



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO.20 OF 2014

REPUBLIC-----PROSECUTOR

VERSUS

SIMON PANYAKO EMUDO-----ACCUSED

JUDGMENT

1. SIMON PANYAKO EMUDO (the Accused) faces the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 3rd of August 2014, the Accused at CDF offices, Nambale town within Busia County, murdered John Masinde Mudaki (the Deceased).
2. Seven witnesses testified on behalf of the Prosecution. It was the evidence of Fredrick Makokha Masinde (PW1) that the Accused was a good friend to his father, the Deceased. That on 3rd of August 2014 at 4 p.m. the Accused visited the home of the Deceased and requested that the two of them visit the Centre. This was not withstanding protests from PW1 that the Deceased was not feeling well. At around 8.00 p.m., later that evening, the witness heard screams from the direction of the CDF Offices, Nambale. When he went to that direction he found that the gate of the compound had been locked and that the Accused repeatedly cutting the Deceased using a Somali sword. The witness said that he could see all these because the lights in the CDF Offices were on. That as he did that, the Deceased pleaded with the Accused asking him "Simon, why are you killing me?" On seeing this PW1 ran and informed Omar Fatuma the Village Elder about what was happening. The Village Elder came to the scene after about 30 minutes. Shortly thereafter three police officers came to the scene and the Accused opened for them. The policemen collected the Deceased and also took the Accused with them. During cross-examination the witness says that on that night he also saw Abubakar Makokha (PW4), a CDF driver, who reached the scene shortly after the Police Officers.
3. At about 4.00 p.m. on that fateful day, Christopher Wabwire Okituyi (PW2) saw the Accused and the Deceased walk past his home. Later at about 8.00 p.m. he too, like PW1, was attracted by the loud screams from the direction of the CDF Offices. When the witness went to the scene, he saw the Accused repeatedly slashing the Deceased using a Somali sword. The witness says that there was sufficient light for him to be able to see what was going on in the compound as the compound is very well lit. The witness says that he continuously begged the Accused to stop the assault but in vain. That he left the scene shortly to report the matter to the Village Elder and both of them returned to the scene. By this time, PW1 had already reported the incident to the Village Elder. Shortly, the CDF vehicle came to the scene and the Accused opened the gate for it and thereafter a police vehicle followed. Some Police Officers put the body of the Deceased into the vehicle and also went away with the Accused.
4. Vincent Ofisi (PW3) also heard the screams from the direction of the CDF office. There, he found PW2 and others at the CDF gate. He saw the CDF watchman assaulting someone. The watchman was using a Somali sword which he used to assault the victim. That he called Abubakar (PW4) to

tell him that there was an incident at the CDF offices. Shortly, Abubakar came to the scene with one Peter. That the two in turn called some Police Officers. The watchman opened the door to the Police vehicle and the Police officers entered the compound and put the body of the Deceased onto the vehicle and went with the Accused. In cross-examination, the witness denied that he heard information that some thugs had invaded the CDF offices.

5. Abubakar Makokha Nambala (PW4) received news of an incident at the CDF offices from PW3. He requested a Peter to accompany him to the CDF offices. Using lights from a vehicle they had used to travel, they beamed into the compound. It is then that he saw the Deceased on the ground wounded. It was his evidence that the Accused told him that the Deceased had gained entry into the compound by climbing over the wall at the back. Thereafter the police from Nambale got to the scene. The Accused opened the gate for the police who entered. This witness also entered the compound and was able to see the Deceased. That the Deceased had multiple wounds to his left shoulder and hand and his left leg.
6. The body of the Deceased was subjected to Post Mortem examination at the request of the police. Dr. Patson Kubuta (PW6) conducted the Post Mortem on 7th of August 2014 at 13.44 hours. The Doctor found extensive injuries to the body of the Deceased. The extent of those injuries can be demonstrated by reproducing parts of the post mortem report prepared by the Doctor. On the external appearance of the body the Doctor found -

- **Several penetrating injuries on Lateral (side) aspect of forearms – an indication of Defence injuries.**
- **Two penetrating cuts on left shoulder joint – 3cm x 2cm x 2cm.**
- **Several deep penetrating injuries on the right arm.**
- **Deep Penetrating injury on the left hand.**
- **Several penetrating injuries on right hand.**
- **Multiple penetrating injuries on the knees bilaterally (both sides).**
- **Multiple penetrating injuries on leg bilaterally cut off the right foot.**
- **Deep penetrating injury on the right lower back.**
- **Multiple complete and comminuted (Breaking into small fragments) fractures on right leg, right arm, forearm and left wrist and left forearm (radius/ulnar).**

To the internal appearance, he found that the great vessels to the upper and lower limbs were severed. On the head, he found that the right parietal aspect had suffered a penetrating injury. On the nervous system, he found that there was brain substance which demonstrated Ischaemic changes. He explained this to be changes of an organ caused by the cut of blood supply. The Doctor formed the opinion that the cause of death was Hypovolaemic shock secondary to an assault.

7. Cpl. Guracha Gufu (PW7) interviewed the witnesses in the incident. They included PW1. It was his testimony that his investigation established that the Deceased and Accused were close friends and were together on the fateful day about 4.00p.m. But later at 9.00 p.m. the Accused was seen assaulting the Deceased using a Somali sword. That during the assault members of public pleaded with Accused to stop but he did not heed their plea. That there was enough light to enable members of the public to see what was happening inside the compound of the CDF Offices. The witness says that he inspected the compound of CDF Offices and did not notice any breakages. In Cross Examination, the witness told Court that the Accused told him that there was an attempted breaking into the CDF office and that those who attempted the breaking were armed. However in Re-examination the witness stated that he could not find any evidence that suggested that there was an attempted break in. The witness however could not tell how the Accused got into the compound.
8. On the close of the Prosecution case the Court formed the view that the Prosecution had led sufficient evidence to require that the Accused person makes a Defence. The Accused chose to give an unsworn statement. It was his evidence that prior to his arrest he was a watchman at the CDF Office Nambale. That on 3rd of August 2014 he reported to night duty at 6.30 p.m. At around 7.00 p.m. he switched on security lights and then he sat at a strategic place from where he could not be seen. That at 9.30 p.m. he heard a loud bang on the office door. He used a dark

- passage of the compound to reach the door of the office. There he saw three people whom he was unable to identify.
9. That the Accused raised an alarm by blowing a whistle and also screaming. That two of the people had torches and a panga each. That the two jumped over the gate and ran away. On turning back he saw a third person close to him. That third person threw a stone at him and the stone hit him on his shoulder. But he fought back using the Somali sword. The Accused cut the Deceased on the neck. All this while the alleged intruder had not identified himself. The intruder held the sword and tried to snatch it from the Accused and the two struggled. That the Accused managed to successfully retain the sword. At this juncture the intruder sat down. And it was only then that he was able to recognize the person. A neighbour called the CDF driver and a CDF vehicle shortly came to the scene. Thereafter the police arrived at the scene. He denied the charges.
10. There is evidence that on 3rd August 2014, the Accused asked out the Deceased to visit the Center. PW1, the son of the Deceased, was at home when the Accused visited the Deceased. His evidence is corroborated by PW2 who saw the Accused and the Deceased at about 4.00 p.m. on that day, pass by his home. There was evidence by Francis Netia Lutta (PW5) that he saw the Deceased in his compound (PW5's) at about 6.00 p.m. sitting under a tree. There was also evidence by PW1, PW2, PW3 and PW4 that some time after 8.00p.m. on the same day, the Deceased was in a critical condition having been severely wounded. He was later to succumb to those injuries. The Accused does not deny inflicting those injuries but pleaded that he was acting in Defence of the property he was guarding and also in Self-Defence. Further that it was only after he had injured the Deceased that he recognized him as his friend.
11. In determining whether or not the Accused is guilty of the offence he faces, the Court will answer the following issues that present themselves:-
- i. How did the Deceased find himself inside the compound of the CDF offices at Nambale?
 - ii. Did the circumstances invite the Accused person to act in Defence of the property of his employer and/or in Defence of self?
 - iii. If so, was the force used by the Accused reasonable in the circumstances?
12. Before the Deceased was seen in the compound of the CDF offices at about 8.00p.m. under brutal assault by the Accused, there was evidence that he was seen at 6.00 p.m. in the compound of PW5. But there was no evidence as to the movements or whereabouts of the Deceased between 6.00p.m. and 8.00p.m. Indeed, there was no evidence from the State as to how the Deceased found himself in the CDF compound. The Accused, however, offered an explanation. In his unsworn Statement, the Accused told Court that at about 9.30 p.m. he heard a loud bang on the door of the CDF offices. He then moved towards the door using a dark passage. There he saw three people that he was not able to identify. He raised an alarm by screaming and blowing his whistle. In the face of this, two of the intruders ran away by jumping over a short gate. The third threw a stone at him. Let me pause there for a moment and fast forward. PW7 who investigated the alleged crime says that he visited the scene on the day after (i.e. 4th August 2014) and on inspection of the building and the compound of the CDF Offices he did not notice any breakages. The witness was discounting the Defence theory that the Deceased, in the company of two others had attempted to break into the CDF offices.
13. In answer to the first question, this Court is unable to find any Prosecution evidence of how the Deceased found himself on the night of 3rd August 2014 in the compound of the CDF offices. In particular there was no evidence that the accused invited, lured, coerced or forced the deceased into the compound of the CDF Offices. If however, the Court was to believe the Defence version that there was an attempted break in, then I must turn to consider whether the circumstances invited the Accused to act in Self-Defence and if so whether the Accused used no more force than was necessary. And in considering this I must remember that the burden is always placed on the Prosecution to prove that the Accused was not acting in Self-Defence.
14. The evidence of PW1, PW2 and PW3 is that on the unfortunate night, the compound to the CDF Offices was well lit. PW1 testified

“The lights of the CDF office were on and one could see the two”

In the words of PW2,

There was sufficient light. At night the compound of the CDF is very well lit.

And PW3,

“The compound was extremely well lit by the lights of the offices”

In his Defence evidence, the Accused stated that the security lights were working and he had to find a dark passage within the compound to approach the door, a concession that the compound was generally well lit. It is my finding that from the totality of the evidence, the compound of the CDF offices at the fateful time was well lit. And the light enabled PW1, PW2 and PW3 to see what was happening inside.

15. On reaching the scene, PW1 found the Accused repeatedly cutting his father. The Accused who was well known to the witness struck several blows on various parts of the Deceased body. It was also the evidence of the witness that the Deceased pleaded

“Simon why are you killing me”

But the Accused would not stop. The evidence of PW1 found support from that of PW2 who got to the scene as the Accused person was still assaulting the Deceased. The witness heard the Deceased ask the Accused,

“Simon you are my in-law why are you cutting me?”

PW2 in addition begged the Accused to stop but that the Accused did not. In the evidence of PW2 the Accused repeatedly cut or hacked the Deceased. Both the Deceased and the Accused were well known to the witnesses.

16. PW3 found some people outside the CDF offices. One of whom was PW2. Inside the compound he saw the watchman using a Somali sword /slasher to cut his victim. The witness knew both the Accused and the Deceased as they were his neighbours. That the victim pleaded,

“Simon why are you killing me”.

17. The combined evidence of these three witnesses is that they knew both the Accused person and the Deceased. Their evidence is that the Accused repeatedly, using a Somali sword (or call it slasher), inflicted blows on various parts of the body of the Deceased. Their further evidence is that a distraught Deceased begged for mercy and PW2 also requested the Accused to stop. That the Accused would not hear of it and continued the assault unabated. Further evidence is that the assault left the Deceased severely injured and the Post Mortem examination confirmed that the cause of death was related to the assault. The three witnesses, however, reached the scene when the assault was ongoing and may not have witnessed how it all began. Consequently, to the question whether the circumstances invited the use of force in Defence property or self, the Prosecution case does not provide an answer.

18. What is abundantly clear however is that the Accused used brutal force in assaulting the Deceased. Using a Somali Sword (also described as a slasher), the Accused repeatedly inflicted various blows all over the body of the Deceased. The weapon was shown to Court and produced as an exhibit (P Exhibit 1). It is a sharp weapon. The Accused was relentless in his assault even in the face of pleas by the Deceased and members of the public that he stops. The extent of the brutality of the attack by the Accused is fully told by the Post Mortem examination. This is an extract of the

Report.

External Appearance

- **Several penetrating injuries on Lateral (side) aspect of forearms – an indication of Defence injuries.**
- **Two penetrating cuts on left shoulder joint – 3cm x 2cm x 2cm**
- **Several deep penetrating injuries on the right arm**
- **Deep Penetrating injury on the left hand.**
- **Several penetrating injuries on right hand**
- **Multiple penetrating injuries on the knees bilaterally (both sides).**
- **Multiple penetrating injuries on leg bilaterally cut off the right foot.**
- **Deep penetrating injury on the right lower back**
- **Multiple complete and comminuted (Breaking into small fragments) fractures on right leg, right arm, forearm and left wrist and left forearm (radius/ulnar)**

Systematic examination:

- **Respiratory system, genito-urinary system, Digestive System, Spinal Column and Spinal Cord intact**
- **Significant findings**
- **Cardio vascular – Hear intact, however the great vessels to upper and lower limbs were severed (cut off)**
- **Head - right parietal area had a penetrating injury**
- **Nervous System – brain substance demonstrate Ischaemic changes (Changes to an organ because of cut off of blood supply)**
- **There was interference of blood supply to the brain.**

19. In determining whether the use of this obviously vicious force was necessary, the Court must pay attention to the following observation by the Court of Appeal in **Mungai Vs Republic [1984] eKLR.**

We agree with the learned judge that on the authority of Palmer v R the appellant was not in law required to weigh to a nicety the exact measure of the action which it was necessary to take to deter the deceased from attacking Christine further. But this must be taken in the light of the explanation of that decision in R v Shannon, in which the court said that the passage:-

“if a jury through that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken”

Was in effect a bridge between the objective test, that is to say, what was reasonable from the view point of an outsider looking at a situation quite dispassionately, and the “subjective test”, that is to say, the view-point of the accused person himself, with the intellectual capabilities of which he might, in fact, be possessed, and with all the emotional strains and stresses to which at the moment in question he might be subjected.

More recently, on 27th June 2014 The Court of Appeal acknowledged that the common law position regarding the defence of self-defence has changed over time. In the decision of **Ahmed Mohammed Omar & 5 Others v Republic 2014 eKLR** the Court of Appeal stated,

“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.”

This Court shall therefore apply the subjective test.

20. The Court, in the absence of a factual proposition to the contrary by the Prosecution, does for a moment, grant some credence to the Defence story. The Accused told Court that the Deceased was part of a three man armed gang that attempted an armed break in. That when he raised an alarm, two of the three intruders took to their heels and escaped. As they did so he noticed a third person who threw a stone that landed on his shoulder. It was then that he cut the intruder with a slasher/Somali Sword. The intruder attempted to snatch the slasher/Somali sword but in vain. The intruder then sat on the ground.
21. If the Accused was to be believed, then upto there he had only struck the Deceased once and that may appear to have been use of reasonable force.
22. And again, if the Accused was to be believed, then, after the retaliation by the Accused, the intruder sat and was subdued because the Accused makes no mention of a further attack or attempt of a further attack by the Deceased. The Post Mortem reveals that the victim sustained multiple and extensive penetrating injuries. This confirms what PW1, PW2 and PW3 told Court that they witnessed the Accused person repeatedly assault the Deceased with the Somali sword/slasher. The witnesses heard the Deceased beg for mercy. The victim called out the Accused by his name. PW2 also sought to intervene. The Accused ignored all this and continued in his barbaric act. The Court finds and holds that when the Deceased was seated on the ground, he was subdued and did not pose a danger to the Accused. The life of the Accused was not in peril. Nonetheless, the Accused continued to viciously and repeatedly deal the bodily blows. The attack was unabated even after the Accused had recognized that the victim was his apparent friend. The attack went on even when it was clear that the victim was severely wounded and was staring at death. The only finding this Court can make was that the Accused used unreasonable force and force that was much more than was necessary. I also find no evidence to suggest that the Accused was provoked into using the force which he did.
23. Given that the Accused mercilessly and repeatedly dealt bodily blows on the Deceased using a dangerous weapon, his intention, without doubt, was to either cause death to his victim or to grievously harm him. In the end he succeeded in causing his death. Section 206 of the Penal Code deems malice aforethought as including:-
- 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.**

In the circumstances of this case I find that the Accused was guilty of express malice as contemplated by 206 (a) or in the very least implied malice in terms of Section 206 (b).

24. The upshot is that I do hereby find the Accused person guilty of Murdering John Masinde Mudaki on 3rd August 2014 and do hereby convict him accordingly.

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

F. TUIYOTT

JUDGE

In the presence of :-

Oile C/Assistant

Owiti - for State

Otanga h/b for Onsongo - for Accused