



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL CASE NO. 64 OF 2010.

REPUBLIC ::::::::::::::::::::::::::::::: PROSECUTOR.

VERSUS

G W O ::::::::::::::::::::::::::::::: ACCUSED.

J U D G M E N T.

GW O (herein, the accused), is charged with murder contrary to section 203 read with section 204 of the penal code.

It is alleged that on the 23rd November, 2010 at Trans Nzoia County, the accused murdered J S.

The case for the prosecution was that on the material date in the evening hours, **J W (PW1)**, aged 16 years old was at the junction of [particulars withheld] School and N while in the company of the accused, **K W (PW3)** and **K W (PW4)**, when they were approached by the deceased who was carrying a machete (panga) and a sharpening file and wearing a cap covering his head. He was asked by the accused as to why he was covering his head. He reacted by sharpening his panga using the file thereby causing the youngsters to run away save the accused, whom he (deceased) hit using the blunt side of the panga while his (accused's) colleagues were a few metres away.

The accused stood up after being hit by the deceased and demanded to know why he was so hit. He (accused) then picked a stone and hit the deceased on the hand before leaving the scene for his home. Thereafter, the deceased went to his home, changed his clothes and followed the accused.

Later, the deceased was found by **J (PW1)** lying on the ground but without any visible injuries on him. He was carried away from the scene by his daughter.

K (PW3), indicated that the deceased was drunk and that he hit the accused with the panga three times before he went to his home and return to follow the accused to his home. A struggle ensued between the two (i.e. the deceased and the accused) and in the process the deceased fell down by a door. The wife to the deceased appeared at the scene and with the help of others carried away the deceased.

K (PW4), more or less confirmed what was said by J (PW1) and K (PW3).

The deceased's wife **M S (PW2)**, indicated that she was at their home when she heard the deceased telling the accused and his colleagues to clear from the area. The accused remained behind as his colleagues ran away. He uttered the words "I will kill this old man" before hitting the deceased on the back with a stone. He then went to his home but the deceased later followed him saying that he (deceased) was going to report to his (accused's) parents. After a while, the deceased's wife (PW2) was informed by her daughter that the deceased had been killed. She rushed to the scene and found that the deceased had

fallen and was lying down. He could not talk. She (PW2) summoned for help to take him to hospital. She noted that his neck was dislocated. She took him to Kitale District Hospital where he told her that he had been assaulted by the accused and his aunt. He (deceased) died after two (2) days in hospital and the matter was reported to the police.

Dr. Paul Njamwe (PW5), carried out a postmortem examination on the body of the deceased and compiled a report (P.Exh. 1) showing that the cause of death was cardiorespiratory failure due to head injury due to brain contusion due to blunt trauma on the head.

Cpl. Smith Kimathi (PW6), investigated the case and found that the deceased and the accused were involved in a quarrel which led to the accused assaulting the deceased with a stone (P.Exh. 3). Consequently, he (PW6) charged the accused with the present offence.

The case for the defence was that the accused and his colleagues were on the material date sitting near a junction when the deceased approached in a state of intoxication and uttering words which could not be comprehended. He was walking in a zig-zag manner and this caused the accused's colleagues to laugh. The deceased was angered by the laughter. He drew out a panga. The accused's colleague took off. He (deceased) then hit the accused on the face and abdomen with the panga. The accused rose up and walked away to his home. The deceased also went to his home which was nearby.

At his home, the accused found his aunt M. His mother was not present. After a few minutes, the deceased appeared there and asked for the accused's parents but they were not in. He (deceased) turned to the accused whom he warned, confronted and held from the back while holding a plastic whip. The accused struggled and freed himself but in the process the deceased fell down and was removed from there by his wife and others. The accused contended that he did not hit the deceased with a stone and only threw a dry battery cell at him at the junction which cell hit the deceased's hand only. The accused further contended that he did not injure the deceased nor did he kill him.

From all the foregoing evidence, it is apparent that the death of the deceased was a culmination of a traumatic episode which involved him and the accused and which was undoubtedly precipitated by his reaction to the accused and his colleagues' juvenile behaviour. It was evident that the deceased was not amused by the juveniles chiding him. He then set upon the accused using the blunt side of a panga. The accused fell victim of the deceased's anger because his colleagues ran away to safety but within a few metres from the scene.

In reaction to the assault meted against him by the deceased; the evidence showed that the accused hit back using either a stone or a hard object. However, it was not made certain as to which part of the deceased's body was hit with the stone or the hard object which the accused suggested was a dry battery cell.

The evidence suggested that the deceased could have been hit on the head or the hand but one thing which was certain was that the assault did not cause any serious injury to the deceased as he was able to walk away from that scene at junction to his homestead.

What was crucial was what happened when the deceased followed the accused to his homestead after the incident at the junction. It strongly appeared that the events which occurred at that point could have led to the deceased sustaining serious injury which later proved to be fatal. The big question is whether the accused was responsible for inflicting the fatal injury on the deceased.

The accused said in his defence that it was while he was struggling to free himself from the deceased that the deceased fell down and was collected from that scene by his wife. This was a clear indication that the accused was not responsible for the fatal injury occasioned to the deceased and that most likely than not, it could have been as a result of the deceased falling down.

Indeed, the post mortem report indicated that the cause of death was a head injury. This would be consistent with a heavy fall of a person or a fall resulting in a person hitting a hard object on the ground.

It would also be consistent with a person being hit on the head by another with a hard object such as a stone.

But nobody saw the accused in the act of hitting the deceased on the head with a stone when the deceased went to the accused's homestead. The accused's colleagues (PW1 and PW4) did not witness the happenings at the accused's home but K (PW3) did. He (PW3) actually corroborated the accused in stating that the deceased fell down by the door when the accused was struggling to free himself.

J (PW1) and K (PW4) found the deceased having fallen down at the accused's homestead and so did the deceased's wife M (PW2) who said that the deceased told her that he was beaten by the accused and his aunt whose name was stated as M.

M was not charged along with the accused nor was she called to testify for or against him although she was a vital witness with regard to what happened at the accused's homestead.

The investigating officer (PW6) said that M could not be traced to record a statement but failed to indicate the efforts he made to locate and have her record a statement and eventually appear in court and testify against the accused if at all he was responsible for occasioning the deceased fatal injury.

In the absence of any clear and reliable evidence to show that the accused while at his homestead where the deceased had gone, assaulted the deceased on the head with a stone and occasioned him fatal injury, the benefit of doubt must be given to the accused. The prosecution has therefore failed to prove its case against the accused beyond reasonable doubt.

The accused is hereby found not guilty as charged and is acquitted accordingly.

[Delivered and signed this 3rd day of October, 2013.]

J.R. KARANJA.

JUDGE.