



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 24 OF 2016

REPUBLIC.....PROSECUTOR

-versus-

1. GEORGE OMONDI

2. CALVIN OCHIENG..... ACCUSED

JUDGMENT

1. When **Daniel Orwa Ochieng (PW5)** set up his bar business at Kambogo Market in West Kanyamkago Location in Uriri Sub-County in the name and style of *Tuda Oduwadu Bar*, he organized a grand opening ceremony on 10/12/2016. He availed a live performing band and many patrons turned up to grace the occasion. Unfortunately, PW5 did not know what lay ahead of his newly-established business.

2. As the night went by the patrons got into the celebratory mood and enjoyed themselves in drinking and dancing. Amid the merry-making there was a time when some patrons clashed, exchanged words and even briefly fought. PW5 intervened and asked them to leave the bar and they obliged. The said exchanges were closely witnessed by **Jacob Onyango Rakala (PW1)** who knew those who differed as they were his fellow village mates and had also been in the same class at School. According to PW1 those involved were **George Omondi** (the first accused person and hereinafter referred to as '**George**') and **Phillip Okal** (the deceased and hereinafter referred to as '**Phillip**').

3. PW1 stated that Phillip danced with a lady and shortly left her to go out of the bar. On return, Phillip found George dancing with the lady. Phillip asked George why he was dancing with the lady and Phillip began fighting George with his fist. A fight broke out and people intervened leading to PW5 asking them to leave the bar.

4. George and Phillip left the bar and went towards the main road. PW1 followed Phillip closely. While outside the bar, PW1 stood next to Phillip. Suddenly PW1 saw George approach and stab Phillip with an item on the chest. Due to PW1's proximity to Phillip the item which stabbed Phillip also scratched PW1. Phillip bled profusely from the chest, staggered and then collapsed, falling on the road. Shocked, PW1 went to where Phillip lay and noted that Phillip was not blinking. George disappeared. Many people gathered and Phillip was rushed to Migori County Referral Hospital where he was pronounced dead on arrival. The body was preserved in the Mortuary pending a post mortem examination.

5. The matter was reported to the police and investigations were commenced. The OCS Uriri Police Station **No. 232698 C.I. David Nyakundi (PW4)** accompanied the investigating officer one **No. 85934 PC Allan Masinde (PW6)** and other officers to the scene. They observed the scene and noted a lot of blood on the road where they learnt that Phillip had been stabbed and fell. They photographed the scene and proceeded to view the body at the Mortuary. They as well photographed the body.

6. PW6 recorded statements from various witnesses. Among them were PW1, **Peter Otieno Opala (PW2)**, **Dr. Vitalis Owuor K'Ogutu (PW3)** and **PW5**. PW2 was the one receiving money from those who entered into the bar to be entertained by the band. He issued receipts and stamped them as well at the entrance. As he had gone for a short call he saw many people running towards the road and on return he learnt that Phillip had been stabbed by George and rushed to hospital.

7. PW3 conducted the post mortem examination on the body of the deceased after it was identified by the relatives. PW3 noted a single deep stab wound approximately 5cm in size running horizontally from the right to the left side of the anterior chest wall. The stab had fractured the sternum and pierced through the sixth intercostal space. The right lung lobe had been cut and the heart generally shattered. PW3 formed an opinion that the cause of death of Phillip was internal haemorrhage due to the deep stab wound on the chest that injured the lung and the heart. He filled in a Post Mortem Form and produced it in Court.

8. PW5 did not either witness how Phillip was stabbed as he did not leave the bar. On 11/12/2016, a day after the incident occurred George and **Calvin Ochieng** (the second accused person and hereinafter referred to as '**Calvin**') learnt that their respective homes had been raided by the villagers on allegations that they had killed Phillip and that the villagers were buying for their blood. George hurriedly surrendered to the police at Uriri Police Station whereas Calvin surrendered to the police at Nyatike Police Station.

9. On conclusion of investigations, PW6 formed the opinion to charge George and Calvin with the murder of Phillip. He arraigned them before Court where they were charged with the murder of Phillip. As George and Calvin denied the offence a trial was held and a total of six witnesses testified. The witnesses are the ones I have dealt with their evidence above. PW5 produced the photographs as exhibits.

10. It is the forgone chronology of events that led this Court to find that both the accused persons had a case to answer at the closure of the prosecution's case. Placed on their defences, the accused persons elected to and gave unsworn evidence without calling any witness. They both denied the offence and narrated briefly how they learnt of the burning of their homes by irate members of public on suspicion of killing Phillip and surrendered to the police for their own safety, but were unfortunately charged.

11. At the close of the defence cases, Learned Counsel for the accused persons **Mr. Odondi Awino** and the State relied on the evidence on record and left the matter for judgment. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether or not the accused persons are guilty as charged.

12. As the accused persons are charged with an information of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

13. There is no doubt that the deceased died. PW3, PW4 and PW6 confirmed as such. As to the cause of death, PW3 took this Court through the Post Mortem Form which he prepared after conducting the examination and opined that the cause of death was the stab wound on the chest which had ruptured the lung and heart. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence. The first ingredient is answered in the affirmative.

14. On the second ingredient as to whether the accused persons unlawfully caused the death of the deceased, none of the witnesses testified to have ever seen Calvin either at the bar or the scene or even assaulting the deceased. It was PW1 who narrated how he witnessed George quarelling with Phillip in the bar and after they were ejected from the bar PW1 again saw George stab Phillip on the chest. PW1 was so close to Phillip that the item which stabbed Phillip also scratched him. He had seen George so well in the bar and even outside and he unmistakably knew him as George not only came from the same Kambogo village with PW1 but had been in the same class at School.

15. I have carefully considered the prosecution evidence and the defenses before Court. On placing the prosecution's evidence and the defences side by side, I find that the prosecution proved that it was only George that stabbed Phillip. The prosecution evidence against George was well corroborated by PW3, congent and water-tight. The witnesses testified before Court and were quite forthright and answered all questions put forth. I formed the opinion that they were truthful and hence believable. I therefore find that it was the George who unlawfully caused the death of Phillip. Therefore, the second ingredient is also answered in the affirmative against George and in the negative against Calvin.

16. As to whether there was malice aforethought when George caused the death of Phillip, the starting point is the law. **Section 206** of the Penal Code defines 'malice aforethought' as follows:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

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(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 fight or escape from custody of any person who has committed or attempted to commit a felony.

17. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

i) The intention to cause death;

ii) *The intention to cause grievous bodily harm;*

iii) *Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.*

*It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions (1975) AC 55*". (emphasis added).*

18. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the conviction of murder with manslaughter observed: -

There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

19. In this case there was evidence that the fight was spontaneous. It all began when George danced with a lady whom Phillip had been dancing with before. That led to exchanges and a fight broke out between George and Phillip. There is also evidence that it was Phillip who started the fight by hitting George with his fist. In those circumstances I find no evidence of malice aforethought and the third ingredient fails.

20. A fortiori, the foregoing analysis does not therefore support a conviction in respect of the information of murder against George who is now found not guilty of the murder of Phillip and he is hereby acquitted. However, Phillip lost his life as a result of the actions of George, but of course without any malice aforethought.

21. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analyzed hereinabove, this Court finds **GEORGE OMONDI**, the first accused person herein, **GUILTY** of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

22. The second accused person, **CALVIN OCHIENG** is found **NOT GUILTY** of the offence of murder of Phillip or any other offence connected with the death of Phillip and he is hereby set at liberty unless he is otherwise lawfully held.

23. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of February, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Odondi Awino, Counsel for the Accused persons.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.