



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO. 39 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

JOHN WANYOIKE MOSIANY.....ACCUSED

J U D G M E N T

1. The Accused is charged with Murder Contrary to Section 202 as read with Section 203 of the Penal Code. In that on the 15th day of May, 2015 at Sintakala in Narok North Sub-County within Narok County he murdered **Peter Kinyanjui Mosiany**. He denied the offence and was represented by Mr. Kamwaro.

2. The prosecution called seven witnesses. The prosecution case was that the Accused was a son of the deceased man and **Margaret Njeri (PW3)**. The couple lived with their children, including the Accused and two minors **R. W. (PW1)** and **N (PW2)**. In the year 2006 the Accused was a student in class six of primary school. Following circumcision rites he dropped out of school. This strained his relationship with his father who eventually ordered him to leave home if he did not resume schooling. The Accused left home and did not return until two months before the material date, bearing an injury. The family took him in and organized for his treatment.

3. The 3rd of May 2015 was a Sunday. **PW3** left home for church while the deceased went to charge his phone at the local town centre. The minors **PW1** and **2** were left in the care of the Accused. All the children had chores to perform and at some point the Accused became agitated after he returned from the shamba. He demanded of the children:

“What have you been told by your parents? Speak quickly before I cut you up.”

Armed with a panga he chased the children who fled after he gave **PW2** a panga to cut a stick to punish the two.

4. At 1.00pm when **PW3** returned home, the two minors were not there while the Accused was locked up in the family house. **PW3** persuaded him to open up and made lunch before proceeding to a neighbour's home for a visit. When the deceased arrived home at about 4.00pm, the two minors returned home and promptly reported the day's even to their father who attempted to intervene. But the Accused would have none of it. He picked a panga and confronted the deceased, who sensing danger attempted to escape but fell into a trench. The Accused then struck him severally with the panga, inflicting severe injuries from which he died a few days later.

5. Members of public, including **PW3** were drawn to the home by the alarm raised by **PW1** and **2**. They caught the Accused as he fled the scene and handed him over to **Sergeant Morris Odhiambo (PW4)** of Nairegia Enkare Police Station. The post mortem was conducted by **Dr. Andrew Kanyi Gachie** on 22nd June 2015. The cause of death was head injury due to sharp force trauma. The Accused was examined for mental fitness. He was certified fit to plead and was subsequently charged.

6. Upon being placed on his defence, the Accused elected to make a sworn statement. He told the court that prior to arrest he worked as a sand loader at Suswa and had returned to his Sintakala home in April 2015. That on the morning of 3/5/2015 the deceased instructed him to care for his siblings **PW1** and **PW2** and others, and to cut some grass as the deceased went to town. His mother also left for church. That after the children squabbled, he chastised them with a stick and they ran away, only returning at 1.00pm when **PW3** had returned home.

7. That they reported to **PW3** who upon making inquiries also punished the siblings before going to a neighbour's home. Seemingly, the siblings left home after this, returning at 4.00pm when the deceased came home. The deceased was allegedly drunk. Upon hearing the report of the Accused's siblings, he produced a knife/panga and slashed the Accused on the hand. When he picked the weapon the Accused was struck on the head by the deceased who also fell. He then struck the father with the panga.

8. The commotion attracted neighbours who came to the scene and rushed the deceased to hospital while handing the Accused over to police. He stated that prior to the incident he had a good relationship with his father and had no intention of killing him. He said that he too sustained injuries in the incident and got sutured in hospital.

9. The basic facts of the matter are not in dispute. In so far as the relationship between **PW1, 2, 3**, the Accused and deceased is concerned there is no dispute that they were members of the same family, residing together in their Sintakala home in the material time. And that on the morning of 3rd May 2015 **PW3** and the deceased left home for different destinations. That the Accused was left in charge of his minor siblings and was involved with an altercation which made the minors flee the home. That when **PW3** returned home the minors had not returned but they later came to report on the incident with the Accused, but left again.

10. That afterwards **PW3** left home to a neighbour's and the deceased arrived in the evening. That the minors came back to the home and reported to their father concerning the earlier events of the day. That some argument or angry words were exchanged and before long the deceased was fleeing from the Accused who gave chase. When the deceased fell, the Accused struck him with a panga. The neighbours were attracted to the home by the commotion and arrested the Accused soon after. The cause of death of the deceased following the attack is not in dispute.

11. The court must determine whether the admitted assault on the deceased by the Accused was accompanied by malice aforethought or whether, as the Accused has stated the action was in self defence and or under provocation.

12. Malice aforethought is defined in Section 206 of the Penal Code as follows:

“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;

(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.”

Malice aforethought can be express implied or constructive. **(See Racho Kuno Hameso -Vs- Republic [2004] eKLR.**

13. The two minors **PW1** and **PW2** who admittedly spent the morning in question under the care of the Accused described their reason for escaping from home as threats by the Accused. During her evidence in chief the older child, **PW1** stated that:

“Then the Accused went to the shamba. Upon return he started chasing around saying: What have you been told by your parents?” He picked a panga and said: Speak quickly before I cut you up.Njenga was told to go and bring a stick to beat us. He was given the panga but he did not return. The Accused said he would beat all of us – administer ten strokeshe followed Njenga as he fled. The Accused said he would kill all of us and remain with his grandfather.”

14. According to **PW1** upon their coming back home after the father’s return, the Accused told the children:

“You wait, I will get you”

He then armed himself with a panga and came brandishing it only hesitating when he saw the deceased. **PW1** said that at that point, an argument occurred between the two and that when the deceased got out the Accused pursued him and slashed him with a panga, when he fell into a trench. That is where **PW3** found him. All the while the Accused allegedly stated that he would not suffer and would remain with his grandfather.

15. During her cross-examination, **PW1** denied that any fight occurred on Sunday or that the children had quarreled. She reiterated that the Accused had chased the children threatening to kill them, forcing them to hide in the shamba until the father returned at 4.00pm. She stated interalia:

“When father returned we went into the house and told father we had not eaten. Father asked for food. We reported what the Accused had done earlier. He did not have a panga – Accused he spoke to father. Then father told Wanyoike (accused) to stop harassing us. Then the Accused left briefly. I did not tell police that father hit and cut Wanyoike (Accused) with panga. An argument arose between father and Accused in the house. Then Accused came out and started giving father a very rude look saying: “You did not give birth to me” Accused fought back against father.”

16. The defence suggestion to **PW1** that the deceased first attacked the Accused was denied by her. She referred to an argument between the Accused and the deceased. **PW3** who was summoned to the scene soon after the tragic attack on the deceased said that on the way home she met with the Accused fleeing while carrying a panga. She avoided him but noticed blood stains on the panga. The witness also narrated that the Accused having left home in 2007 and returned with an injury on the hand, some previous months before the material incident.

17. Despite the foregoing evidence, the defence and did not question **PW3** as to the presence of fresh injuries on the Accused soon after the incident. If indeed the Accused had been cut with a panga by the deceased, **PW3** who came close enough to see the blood stains on the panga wielded by the fleeing Accused, should have noted his injuries if any.

18. Further the arresting officer **PW4** confirming that the Accused had injuries on arrest, said they were sustained at the hands of the mob which arrested him. It was not put to him that the injury was a fresh

one on the left hand as the Accused was later to state in his defence. Nor was there any challenge during cross-examination of **PW3**, on her evidence that the Accused came home after his long absence to nurse a hand injury for which he was undergoing treatment at the material time. The wound site shown to this court in my considered view is most likely the old one and not the one he claims to have sustained during the exchange with his deceased further. My conclusion is fortified by the fact that the wound site on the Accused's hand is quite extensive and I doubt that having sustained such a deep gush, the Accused would have been able to chase the deceased, strike him and run off as he did.

19. It is inconceivable that the deceased, described by the Accused as drunk at the material time, could have armed himself with a panga and been the first to attack the Accused. Besides, from the evidence of **PW1**, supported in part by a younger child **PW2**, the deceased had only tried to intervene verbally on behalf of the two minors who had returned home hungry when altercation started. So frightened were the two children that even when **PW3** returned home at 1.00pm they did not venture back home. Only when the father came did they deign to go home.

20. There is no evidence that the father was at the material time armed with a panga. Indeed the Accused is the person who all day had a panga, and according to **PW1** armed himself ready to "do battle" when the children returned home at 4.00pm but unfortunately, the deceased who was already home stepped in to intervene. The evidence of the Accused's conduct since the early part of day prior to the material incident – a hurling insults at, chasing and threatening **PW1** and **2** with death – is consistent with that of a person who was mentally prepared to harm somebody if not the children.

21. In advancing his defence the Accused relied on Section 17 of the Penal Code which states:

“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.”

22. I have found much guidance in the Court of Appeal decision in **Ahmed Mohamed Omar & 5 Others -Vs- Republic [2014] eKLR** and the High Court decision in **Republic -Vs- Joseph Macharia Waweru [2015] eKLR** both of which were cited by the defence. The key differences between the facts of this case and the cited authorities are these: the Accused persons in the former were suddenly confronted with what they perceived to be a dangerous situation or attack calling for self defence. Their attackers were armed with lethal weapons. They had had no previous engagement with their victims or related other persons prior to the offence. The victims were more or less strangers to them and were the aggressors.

23. The Court of Appeal held, citing the Privy Council decision in **Beckford -Vs- Ford [1987] 3 ALLER 425** that:

“Accordingly, the best for self-defence was that a person could use such force on defence of himself or another as was reasonable in the circumstance as he honestly believed them to be their Lordships established that self-defence depends on a subjective test, rather than objective one..... The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in **Director of Public Prosecutions -Vs- Morgan [1975] 2 ALLER 347, the view was that as essential element of self defence was not only that the Accused believed that he was being attacked or in innocent danger of being attacked but also that such belief was based on reasonable grounds.**

But in **Director of Public Prosecutions -Vs- Morgan (supra) it was held that :**

“If the Appellant might have been laboring under a mistake as to facts, he was to be judged according to his mistaken view of facts whether or not that mistake was, on an objective view reasonable, or not..... its unreasonableness so far as guilt on innocence was concerned, is irrelevant.”

24. In this case, the Accused says he was actually attacked first by the deceased, sustaining injuries. But

the key prosecution witness assert otherwise. And in my view, in light of the preceding events of the day, they must be speaking the truth. The Accused had been brooding all day after chasing the minors around with a panga, and could not stand their return to the home when the deceased got home. Much less, being questioned by the deceased about the events of the day.

25. Threatening words earlier uttered against the lives of **PW1** and **PW2** were acted out against the deceased when he deigned to question the Accused's conduct. The Accused, at that moment unharmed, had the presence of mind to rush to his room and arm himself with a panga rather than leave the home. Thereafter he proceeded to chase after the deceased as he tried to escape. He aimed two heavy blows on the deceased's head and neck inflicting deep cuts as the Post Mortem Report shows. After attacking his father, he rummaged through his pockets to take out money and other valuables. He then fled the home and was eventually restrained by villagers.

26. It is my conclusion, based on the evidence before me that the Accused was not attacked by or in any danger from the deceased who in fact fled from him, falling into a trench in the process. The Accused was the aggressor and the scar he showed to this court must be the old one that had evidently forced him to return home for nursing after staying away since 2007.

27. Similarly, from the facts proven before me the defence of provocation is not available to the Accused. Section 208 of the Penal Code provides as follows:-

“(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 to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4)

(5)”

28. In this case, the Accused rushed to his room and armed himself with a panga, and when confronted by his father in a bid to intervene on behalf of his minor siblings, chased him, slashing him twice on the head and neck when the deceased fell down.

29. In the case of **Roba Galma Wario -Vs- Republic [2015] eKLR** the Court of Appeal cited the Court's decision in **Tei s/o Kabaya -Vs- Republic [1961] EA** where it held that

“In considering whether provocation was sufficient to reduce offence to manslaughter, it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used.”

30. Whatever may have happened earlier in the day, the Accused's siblings return home after spending all day in hiding does not amount to provocation, nor the legitimate question by the deceased of the Accused's earlier conduct against his siblings. The Accused was seemingly aggravated all day and had uttered threats to the effect that he would kill his siblings. After chasing them off, he locked himself up in the family house until **PW3** returned. Later, having armed himself with a panga he insulted his siblings

and issued further threats against them, only to attack his father when he intervened. Here is the picture of a man who was on the war path all day long and who demonstrated every intention to use violence.

31. Considering all the day's event and particularly upon the arrival of the deceased, the Accused cannot be said to have acted in the heat of passion. Rather than leave the home when his father confronted his actions, the Accused elected to "take him on" and to chase him with a panga and slash him twice. The blows were aimed at delicate areas of the body, namely the neck and head. There was no sudden attack or threat thereof near or serious enough to cause the Accused to lose self control.

32. The facts of this case establish an intention on the part of the deceased, to kill as envisaged in Section 206 (a) and (b) of the Penal Code. It matters not that the person who bore the brunt of the Accused's declared intentions to kill was the deceased and not the siblings of the Accused.

33. The prosecution in this case has proved the element of malice aforethought on the part of the Accused, thereby demolishing his defence on the basis of self defence and or provocation. I reject the defence offered by the Accused as improbable and untrue.

34. I find that the prosecution has proved the charge laid against the Accused beyond any reasonable doubt and will enter a conviction for the offence charged.

Delivered and signed in Narok this 1st day of December, 2016

In the presence of:

Mr. Kamwaro for the Accused

Mr. Koima for the State

Court Assistant - Barasa

Accused - present

C. MEOLI

JUDGE