



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 2 OF 2016

REPUBLIC PROSECUTOR

VERSUS

KENNETH OTIENO MULAA..... ACCUSED

JUDGMENT

1. **Kenneth Otieno Mulaa** is 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 5th day of January 2016, at **Chikongo** sub-location of **Butula** District of **Busia** County, murdered **Chrispinus Ochieng Ogutu**.
3. The prosecution case is that on the material day at about 5 p.m., the deceased raised an alarm. The accused was found sitting on his stomach and was punching him on the head. The deceased sustained ruptured gut which subsequently led to his death.
4. In his defence the accused contended that he only slapped the deceased after he allegedly insulted him in front of children.
5. The issues for determination are:
 - a) Whether the accused just slapped the deceased or he beat him in the manner described by Annalisa Ochieng (PW1);
 - b) Whether the beating by the accused resulted in the death of the deceased; and
 - c) Whether the action of the accused amounted to murder.
6. For an offence of murder to be proved, the prosecution has the onus of proving the following ingredients beyond any reasonable doubt:
 - (a) the death of the deceased;
 - (b) that the accused committed the unlawful act or omission which caused the death of the deceased; and
 - (c) that the accused had the malice aforethought.

In the case of **Republic vs. Andrew Mueche Omwenga [2009] eKLR**, D. K. Maraga J, as he then was, spelled out the ingredients as follows:

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 that 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.

7. Annalisa Ochieng (PW1) is a 14 years old girl and a daughter of the deceased. She testified that at about 5 p.m. she was in their house. She heard her father raise an alarm. When she went out to check, she found the accused sitting on her father's stomach and punching him on the head. She went and called her uncle Kevin who separated the two. The accused on the other hand contended that the deceased was drunk. He quarreled him and told him that he had left his wife to other men. This was in the presence of some children. He slapped the deceased on the cheek. The following day he learnt that he had passed away.

8. These are two conflicting versions. The post mortem findings were as follows:

- a) No signs of external injuries;
- b) There was greenish froth from both nostrils;
- c) Spillage of gut contents into the abdominal cavity; and
- d) Perforation of the small gut.

Dr. Hillary Kiplagat (PW3) who performed the post mortem was of the opinion that the cause of the death was septicemia secondary to ruptured gut secondary to blunt trauma to the abdomen.

9. The version of Annalisa Ochieng (PW1) was corroborated by the medical evidence to the extent that the accused did not merely slap the deceased. Her uncle Kevin who allegedly separated the two was not called as a witness and no explanation was given. He could have shed more light on what transpired.

10. Though the accused contended that he only slapped the deceased on the cheek, the evidence by the doctor did not support this contention. The deceased had a blunt trauma to the abdomen.

11. The prosecution did not adduce evidence that the accused was armed with any weapon. I am persuaded to make an inference that the accused did not have malice aforethought given his explanation as to the cause of their differences. The offence of murder was not therefore proved.

12. I however find that the prosecution has proved the lesser offence of manslaughter contrary to section 202 of the Penal Code. I find him guilty and accordingly convict him.

DELIVERED and SIGNED at BUSIA this 21st day of February, 2019

KIARIE WAWERU KIARIE

JUDGE