



No. 388/14

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 4 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

MALOMBE MULI.....ACCUSED

JUDGMENT

1. **Malombe Muli** (*accused*) is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.
2. The facts of the case are that the accused cohabited with **Nzisa Kimanzi**. They were blessed with a child, **Kelvin Nzisa**. They disagreed and **Nzisa** returned to her maiden home. On the **16th – 17th November, 2005**, night, the accused went to the **Nzisa's** mother's house where **Nzisa** and the child were staying, he called out. When **Nzisa** declined to open the door he kicked it. The door gave way. The child on hearing his father's voice asked if he had taken to him meat. Instead of answering the question he turned and stabbed him with a sword. He then turned towards that direction where **Nzisa** and her sister were. Her sister hit the lamp which went off hence he was not able to reach them. They screamed and the accused escaped.
3. They sought the assistance of neighbours, the accused's mother inclusive. They took the child to hospital. He was admitted. He however passed on. The matter was reported to the police. Investigations were carried out that culminated into the arrest of the accused. Consequently, he was charged.
4. In his defence, the accused stated that his wife **Nzisa** left their matrimonial home on the **21st September, 2005** without his permission. She was incited by her mother to desert him. The bone of contention was that he had not made their relationship formal.
5. He stated that on the fateful night he had gone to take away his son. The child knew him very well. His wife and mother-in-law could not let him carry his son. He however, held the child. His wife picked a knife and raised it in an attempt to stab him. He moved to hold her. In the process she stabbed the child. Since he was drunk he was not able to tell where exactly the child was stabbed. He went home and notified his relatives. His mother went to their in-laws' place. The following day he was informed the child had died. He had an appointment in Nairobi therefore he did not attend the burial.
6. Issues for determination are;-

i. Whether the accused caused the death of the deceased?

ii. Whether the act that caused death was actuated by malice aforethought?

7. It is not in dispute that the child died. PW5, **Dr. Musembi Paul** who performed a postmortem on the body of the deceased found that he sustained a laceration on the left parietal region and a fracture of the skull. He formed an opinion that the cause of death was severe head injury and subdural hemorrhage secondary to assault.

8. It was the prosecution's case that the injury sustained was occasioned by the accused while in his defence he argued that it was occasioned by the child's mother who is now deceased. In her evidence PW1, **Ndanu Kimanzi** a sister to **Nzisa**, the child's mother, stated that she was in the house with her, their mother, **Mulewa Kimanzi** (PW2) when she heard a knock on the door and the accused called out. She woke up and lit a tin lamp. The child had slept on a bed with PW2. When he ran to the accused calling him out, he turned and stabbed him with a sword that he carried. He then turned searching for **Nzisa** who hid and managed to escape when the lamp went off. On cross-examination she denied an allegation that the accused aimed at stabbing **Nzisa** who used the child to shield herself and he was injured in the process. She however, admitted that what happened was accidental.

9. PW2 who was in the same room confirmed in material particular what PW1 stated. The tin lamp was on. He saw the accused stabbing the child on the head. On cross-examination he said the accused was drunk when he went to the house and kicked the door which gave way. She saw the accused stab the son once. According to her, the act was accidental not intentional. For that reason they were compensated for the killing, some **Kshs. 30,000/=** was paid as blood money.

10. Although in his defence the accused came up with a theory of the child's mother having stabbed him, at the close of the defence's case his counsel submitted that at that point in time they were still offering a plea bargain, the act having been committed while the accused was drunk and also due to provocation.

11. Right at the outset there was an offer to plead guilty to a charge of manslaughter but since it was not made formal. The State did not consider it.

12. A consideration of evidence on record clearly proves that indeed it was the accused who stabbed the deceased and caused his death.

13. This brings us to the question whether he acted with malice aforethought? Malice aforethought is defined in **Section 206** of the **Criminal Procedure Code** as follows:-

“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 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 wish that it may not be caused.

c. An intent to commit a felony.

14. It has been stated that at the time of commission of the act that caused the death of the deceased the accused was intoxicated. Intoxication is not a defence to a crime. It may however, be a mitigating factor. The level of intoxication must be established. Was the level so high that it could prevent the accused from forming the necessary *mens rea* of the crime? The intoxication having been voluntary in the circumstances the question would be if it was a suggestion that his mental capacity was so impaired such

that he could not account for his action. However, in this case it is the accused's counsel who has submitted that he was intoxicated. In his defence he has blamed his wife for what befell their child. Having failed to allude to the factor of intoxication the defence must be disregarded which I hereby do.

15. It has been submitted that the appellant was provoked. The accused went to his mother-in-law's house after midnight. PW2 estimated the time to have been 2.00am. Although PW1 said it was at midnight. On arrival he called **Nzisa's** name. He wanted to see his wife. She responded by saying that she did not want to see him. It was at that point in time that he kicked the door which gave way and he entered. He had a sword. When the child called out he turned and stabbed him.

16. In his defence he said PW2 his mother-in-law was the problem. She incited his wife to desert her matrimonial home. The sole problem according to him was because he had not paid dowry. Further, he stated that he used to go to his mother-in-law's house at any time. He did tell them that he would take away his child prior to the incident.

17. The question to be answered is whether this amounted to provocation?

18. Provocation is defined in **Section 208** of the **Penal Code** 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 person 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 or 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.”

19. In the case of ***Cheboi versus Republic – Criminal Appeal No. 50 of 1991*** – provocation was put up as a defence to a charge of murder. This was a case of cumulative provocation as the appellant had been subjected to insults and maltreatment by his wife over a period of time. The appellant killed his wife with a knife after an argument. What was to be determined was whether the appellant was in a subjective state of mind due to the history of the disagreements with his wife. Whether such history amounting to cumulative provocation was sufficient to reduce his offence from murder to manslaughter. The trial judge had convicted on the basis that the appellant had packed his knife in a bag – therefore he must have had the intention of injuring the deceased. The offence disclosed was murder as opposed to manslaughter. The Court of Appeal overturning the decision of the learned Judge held:-

“It was probable that if the trial judge and assessors had given sufficient consideration to the appellant's subjective state of mind when the deceased finally told him to get out of his life, they would have come to the conclusion that the appellant had been provoked enough as to render the crime to be manslaughter rather than murder.

The history of disagreements between the appellant and deceased, as narrated by the appellant amounted to what could be termed as cumulative provocation. The whole scenario had been looked at from the point of view of the ordinary person and not necessarily the reasonable person”.

The conviction of murder was quashed and one of manslaughter substituted.

20. In the instant case, the appellant and **Nzisa** separated against his will on **21st September, 2005** per the appellant's testimony. The appellant and his wife were relatives foremost, prior to being a couple. They were neighbours. Their homes as per the evidence were separated by a fence. There was interference of their marriage by parents. He wanted his family back but he was deterred from being with them. He was just an ordinary young man who was wronged to an extent that the disagreement that existed between them making him stay away from them for two (2) months amounted to cumulative provocation.

21. Looking at these peculiar circumstances, it cannot be stated with certainty that the accused went to the house of his mother-in-law on the fateful night with an intention to cause death or do grievous harm to the occupants of the house.

22. In the premises, by virtue of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, I do reduce the charge to that of manslaughter. Accordingly, I do find him guilty of having killed the deceased in the heat of the moment, unlawfully and convict him of the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**.

DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of SEPTEMBER, 2014.

L.N. MUTENDE

JUDGE