some fencing poles and started putting the poles in the handcart which they had. The Accused restrained them and enquired from them, why they were collecting the fencing poles? the Accused stopped them from carrying the poles but Michael Wafula Mwasa insisted on carrying them provoking the accused to make a telephone call to his brother who instructed him not to allow them to carry the poles, but Michael Mwasa Wafula, told the accused he would carry the poles by force. The Accused called his brother who told him not to allow them to carry the poles. The Accused then started removing poles from the handcart and at the same time Wafula continued loading the poles. The accused, as he was removing a pole, that was heavy, Michael Wafula grabbed it and each one of them started pulling it from each other, leading to the Accused releasing it and Michael fell down and so was the accused. That both of them got up and accused proceeded to his brother's house from where he got the sad news that Michael Mwasa Wafula has died. The Accused proceeded to Bondo Police Station and explained what had happened. The Accused stated he knew Wafula as a neighbor of his brother and that he had no grudge with him and that he had no intention to kill him. He stated the incident was an accident.

5. In a charge of Murder the Prosecution is under an obligation to establish the following ingredients:-

i. The death of the deceased and its cause.

ii. That the accused caused the death of the deceased through an unlawful act or omission.

iii. That the Accused possessed an intention to cause harm/kill or malice aforethought.

6. The Accused faces a charge of **Murder under Section 203 of the Penal Code** which provides:

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

The malice aforethought is a very important ingredient for the offence of murder. The Prosecution has to prove facts which establish malice aforethought **Section 206 of the Penal Code** sets down the facts which constitute malice aforethought as follows:

“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 or grievous harm to some person, whether that person is the person actually killed or not, 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;”

7. Whether the Prosecution proved death and cause of death of the deceased herein? The postmortem of the body of the deceased was carried out by Dr. David Omondi and his report was produced by Collins Otieno Oginga (PW2), who had worked with him and was familiar with his handwriting and signature. He produced postmortem Report dated 29.12.2011 exhibit P1. The exhibit P1 indicating the deceased's body was identified to the Doctor for postmortem purposes by Musamali Fredrick and Nambuya Susan. PW5, No.91241 P.C. Antony Munyoro, testified he proceeded to the scene of crime on 20th December 2011 and found the body of a young man lying on the ground and collected the body to Bondo Sub-District Hospital Mortuary. PW5 subsequently was present when postmortem was carried out on the body of the deceased, by Doctor Omondi and was given a copy of the postmortem Report. He identified exhibit P1. The cause of death as per exhibit P1 is due to intra-peritoneal bleedings due to ruptured liver capsule. The death of the deceased herein is not indispute as the accused also stated he learnt of the death

and proceeded to Report it at Bondo Police Station. I therefore find that the postmortem has proved the death of the deceased and the cause of the death.

8. I now turn on the next issue as to who caused the death of the deceased herein? The Prosecution called two eye witnesses PW1 and PW3, from the evidence of PW1, Ibrahim Angoso Eboso, a fracas over the carrying of the firewood of Jared's brother, the Accused and the deceased ensued that lead to the two confronting each other, they collided and both of them fell down. The deceased rose up and fell down again and passed on later, whereas the accused got up and walked away. From the evidence of PW3, David Otieno Nyangola, the Accused approached the deceased who wanted to take the accused brother's firewood and told him, if the firewood were to be taken somewhere, then somebody would die at the scene and the two started pulling one another and started a brawl whereby the Accused kicked Wafula on the left side below the ribs. That Wafula fell down and started shaking and the Accused left. PW1 and PW3 and others were at the scene when disagreement arose over the carrying of the Accused Brother's firewood by the deceased. PW1 and PW3, in their evidence do not agree on material facts as to what happened at the scene. PW1 was emphatic that the accused and the deceased were charging at each other when they collided and fell down and that the accused did not kick or box the deceased nor was there a fight, whereas PW3 insists the two fought, accused boxed and kicked the deceased on the right side below his ribs and fell down. The Accused in his defence denied fist fighting or kicking the deceased but instead stated they were pushing and pulling a heavy log to and from each other, when the accused released it leading to the deceased losing balance and falling down. They all agreed that after the deceased fell down, the Accused did not engage him anymore in the assault, while on the ground. I find the evidence of PW1 and PW3, is inconsistent as to what happened at the material time. I had the opportunity of observing the demeanour of PW1 and PW3 and I find that PW3's evidence was not credible as to what happened, he tendered to exaggerate what happened at the incident. PW2, Dr. Collins Otieno, who produced postmortem Report by Dr. David Omondi, MFI-P1 as exhibit P1, testified the postmortem Form indicate the deceased fell down while fighting with his colleague and that on observation of the body he had a bruise on the right frontal aspect of the head and he had no other visible external injuries. The postmortem report gave credence to the evidence of PW1 that the Accused and the deceased were engaged in a brawl which lead them to collide as they struggled over the firewood belonging to the brother of the Accused. PW4 Investigating Officer testified he was told by members of the public that the deceased was kicking the Accused and he fell down. The postmortem Report and evidence of PW2 and PW1 did not support the allegation of the deceased having been kicked below the ribs. I therefore find from the evidence of PW1 and from observation as per postmortem report and evidence of PW2 the deceased and the accused had head collision as they charged at each other and that there is no credible evidence that the said boxed and kicked the deceased on left side below ribs as stated by PW3. The injuries sustained by the deceased arose as a result of the collision and falling down of the two arising from the collision.

9. The Accused's defence of the falling of the deceased as they pulled a log from each other is in view of the bruises sustained by the deceased on his right frontal aspect is inconsistent to the way the deceased was said to have been kicked and boxed. I find the evidence of PW1 to be truthful that the two collided as they charged at each other, that explains the bruises on the frontal aspect of the head by the deceased.

10. I now turn to the issue as to whether the accused had malice aforethought? PW1 told the Court that when the Accused told the deceased not to carry firewood as his brother had instructed him not to allow him to carry the firewood, the deceased ignored the instruction and wanted to carry the firewood inspite of PW1 asking him to await for owner of the firewood. That a struggle ensued between the two as the deceased went on putting the firewood into the handcart while the Accused would be removing them. The Accused testified that the deceased had insisted he would carry the firewood by force. The two struggled over the firewood for 30 minutes as PW1 and PW3 tried to separate them without success, till the two charged at each other collided and fell down. PW1 testified that the deceased and the Accused were friends both of who come from Luhya community. PW3 told court he did not know whether the deceased and the Accused knew each other before but he knew both. PW1's evidence is clear that there had been no bad blood existing between the two, thus the deceased and the Accused. That as per PW1 the struggle over the firewood and collision between the two occurred after the deceased insisted he would carry the firewood, after the Accused told him his brother had asked him not to let the deceased

carry the firewood. PW3 told the court that the Accused had told the deceased, if the firewood would be taken somebody would die at the scene. Incidentally, PW1 was at the scene of crime together with PW3 and he never heard the accused utter those words nor threaten the deceased with death. PW4, the Investigating Officer, never mentioned that PW3 told him he never heard such words of threat of death by the accused. He never mentioned any other witness stating the accused told the deceased, if the firewood would be taken someone would die at the scene. I observed PW3 and I did not find him to be a credible witness. I therefore find that such words were not uttered by the Accused and had that been the case, PW1 would have heard them, PW3 would have told PW4 in his first Report to the Police, therefore there is no evidence that the accused had planned to commit the offence. I therefore find that as a result of struggle between the deceased and the accused as the accused prevented the deceased from taking his brother's firewood and as a result of the deceased and accused charging at each other and colliding, accidentally. That collision, caused the injuries on the deceased which caused his death, however, I find the malice aforethought is therefore not proved. I find the Prosecution proved a lesser offence of manslaughter, consequently, I substitute the charge against the accused from **Murder contrary to Section 203 of the Penal Code to Manslaughter contrary to Section 202 of the Penal Code as read with Section 205 of the Penal Code.**

11. The upshot is that I find the Accused is guilty of the substituted charge of Manslaughter and convict him accordingly.

DATED AND SIGNED AT SIAYA THIS 8TH DAY OF DECEMBER, 2016

J.A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 8TH DAY OF DECEMBER, 2016.

IN THE PRESENCE OF:

MR. OORO FOR THE ACCUSED

MR. OMBATI FOR STATE

COURT ASSISTANTS:

1.K. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE