



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 25 OF 2018[MURDER]

STATE.....PROSECUTOR

VERSUS

PAUL ONYANGO ARIRA.....ACCUSED

JUDGMENT

1. The accused person herein Paul Onyango Arira is charged with the Offence of Murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of Information dated 12th November 2018 are that on the 29th day of July, 2018 at Rue Village in Ugunja Sub County within Siaya County, Jointly with others not before court they murdered one Charles Oduor Ongeti

2. The accused denied the offence and the prosecution called seven witnesses to establish a prima facie case against the accused person. Placed on his defence, the accused person gave an unsworn defence denying the offence and called no witness.

Evidence

3. **Michael Odongo** a resident of Ruwe Village testified as PW1 and recalled that on 29.7.2018, at about 5pm, he was at the home of Wycliffe Otema when he saw four men and one of them was the accused person Onyango Arira (pointing at the accused) saying that he knew him and even built for him his house. He stated that the four people were on a mission to arrest Charles Oduor Ongeti (deceased) and that in the process, they beat him thoroughly using clubs and woods as if they were killing a snake. He stated that it was the accused person herein Paul Arira who entered the house of Oduor Ongeti saying that the deceased had stolen an animal and he started clubbing the deceased and leading him away from the house and three the deceased down, outside the house and beat him thoroughly such that he could not walk. He was led to some home where there was a funeral and where the animal was alleged to have been stolen from. The animal allegedly stolen and which had spots was later recovered and taken to Musanda Police Station. He stated that Paul Arira is a village elder and a personal assistant to the Area Assistant chief.

4. On being cross examined by Mr. Ochanyo Advocate for the accused person, the witness stated that on 29.7.2018, there was a funeral at the home of the accused as his sister had died. He stated that he knew both the accused and the deceased very well. He stated that the deceased was his neighbor and was well behaved, not a thief.

5. **PW2 William Ongedi Pesa**, a peasant farmer with a physical disability on the leg testified that he was from Ruwe and that he knew Charles Odiwour Ongeti, who was his first born son. He further stated that he knew Paul Onyango Arira. He recalled that on 29.7.2018 at around midnight, he heard knocks on his door and when he inquired as to who it was, the person told PW2 that he was Onyango. That he recognized the voice of Onyango whom they called Onyango Abisa. He identified the accused person in the dock as the Onyango Abisa. According to PW2, the accused asked the whereabouts of Oduor and PW2 told him that Oduor was at the funeral. However, the accused demanded that PW2 opens the door of which PW2 answered that he could not move and open the door as he had a bad leg.

6. He further stated that the accused asked him ***“You have refused to open the door? Tomorrow if you will find Oduor in the mortuary, do not feel bad.”*** that on hearing this from the accused person, PW2 told him that if that is what they had planned to do to Oduor, it was upon them. PW2 stated that the accused was in the company of other people because he heard them converse.

7. PW2 further stated that at about 2 a.m., the same night the same people returned and PW2 heard Onyango's voice which he could recognize as Onyango was his nephew- his sister's son. PW2 then saw torchlight and heard the said people walking and trying to open the door but they jumped over the fence looking for Oduor Ongeti. the following morning at about 6 a.m., Onyango Abisa, the accused Otieno Ojay, Afwande Ojay and Onyango Ojay went to the home of PW2 and told him that if Oduor does not return the stolen animal, he was not going to live in that village and that on 29.7.2018 at about 7 a.m. he received information that his son Oduor Ongeti had been killed and was already in the mortuary. He later recorded his statement with the police.

8. On being cross examined by Mr. Ochanyo advocate for the accused person, PW2 stated that the deceased had the character of stealing from people although he had reformed. He stated that there was a funeral at the home of the accused and that the accused was the village elder and assistant to the re Assistant Chief.

9. PW3 Chrispin Owino Otieno a resident of Ruwe sublocation testified that on 29.7.2018 at about 5 p.m. he had gone to the home of Wycliffe Malala Otema to assist the latter go to hospital as he was ailing and that while there, he saw Onyango Abisa (Accused identified in the dock by the witness pointing at him) who went to the house where PW3 was with the owner of the house and the deceased Charles Oduor Ongeti. He stated that the accused was in the company of Onyango Ojay, Afwande and Otieno Ojay and that as they entered the house, they pulled Oduor Ongeti from the house of Wycliffe Otema and started beating him using runkus (clubs) and wood. He stated that the accused Onyango Abisa was hitting the deceased using a rungu on the head and the other three people who came with him joined in the fray and beat him mercilessly until Oduor Ongeti fell to the ground and lost consciousness.

10. That when PW3 asked them why they were beating Oduor instead of escorting him to the police, they responded that the deceased Oduor had stolen an animal, a cow and that the accused Paul Onyango Arira stated that if a thief is found, he must be killed. That they made a stretcher from firewood and carried the deceased to the place where there was a funeral and that on arrival, they lit fire and started burning the deceased in the ears and mouth and took the deceased to Wangotong Police Post. The following day 30.7.2018, PW3 heard that the cow allegedly stolen had been recovered at Musanda Police Station. The witness recorded his statement with the police.

11. On being cross-examined, he reiterated his testimony in chief and stated that he was at the house of Wycliffe Otema Ofula when the accused and others went looking for the deceased. Further, that he could not tell the character of the deceased.

12. In reexamination he stated that he heard the accused person saying that they should beat and kill the thief.

13. **PW4 Wycliffe Otema Ofula** a resident of Ruwe testified and recalled that on 29.7.2018 at about 5 p.m., he was unwell and in his house with PW3 Michael Odongo, Owino and Charles Oduor Ongeti when he saw 4 people whom he knew very well enter his house these were-Onyango Abisa Arira, the accused herein identified, Otieno Ojay, Onyango Ojay, the brother to Otieno Ojay and Afwande. He stated that the accused was his nephew and that as they entered the house, they lifted Oduor and that Onyango Arira tore the clothes which Oduor Ongeti had on, asking the deceased to produce a cow. He stated that the four had runkus-clubs and that the accused also held a panga. He stated that as they pulled the deceased, they were assaulting Oduor, PW4 heard Oduor say **“just kill me only God knows.”** The said people later returned to the home of PW4 looking for a cow which was allegedly stolen.

14. PW4 also learnt of the death of the deceased so he went and recorded his statement with the Police at Ugunja.

15. In cross examination, PW4 stated that he knew the accused as a village elder and that the deceased was a nephew. He also stated that the deceased had a bad name in the village as it was being alleged that he was a thief.

16. PW5 No. 112628 PC Francis Mwaura based at Sigomere Police Station in Ugunja testified and recalled that on the 30.7.2018 at around 2 am, he was at the report office when he received one suspect Charles Oduor Ongeti who was drunk and beaten up seriously. The suspect was complaining of pains. PW5 informed his senior at the station Sergeant Mukoma who called other officers to take the suspect to Hospital and the suspect was escorted to Sigomere Sub-county Hospital. While undergoing treatment, they received information that the suspect had died.

17. In cross examination, the witness stated that when the suspect was brought to the police station, he was alive. Further, that the suspect was brought by APC Wanjala and Zachary Obiri, Police Officers from Rue Camp who explained that they rescued the suspect from mob injustice because he was found to have stolen a cow which was to be slaughtered at a funeral so he was beaten up and the police officers rescued him.

18. In reexamination, the witness stated that he received the deceased at about 2 am not 2pm.

19. PW6 Dr. Gabriel Juma a medical officer working at the Siaya County Referral Hospital for 3 years and a graduate from Moi University in 2013 with Bachelors' Degree in Medicine and Surgery testified and produced a post mortem report for the deceased Charles Oduor done at Bondo District Hospital on 16.8.2018. The body was identified by Peter Onyango and Paul Okeyo. The post mortem was done by Dr. Collins Oginga a colleague who was transferred to Madianyi but was away on training. The two had worked together for one year at Siaya County referral Hospital hence PW6 knew his handwriting and was able to interpret the postmortem report.

20. According to the postmortem report, the deceased died on 29.7.2018 and the Post mortem was done on 16.8.2018. The deceased was a male adult aged 44 years, 5 ½ feet tall, well built and well nourished. The body had burnt fingers and toes of both hands and feet. There were blood stains on the nose and mouth. He had bruises over external area of the chest measuring 5cm by 7cm. The respiratory system was normal. In the Cardiovascular system there was blood clot below the Pericardium overlying the anterior chest wall. In the digestive system, the liver was ruptured and there was massive intra-abdominal bleeding. The doctor concluded that the cause of death was cardiopulmonary collapse from ruptured abdominal viscera (organs) (liver and Spleen) with massive intra- abdominal bleeding. What that means is that the body was unable to circulate blood normally because the deceased had lost a lot of blood. The Certified copy of post mortem report dated and signed on 16.8.2018 was produced as Prosecution Exhibit 1.

21. In cross examination, the witness stated that the exact place of death is captured by police officers on the first page of postmortem form. He further stated that it was not easy to say that injuries were caused by one or more people but one person would use much energy to inflict such injuries. He stated that there was a form of torture due to burning of fingers and toes but there were no defensive injuries. He stated that in severe hemorrhage, a patient who loses 10% of blood can be salvaged but above 50%, the chances are slim as survival depends on how fast the patient was taken to hospital and attended to.

22. **PW7 No. 57107 CPL Richard Kongera** stationed at DCI Ugunja performing general investigation duties and the investigating officer in the instant case testified that on 29.7.2018 a mob injustice incident involving the deceased was reported at Sigomere Police Station at about 4pm. the witness then took over the investigations and established that the victim of the murder Charles Oduor Ongerti was suspected to be a thief of stock theft at Rue village, sub-location. The witness then visited the scene at Rue village and found that at funeral place, a cow had been bought to be slaughtered for mourners. The deceased was suspected to have stolen the cow. The villagers looked for the deceased, found him and they started beating him calling him a thief, at Rue area near his house. The cow was not found. The suspect was escorted to Ruwe AP Police Camp, and were advised to escort him to Sigomere police station. He was taken to Sigomere Sub-county Hospital for treatment but he died while undergoing treatment.

23. PW7 returned to the scene and got information on the 4 to 5 people who allegedly beat up the deceased injuring him. Paul Onyango Arira was among the suspected assailants. He later recorded the statement from the deceased 's father and looked for the suspects. He arrested Paul Onyango Arira only, whom he identified in court, escorted him to JOOTRH for mental assessment and had him charged with murder.

24. On cross examination, PW7 stated that a report was lodged at Sigomere Police Station at 1600hours on 29.7.2018 by villages who suspected the deceased stole the cow but were advised to take him to Rue Camp. That at the latter station, the villagers were to escort him to Sigomere Police Station. He stated that the investigation diary indicates in the Return follow up Report that the deceased died while undergoing treatment. He denied a suggestion by Mr. Ochanyo that in the absence of timelines, the deceased died at Sigomere Police Station, maintaining that the deceased died at Sigomere Sub-county Hospital.

Defence case

25. The accused person gave unsworn testimony as DW1 and stated that he was **Paul Onyango Arira** from Ruwe Sub-location. He stated that he served as a village elder for Nyangera village. He recalled that on 29/7/2018, he was at a parents' Committee meeting at Wangotong Primary School from 8am to 10.00am. He stated that he knew the deceased Charles Oduor Ongeti as they were cousins in that the deceased was the son to the uncle to the accused. The accused further stated that on the material day, they had a funeral at Nyangaa village when he received a report by mourners William Onyango and Michael Ochieng that a cow bought for slaughter at the funeral had been stolen and they suspected Charles Oduor Ongeti, a known cattle thief who had been seen at the venue. The accused stated that he then reported the matter to the Assistant Chief and to the Administration Police Camp at Wangotong but that no Police officer appeared and no action was taken so the complainants went back home to bury their dead and he also went home.

26. On being asked by his counsel whether he heard the evidence adduced by the prosecution witnesses to the effect that he had assaulted the deceased, he stated that he never beat the deceased and that he did not know anything concerning the death of the deceased Charles Oduor Ongeti.

Analysis, findings and determination

27. Having considered the evidence adduced by the prosecution witnesses and the defence, the main issue for determination is whether the prosecution have proved the charge of murder against the accused person beyond reasonable doubt and therefore whether all the elements of murder have been established to warrant and sustain a conviction.

28. The accused in this case was charged with the offence of murder contrary to section 203 of the Penal Code which defines murder as the unlawful killing of a person or persons with malice aforethought.

29. In **Republic Versus Andrew Omwenga 2009 eKLR** the court held: **"It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b) That the accused committed the unlawful act which caused the death of the deceased and (c) That the accused had the malice aforethought".**

30. This court has therefore to analyze the evidence in light of these essential elements required to be proved by the state against the accused person. In this endeavor the above ingredients will be in issue and in making a determination of this case I will deal with each singular ingredient as follows:

31. The death of the deceased is not in issue as per the postmortem report produced by the Doctor PW6 Gabriel Juma of Siaya County Referral Hospital as an exhibit, showing that the deceased died on 29/7/2018 due to cardiopulmonary collapse from ruptured abdominal viscera with massive intra-abdominal bleeding. the post mortem was done with relatives of the deceased namely, Peter Onyango and Paul Okeyo identifying the body of the deceased to Doctor Collins Oginga who performed an autopsy. accordingly, iam satisfied that the prosecution proved beyond reasonable doubt the death of the deceased and its cause.

32. On whether the death of the deceased was caused by an unlawful act, Article 26 (1) of the constitution provides that:

"Every person has the right to life. It is also stated in subsection (3) that a person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law."

33. From these provisions, not all homicides are unlawful. The principle in the case of **Republic Versus Guzambizi S/o Wesonga 1948 15EACA 65** articulates that Death is excusable by law in circumstances of reasonable defence to self, property, as a result of accident or misadventure or in protection of life or property of a third party.

34. In proving the cause of death section 213 of the Penal Code provides acts and circumstances which an inference as to death can be inferred by way of evidence to prove the cause of death. This was the holding in **Republic Versus Smith [1959] 2 ALLER 193** where the court held inter alia that:

“If the victim’s death is traceable to the injury inflicted by the accused it will avail him nothing to show that the deceased’s death might have been prevented by proper care or treatment”.

35. In the Kenyan courts, proof of death and cause is by way of medical or circumstantial evidence. (*See Benson Ngunyi Ndundu Versus Republic CA CRA No. 171 of 1984*).

36. PW1, PW2, PW3 and PW4 all witnessed the deceased being assaulted. the assault was not justified and the accused has not given any defence of self defence. the type of injuries sustained by the deceased, as stated by PW6 are not defensive injuries meaning the deceased was beaten to death. No person has any right to kill another. as there was no justification for the killing of the deceased, I find and hold that the death of the deceased was caused by an unlawful act.

37. On whether the accused person was identified as the deceased’s assailant, PW1, PW2, PW3 & PW4 witnessed the thorough assault on the deceased by the accused. The offence took place at 5 pm on 29/7/2018. PW1 described the assault on the deceased that it was as if the people were killing a snake, using clubs and woods. he identified the accused as being among the four people who went to arrest the deceased claiming that he had stolen a cow and started beating him up thoroughly. PW1 knew the accused very well as a village elder and stated further that he had even built a house for the accused.

38. The 4 witnesses knew the accused very well as a village elder and a Personal Assistant to the Assistant Chief. The accused person was in the company of others who were also well known to the witnesses. He used clubs/rungus and wood to beat the deceased. they were claiming that the deceased had stolen a cow meant to be slaughtered at a funeral of accused’s sister. As he assaulted the deceased on the head using a rungu, his accomplices joined in beating the deceased mercilessly until he fell on the ground.

39. The accused also told PW2 that if he PW2 finds his son in the morgue, he should not feel bad. Accused further told PW3 that if a thief is found, he should be killed. Accused also claimed that the deceased stole a cow meant to be slaughtered at his sister’s funeral.

40. PW3 watched in horror as the accused and others beat up the deceased and led the deceased away. He followed the accused and his accomplices as they made a wooden stretcher, placed the deceased on it and carried the deceased who was by then unconscious, to the funeral place then they lit fire and started burning the deceased and took him to Wangotong Police Post.

41. Evidence of PW1 and PW3 was corroborated by PW4 Wycliffe Otema Ofula as they were all together when the accused and 3 others went to PW4’s house, lifted up the deceased and the accused herein was seen tearing clothes of the deceased asking him for a cow. They were armed with rungu and the accused also had a panga. They assaulted the deceased as they pulled him from the house of PW4.

42. PW5 was at Sigomere Police Station on the night of 30/7/2018 at 2 am when he received the deceased appearing thoroughly beaten and allegedly drunk. He informed his seniors and had the suspect of alleged cattle theft send to Sigomere Sub county Hospital where he died while undergoing treatment.

43. PW6 produced postmortem Report on the deceased done by Dr. Oginga-who was on transfer and away on training. Dr. Odinga found the deceased’s body had burnt fingers, toes on both hands and feet. He also found the following on the deceased’s body:

- **Blood on nose, mouth**
- **Bruises all over external area of chest - 7cm.**
- **Blood clot below pericardium.**
- **Ruptured liver, spleen.**
- **Massive intra-abdominal bleeding.**
- **Organs liver and spleen with massive intra-abdominal bleeding. Consistent with beatings described by witnesses by PW1, PW3 and PW4. There were defensive injuries.**

44. The Cause of death was cardiopulmonary collapse from ruptured abdominal viscera.

45. In his defence, the Accused denied knowing how the deceased died but admits receiving a report of loss of a cow meant for a funeral. From the above evidence by the prosecution witnesses and the accused in his defence, I find the evidence pointing at the accused as the deceased’s assailant watertight and credible. There is no evidence of framing up as the offence occurred in daylight. Witnesses knew both accused and deceased and vividly described how the accused assaulted the deceased on suspicion of being a cattle thief the injuries found on the deceased’s body are consistent with the beatings that the deceased received as described by PW1,2,3 and 4. accused was positively identified as the killer by PW1, 3, 4 who corroborated each other as they saw the accused look for the deceased, pull him from PW4’s house and assault him mercilessly and even burn him. Evidence of burning is confirmed by the postmortem report. I am satisfied that it was the accused person herein Paul Onyango Arira who, with others unlawfully killed the deceased Charles Oduor Ongeti.

46. The evidence against the accused is that of recognition as he was well known to the witnesses who saw him assault the deceased and the event took place in daylight. The defence by the accused person was a mere denial. The evidence against him was overwhelming.

47. I therefore find and hold that the accused person herein Paul Arira Onyango was positively identified as the deceased’s assailant and that

it is those injuries inflicted on the deceased by the accused and his co assailants that led to the demise of the deceased.

48. On whether the accused had malice aforethought when he unlawfully killed the deceased, Malice aforethought is the *mens rea* or the mental element required for a conviction for the offence of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If malice aforethought is lacking the unlawful homicide will not be murder but manslaughter. See Nyakundi J in **Republic v Ismail Hussein Ibrahim [2018] eKLR**.

49. Section 206 of the Penal Code provides for circumstances which if manifested in any particular case, malice aforethought is deemed to be established the section stipulates:

“(a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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 fight or escape from custody of any person who has committed or attempted to commit a felony.”

50. In **Rex Versus Tubere S/O Ochen 1945 12EACA 63** the court held:

“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident.”

51. In **Cunliffe v Goodman 1950 1 ALL ER 724**, Asquith L.J stated:

“An intention, to my mind, connotes a state of affairs which the party intending does more than merely contemplate, it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition.”

52. Thus, the nature of injuries are evidence of malice afterthought. The accused and his accomplices mercilessly beat up the deceased occasioning him grievous harm and even when he was unconscious, they continued assaulting and burning him which shows that they had an intention to cause grievous bodily harm and eventual death. Malice afterthought was therefore proved beyond reasonable doubt. The accused as a community leader was under duty to protect the suspect and arrest him and take him to face the law in the event that the accused was a law breaker, not to take the law into his own hands.

53. I find that the prosecution proved beyond reasonable doubt that the accused herein in the company of others unlawfully killed the deceased Charles Oduor Ongeti with Malice aforethought I find the accused **Paul Onyango Arira**, guilty of the offence of murder as charged. I convict him accordingly. Sentence will be after mitigation and presentence Report.

54. Orders accordingly.

DATED, SIGNED, DELIVERED AT SIAYA THIS 30TH DAY OF NOVEMBER 2020

R.E. ABURILI

JUDGE