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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 6 OF 2015

REPUBLICPROSECUTOR

VERSUS

PETER MUNYOKI KIMANZI.....ACCUSED

JUDGEMENT

1. The accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya.

The particulars of the offence are that the accused person on 14th Day of March 2015 at Muliluni Village in Kiomo Location of Mwingi Central Sub County within Kitui County, Murdered **David Musyoka**.

2. The Accused pleaded not guilty and the matter proceeded to full hearing where the prosecution called a total of thirteen (13) witnesses in support of their case while the accused person testified as a sole witness.

3. **PW1 Boniface Mutua Kilonzi** testified that he was with the deceased when they met the accused on the material date. That the accused person tried to greet the deceased who failed to respond leading to an altercation between the two; the accused slapped the deceased who did not respond but instead ran away. The accused followed and the deceased turned against him cutting him with a panga. On hearing the accused say he had been cut the witness ran away.

He would later on meet with the accused person as he headed to report the assault. The accused informed him that he had actually cut the deceased with a panga after snatching the same from him. He was later to learn that the deceased succumbed to the injuries he sustained from the cut inflicted upon him by accused person.

4. **PW2 Dennis Munyoki** was with accused who had visited him that evening. Together they went to a marriage ceremony at his neighbours. With them were the accused brother and cousin. After 9 p.m. they left for home. He reached his gate first and left the others to proceed. The following morning his father woke him up with the news that the deceased had been cut. He went to the scene where he found the deceased lying and covered with a sack.

5. **PW3 Alexander Muthengi** told the court that he witnessed the confrontation between the accused and the deceased. The accused person slapping the deceased and the two were engaged in a confrontation, together with his son, they escaped from the scene. That on the next day his son went to the scene and found the deceased. The scene was 50 meters from where they had left the accused and the deceased.

6. **Pw4 Benard Muthui Muthengi** corroborated the testimony of **PW3**. He told the court that he also witnessed the confrontation between the accused and the deceased. That during the confrontation the accused had informed him that he had been cut and it was this time that he ran away. The next day at 7:00 a.m. he found the deceased 30 meters from the point the accused and the deceased had a confrontation. He told the court further, that at the time the deceased was lying down and was seriously injured. The deceased attempted to stand but could not neither could he talk. The deceased was later taken to hospital but he died on the same day.

7. **PW5 John Kagege Kyingo**, a village elder testified that he was at the scene at about 7:30 a.m. The deceased was lying on the ground with a cut on the head near the ear. He reported the matter to Mwingi Police Station. It was his further testimony that at the scene there was scattered blood stains, a belt and a hat. That together with the police and a brother to the deceased, they took him to

Mwingi Hospital in a stretcher where he was stitched and admitted, he later on succumbed to the injuries.

8. **PW6 John Mutuu Musyoka & PW7 Peter Munyasya Kivite**, brothers to the deceased were present during the post mortem. They identified the body of the deceased.

9. **PW8 Kennedy Wekesa** narrated the course of the investigation. He used his own phone to take pictures at the scene. He testified that the deceased had a cut on the right cheek and bruises on the face. At the scene they recovered a belt and cap. They took the deceased to hospital where he received treatment. He took more photos whilst the deceased was at Mwingi Hospital.

10. It was his further testimony that upon reporting back to the station he met with the accused who had gone to report an assault case. At the time the accused informed the police that he was involved in a tussle with the deceased, when the deceased attacked him with a machete, he disarmed the deceased and used the said machete to cut the deceased. He submitted the machete to the police station.

11. At this time, they did not arrest the accused, but informed him to first seek medical treatment. It is only later that he was called and informed of the demise of the deceased and on the same day they proceeded to the house of the accused person and arrested him. The next day he handed over the exhibits to Cpl Tunai.

12. In cross-examination he conceded that he is not gazetted to take photographs.

13. **PW9 Doctor Abdalla Mohammed** currently attached to Mwingi Level Five Hospital presented the post mortem report as **Pexh4**. It was his opinion that the cause of death was cardio pulmonary arrest secondary to head injury.

14. **PW10 Mathews Mwale**, O.C.S. Mwingi Police station, an Inspector of Police, testified that on 16th March 2015, he was tasked by the DCIO to record the accused person's statement. It was his testimony that the accused person wanted to make a confession and it was his role to record the cautionary statement. He informed the accused of his right to have legal representative but the accused stated that he had none. He thereafter asked him to call his relatives and he availed his mother, Kasyoka Kimanzi and uncle Dominic Kilonzi.

15. He cautioned the accused before he recorded his statement; the accused also signed the caution. He then proceeded to record the accused statement and read it out to him. The same was signed by the accused in the presence of his mother and uncle.

16. In cross-examination he conceded that in the statement there is no space for preferred language. He also conceded that it is only a chief Inspector and above who can take cautionary statement. Further he stated that he did not record a certificate at the end of the statement.

17. **PW12 Anne Wangeci Nderitu**, a holder of Msc degree in Chemistry, and currently a government analyst testified that on 16th of April 2015 she received 1 panga with black rubber handle, 2 Blood samples with blood vacutainer "B" indicated deceased David Musyoka, 3 blood sample on cotton gauze marked "c" indicated of accused Peter Munyoki Kimanzi. It was her further testimony that DNA profile generated from the panga matched DNA sample of deceased David with a probability match in 2.52×10^8 .

In cross-examination she told the court that from the memo date of incident was 14th March 2015 and they received the items on 16th May 2015.

18. **PW13 Cpl Tunai** attached to DCI Mwingi Constituency was the investigation officer in the matter. He testified that he went to the scene on 16th March 2015 and drew a general plan view. At the time the deceased was at Mwingi Level 4 Hospital while the accused had already been arrested. He recorded statements from witnesses and attended to the postmortem. He also issued exhibits to the Government chemist for analysis. He further told the court that the accused person confessed before him and O.C.S. Mr. Masaka. Ana on learning that the victim had died he preferred a murder charge against the accused person. He produced the head cap as Exh 1, belt Exh 2. Khaki envelop exh 7 panga Exh 8, Sketch plan Exh 9.

19. On cross-examination he conceded that the accused person had reported an assault case at the Police Station. That in the investigation he established that the panga belonged to the deceased. He admitted that upon investigation it was established that the deceased first hit the accused person but insisted that the accused was violent against the deceased. He confirmed that both the deceased and the accused were drunk and there was no provocation.

20. The accused was found to have a case to answer and when placed on his defence stated that he was from drinking with his cousin and other friends when they met with the deceased. That the deceased stretched his hand and retrieved a panga and tried to cut him. He missed his head but cut his finger. He shouted that he had been cut. His brother used his phone torch and upon seeing that he had been cut he ran away.

That the deceased continued to assault him and he chose to defend himself and a serious fight ensued. He pushed the deceased and his panga fell and the deceased held his legs as he screamed that his panga had fallen. As the deceased continued to scream people gathered and in order to protect himself, he cut the deceased and ran away. He ran home, later he reported to the police station and was thereafter treated at the hospital. He did not know the deceased prior to the incident, they did not have any differences and he is yet to establish why the deceased attacked him.

SUBMISSIONS

21. The prosecution submitted that though the deceased was the one armed and who cut the accused first, he had ran away from the accused, but the accused followed him with the intention of revenging. As he snatched the panga from the deceased and inflicted the injuries that resulted to the death of the deceased. That the aspect of self defence cannot arise in this case. They cited the case of **Roba Galma Wario versus Republic [2015] eKLR, Nzuki v Republic [1993], Nzuki v Republic [1993] KLR 191.**

22. On the part of the accused it was submitted that he did not foresee and/or plan for the incident to occur and the same was as a result of provocation. Further, that the element of malice aforethought was not proven by the prosecution. In this regard they cited the case of **VMK versus republic [2015] Eklr, Joseph Kimani Njau v Republic [2014] eKLR, Republic v Stanley Muthike Tiire [2018] eKLR.**

ANALYSIS AND DETERMINATION

23. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The elements of the offence of murder are: -

(a) the death of the deceased;

(b) that the accused committed the unlawful act or omission which caused the death of the deceased; and

(c) that the accused had malice aforethought.

24. The cause of death of the deceased has been proved by the **PW1, 2, 3, 4, 8** who saw deceased's body with a deep cut on the neck, PW6 & 7 attended to the post mortem and by the postmortem form **PEXH. 4** produced by PW 9 that gives the cause of death as *cardio pulmonary arrest secondary to head injury.*

25. **Whether the accused committed the unlawful act which caused the death of the deceased.** The accused conceded that he had an altercation with the deceased, who cut him and, on his part, he picked the Machete and cut the deceased in defence. Prosecution witnesses present at the scene confirm the same. From the foregoing; there is no doubt that the action of accused caused the death of the deceased which constitutes the '*actus reus*' of the offence.

26. **Section 206** of the Penal Code defines malice aforethought as follows: -

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.

27. In *Nzuki v Republic* [1993] KLR at 171 the Court of Appeal held as follows;

“Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

Without an intention of one of these three types, the mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.”

28. In this case the facts reveal that the deceased sought to harm the accused, and did so by cutting his finger with a panga. The accused got hold of the panga from the deceased. In turn, he cut the deceased which resulted to fatal injuries.

29. The prosecution also conceded to the fact that the deceased provoked the accused person. The accused person testified that he did not know the deceased before the incident and he had no reason to harm the deceased and it is in the cause of the fight that ensued that he cut the deceased in an attempt to defend himself.

30. The court has considered the accused person’s action after the incident, he sought to report the assault case and during the cause of the investigation sought to record what would have been a confession. (Fails the test though), the cut that turned fatal was in the spur of the moment. All this is coupled with the fact that during the incident the two were intoxicated. And that the accused was acting in self defence without any pre-meditated intention.

31. Based on the evidence and the analysis above this court is of the considered opinion that the prosecution did not prove the accused killed the deceased with malice aforethought. The evidence on record establishes the offence of manslaughter and not murder.

32. Consequently, the charge of murder is hereby substituted with that of manslaughter. The accused is hereby convicted of the lesser offence of manslaughter contrary to Section 205 of the Penal Code.

DATED SIGNED AND DELIVERED IN GARISSA THIS 3RD DAY OF MARCH 2022

ALI-ARONI

JUDGE



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