



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO.100F 2011**

**LESIIT, J**

**FREDRICK MWENDA.....ACCUSED**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Accused **FREDRICK MWENDA** was charged with one count of murder contrary to section 204 of the Penal Code. The Particulars of the prosecution case are that on the 11<sup>th</sup> day of February 2011 at Tunyai Location in Tharaka South District, within Eastern Province murdered Samuel Mutege Mwangangi.
2. The prosecution called four witnesses. The facts of the prosecution case are as follows. PW1 and 2, Teresia and Jacinta respectively, were at Canal drawing water when they heard a man screaming. It was 8 pm or so on 10<sup>th</sup> February 2011. They heard a bang of iron sheets being hit. They decided to check who it was.
3. They went to accused home where they found the accused standing outside his house flashing a torch at a man on the ground as Mutege, the deceased. PW1 and 2 decided to go to the home of Karea, the mother of the deceased. They informed her of the incident.
4. PW1, 2, Karea and two others one Gitonga and one Kabaara walked back to accused home. They found the accused still flashing his torch at the deceased.
5. PW3 was asleep in his home when accused woke him up and informed him that he had gone home after 8.30 pm when he heard a glass fall inside his house. He told him that he then saw a man emerging from his window and that he took a stick and hit him and he fell down outside his house.
6. PW3 said he went to the home of his parent's home where he found PW1 and 2 also there. They went together to accused home where they carried away the deceased. Eventually they took deceased to Materi Hospital where he was admitted on the 11<sup>th</sup> February 2011. The next day the deceased died.
7. The Post mortem was by Dr. Nato. His report was produced by Dr. Guantai. According to the report the deceased died due to severe head injury with intracranial injury as a result of a single blow to the head. The report was P.Exh2.
8. The accused was placed on his defence. He gave a sworn statement. He did not call any witness. In his statement he said that he was living alone. That on the 10<sup>th</sup> February 2011 he went home after 8.30 pm and heard a glass fall inside his house. He then found the rear window which he had left locked wide open. He then heard footsteps then saw a hand, leg and head of a man holding a knife emerging from the window of his house.

9. The accused said he fell down to avoid being stabbed. Then he picked a stick and hit him once on the head and once on the hand. When the man fell down outside his house, the accused stated that he flashed him and realized he was his neighbor. He then went to PW3, and informed him about the incident.
10. The accused is charged with murder contrary to section 204 of the Penal Code. The Prosecution has the burden of proof. They must adduce evidence to establish that the accused totally wounded the deceased and that at the time of inflicting the fatal blow, he had formed the necessary intention to cause grievous harm or death to the deceased.
11. The case against the accused is circumstantial as there was no eye witness of the incident.
12. Mr. Mutwiri represented the accused in this case and in his final submissions he urged the court to find that the ingredients of murder had not been satisfied. Counsel urged that the evidence tendered by the prosecution tallied with that of the defence that the accused delivered a fatal blow on the deceased but that the same was not premeditated. Counsel urged that there was no grudge between accused and deceased and there was no guilty mind.
13. Mr. Moses Mungai, the learned counsel for the state prosecuted the case. He urged the court to consider the entire evidence then make up its own mind.
14. I have carefully considered the entire evidence adduced both by the prosecution and the defence. In this case the accused has admitted hitting the deceased and also admits that it was that blow that caused the death of the deceased. From the accused statement in defence, the defence of person and property is disclosed.
15. The defence of person or property is provided for under section 17 of the Penal Code which stipulates as follows:

**“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.”**

16. The issue of whether the defense of person or property can apply was discussed at length in MUNGAI V. REP [1984] KLR 85 at page 98, where KNELLER, HANCOX JJA and NYARANGI Ag. J.A. held:

**“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 *R v Ngoilale (supra)* and *R v. Shaushi [1951] 18 EACA 198*, the latter of which was cited with approval in *Hau s/o Akonaay v R [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 *R v Ngoilale* and *R 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.”**

**We have no doubt therefore that, in the instant case, the learned trial judge should have directed himself in accordance with the rule of Common Law which we have cited.”**

17. I have carefully considered the circumstances under which the deceased met his death as stated earlier there was no eye witness of this incident. The two ladies who were the first to arrive at the scene, PW1 and 2 found the deceased already on the ground with a serious injury on the head. The accused person was standing next to him flashing the deceased with a torch.

18. Under Sections 111(1) and 119 of the Evidence Act a statutory presumption can be created in circumstances similar to this case. The two sections provide

**“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.**

**119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**

19. Going by the two sections herein above the accused person had a statutory burden to explain how the deceased who was found with him got the injury that led to his death.

20. The accused person has complied with the statutory burden and has given an explanation in which he explains that he hit the deceased on the head and also on the hand in order to protect himself. His explanation reveals that the deceased broke into his house in his absence and that when the accused returned the deceased came out of the house holding a knife. There is clearly no evidence of premeditation on the part of the accused person. He did not expect the deceased to break into his house on the material day. He suddenly found a person in his house and when he challenged him. He came out holding a knife in a threatening manner. I am therefore satisfied that from all the facts and circumstances of this case the prosecution has failed to prove the element of malice aforethought which is essential to establish in a charge of murder.

21. The accused defence is that of self defence of person and also of property. As explained in the case of Mungai Vs Republic supra **“the essence of 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 force the loss of control, then the influence of malice is rebutted and the offence will be manslaughter.”**

22. In the instant case I find that the accused person was under an eminent threat of attack by the deceased. It was in the dark. The deceased was emerging from his house through the window. The alleged knife was not an exhibit in this case. Nevertheless there is evidence that the deceased banged the iron sheets of the house of the accused. That bang was strong enough for PW1 and 2 to hear while drawing water at the canal a distance away. The two ladies also heard the accused person screaming two times and they recognized his voice according to the evidence.

23. I have no doubt therefore that from the circumstances of the case and the conduct of the deceased at the time that the accused person was under a threat of attack which was near enough and serious enough to cause loss of control. Furthermore the accused hit the deceased only once

on the head, which was the fatal, blow in this case. The fact that it was a single blow goes further to show that the intention of the accused was to protect himself. In the circumstances I am satisfied that the inference of malice is rebutted. The charge of murder cannot stand against the accused person. In the circumstances I substitute the charge against the accused person from murder contrary to section 204 of the Penal Code to manslaughter contrary to section 202 of the Penal Code.

24 Accordingly I find the accused person guilty of the substituted charge of manslaughter contrary to section 202 of the Penal Code and convict him accordingly.

**DATED SIGNED AND DELIVERED AT MERU THIS 6<sup>th</sup> DAY OF FEBRUARY 2014.**

**J. LESIIT**

**JUDGE**