**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 44 OF 2012**

**LESIIT, J**

**REPUBLIC……………………………..............…...PROSECUTOR**

V E R S U S

**NKURU GWATIA RUKARIA...................…………ACCUSED**

**JUDGEMENT**

1. The Accused Nkuru Gwatia Rukaria 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 6th of June, 2012, at Karithini Village, Kanjoro Sub location in Tharaka North District within Tharaka Nithi County murdered David Mukundi.
2. The Prosecution called six witnesses. The facts of the prosecution case were that the deceased, aged 15 years old and one Mutethia, his brother aged 2 ½ years old were grazing sheep and goats near the accused shamba when the accused approached them and shot the deceased on the stomach with an arrow.
3. There was no eye witness. However PW1 an aunt to the deceased and Mutethia, who was 40 meters from the two, heard Mutethia screaming. On going to check on him, she found the deceased lying on the ground with an arrow in his stomach. PW1 also saw the accused walking away with his cattle 40 meters away. PW1 also enquired from the deceased who told her that accused shot him because the goats and sheep he was grazing strayed into the accused land.
4. PW2 an uncle of the deceased who went to the scene soon after the attack was also told by the deceased that it was the accused who shot him. PW3 also received same report from the deceased that the accused was the one who shot him.
5. PW1, 2 and 3 all testified that the accused was carrying bow and arrows on one hand when they saw him inside his land soon after the attack.
6. The accused gave a sworn defence. He denied having seen the deceased on the day in question. He also denied having seen PW1, Regina that day. He said he was arrested at 4 pm as he drove his animals home. He said he was arrested by 2 men who assaulted him before handing him over to the police. He stated that he had no grudge against the deceased and had no reason to shoot him.
7. I have carefully considered the evidence adduced by the prosecution and the defence. I considered the submissions by Mr. Murithi, counsel for the accused and Mr. Mungai learned Prosecution Counsel.
8. The Accused faces a charge of murder. The prosecution has the burden of proof to prove the charge against the accused beyond any reasonable doubt. The prosecution must adduce evidence to prove that it was the accused, and no one else who shot the deceased with an arrow causing his

death. The prosecution should also prove that at the time the accused shot the arrow at the deceased, he had formed the necessary malice aforethought to cause either death or grievous harm to the deceased.

9. Section 206 of the Penal Code sets down the circumstances which constitutes malice aforethought 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 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. **... (d) ..."**

10. There was no eye witness in this case. The evidence the prosecution relies upon is a dying declaration by deceased to PW1 and 2. The prosecution also relies on circumstantial evidence that the accused was seen by PW1, 2 and 3 while armed with a bow and arrow, 40 meters from the scene where deceased was found lying.
11. Mr. Murithi took issue with failure to call Evans Mutethia, the only eye witness of the incident to testify. The evidence of PW1 was that Elias Mutethia was a child of 2 ½ years. That is a child of tender years. The prosecution has a duty to determine which persons to call as witnesses in its case. The decision not to call Mutethia, a child of tender age of 2 ½ years cannot be faulted given the tender age of this witness. I find nothing turns on this point.
12. Regarding the dying declaration Mr. Murithi urged that before the court could rely on a dying declaration, it was necessary to have other evidence corroborating it counsel relied on **Achira v. Republic CA No. 47 of 2003** for the proposition that it would be unsafe to base a conviction solely on a dying declaration where there is no satisfactory corroboration.
13. Mr. Murithi also relied on the case of **Republic v. Yiende High Court Criminal case no. 16 of 1990** where a court of parallel jurisdiction held:

1. **"Any statement made by a deceased is admissible as a dying declaration if it is established that it was made by him when he was in immediate expectation of death and had lost every hope of living.**
2. **It is not required in law, in order to support a conviction, that a dying declaration must be corroborated. There is need for exercising caution though before a conviction is based solely on it.**
3. **A dying declaration is the weakest of all evidence. It must be remembered that it is made in the absence of the accused and is not subjected to cross examination.**
4. **In the instant case, the evidence fails to establish that the deceased made a statement when he was under the solemn belief of impending death. Accused acquitted."**

14. Mr. Mungai urged the court to find that the dying declaration was made by the deceased at a point of imminent death. He urged the court to find that the deceased statement was indeed a dying declaration, and that it was reliable.
15. The prosecution relies on circumstantial evidence against the accused. The test to apply in order to determine whether the circumstantial evidence has been established was set out in the case of **ABANGA alias ONYANGO V. REP CR. A NO. 32 of 1990(UR)** at page 5 the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

i. **the circumstances from which an inference of guilt is sought to be drawn,must be cogently and firmly established,**

ii. **those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**

iii. **the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

16. What qualifies to be a dying declaration is now well settled in the case of **Choge V. Republic 1985 KLR 1,** the Court of Appeal held:

> **“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.**

17. I am satisfied that the statement made by the deceased to PW1 and 2 qualified as a dying declaration. The deceased had just been shot with an arrow. Death was imminent and that was well established by the fact that even thought action was taken almost immediately to deliver the deceased to hospital, he did not make it to leave the scene alive. I am satisfied that the deceased mind was induced by the most powerful consideration which is to tell the truth.
18. I have considered that the incident took place at about 12.30 pm or so. It was in broad day light. Deceased statement first to the PW1 then to PW2 was both consistent and coherent. The deceased stated that he was grazing goats and sheep when they strayed into accused land. Immediately that happened the accused approached him with a bow and arrows, aimed and shot him in the stomach` despite pleading with him not to.
19. The accused was 40 meters or so from the deceased when the dying declaration was made. PW1 and 2 both testified that they saw the accused inside his land nearby, holding a bow and arrows in his hands. I find the evidence that accused was 40 meters from where the deceased was lying after being shot, and the evidence that he had in his hand bow and arrows provided corroborative evidence to deceased dying declaration.
20. There was corroboration that accused was near the scene while armed with a bow and arrows from PW3. I considered PW3 as an independent witness. He had no relation with deceased, unlike PW1 and 2. He went to the scene in answer to PW1’s screams. He went immediately to find PW1 and 2 with the deceased. PW3 saw accused inside his land armed with bow and arrows.
21. PW1 was the first person at the scene. Her evidence was that she saw the accused walking away when she reached where the deceased was lying. That evidence, that accused was walking away as PW1 who was about 2 minutes from the place deceased was herding the animals reached the deceased placed the accused at the scene of attack. PW1 said there was no one else at the scene except deceased and accused.
22. This evidence further corroborates the deceased dying declaration that accused approached him while armed with a bow and arrows, and shot him because of the animals the deceased was herding trespassed into his land.
23. In **Choge V. Republic, supra**, corroboration of a dying declaration is not a must. However, the court must exercise caution when receiving such evidence. I did exercise caution while receiving the evidence of dying declaration in this case. Further it is not the only evidence against the accused.
24. Even though it is not required in order to base a conviction on it, I find that the dying declaration in this case received corroboration from the evidence of PW1. There was corroboration that within

2 minutes of the attack there was no one else where in sight where the deceased was except the accused. Secondly from evidence of PW1, 2 and 3 the accused was armed with bow and arrows, the same weapon used in this attack, when they saw him near the scene soon after the attack.

25. The above evidence of PW1, 2 and 3 is circumstantial evidence which points irresistibly to the accused as the one who shot the deceased. See **Kimeu v. Republic (2002)I KLR 766**.
26. The arrow head and a piece of arrow stick was recovered from the body of deceased at post mortem as per the post mortem report Pexh2. That arrow head and stick were produced in evidence as Pexh1.
27. I find that the prosecution established the facts upon which the inference of guilt is sought to be drawn. I find also that the facts proved unerringly points towards the accused guilt and form a chain so complete that there is no escape from the conclusion that the offence was committed by the accused.
28. The Investigating Officer PW6 was unable to recover any bow and arrows from the accused house. PW6 testified that upon re-arresting the accused from members of public on the evening of day of attack, he took the accused back to his house which he searched unsuccessfully for the murder weapon.
29. I do not find the failure to recover the bow and arrows from accused home of any significance. The reason is the accused had an ample time to dispose of the murder weapon as he was arrested after 4 pm while the incident had occurred at about 1 pm a difference of three hours. Nothing turns on this point.
30. The accused denied injuring the deceased. He denied seeing either the deceased or PW1 on the material day.
31. I have considered accused defence. The accused kept changing his evidence. His initial evidence was that he did not know PW1 at all. Later he changed and said he knew her well. I found the accused defence a bare denial intended only to escape liability for his actions.
32. I find that the prosecution adduced sufficient direct evidence which placed the accused at the scene of the attack. The evidence adduced also proved beyond any doubt that the accused was the only other person near where the deceased was herding animals and that within 2 minutes of the attack; the accused was seen walking away from deceased while armed with bow and arrows, which were similar to the murder weapon in this case.
33. The dying declaration was further evidence against the accused that he shot the deceased in this case. The deceased knew accused very well. The attack was in broad day light. The deceased death was imminent. Given the corroborating evidence by PW1, 2 and 3 that the accused was near the scene armed with weapons similar to the murder weapon, goes further to strengthen the evidence against the accused.
34. The prosecution has established a motive for the attack. From the evidence of PW1 and 2, the accused kept quarreling his neighbours, including PW1's family because of their animals trespassing into his land. The deceased statement to PW1 and 2 confirms that there was a trespass into accused land by the animals the deceased was herding just before the attack.
35. The accused displayed a finger in his right hand which seemed to be permanently stretched and stiff. It is the first finger from the right thumb. He claimed he could not fire a shot from an arrow due to that finger.
36. The rest of the accused fingers were in good shape. The stiff finger was the first finger. It was clear the accused could use his right hand and all his fingers. I am not convinced that he could not fire with or without the stiff finger. I considered that piece of defence both an afterthought and a bare denial. I therefore reject it in total.
37. I find that it was the accused and no one else who fired at and shot the deceased with an arrow resulting with deceased death.
38. Regarding malice aforethought, it has been shown that the accused had quarreled with PW1's family over the trespass by the family members into his land. There was trespass by animals into accused land just before he shot the deceased. The deceased reported the trespass to PW1 and PW2.
39. The question is whether the trespass amounted to provocation as to reduce the charge from murder contrary to section 203 of Penal Code, to manslaughter contrary to section 205 of the Penal Code.
40. Section 207 of the Penal Code provides for provocation as follows:-

> **"207. 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 is time for his passion to cool, is guilty of manslaughter only."**

41. 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."**

42. Section 17 of the Penal Code states:

> **"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."**

43. I find the trespassing of animals herded by the deceased into accused land was a provocative act. I find that the provocation acted on the accused mind causing him to fire the fatal shot at the deceased in defence of property. The accused fired a single shot. It was soon after he became aware of the trespass by the animals. There was a direct link between the trespass and the shooting of the deceased.
44. It is not reasonable for an adult man like accused to shoot a child like deceased in order to protect ones property. However for a person acting under the stress of provocation, reasonableness of an action is not the first thing that comes to mind. I am not excusing the accused. However I noted he was 66 years old, even though he looks much older. He was malnourished and of a small stature. He lived alone. I think his age and fact the provocative acts which appear to have been

repeated by the time of this attack, did work on accused mind causing him to move in a swift action firing the fatal shot at the deceased.

45. I find that the defence of provocation and defence of property, even though not pleaded, is available to the accused in this case. I find that there was excessive use of force in defence of property.
46. I find that the circumstances of this case shows that the fatal shot was fired in the heat of sudden threat to property, however unreasonable the perception of the threat, and that the accused cannot be considered to have formed the necessary malice aforethought to commit murder.
47. Having come to this conclusion I substitute the charge against the accused from 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 charges of manslaughter contrary to section 202 of the Penal Code and convict him accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF OCTOBER, 2014.**

**LESIIT, J.**

**JUDGE**