IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 78 OF 2009

(Lesiit, J)

REPUBLIC……...PROSECUTOR

VERSUS

DAVID MWENDA MURIUNGI……..…ACCUSED

JUDGEMNT

1. The accused David Mwenda Muriungi is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 3rd day of February 2007 at Kiaruji Village of Uruku Location in Meru District, within Eastern Province, murdered Douglas Mbaya Magaju.
2. The prosecution called five witnesses. The prosecution case was that the accused was seen beating the deceased with a piece of stick. He then left the deceased bleeding from the nose after the deceased fell down. The deceased died on the 14th February 2007, 11 days after the assault.
3. The deceased gave a sworn defence. His case was that on Sunday 3rd February 2007, the deceased his childhood and best friend, went for him in his house. They left together to take alcohol as they usually did.
4. The accused stated that after taking alcohol, the two of them disagreed due to drunkenness as a result of which they started wrestling. The accused said the wrestling deteriorated to a fight and eventually he pushed the deceased who fell down over stones due to lack of balance due to alcohol. The accused stated that the deceased suffered a severe injury due to the fall and bled from the nose. He said that with help of passersby he helped the deceased walk home.
5. The accused faces a charge of murder contrary to section 203 of the Penal Code under section 203 of Penal Code the offence of murder is defined as

> **"203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder**."

6. An important ingredient of the offence of murder is malice aforethought. The prosecution has to adduce evidence to establish that the accused had formed the malice aforethought to cause either death or grievous harm to the accused. The prosecution must show that at the time the accused assaulted the deceased he was motivated by malice and that the injuries suffered during the assault were the actual cause of death.
7. Section 206 of the Penal Code gives the circumstances from which malice aforethought can be construed. The section stipulates:

‘206. 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.’

8. I have carefully considered the evidence adduced by the prosecution and the defence of the accused. I also considered submissions by Mr. Kiogora Mugambi, learned counsel for the accused and Mr. Moses Mungai, learned Prosecution counsel.
9. Mr. Kiogora’s submissions were that the prosecution failed to rebut the accused defence of self defence and also urged court to find death was accidental.
10. Counsel relied on **Morris Mungathia v. Republic [2007] eKLR** for the proposition that it was the duty of the prosecution to show by evidence that the accused was not acting in self defence. Counsel also relied on **Republic V. Gachanja [2001] KLR 428** for the proposition that in law self defence is an absolute defence to a criminal charge and that it absolved an accused of criminal liability.
11. Mr. Moses Mungai urged the court to consider the entire evidence adduced in the case and find that the prosecution had proved the case beyond reasonable doubt.
12. I have found that there are undisputed facts in this case. There is no dispute that the accused and the deceased were engaged in a fight when PW1 saw both of them. There is no dispute that the engagement or scuffle involved only the accused and the deceased.
13. PW1 was the only prosecution witness who saw the scuffle between the accused and the deceased. Since PW1 was not present when the scuffle begun, she did not know how the same started. PW1 could not ascribe blame to either the accused or deceased. She could not say the motive for the attack either. She however, saw deceased fall to the ground after the attack. That fall is consistent with doctors finding that the deceased had a fracture on the skull which was the cause of death.
14. The accused defence was that he was deceased’s great friend and that they went everywhere together. The accused defence was that he and deceased disagreed after drinking alcohol and becoming drunk.
15. The counsel for the accused submitted that the accused had put forward self defence as his defence. The question is whether accused put forward self defence as his defence in this case.
16. Section 17 of the Penal Code provides for the defence of person or property and 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.

In **MUNGAI V. REP [1984] KLR 85** at page **98,** 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. It is clear that the accused was putting forward intoxication as his defence. Intoxication is provided for under section 13 of the Penal Code. the section provides as follows;

> **13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**
>
> **(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -**
>
> ***(a)* the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**
>
> ***(b)* the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**
>
> **(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (*a*) thereof the accused shall be discharged, and in a case falling under paragraph (*b*) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.**
>
> **(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.**

18. Intoxication is divided into two, intoxication as an absolute defence where the intoxication was caused without accused consent. In that case the accused will not be held criminally liable for his actions and should be discharged. This category falls under section 13(2) (a) of the Penal Code. The second one is where the court has to determine whether the accused had by reason of intoxication become insane at the time he did the act or omission the subject matter of the case.

That falls under Section 13(2) (b) of the Penal Code.

19. Having considered the accused defence it is clear that his defence of intoxication falls under Section 13(2) (b) of the Penal Code. The burden lies on the prosecution to prove that the accused had formed the necessary malice aforethought when the incident took place. The prosecution should adduce evidence to shake the accused defence that he was intoxicated at the time and that as a result he could not form any intention to cause death or grievous harm to the deceased.
20. The prosecution has not adduced any evidence to controvert the accused defence. Consequently the accused defence that he was intoxicated to the extent of being unaware of what he was doing or of knowing it was wrong, and therefore that he was incapable of forming malice aforethought stands.
21. I find that the defence of intoxication is available to the accused to the extent that he was incapable of forming an intention to cause death or grievous harm to the deceased. I find that malice aforethought was not proved. Consequently I find that the prosecution failed to prove the charge of murder contrary to section 203 of the Penal Code. I find that the accused caused the death of the deceased and that at the time he caused him the injury leading to death; the accused was incapable of forming the necessary malice aforethought to be guilty of murder. I find that the prosecution instead proved the offence of manslaughter contrary to section 202 of the Penal Code.
22. Having come to the conclusions I have of this case I substitute the charge against the accused from that of murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 of the Penal Code. I find the accused guilty of the substituted charge of manslaughter and convict him accordingly.

DATED AT MERU THIS 15th DAY OF MAY 2014

J. LESIIT

JUDGE