



IN THE HIGH COURT OF KENYA

AT NAKURU

H.C. CRIMINAL CASE NO. 7 OF 2011

REPUBLICPROSECUTOR

VERSUS

FRANCIS GITAHI CHEGE ACCUSED

JUDGMENT

Francis Gitahi is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code. It is alleged that on 13/1/2011, at Karima village in Kipipiri District, within Central Province, he murdered Zipporah Wanjiku Gitahi. He denied the offence and the prosecution called a total of eleven (11) witnesses. The accused was placed on his defence and gave evidence on oath. He did not call any other witnesses.

The first prosecution witness was declared a hostile witness so her evidence is not useful to this case. **Samwel Nyongo Magwa (PW2)** of Kipipiri told the court the accused that he knew as he used to sell potatoes to him. He also knew the deceased as accused's wife. On 13/1/2011 at about 1.00pm, he went to the accused's home to get potatoes. On reaching the house he found the deceased and the daughter carrying bags. The deceased came back shortly, thereafter and accused excused himself to go and attend to the deceased. They entered the kitchen, came out and entered the main house. The deceased went to the kitchen and accused followed. The deceased then stood at the door with a kitchen knife on the door asking why the accused had refused to educate their children and if he did not, she had found a man who would educate them. **PW2** heard screams and went to intervene and found the accused holding the deceased who had a knife. The deceased ran off and he was left with accused. Accused escaped and ran after the deceased. **PW2** went after them but it took time for him to open the gate. He ran after the accused and found deceased had fallen and was bleeding from the ribs. **PW2** and deceased's daughter screamed and people gathered. Accused disappeared from the scene. **PW2** left when the deceased was still at the scene, alive and was talking. **PW2** said that after he saw the deceased with the knife, a struggle ensued between the accused and deceased, the accused then snatched the knife from the deceased.

Gladys Waringa (PW3) is a sister in law of the accused. She was asked by the accused to go to talk to the deceased with elder **John Kihiu (PW5)** to help them solve their differences. The accused wanted **PW3** to convince the deceased not to go back to her parents' home but remain in her matrimonial home. After talking to the deceased, **PW3** left accused and deceased talking and went away but later heard screams, she went to the scene and found a crowd, with deceased seated under a tree and was bleeding.

PW4 Zakayo Mungai is the father of the deceased. He was aware that the deceased was no longer living with the accused because they had separated after many disagreements. Even after the accused promised not to use violence on the deceased after he drunk, he continued to mistreat the deceased and by

13/1/2011, the deceased had been living at her parents' home. **PW4** said his home is not far from accused's. He only heard screams from accused's home and on going there, found the deceased injured and the intestines were exposed. **PW4** said he saw a blood stained knife, jacket and deceased's scarf at the scene.

PW5 John Kihiu Kanyara, recalled that the mother of the deceased had asked him to escort the deceased to go and get her clothes from accused's home in company of the deceased's daughter Anne. **PW5** informed accused that the deceased wanted to take her clothes; the accused had no objection/and he left accused deceased trying to resolve their problems. He later heard screams from accused's home and on going there, found the deceased injured. The only role that **PW6 Moses Wakaru Gatuma** played was to rush the deceased to hospital. She was declared dead on arrival.

PW7 John Muriithi Kamau, a nephew to the accused, identified the deceased's body at Ol-Kalau hospital mortuary before postmortem was carried out.

PW8 CPL Raphael Matheka received the assault report, went to the scene, found the deceased had been removed but recovered a kitchen knife that was blood stained near the kitchen door, a yellow jacket which allegedly belonged to the deceased. He sent the knife, accused's trouser and blood samples to the Government Analyst for further investigation.

The postmortem on the deceased's body was conducted by Dr. M.W. Gitau and produced in court by **Dr. Patrick Kikuki (PW9)** of Ol Kalau hospital. Dr. Gitau formed the opinion that the cause of death was a stab wound on the right chest wall causing massive right haemothorax.

The Government Analyst **Lawrence Kinyua Muthuri (PW10)** recalled that he received blood samples of the deceased and the accused, a knife, a brown trouser and yellow jacket to examine and determine the source of the blood. He found that the DNA generated from the blood on the knife, trouser, jacket all matched the DNA generated from deceased's blood. He produced the exhibit memo and report as Exhibit 4 (a) & (b). **PW11 APC Joseph Wambugu** arrested accused when he went to their camp to report an assault.

In his sworn statement in his defence, the accused said that the deceased had left their matrimonial home in June/July 2010 due to differences between them and on that fateful day, she went back to his house in company of the daughter Anne and **PW5** so that she could collect her clothes. Accused and deceased decided to try to talk and resolve their issues in the presence of **PW3, 5** and the two agreed; That the deceased later told the accused she needed time to think about what they had agreed, got some of her things from the house and left with the daughter. By then, **PW2** had arrived to get his potatoes from the shamba. When accused was going to the shamba, the deceased called him back, accused him of wanting to marry, claimed that accused wanted to stop paying school fees for their children and of infidelity and she wanted to take the children and that the man she had got was of better worth than him; that the deceased wanted sufurias from the kitchen and he went in to give her. He stopped at the door, wanted to slap her because of the abuses that she was hurling at him and he threw a sufuria at her to disarm her of the knife she was holding. They started to fight over the knife and they fell inside the kitchen and it is then he heard deceased say that she was injured. It is then **Simon (PW2)** tried to hold him, he made her sit and she was bleeding a lot. People gathered and he decided to go away. He denied stabbing the deceased despite the fact that the deceased abused him and had a knife.

Having considered all the evidence and the submissions made by both the prosecutor and defence, there is no doubt that the deceased was injured after a disagreement with the accused. The accused seems to be raising defences; that he never committed the offence; that he was provoked. The questions that the court will determine are;

1. Whether the accused inflicted injuries on the deceased?
2. If so, is the defence of provocation/self defence available to him.

3. Whether malice aforethought was proved.

The duty squarely lies on the prosecution to prove its case beyond any reasonable doubt. In this case, there is only one eye witness to the incident, **PW2**, the other one having been declared hostile. **PW2** did not know what had transpired earlier on the day. But, clearly from the evidence of **PW3, 4 and 5**, the accused and deceased had been estranged for some time. Although the deceased had come to collect her belongings from the matrimonial home on that day, there was an attempt at reconciliation and **PW3 & PW5** left the two to continue talking. Things seem to have changed for the worst because **PW2** said, on arrival at the accused's home, he first saw the deceased, leaving but later saw her with a knife, while standing at the kitchen door, knocking the knife on the door. He also heard the deceased abusing accused claiming he has not paid school fees for the children and she had found a better man than accused. That seems to be when a struggle ensued when the accused snatched the knife from the deceased. The deceased ran from the scene, (kitchen) **PW2** tried to get hold of the accused but he managed to chase the deceased out of the compound till where she fell. **PW2** did not state whether he saw accused actually stab the deceased. However, nobody else could have done it because it is only the two of them who were engaged in the struggle. The post mortem disclosed multiple injuries on the deceased. i.e; Laceration on the posterior aspect of both arms, stab wound on the right chest wall; a stab wound on left iliac fossa with evisceration of the small intestines; stab wound on the right chest wall, involving middle lobe of right lung. Stab wound involving mesenteric vessels. The cause of death was said to be a stab wound on the right chest wall causing massive right haemothorax. It is obvious that the deceased was not stabbed once, but severally. I do not believe that she fell on the knife or that it happened during the struggle as the accused would have the court to believe. I find that after the accused snatched the knife, he must have used it to stab the deceased and even after he had done so, and she was subdued, she ran, he chased her up to where she fell. **PW8** corroborated **PW2's** evidence that he visited the scene, saw blood and foot marks where the deceased was first injured up to where she fell-despite the fact that the scene had been disturbed. **PW9** opined that due to the nature of the injuries, they could only have been inflicted by somebody else. From a consideration of all facts and findings above, I am satisfied beyond any doubt that even if it were true that the deceased was the one who had the knife first, the accused snatched it from her and inflicted the multiple stab wounds found on the deceased.

Was the accused provoked?

Section 208 of the **Penal Code** defines provocation as;

“(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 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 and 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.”

Mr. Kipkoech counsel for the accused relied on the decision of **Samwel Kipngeno Birir Vs. Republic (2012) KLR** where the court of appeal upheld a decision where a father caused the death of his son as a result of provocation. He urged that the accused was sufficiently provoked in this case. The provocative words that were allegedly uttered were that the accused was not educating their children and that in any event, the deceased had found herself another man who was of more worth than the accused.

The deceased's father, **PW4**, told the court that the accused and deceased had had many disagreements in their marriage and that the accused would beat up the deceased and she would run back to her parent's home. He produced in evidence an agreement (Pexh1) signed by the accused and deceased whereby the

accused agreed to stop using violence on the deceased based on false accusations or suspicion of infidelity by the deceased and that they would discuss or consult whenever they had a dispute. The agreement had been signed on 8/5/2010 but it seems things did not work because the deceased had gone back to her parents even after it was signed. This in evidence was not contested. Bearing the earlier disputes in mind, for the deceased to utter the alleged words to the accused was only adding salt to a wound that had been festering in their relationship. It seems the accused was a person who was already wounded as he used to accuse his wife of infidelity before and there she was throwing it right into his face. If indeed the deceased uttered the said words, it meant he was looked down upon or demeaned as a husband or as a man as he was being compared to another man who was sharing his wife with him. In my view those utterances which were made in the presence of **PW3**, amounted to sufficient provocation.

When does the defence of provocation avail?

Section 207 of the penal code define the defence of provocation as;

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there was time for his passion to cool, is guilty of manslaughter only.”

The post mortem revealed that the deceased sustained multiple stab wounds. The question is, did the accused need repeatedly stab the deceased? Having disarmed and stabbed her once, the deceased must have been subdued and the subsequent stabbed wounds were not necessary.

In his submissions, counsel for the accused also brought in the issue of self defence and relied on the decision of **Republic Vs. Benard Gitonga** 2011 where J. Lessit relied on the decision of **Mungai Vs. Republic** (1984) KLR 85 where the court held that use of excessive force in the defence of a person and property may lead to a finding of manslaughter. The Court of Appeal held as follows in the above case.

“1. It is a doctrine recognized in East Africa that the excessive use of force in the defence of a person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter *R v. Ngolaile s/o Lenjaro* (1951) 18 EACA 164; *R v Shaushi* (1951) 18 EACA 198.

2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered –*Palmer v Reginam* [1971] 1 All ER 1077.”

In the instant case, the accused managed to snatch the knife from the deceased and the deceased was no longer a threat to his life. In any event there is no evidence that the deceased tried to harm the accused with the knife. There is no evidence that he found any resistance from the deceased. There is no evidence that he was injured anywhere as a result of the scuffle between them. Infact **PW2** said the deceased ran. Inflicting of multiple stab wounds on the deceased cannot be said to have been done in self defence. I find that the accused used excessive force in the circumstances. From the holding in the **Mungai** case (supra), whether or not use of excessive force will result in a finding of manslaughter depends on the facts of each case.

Taking into account the conduct of the accused before the disagreement arose, that he was all out to have his wife reconcile with him; that he called **PW3** and others to try and talk her from leaving and from my findings that the words uttered by the deceased did provoke the accused resulting in his acting in the heat of the moment, I find that the accused never intended to murder the deceased though he used excessive force. In the circumstances, I find that a lesser offence of manslaughter has been proved. I will find him guilty of the lesser offence of manslaughter contrary to **Section 202** of the Penal Code and convict him accordingly.

DATED and **DELIVERED** this 16th day of May, 2014.

R. P. V. WENDOH

JUDGE

PRESENT:

Ms Manyara holding brief for Mr. Kipkoech for the accused

Mr. Nombi for the State

Kennedy – Court Assistant