



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 12 OF 2019

REPUBLIC.....PROSECUTOR

-versus-

BILLY OTIENO AGADE.....ACCUSED

JUDGMENT

Billy Otieno Agade, the accused, faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 11th September 2019 at Gamba Village, Gamba Sub Location, Migori County, murdered **James Opare Odhiambo**. The accused denied the offence and the case proceeded to full trial with the prosecution calling a total of eight witnesses.

PW1 Killion Odhiambo, a brother to the deceased recalled that on 11/9/2019 about 2:30 a.m. he was woken up by noises and screams by the deceased and accused. He heard the deceased say in Dholuo that Billy was snatching his phone and that Billy was a thief. He went to the door but did not hear them talk again and went back to sleep. Later, he was called by Mercy (PW5), an in law, and his brother Titus (PW3) who told him that Billy had killed the deceased. Using the torch on his phone, he saw the deceased lying down, injured on the left side of the chest and was already dead. PW1 said he knew the accused since childhood and was familiar with both the voices of accused and the deceased; that accused and deceased were good friends drunk alcohol together and it was normal for them to disagree and abuse each other. PW1 did not see accused where deceased's body lay but later found accused at Awendo Police Station. PW1 reported that accused had killed the deceased.

PW2 Prisca Achieng, the wife of the deceased stated that on 10/9/2019 about 10:00 p.m. Accused, who was a friend of the deceased, called the deceased outside the house and they left together to go to Nyatambe Centre. About 2:00 a.m she was woken up by screams of the deceased telling Billy (Accused) to give him back his phone. She opened the main door, put on solar lights and saw accused and deceased walking past her house. She said that she saw accused holding a knife as deceased followed him; that she told the deceased to get into the house but he refused and it is then accused stabbed him. She was about 35 metres away; that the deceased fell and she was the first at the scene.

Titus Ooko Odhiambo (PW3), a brother to the deceased recalled that on 11/9/2019 about 2:00 a.m, his wife woke him up because of screams from the outside his house. He heard the deceased ask Billy why he was stabbing him over his own phone. He saw accused walk away towards their mother's house. He saw accused from the back but that the place was well lit from solar lights and moonlight. The deceased could not talk and he saw blood oozing from the left of his chest. He was the first at the scene before PW1 and their mother.

PW4 CPL Julius Kiptanui of Awendo police station recalled that on 11/9/2019 about 7:00 a.m. two reportees were at the station to report the murder of a person at Gamba village. Together with the DCIO, and the reportees, they proceeded to the scene where they found a crowd of people; that IP Marwa, PW8 interrogated the people who pointed at accused, who was one of the reportees, as the suspect. People became rowdy wanting to lynch the accused but they managed to take him from the scene together with deceased's body.

PW5 Mercy Odhiambo Onyango a sister in law to the deceased, recalled 11/9/2019 about 2:00 a.m she was woken up by screams of the deceased; that he spoke in dholuo asking Billy for his phone and wondered why Billy was calling Olweny and Opiang to kill him. She left her husband in the house as he was drunk; she went round her house to where the screams emanated, where she saw deceased moving and Billy pushing him. She denied that there were security lights but there was moonlight; that the deceased abused the accused as Billy wonned him not to; that Billy got hold of the deceased, made him fall, sat on him and asked if he should stab him; that the deceased dared Billy to stab him and Billy did and then ran towards his house. She found PW3 was already at the scene where deceased lay which was next to PW3's house.

Dr. Joseph Otieno (PW6) a medical officer at Migori County Referral Hospital performed the post mortem on the body of the deceased and found a single stab wound on the left side of the chest, penetrating the left lung, pooling of blood in the chest cavity and Blood clots in the neck, chest and head.

PW7 Polycap Lutta Kweyu, a Government analyst based at Kisumu received blood samples of James Opere, Billy Otieno Agade and a Dark brown trouser. He was asked to determine the origin and presence of blood stains if any, on the trouser. He generated DNA profile from all the three items. On analysis, he found the blood sample of the deceased matched the profile on the blood stains on the trousers. He prepared a report to that effect (PEX.2).

PW8 IP Wycliffe Marwa, DCIO Awendo Sub County received a call from OCS Awendo on 11/9/2019 at 5:30 a.m reporting a murder. He proceeded to the scene with other officers (PW6) where they found a crowd of people and the deceased's wife informed him that it is accused who killed the deceased. He arrested accused. The irate crowd wanted to lynch accused but they got away. He collected a sample of blood from deceased; recovered a trouser from the accused because he noticed blood stains on it. He escorted accused to Government Chemist in Kisumu where blood samples were taken. He produced the mental assessment report, exhibit memo form that forwarded the exhibits to the Government Chemist, dated 1/10/2019.

When called upon to defend himself, the accused opted to make an unsworn statement. He stated that on 10/9/2019, he left his home at 7:00 p.m for the shopping centre where he met the deceased in a shop; that the deceased was very happy and claimed to have been drinking with his friends since 1:00 p.m; that the deceased introduced him to two people in the bar, where the deceased bought him, alcohol and food which they ate till 10:30p.m. He excused himself as he had an early delivery to make next day and left for home. He slept deeply with all his clothes till he heard cries outside and on going out, found the deceased's body and went to report at the police station. After reporting, the deceased's brother also came to make a report of the murder. He went with police to the scene and when he was arrested, people complained why he was being arrested.

After the close of the defence case, **Mr. Singei** filed submissions in which he identified the following issues; whether the accused was identified as the culprit; whether *mens rea* was proved and whether the evidence was sufficient to sustain a conviction on a charge of murder. On the first issue, he submitted that the three witnesses PW2, PW3 and PW5 were not truthful as to who arrived at the scene first; that PW2 could not have seen a large knife when PW5 says that the only light was moonlight. Counsel relied on the decision of **Charles Maitany vs Republic (1985)2KAR 25** on the question of whether or not the identification was full proof.

As to the issue of malice aforethought, Counsel drew assistance from the decision of **Republic vs Tubere s/o Ochen [1945] 12 EACA 63** and Section 206 of

the Penal Code. He submitted that the deceased was stabbed once, the wound was not deep hence no pressure was exerted; that all witnesses PW1, PW2, PW3 and PW5 acknowledged the good relationship between accused and the deceased and hence no malice aforethought can be imputed. Counsel also relied on the decision of **Bakari Magangha Juma vs Republic (2016)eKLR** where the accused raised the defence of intoxication which was never challenged and the court took it into account in determining whether or not the accused had malice aforethought.

As regards the alleged contradictions in the prosecution evidence, counsel agreed that it depends on the nature of discrepancies and whether they discredited the prosecution evidence. He compared the evidence in this case with the case of **John Cancio De SA vs. V. N. Amina CA 27/1933(1934)1 EACA 13**. Counsel urged that both the post mortem report and the Government analyst evidence did not connect the Accused to the offence. He urged the court to acquit the accused.

I have duly considered all the evidence on record and submissions. The accused was charged for the offence of murder under Section 203 as read with Section 24 of the Penal Code. Under Section 203 of the Penal Code the prosecution has to prove beyond reasonable doubt the following ingredients:-

1. **The death of the deceased;**
2. **That the accused committed the unlawful act or omission that caused the death of the deceased;**
3. **that the accused had malice aforethought.**

Death of deceased:

The death of the deceased is not in doubt. All the witnesses except PW6 and PW7 saw the body of the deceased after he had been fatally injured. PW6 performed the post mortem on the deceased in the presence of PW1. He found that the deceased suffered one penetrating stab wound to the chest, pooling of blood in the chest and blood clots in the neck, head and chest. He formed the opinion that the cause of death was hypovolemic shock due to a deep stab wound on the chest.

Whether it is the accused who committed the unlawful act that caused the death:

The deceased was murdered at night. The testimonies of PW1, PW2 and PW3 and PW5 confirm that they were woken up by noises and screams about 2:00 to 2:30a.m Being night, the issue of identification of the perpetrator comes into focus. The courts have over the years held that such evidence of identification under unfavourable conditions must be treated with great caution so that it does not lead to a miscarriage of justice.

The court of Appeal in **Wamunga vs Republic (1980) KLR 426** stated as follows:-

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to exercise such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

The case of **R vs Turnbull & others (1973) 3 ALL ER 549** provides good guidelines on what the court should consider in such cases as the instant one. The court said :-

“The court 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 with the Accused under observation: At what distance? In what light? Was the observation impeded in any way? 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 relatives and friends are sometimes made”.

PW1 did not witness the murder. It is PW2, who claimed to have heard the accused and deceased, arguing, came out of the house and saw deceased pursuing the accused claiming that he was going to get his phone. She said that by then, he was 5 meters away and that she followed them and saw accused stab deceased on the chest. By then she was 35 meters away and that she saw the two by use of security lights and moonlight. PW3 said that on coming out of his house, he saw accused walking away towards his mother’s house, and by then the deceased was already lying down. He did not witness the accused actually stabbing the deceased. He however, but said that there were security lights and moonlight at the scene. PW5 on the other hand said that she watched the incident from a distance of 30 meters away. She said that there were no security lights but there was moonlight. PW5 said that the accused first held accused by the waist made him fall, threatened to stab accused and the deceased dared him to stab him and accused went ahead. PW2 and PW5 gave different versions of how they witnessed the actual assault on the deceased. PW1 told court that there were solar lights on PW3’s house and his mother’s house which was also close to the scene. PW2 and PW3 also confirmed that there were solar lights on PW3’s house. It was also not in dispute that the deceased’s body was found very close to PW3’s house the deceased’s body was only seven (7) meters from PW3’s house, then PW3 was in a position to see and recognize the accused as he walked away being a person he knew very well.

PW3 said he was the first at the scene. PW5 confirmed that she found PW3 where the deceased’s body was and that she ran to call PW1. PW1 did confirm that it is PW5 who called him and so did PW3. None of those three (PW1, PW3 & PW5) witnesses ever mentioned that PW2 was first at the scene or at all. I doubt that PW2 was at the scene when the deceased was stabbed. I am more convinced to believe PW1, PW3 and PW5 as to who first arrived at the scene.

There is uncontroverted evidence on record that accused and the deceased were great friends and that they used to drink alcohol together and quarrel. It was also stated that, the deceased was very abusive when drunk while the accused was not. PW1, PW2, PW3 and PW5 all knew accused as a close neighbour. Accused admitted that fact. In fact PW1 described accused as a friend too. All the four witnesses PW1, PW2, PW3 and PW5 said that they heard and recognised the voices of the accused and deceased, during the argument between them over a phone. All the witnesses confirmed that the deceased was murdered just outside PW3’s house. PW3 said that it was about seven meters from his house. From the evidence of the witnesses, the Accused and deceased had walked past PW1’s house as they quarreled till the deceased was stabbed outside PW3’s house. I am satisfied that the witnesses PW1, PW2, PW3 and PW5 who had known the accused for so long were able to recognize his voice on that night just before the deceased was injured.

PW2, the deceased’s wife also told the court that Accused had come to her house earlier that night about 10:00p.m and called the deceased to accompany him to the shopping centre and that they left together. That evidence was never controverted and it goes to buttress PW1, PW3 and PW5’s evidence that they heard accused and deceased quarreling outside PW1 and PW3’s house before the deceased was injured. Under Section 111 of the Evidence Act, since the accused was the last person with the deceased, he had a duty to explain what happened to the deceased which he did not.

When PW1 was called from his house by PW3 and PW5, PW1 said that even then PW3 informed him that it is the accused who had stabbed the deceased. When

PW1 went to report at the station and found Accused had already made a report of the deceased’s death, PW1 made a report vide OB 3 of 11/9/2019, in which he named the accused as the killer. PW8 confirmed the said report. This meant that there was no doubt in the witnesses mind that it was the accused who murdered the deceased.

The accused gave an alibi defence; that he met the deceased at their shopping centre and that he left him there with friends and that he was woken up from sleep by screams about 6:00 a.m., went out and found deceased’s body and then went to report at police station. An alibi defence is raised when an accused state that he was not at the scene of the crime but was elsewhere. The onus is always on the prosecution to dislodge the defence of alibi after the same is raised at the trial. In **Victor Mwendwa Mulinge vs. Republic (2014) EKL R**, it was held:-

It is trite that the burden of proving the falsity, if at all, of an accused’s alibi lies on the prosecution”.

In **SSentale vs Uganda (1968)EA 365**, Sir Udo Udoma CJ of Uganda said:-

“... A prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so in more than one occasion. The defence of alibi was put forward for the first time some few months after the robbery when the appellant made his answer in statement in court. Even in such circumstances, the prosecution or the police ought to check and find the alibi wherever possible.”

In this case, PW1, PW2, PW3 and PW5 placed the accused at the scene of

crime. In his alibi, the accused claimed to have found the deceased dead at 6:00a.m. and went to report. However, PW8 found his trouser to

have been stained with blood. PW8 recovered the trouser from him and the same was subjected to DNA sampling by PW7 and his findings were that the blood found on the accused's trouser belonged to the deceased. That evidence places the accused at the scene of the murder. The blood must have splashed on his trouser during the attack. The accused never explained how the blood had found its way on his trouser.

Being the deceased's close friend and neighbour one wonders why on finding the deceased's body, the deceased did not inform the family but instead rushed to report at the police station. Accused's conduct raises questions as to his truthfulness.

In his submissions, the defence counsel urged that there were many contradictions in the prosecution evidence. Counsel relied on the case of David Ojeabuo vs Federal Republic of Nigeria (2014)LPELR -22555(CA) where the Court described what amounts to contradictory evidence. I find guidance in the case of Philip Nzaka Watu v Republic (2016) eKLR where the court stated:-

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this court, some inconsistencies in evidence may signify veracity and honesty, just as unusual uniformity may signify fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

The Ugandan Court of Appeal in Twehangane Alfred vs. Uganda Cr. Appeal 139/2001 (2003) UGCA the court said:-

“With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions, unless satisfactorily explained will usually but not necessarily lead to the evidence of the witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not effect the main substance of the prosecution's case.”

In this case, I have rejected PW2's narration that she witnessed the accused stab the deceased because the other witnesses never saw her at the scene nor was, she the first at the scene where the deceased's body lay. After evaluating the evidence of PW1, PW2, PW3 and PW5, I am satisfied that the discrepancies alluded to by the defence are minor and do not go to the substance of the case. I am satisfied that PW1, PW3 and PW5, recognized the accused and deceased's voices. The accused had called the deceased from his house that night and left with him. He was seen by PW3 leaving the scene which was outside PW3's house. Lastly, the blood found on trousers links accused with the scene of crime. I am satisfied that the prosecution proved that accused caused the unlawful act that caused the deceased's death.

Whether Accused had malice aforethought:

Malice aforethought is defined under Section 206 of the Penal Code as follows:-

- a) an intention to cause the death of or 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.”

In Tubere s/o Ochen v Republic EA (1945)12 EACA 63, the East African court of Appeal said:-

“The duty of the court in determining whether malice aforethought has been established is to consider the nature of the weapon used, the manner in which it is used, the part of the body injured, the conduct of the accused before, during and after the attack.”

In this case, given the circumstances as narrated by the witnesses, that the accused and deceased were engaged in a brawl, may be due to intoxication and, though the defence of intoxication was not pleaded; the fact that it was said it was deceased pursuing the accused, insisting that he gives back his phone and the resultant injury which was just one stab wound though deep, must have happened spontaneously and without an intention on the part of the accused. Though the accused did not reveal that he was the assailant, his conduct of going to report the incident is telling, that he did not possess malice aforethought. I am satisfied that the acts and conduct of the accused are not consistent with one who had malice aforethought. Since the ingredient of malice aforethought is not proved, the charge of murder must fail. However, the accused unlawfully caused the death of the deceased and under Section 179(2) of the Criminal Procedure Code. I find him guilty of the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 22ND DAY OF APRIL, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of:-

Mr. Kimanathi State Counsel

Ms. Okota holding brief Mr. Singei for Accused

Ms Oloo Court Assistant

Accused present