



REPUBLIC OF KENYA



**Republic v Agit (Criminal Case E020 of 2021)
[2023] KEHC 21510 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E020 OF 2021**

**KW KIARIE, J
JULY 31, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAILAS OUMA AGIT ACCUSED

JUDGMENT

1. Sailas Ouma Agit is charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the April 28, 2021, at Rodi Trading Centre in Homa Bay Sub County of Homa Bay County jointly with another, murdered Martin Onyango Owiti.
3. According to the prosecution, for reasons only known to the deceased and the accused, when the latter found the deceased at a shop in Rodi Kopany, he attacked him. They engaged in a fight and the accused fatally stabbed the deceased.
4. The accused in his defence contended that he accidentally stepped on the deceased as he moved backwards in a crowded shop. He apologized but the deceased attacked him. He managed to flee from the scene and on the following day he learnt of the death of the deceased.
5. The issues for determination are:
 - a. As between the deceased and the accused who was the aggressor;
 - b. Whether the prosecution has established any motive for the offence; and
 - c. Whether the offence of murder was proved.
6. Edina Akello Odhiambo (PW1) is a shopkeeper at Rodi Kopanyi. It was at her shop where the fatal incident took place. Her evidence was that at about 10 p.m., the deceased was at the verandah of the



- shop with his friend taking bread and soda. At the shop's verandah there were about four customers. The accused shouted from outside and ordered for airtime. He then hit the deceased on the shoulder and on the chest and the two started to fight. When the deceased was pushed inside the shop by the accused she noticed that he was bleeding. She raised an alarm and the accused ran away with a knife he removed from the deceased's body.
7. In his defence the accused contended that the shop was crowded and while in the process of moving backwards, he accidentally stepped on the deceased who started to beat him before he could apologize. He bled from the nose and ran away from the scene.
 8. The defence of the accused was contradicted by the evidence of Edina Akello Odhiambo (PW1) the shopkeeper at whose shop the incident took place. We gather from her evidence that there were very few people. She knew both the accused and the deceased as her regular customers. I have no reasons to doubt her evidence.
 9. From the evidence on record, I therefore find that the accused was the aggressor. The prosecution did not bother to investigate what the motive was. Since ordinarily people do not meet and start fighting this was a failure by the investigating officer.
 10. In order to found conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In Black's Law dictionary, 10th Edition malice aforethought is defined as:
The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).
 11. Section 206 of the *Penal Code* gives instances when malice aforethought may be proved. It provides:
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.
 12. Since there was no evidence of what may have prompted the accused to act in the manner he did, I find that the prosecution has not proved the offence of murder against him. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit the accused of the charge of murder. I find him guilty and convict him of them of the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF JULY, 2023

KIARIE WAWERU KIARIE



JUDGE

