



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. E034 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

GODWIN OMONDI ONGARO.....ACCUSED

JUDGMENT

1. Godwin Omondi Ongaro 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 27th day of July, 2020, at Kanyiriama village, Rangwe Sub County of Homa Bay County, murdered Phelix Castro Nyigilo.
3. It is apparent from the prosecution evidence that the deceased and the accused supported different political aspirants. On the material day the deceased and his group went to the home of the former MP on seeing his motor vehicle. However they turned back shortly after they were informed that it was only his driver who had gone to the home. On the way back they found the accused who hit the deceased with a stone. When the accused approached the deceased while armed with a knife, the deceased fled. The accused pursued him and stabbed him. The deceased later succumbed to the injuries.
4. The accused in his defence contended that on the material day he was in Nairobi in his house. He further said that he did not know the deceased.
5. The issues for determination are:
 - a) Whether the accused knew the deceased or not.
 - b) Whether the accused was present at the place where the deceased was stabbed or not;
 - c) Whether the accused caused the fatal injuries to the deceased; and
 - d) Whether the offence of murder was proved.
6. Godwin Omondi Ongaro, the accused herein pleaded an alibi. When an accused has pleaded an alibi, the onus is on the prosecution to prove that the alibi is not true. In the case of **Kiarie vs. Republic [1984] KLR** the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

This burden does not leave the prosecution even when it is raised for the first time during defence. In the case of **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal rendered itself as follows on the issue of alibi:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see **KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.**

I will therefore endeavour to find if the prosecution discharged this burden.

7. It was a dark night when incident that led to the death of the deceased herein took place. The only source of lighting was the motor cycles' headlights. It therefore calls for careful evaluation of evidence in order to ascertain if the purported recognition was free from error. I will bear in mind the direction by Lord Widgery CJ in the celebrated case in identification and recognition where in **R. vs. Turnbull and Others [1976] 3 All ER 549** he stated as follows:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

...

Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

8. Vincent Omondi Otieno (PW1) was the one riding the motor bike on their return journey. His evidence was that the accused was standing facing them and he saw him from a distance of about 8 meters. Though he said the person he recognized was standing facing them, we can assume he was off the road for if he was on the road, he would have said so. He did not testify what speed he was doing. Since he was not anticipating the incident, there is no evidence on record on the duration he looked at the person he said was the accused. Without such evidence I cannot make a finding that up to the point when the deceased was hit with a stone, he had identified the culprit. The same argument can be advanced in respect of the evidence by Clement Ouma Oluoch (PW2).

9. When the four motor cycles stopped after the deceased was hit with a stone, the evidence of Vincent Omondi Otieno (PW1) was that the accused went and placed a knife on his chest. This is what Clement Ouma Oluoch (PW2) testified to. At this juncture with the light from the four motor cycles I am convinced that the witnesses were in a position to recognize the accused with whom PW1 went to the same school and was known to PW2 for about five years.

10. These two witnesses testified that when the deceased asked the accused why he hit him with a stone and went as if to pick a stone, the accused approached him and chased him with the knife. Vincent Omondi Otieno (PW1) followed them and found the deceased lying. He said the accused had stabbed him.

11. The alibi defence of the accused was therefore displaced by the evidence on record. I find that he is the one who fatally injured the deceased herein.

12. 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).

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.

13. In the circumstances of this case, there is no evidence to show that the offence was premeditated. The accused acted in an overzealous manner due to some political inclination. I therefore, 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 him of the charge of murder. I find him guilty and convict him 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 MARCH, 2022

KIARIE WAWERU KIARIE

JUDGE