



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL MURDER CASE NO.41 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

ROBERT OTIENO OTUNGA alias CHIEF OTUNGA.....ACCUSED

JUDGMENT

[1] The accused, **Robert Otieno Otunga**, also known as. **Chief Otunga**, faces a charge of murder, contrary to **section 203** as read with **Section 204** of the **Penal Code** in that, on the 20th November 2018 at Wiga Village, Kalanya/Konyango location, Homa Bay County, he murdered George Odhiambo Okelo.

[2] The case for the prosecution was that the accused, a police officer based in Nairobi, was on the material date at his home village within the Kabunde area of Homa Bay township where he was commonly known as “**Chief Otunga**” when he visited a “changaa (illicit liquor) drinking den” operated by **Beatrice Anyango Kura (PW2)** in the company of one Ray. They found other patrons at the place and joined them in partaking the liquor. The deceased also arrived at the scene and joined the group which was outside the house of Beatrice.

[3] After a while, it began to rain and the group dashed into the house. The accused was already drunk at that juncture. He became disorderly and abusive inside the house. He was in possession of a knife which he used to stab and fatally injure the deceased who had attempted to restrain him from continuing with his disorderly conduct. He thereafter left the scene despite attempts to restrain him from doing so.

[4] The accused’s disorderly conduct and his act of assaulting the deceased unfolded right in the eyes of Beatrice (**PW2**), a motor cycle taxi operator (boda boda) **Selema Asiyu (PW3)** and a carpenter, **Patrick Odhiambo Odumbe (PW5)**. The motor cyclist (**PW3**) arrived at the scene just as the accused held the deceased near the door to the house. He (accused) then pointed the knife menacingly at the cyclist and chased him away.

[5] Immediately after being chased away, the cyclist learnt that the accused had stabbed the deceased with the knife. He returned to the scene and found the dead body of the deceased lying on the ground. The accused had by then walked away from the scene. He (cyclist) thereafter proceeded to the accused’s home and informed his mother what had happened.

[6] The accused’s mother, **Brigitta Auma Okello (PW4)**, also proceeded to the scene and found the deceased on the ground bleeding from the chest and neck, but was already dead.

In the meantime, Beatrice (**PW2**) went to the nearby Kabunde Administration Police Post to report the matter.

[7] **Cpl. Godfrey Otieno (PW1)**, received the necessary report and proceeded to the scene with his team. They found the body of the deceased lying on a verandah outside the house with an injury on the neck. They learnt that the accused, a colleague of theirs based in Nairobi, was the assailant, but was not at the scene.

[8] The body of the deceased was removed to the Homa Bay Referral Hospital where it was identified by the deceased’s elder brother, **Charles Okello Ochieng (PW7)**, for post mortem purposes.

Dr. Osuri Kevin (PW6) carried out the autopsy and compiled the necessary report (**P.Exh. 1**) showing that the deceased died from hypovolemic shock.

[9] **Cpl. Nicholas Omondi Otieno (PW8)**, carried out the necessary investigations and led a contingent of police officers to arrest the accused who considered to be armed and dangerous. However, no resistance came from him and he voluntarily surrendered on seeing the contingent.

On completion of the investigations, the accused was charged with the present offence, but the suspected murder weapon was never recovered.

[10] In his defence, the accused implied that he did not commit the offence. He stated that a confrontation occurred between him and the deceased while they were at the “changaa” drinking den and in the process, the deceased attempted to block him from leaving. He then shoved the deceased aside and left for his home where he spent the night only to be confronted by police officers on the following morning on allegations that he had killed the deceased who was his friend and cousin.

[11] In law, a person who of malice aforethought causes the death of another person by an unlawful act or omission is said to be guilty of murder (see, **Section 203** of the **Penal Code**).

Malice aforethought, is under **Section 206** of the **Penal Code**, deemed to be established by evidence proving “**inter alia**” 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.

[12] The evidence adduced herein against the accused was overwhelming and credible in undisputedly establishing that he was the person responsible for stabbing and fatally injuring the deceased while they were at a changaa drinking den. His allegation that he only shoved aside the deceased in the process of a confrontation between them was clearly disproved by the key prosecution witnesses such as Beatrice (**PW2**), Selemia (**PW3**) and Patrick (**PW5**).

[13] In fact, these witnesses credibly established that right from the start, the accused was the aggressor and that the deceased bore the brunt of the aggression with his life. It is without doubt that the incident occurred at a “changaa” drinking den and that the accused and the deceased were intoxicated at the time. This may have clouded “the accused’s intention to cause the death of the deceased, but not to grievously harm him. Therefore, under section 206 of the Penal Code, malice aforethought was clearly established against the accused.

[14] Indeed, the evidence by Beatrice (**PW2**), and to an extent that of Selemia (**PW3**), showed that even before assaulting and fatally injuring the deceased, the accused was playing “Russian roulette” with the murder weapon (knife) when he aimed, threw and embedded it at the arm of a seal or when he menacingly swung it towards Selemia (**PW3**).

All this, shockingly as it were, from a person mandated to maintain and enforce the law.

[15] It is clear from the foregoing that the death of the deceased was not caused unintentionally by the accused. The fact that he was intoxicated at the time did not afford him such possible defence for a charge of murder or even have it down scaled to manslaughter as it was not established that he was so intoxicated to be incapable of forming an intention to commit the offence. He never lost control of his senses and reasoning despite his intoxication. He was very much conscious of his actions, lawful and unlawful, and that is why he hurriedly left the scene on realizing the costly mistake he had made.

[16] For all the foregoing reasons, this court finds that all the necessary ingredients of the charge of murder were duly established against the accused by the prosecution. In the premises, the prosecution’s burden of proof was positively discharged for the court to enter a verdict of guilt against the accused.

Accordingly, the accused is hereby found guilty as charged and is hereby convicted.

Ordered accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 22nd day of October, 2020].