



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 3 OF 2014

REPUBLIC----- PROSECUTOR

VERSUS

CHRISTOPHER KHAEMBA WANGIA-----ACCUSED

JUDGMENT

1. It is alleged that there is Murder in a Family. Christopher Wangia Khaemba(The Accused) is charged with murdering his brother Jacob Soita Wangia (The Deceased). It being said that on the 3rd of January 2014 at Nangoma Village, Matayos Division within Busia County, the Accused murdered the Deceased.
2. On 3rd January 2014, at about 7.30 a.m., Everlyne Akinyi Ojiambo (PW2) joined her husband, the Deceased, and their children to work on their farm. They remained there until 9.00 a.m. and she parted ways with the Deceased and her children David and Jane (PW3). PW3 and her father went to fetch water from a nearby River. As they returned from the River, they met Joy who is a sister to PW3 and a daughter of the Deceased. Joy was crying and PW3 says that Joy told her father that her uncle (the Accused) had sent some children to snatch firewood from her.
3. It was the evidence of PW3 that this news irked the Deceased who became angry. The Deceased then asked the Accused why he often provoked him. That the Accused became abusive and a quarrel ensued. The witness told Court that the Accused then hit the Deceased on his head using a hoe(jembe). That at this juncture, Rapher Auma (PW4), the mother to both the Deceased and the Accused, cried out to Christopher and asked “Christopher why are you killing your brother”. That the Accused attempted to hit the Deceased a second time but in the process of the Deceased shielding himself he accidentally pushed PW4 to ground. He too fell and Christopher hit him a second time on the head using the same jembe. After doing that Christopher dropped the jembe and ran away.
4. PW4 had the misfortune of witnessing a violent confrontation between her two sons. On the material day she was at her home when she heard noises of two people quarrelling. She heard the Accused yelling at the Deceased to leave. The Accused also stated to the Deceased “Baba said you leave” and also added, “I want to deal with you.” PW4 attempted to restrain the Accused but he did not answer. And so turned to urge the Deceased to let the issues lie. It was the evidence of PW4 that the Deceased who was annoyed pushed her aside and she fell. The Deceased then fell on her as he had tripped on a tree stump. That at this point the Accused came where they were, armed with a jembe and hit the Deceased. As the Deceased struggled to stand, the Accused hit him a second time. That at this juncture she asked the Accused why he was killing his brother. That the second blow left the Deceased flat on the ground and unconscious but, relentless, the Accused hit him a third time. The Deceased was now bleeding profusely as the Accused left the jembe and went away. The witness was distressed and screamed for help. In cross-examination, the witness gave a slightly different version. She says that she saw the Deceased with a wet branch from which he was removing leaves. That the Accused and Deceased stood 10 metres apart and the both

- looked annoyed. She tried to calm them down but the Accused was particularly harsh. That the Deceased pushed her aside because he was annoyed and that is when the Deceased fell accidentally and the Accused struck the first blow.
5. The screams of PW4 attracted the attention of PW2 who quickly ran to her mother-in-law's compound. As she made her way, she met her son David who was crying and told her that his Dad had been killed. On reaching the scene, she found the Deceased on the ground and the Deceased was bleeding from the nose and head. PW4 and some children were crying. The witness says that she also saw the Accused at a distance running away. She says that she saw several injuries on the Deceased head. Next to where the Deceased lay was a jembe. She recognized it as one belonging to the Accused.
 6. After the incident PW4, in distress, called her other son Albert Wangai PW1 and informed him to hurry home because the Accused had hit the Deceased and the Deceased was dying. PW1 organized for a vehicle motor vehicle, Registration No. KAG 897 L, and drove home. At the scene he saw the Deceased lying on his back. He was about 12 metres from PW4's home. The Deceased looked unconscious and the left side of his head was significantly depressed. There was blood on his mouth and nose.
 7. Some villagers helped him to place the Deceased on the vehicle and he drove him to Busia District Hospital where he was admitted for a few hours and then referred for further treatment at Moi Teaching and Referral Hospital. That the Deceased was admitted at the said hospital on that day until 17th of January 2014 when he passed on. It was the evidence of PW1 that he was with Deceased on 3rd of January 2014 to 8th January 2014 but throughout this period the Deceased was unconscious.
 8. Faustine Ogola Oundo (PW7) operates a shop offering computer services at Matayos. He was aware of an allegation that the Accused had killed his brother and was at large. So on 23rd January 2014 at about 2.30 p.m. when he saw the Accused person at Busia town PW7 approached him. The witness attempted to hold the Accused but the Accused person shoved him aside and sprinted away. The witness raised an alarm and members of the public assisted him in apprehending the Accused person after a chase of about 50 metres. The Accused was thereafter escorted to Busia Police Station. Sgt. Charles Ouma (PW8) re-arrested the Accused person. He was also the officer who investigated the murder incident.
 9. PW8 told Court that upon recording statements from various witnesses, he formed the view that the Accused person should be charged with murder. That the investigations established that there was sibling rivalry and, without provocation, the Accused hit the Deceased at least three times using the sharp edge of a jembe. The witness also told Court that he recovered the murder weapon from the scene on 24th March 2014. In Re-examination he stated that the weapon had remained on the scene from the date of assault up to when he recovered it on the 24th March 2014.
 10. In his Defence the Accused stated that between 7.30 a.m. and 8.00 a.m. on the morning of 3rd of January 2014, he was weeding some flowers around his house. He was using a jembe. That as he did so, Lyncy and Auma who are children to his sister Hellen were playing with Joyce a child of the Deceased. That after a short while the noises of the playing children ceased but soon thereafter the Deceased emerged, looking upset and asked for the whereabouts of Auma and Lyncy. That the Deceased asked him about some firewood that had allegedly been snatched by the two children from his daughter Joyce. As the Accused was not aware about this he continued to weed. At this juncture the Deceased who was upset slapped him. That PW 4 came to where they were and asked them what the problem was. As they spoke the Deceased removed a tree branch and charged at him. He pushed aside PW4 who was standing between them. That at this juncture Joe, the son of the Deceased, attempted to restrain them. That the Deceased hit the Accused with a stick and on attempting to repeat it, the Accused shielded himself using the jembe but by accident the jembe hit the Deceased on the side of his head. He then noticed that the Deceased was bleeding and tried to administer First Aid on him using spirit. But soon thereafter neighbours came to the compound and were furious and confronted him, he therefore retreated into his house. Later he left his house and proceeded with business of selling clothes. That business would keep him away from home. He confirms that he was arrested while at Busia.
 11. There is common evidence that on 3rd January 2014, there was an encounter between the Accused and the Deceased that turned violent. That violence left the Deceased seriously wounded. There is

- however, Divergence between the Prosecution version and that of the Defence as to how the confrontation started, progressed and eventually reached a tragic end. The Prosecution case was that the Accused was the aggressor while the Accused put forward a Defence of provocation. Which version if any is this Court to believe?
12. Although there were some minor variations between the evidence of the two eye witnesses for the Prosecution, their evidence was similar in material particulars. When the Deceased was informed that some children had snatched firewood from his daughter, Joyce, this upset the Deceased. According to PW3, the Deceased then confronted the Accused and asked him why he often provoked him. PW3 and PW4 say that the response by the Accused was aggressive and abusive. In the version of PW3, the Accused then hit the Deceased using a jembe. As he tried to hit him, a second time, the Deceased shielded himself using his hand and in the process pushed PW4 to ground. The Deceased also fell and the Accused used the occasion to hit him a second time.
 13. The version of PW4 on how she fell differed from that of PW3. PW4 stated that as she tried to cool down her quarrelling sons, the Deceased pushed her aside and they both fell. The Accused then came to where the Deceased had fallen. The Accused who was armed with a jembe hit the Deceased. As he struggled to wake up, the Deceased was hit a second time by the Accused. This left the Deceased flat and unconscious on the ground. The Accused then hit him a third time. Under Cross-examination, however, the witness conceded that at one time during the quarrel, the Deceased was removing some leaves from a stick he was holding. The Deceased appears to have been preparing a weapon.
 14. It is therefore believable when the Accused told Court in his Defence that, the Deceased was armed with a stick. His further evidence was that the Deceased hit him once with this stick but when he attempted to hit him a second time, the Accused used a jembe to block the stick. And by accident the jembe hit the Deceased on the head.
 15. From my Analysis of the evidence, I find that on that fateful day there was a hostile verbal exchange between the Accused and the Deceased. Both were angry. Both were armed. The Deceased with a stick and the Accused with a jembe. As to who struck the first blow is unclear. The evidence of PW3 and PW4 was that the Accused struck the Deceased on the head more than once. PW3 says the blows were two (2) while PW4 says they were three (3). The impression given by these two witnesses is that the Accused intentionally hit the Deceased with the Murder weapon but the Accused says it was an act of Self-Defence. That in fact the jembe hit the Deceased accidentally as the Accused used it as a shield.
 16. The impasse created by the two versions is unlocked, I think, by the Medical evidence given by Dr. Nalyanya (PW5). This is the Doctor who carried out a Post Mortem on the body of the Deceased. On the External Appearance he found:-

Sutured surgical wound on scalp 26 cm long.

2 surgical wounds – one on left and another on right of front region each 1 cm diameter.

When he examined the inside of the Deceased head, he found:-

Injuries were in the head –multiple comminuted skull fracture (involving both frontal and parietal bones) 14 x 8 cm multiple bone fragments some inside the brain.

Massive generalized subdural subarachnoid Hemorrhage, bleeding on the surface of the brain.

17. From that Medical evidence it is clear that the Deceased had at least two wounds on the left and right frontal region. The Deceased had suffered multiple comminuted skull fracture. The Medical evidence was more consistent with the Prosecution evidence that the Deceased had been struck more than once. And I believe that version of PW4 that although the Deceased was armed with a stick, the Accused struck him at least twice on the head.
18. In the submissions to Court the Defence Counsel argued:-

According to PW4 she was in between the Deceased and the Accused when the confrontation

took place. She told the Court that the Deceased was angry to the extent he pushed her to the ground while armed with a fresh stick charging at the Accused and it was in the midst of the struggle between the Deceased and Accused that Accused assaulted the Deceased. In the circumstances of this case there was no pre-determination to commit murder.

As I understand it, the Counsel was arguing that the Deceased provoked the Accused and these negated any *mens rea* for Murder. But this was not congruent with the testimony of the Accused himself. The Accused's Defence was that he acted in Self-Defence when the Deceased charged at him while armed with a stick. I did not hear that Accused say that the Accused had acted out of lack of self-control.

19. So is the plea of Self-Defence sustainable? In answering this question, this court keeps in mind that:-

- i. Where the plea of Self-Defence is raised in a criminal case, the onus of proving the Accused's guilt remains with the Prosecution.
- ii. The plea of self-Defence fails when the force used goes clearly beyond what was reasonable in the light of the circumstances as they reasonably appeared to the Accused (The Court of Appeal in *Mungai Vs Republic* (1984) eKLR.)

In determining whether the force used was reasonable, this Court is guided by the following observation made by the Court of Appeal in *Ahmed Mohammed Omar & 5 others V Republic* (2014) eKLR.

“It is acknowledged that the case of *DPP V Morgan* (Supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one.”

20. This Court has held that at the onset of the violence both the Accused and the Deceased were angry. Both were armed. The deceased with a stick and the Accused with the jembe he had been using to work his compound. That the Deceased was armed was conceded to, albeit reluctantly, by PW4. The only other witness who testified, PW2, left out this aspect altogether. For that reason, what the Deceased did or did not do with the stick is the word of PW4 against that of the Accused. According to PW4, the Deceased was merely removing the stick of its leaves. Presumably preparing a weapon. The Accused on the other hand says that the Deceased charged at him with the stick and hit him once. On attempting to do so a second time, the Accused used a jembe to block it but the jembe accidentally hit the Deceased. Those are the rival versions. This Court has, however, held that on account of corroboration of Medical evidence the Accused hit the Deceased at least twice.

21. What, however, was not corroborated was that it was the Accused and not the Deceased who threw the first blow. The witness who could have provided the invaluable corroboration for the Prosecution was PW3. But as earlier stated PW3 said nothing about whether or not his father was armed with a stick. And according to him, PW4 fell as the Deceased was shielding himself from the attack by the Accused. This was however not consistent with the evidence of PW4 that she was shoved aside by the Deceased as he tried to urge him and the Accused to cool down. Given this evidence, this Court cannot safely find that the version of Prosecution and not of the Accused is the true story as to how the fight began. There are aspects, pointed out by this Court, which create a doubt of the Prosecution case. This doubt, as usual, must benefit the Accused.

22. But there is evidence that the jembe struck the Deceased at least twice. Can this be said to be use of reasonable force. The two brothers were angry men! They were breathing to get at each other! Both, as stated, before were armed! From the evidence it is not clear who the aggressor was. The emotions were high and the atmosphere was tense! Given these circumstances and the possibility that the Deceased may have charged at the Accused, I am unable to tell with certainty that Accused intentionally used more force than was necessary. In reaching this Decision, I have also considered that the Accused never went out of his way to fetch the weapon. The evidence on

record is that he was using the jembe to work on his farm. The Accused may have instinctively turned the farm implement into a weapon. I have also reached this Decision notwithstanding that as the two verbally confronted each other, prior to the physical confrontation, the Accused said to the Deceased "I want to deal with you." Given the insufficiency of the evidence as to who threw, and how the first blow was struck, this Court does not find that these words expressed an intention of the Accused to kill his brother. Further there is no evidence to suggest that the Accused had used the opportunity presented by the conflict to settle an old score.

23. In the end this Court holds and finds that the Accused person committed the lesser offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and Convict accordingly.

Dated, signed and delivered at Busia this 11th day of November 2015.

F. TUIYOTT

J U D G E

In the presence of :-

Oile C/Assistant

Owiti - for State

Otanga h/b for Bokongo - for Accused