



**Republic v Olumayo (Criminal Case 2 of 2019)
[2024] KEHC 1762 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 2 OF 2019
SC CHIRCHIR, J
FEBRUARY 22, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

TOM MATERE OLUMAYO ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars of the charge are that on December 28, 2018 at Mukhombe village, Ebusiloli sub-location, Echichibulu location, Emuhayasub County within Vihiga county murdered Charles matere.
3. The accused person pleaded not guilty to the charge, and the prosecution called a total of 5 witnesses in support of their case.

The evidence.

4. PW1, testified that on December 28, 2018 at about 1.00 p.m. the accused was at home. He began to verbally abuse her, threatening to kill her and the deceased. She left the homestead, leaving the deceased and the accused at home.
5. She came back, at around 4.00 p.m. and heard some noises coming from the home of the accused. she went to investigate, and- that is when she saw the deceased lying on the Napier grass outside the deceased's house.
6. She further stated that the deceased had been cut on the head and was bleeding from his head. She called the Assistant chief, John Imbaya (PW2), who instructed her to check if the deceased was breathing . She checked and found that he was not breathing. She reported back to PW2 who in turn, called the police



7. She further told the court that the accused came back to his house and locked himself. The boda boda operators came, broke the door and started attacking the accused.
8. The police later came and took the deceased body and also retrieved two jembes both stained with blood, and a jacket.
9. The witness further told the court that the accused had a history of violence which began in the year 2017. She recalled that the accused once broke her window ,leading to his incarceration in Kodiaga prison. She admitted that she never witnessed the killing.
10. PW2 was the Assistant- chief. He recalled that on 28/12/2018 at about 4.00 pm he was in his office when he got a call from PW1. She informed him the sate in which the deceased was in. He came and confirmed that the deceased was dead. The deceased had a cut on the crown of his head and his clothes were bloody.
11. He called the chief who called the police. When the police arrived, the accused had already been forced out of his house by a crowd who were assaulting him. The accused was arrested and the deceased's body taken to the mortuary.
12. He testified that he had been an assistant chief for 12 years and all this while, he had known the family to be having wrangles. He stated that he did not see any weapons on the scene.
13. PW3 was the pathologist, Dr. Dixon Mchana . He testified that he conducted the autopsy on the deceased's body on 21/1/2019 and two witness identified the body.
14. On examination, he found that there was an injury on the back of the head and the bone was fractured. His conclusion was that the cause of death was a severe head injury caused by sharp object, following an assault. He produced the post mortem report dated 2/1/2019 (PEXB. No. 1).
15. On cross-examination, he stated that the deceased also had 4 cut wounds. There was one on the back, on the leg and both the knees. The injuries were caused by a sharp object. The deceased had no defence injuries .
16. PW4 was the investigating officer. He recalled that on 28/12/2018 at about 4.00-5.00 p.m. he received a call from the Assistant- chief (PW2) who informed him that there was a murder incident in his area. Together with PC David Mabata and CPL Theuri, they went to the scene and found the deceased body ,on the side of the house. On close examination, he saw several cuts on the deceased head, knees and on both parts of his leg. The witnesses told him that the deceased was attacked by his brother. They found 2 jembes at the scene, which were inside the house of the Accused, and were blood stained.
17. He further stated that the body of the deceased was taken to Coptic hospital and the accused booked and later taken to the hospital for treatment since he had been attacked by members of the public.
18. He informed the court that a DNA test was conducted on the 2 jembes and blood samples from the suspect. He produced a sketch plan of the house of the accused, deceased's and the step mother's house.
19. On cross examination, he testified that he was a corporal at the time of the investigation and that the inspector of police took the statement of the deceased. He however recorded the statement of the step-mother, the chief and the Assistant chief.
20. He testified that he drew the sketch plan of the murder scene . He was informed that the accused and the deceased were step- brothers and they had bad blood between them. He recalled that he found the two blood – stained jembes in the house of the accused, although the blood was not visible at the time.



21. PW5 was the Government analyst. He testified that on 4/1/2019, corporal Birgen brought for DNA testing the following items:
 - a. Blood stained Jembe (1-A)
 - b. Blood stained Jembe (11-B)
 - c. A cartilage for soft bone of the deceased –(marked c)
 - d. Blood sample from the accused –(Marked D)
22. He testified that upon analysis, the 2 jembes were stained with human blood and the it matched the DNA of the deceased. He further stated that the DNA analysis also showed that the accused and the deceased were related. He produced the DNA report (PEXB 5) and exhibit memo(P EXB 4) .
23. The accused was put on his defence and he opted to give a sworn statement. In his defence the accused admitted that he killed his brother although it was an accident, since he felt aggrieved. He told the court that on the day of the incident, he had come from drinking. On the way home, he met the deceased, who had trespassed in his land and was threatening him with panga.
24. He claimed that out of anger, he took a weapon and hit the deceased who fell and he left him not knowing that he had died. After that, he went out to drink and when he came back, he found a crowd, which started attacking him. He was later rescued by the police and taken to the station.
25. On cross examination, he stated that he was a bit drunk at the time he attacked the deceased; that the deceased threw a panga at him but he ducked , and hence avoided being hit.
26. He further stated that he went to his house and took his weapon out of annoyance . That his actions were premeditated but out of provocation by

Accused submissions

27. It is the accused's submissions that there is evidence to show that both the deceased and the accused were drunk at the time, and that the accused had been provoked by the deceased; Thea the killing was an act of self -defence. He relied on the case of *Republic v Ismail Hussein Ibrahim* (2018) eKLR which discussed the circumstances where malice aforethought can be inferred. He finally submits that in this case there was no malice aforethought.
28. The prosecution did not file any submissions.

Determination

29. For Prosecution to secure a conviction on the charge of murder, it has to prove three elements against an accused person. In the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the elements of the offence of murder were listed as follows: -
 - (a) that the death of the deceased occurred;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
30. On the death of the deceased , PW 3 conducted the autopsy on the body of the deceased and produced a post- mortem report. He told the court that the body was identified by Julius Imbayi and Wilson matere and his conclusion was that the cause of death was a severe head injury, caused by a sharp object, following an assault. Thus the prosecution has met the threshold on the first element.



31. On whether the accused is the one who inflicted the fatal injury, to the deceased, the accused readily admitted that he killed his brother. Further the killer weapons, namely, the two jembes, were found in his house. The weapons were stained with the blood of the deceased according to the Government analyst. The deceased only defence is that he was provoked by the deceased.
32. It emerged from the evidence of PW1 that the deceased and the accused were step- brothers. The accused defence was that he killed the accused because of provocation, as the deceased tried to attack him first with a panga. He went to his house and got a jembe. Although his step- mother told the court that he left the two quarrelling, it is not known what exactly provoked the actual attack, save for what the accused told the court. According to PW1, the accused had always been the troublesome one. Indeed on the material day, he had been threatening PW1 and the deceased, that he would kill them. The fact however remains that, no one witness that last altercation between the deceased and the Accused which led to the fatal attack.
33. It is a question of fact whether the accused in all circumstances of a particular case was acting in the heat of the moment caused by a serious and sudden provocation. While the accused does not shoulder the burden of proving the defence, it is the duty of the prosecution provide evidence to disprove the defence of provocation beyond reasonable doubt.
34. In this case, it was the prosecution's duty to prove beyond reasonable doubt that the crime of murder was committed unlawfully, and with malice aforethought, so as to dismantle the defence of provocation and self-defence that was advanced by the accused.
35. In the absence of any other explanation from the prosecution, I accept the accused's narrative of what transpired, that is, that the deceased was the first Aggressor and he acted in self- defence.
36. It is my finding therefore that the prosecution has failed to prove the offence of murder,
37. Provocation is defined in section 208 of the [Penal Code](#) as follows:
38. 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 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".
39. In *Mabanga v Republic* [1974] EA 176 the court had this to say about the defence of provocation:

“.....We have on our own revisited the content of section 208 of the [Penal Code](#) and construed it. To us content of provocation means any wrongful act of insult of such a nature as to be likely when done to an ordinary person 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.”
40. Under section 207 of the [Penal Code](#), provocation is a defence to murder. The Section provides that: -

“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. The implication of section 207 of the *Penal Code* is that an unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation.
42. From the evidence of the government Analyst, it is evident that the Accused must have used both jembes. It raises the question as to whether the use of two jembes were necessary . Wasn't the force rather too excessive, however much the degree of provocation ?
43. However, in the earlier case of *Republic v Hussein S/O Mohamed* [1942] EACA at pg. 66 the Eastern Africa Court of Appeal held as follows:

“When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation.”
44. Section 179 of the *Criminal Procedure Code* provides as follows:
 - (1)
 - (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”
45. In accordance to section 202 of the *Penal Code* any person who by unlawful act or omission causes the death of another person is guilty of the felony termed as manslaughter. From this definition the offence of manslaughter can be broken into three elements:
 - (1) There must be an unlawful act.
 - (2) The unlawful act must be dangerous.
 - (3) The unlawful act must cause death
46. In this case , there is ample evidence that the Accused attacked the deceased. The attack was unlawful. He cut the deceased not just with one but two jembes, and the cut was on his head. According to the pathologist according it was this cut on the head that caused death. All the ingredients of manslaughter was therefore proved. I therefore find that the prosecution has proved the offence of manslaughter against the Accused.
47. In view of all the foregoing , in accordance with section 179 (2) of the *Criminal Procedure Code*2, I hereby reduce the charge of murder to manslaughter.
48. The accused is hereby found guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code* and I convict him accordingly.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF FEBRUARY 2024.

S. CHIRCHIR.

JUDGE.

In the presence of :



Godwin- court Assistant

The Accused

MR. otsyeno for the Accused

