



**Republic v Ongowo & 2 others (Criminal Case 11 of 2018)
[2022] KEHC 10534 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 11 OF 2018**

**KW KIARIE, J
JUNE 21, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

JARED OCHIENG ONGOWO ALIAS JANYAKACH 1ST ACCUSED

MAXWELL OTIENO ODHIAMBO ALIAS JAKAMRERI 2ND ACCUSED

KENNEDY OTIENO AKETCH ALIAS JAGWASSI 3RD ACCUSED

JUDGMENT

1. Jared Ochieng Ongowo alias Janyakach, Maxwell Otieno Odhiambo alias Jakamreri and Kennedy Otieno Aketch alias Jagwassi are 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 16th day of February, 2018, between Unara and Ugina waters in Lake Victoria Mfangano Island in Mbita sub county of Homa Bay County, murdered Clinton Ongojo.
3. The prosecution case is that the deceased and his fellow fishermen pursued the boat in which the accused were in after their fishing lamp had gone missing. When they caught up with them, the accused and another one who absconded after he was released on bond attacked them. The deceased fell into the water after he was attacked and drowned.
4. The three accused persons denied the offence. They blamed their co-accused who absconded for the death.
5. The issues for determination are:
 - a) Whether any of the accused or all were involved in the death of the deceased; and



- b) Whether the offence of murder was established.
6. There is no dispute from the evidence on record as to how the deceased died. Both the prosecution and the defence evidence indicate that he was beaten before he fell into the water. This was indeed confirmed by the finding of Dr. Clinton Ongocho. In the post mortem report that was produced by Dr. Brian Akuom (PW6) the cause of death was cardiac arrest secondary to head and abdominal injuries.
7. Austin Ooko Bunde (PW1) testified that when they found their fishing lamp missing, they went to enquire from a group of fishermen who were nearby. This group told them not to move close to them. The group then moved to where they were and collided their boat with theirs deliberately. This made Clinton to fall in the water. They however managed to rescue him. The other group of the accused persons set upon them with wooden planks. One of the four was holding their boat while the rest attacked them. Clinton (the deceased herein) fell into the water and when they attempted to rescue him, the accused prevented them.
8. This was the gist of the evidence of Fredrick Ochieng Odundo (PW2).
8. Section 21 of the [Penal Code](#) provides:
- When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.
- This section has been subject of interpretation by various courts. In the case of [Dickson Mwangi Munene & Another vs. Republic](#) [2014] eKLR the Court of Appeal said:
- ...where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence.
- In the instant case, the evidence on record proved common intention by the accused persons from their conduct.
10. In order for a conviction for the offence of murder to be founded 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. From the evidence on record, no evidence of malice aforethought has been adduced. I therefore find that the prosecution has not proved the offence of murder against the accused persons. I acquit each of the charge of murder. 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 find each 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 21ST DAY JUNE, 2022

KIARIE WAWERU KIARIE

JUDGE

