



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 114 OF 2014

REPUBLIC.....PROSECUTOR

-VERSUS-

1. DAN OJJI OJJI *alias* MZEE SULWE

2. FELIX OMONDI OJJI

3. FELIX OKOTH JOSHUA...ACCUSED

JUDGMENT

Introduction:

1. The death of **John Ogwen Maganda *alias* Lule** (hereinafter referred to as '**the deceased**') who hailed from Kadem village, Mitei Location of the Nyatike Sub-County in Migori County on 25/11/2014 remain a mystery to date.

2. Out of police investigations **Dan Ojji Ojji *alias* Mzee Sulwe**, the first accused person herein, **Felix Omondi Ojji**, the second accused person and **Felix Okoth Joshua**, the third accused person were arrested and charged with the murder of the deceased. The accused persons denied committing the offence and the case was set for hearing.

The Trial:

3. Fourteen witnesses testified in support of the information facing the accused persons. **PW1** was the Chief of Mikei Location within Nyatike Sub-County one **David Oula Otieno**. **PW2** was **Charles Otieno Kizia** who was a Gold Prospector in Nyatike Sub-County as well as one **Charles Otieno Okumu** who testified as **PW3** and also one **James Otieno Odongo *alias* Lorna** who testified as **PW8**. **Kefa Ogembo Miko** who testified as **PW4** was a Cashier at Dearland Bar in Nyatike which Bar was owned by one **Dismas Mikuru Nyambogi** who testified as **PW10**. A son to **PW10** testified as **PW12**. He was **Andrew Omondi Mikuru**. A brother to the deceased one **Julius Mang'ira Maganda** testified as **PW5** and the Father to the deceased one **Richard Maganda Mang'ira** testified as **PW6**. The wife to the deceased one **Mary Atieno Richard** testified as **PW7**. A businessman who owned a house near the Dearland Bar which house was next to the place where the deceased was found dead testified as **PW9**. He was **Odhiambo Joannes Onguka**. Another businessman who had a house next to Dearland Bar and had rented two rooms to **PW10** testified as **PW13**. He was **Joas Owino Odindo**. **Dr. Ndege Jared** who conducted the post mortem examination on the body of the deceased testified as **PW11** and **No. 79589 Corp. James Nzioka** who was one of the investigating officers testified as **PW14**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified. Part of the evidence of **PW2** and that of **PW3** were recorded before my sister **Omondi, J.** upon complying with **Section 200(3)** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya. This Court also complied with **Section 200(3)** of the **Criminal Procedure Code** before it took the rest of the evidence.

4. The prosecution's case was that the deceased was murdered by the accused persons herein. Evidence was called and all the witnesses gave their versions of what happened. There were several issues which were not in dispute in this matter. They included **PW10** being the owner of the Dearland Bar (hereinafter referred to as '**the Bar**') situated at Osir Junction in Nyatike and **PW12** being a son to **PW10**; that in the evening of 25/11/2014 several patrons gathered in the bar and variously had drinks including **PW2**, **PW3**, **PW8** and the accused persons herein. It was also not disputed that **PW10** and **PW12** were at the Bar on the said day but on different times and that **PW4** was the Bar Cashier.

5. The events that took place in the bar in the evening of 25/11/2014 were narrated by those who were inside the bar. **PW2**, **PW3**, **PW4**, **PW8** and **PW12** were all unanimous that there was a fight inside the bar. They all testified on how the fight began: The accused persons occupied one of the tables in the bar as they took drinks whereas **PW2**, **PW3**, **PW8**, the deceased, **Joseph Otieno *alias* Otis** (not a witness) and others occupied another table. At one time the deceased visited the toilets and on his way back he accidentally knocked the table that was occupied by the accused persons. Some beer was splashed, bottles fell and broke. The accused persons put the deceased to task as to why he knocked their table. A confrontation arose as both groups were drunk. The third accused person slapped the deceased prompting those who were with the deceased to intervene. A fight broke out. Within a very short period the two groups engaged in a very fierce fight which involved the use

of tables, chairs and bottles. PW12 and the Watchman attempted to intervene in vain.

6. The fight then moved outside the bar and continued. PW12 also followed them. The main entrance to the bar was locked. PW4 and the other workers were inside the bar as the fight continued outside. There was however a mismatch on what happened to the deceased after the fight was over. According to PW2, PW3, PW8 and the accused persons the deceased was rescued by PW12 and one **Joseph Otieno alias Otis** from outside the bar and locked inside one of the rooms in the bar for his own safety more so that he was too drunk. That, as both groups left, the deceased in the hands of PW12 who was not only the Bar Manager but also a relative to the deceased.

7. There was another version on what happened to the deceased. That was by PW12 and PW4. They contended that the deceased did not return into the bar after the fight moved outside. PW12 testified that after he rescued the deceased he left him walk towards his group which was in their car outside the bar as he left in the company of one **Lawi** (not a witness) for home. PW4 stated that after the fight was over he was the first to leave the bar leaving the rest behind including the Manager and his son and that the deceased was not in the bar.

8. That being so, there was a general consensus among those who were at the bar during the fight that the deceased was not seriously injured if at all. However, the mystery compounded when the deceased was no where to be seen the following day.

9. PW3 was called by the younger wife of the deceased in the morning of the following day and asked of the whereabouts of the deceased as the deceased had not returned to his home since he left the day before. Since PW3 was clear that the deceased was left in the custody of PW12 he proceeded to the Bar where he found PW12. On enquiry of the whereabouts of the deceased PW12 replied that:

Lule (deceased) left first after you people left, he left running...

10. PW3 further probed PW12 on why he left the deceased to leave and yet he was so drunk and PW12 informed him that the deceased escaped when he had left him with the Watchman and ran off following his companions. PW3 went to Nyatike District Hospital to look for the deceased in vain. He then reported the disappearance of the deceased to the police. As word went round the village about the disappearance of the deceased, the villagers assembled at the office of PW1 and sought his assistance as they wanted to search the Bar. PW1 informed the police who sent two officers to oversee the exercise. The officers included PW14. The search was conducted in the Bar, the surrounding buildings and the nearby bushes. There were two holes which were dug but not covered and had water inside. The members of public organized for a generator and pumped all the water from the holes and nothing was found. The villagers then organized for searches in groups around the village.

11. It was until the afternoon of 28/11/2014 when the villagers broke even. The deceased was found but he was not alive. Surprisingly, the deceased was found in one of the holes which the villagers had emptied the water earlier in vain. PW1 was informed and in turn called the police who moved to the scene. The atmosphere was charged. The villagers were baying for the blood of PW10 and his employees. The police rescued them to the police station where PW10 was held until the following morning for his own security.

12. The villagers rioted; they demolished the bar and the houses of PW9 and PW13. However, the police managed to quell the riots and with the aid of some villagers retrieved the body of the deceased from the hole. The body had serious injuries; two wide cuts on head and the cornea of the right eye was protruding. Blood was oozing from the mouth, nose, ears and the right eye. The police then photographed the body and the scene which included one of the incomplete rooms in PW13's house which had some fresh blood on the inside of the door and the wall. The body of the deceased was then taken to the Migori County Referral Hospital Mortuary for preservation.

13. A post mortem examination on the body of the deceased was carried out the following day by PW11. PW5 and PW6 identified the body and also witnessed the examination. PW14 was also present during the examination. PW11 confirmed the injuries on the outside of the body and also opened the body. He confirmed two fractures on the head and rupture of the spleen. He opined that the cause of the death of the deceased was the rupture of the spleen and the twin fractures on the head which all caused extensive bleeding.

14. PW11 clarified that the deep cuts were certainly caused by a sharp object, but not a fist and that there were no penetrating injuries. On why the body had fresh blood oozing PW11 stated that the blood was not fresh as it was altered and there were clots on the nose and mouth. He explained that blood can ooze from a dead body even for a week depending on the body's ability to make the blood clot and that rotting of the body starts immediately the blood stops moving. PW11 assessed the time of death as at least 24 hours as *rigor mortis* was setting in.

15. The police continued with investigations and interrogated several people. Witnesses recorded statements. At the conclusion of the investigations the accused persons were arraigned before Court and charged with the murder of the deceased. They were prior thereto mentally assessed and found fit to stand trial.

16. During the trial, the photographs and the Certificate thereof, Post Mortem Form, Sketch Plan and the Mental Assessment Forms for the three accused persons were variously produced as exhibits.

17. At the close of the prosecution's case, the accused persons were placed on their defences and all opted to give sworn testimonies. The first accused person and the second accused person called their respective wives as witnesses. The wife of the first accused person testified as **DW1** and she was **Lizzy Akinyi Orwa** whereas the wife of the second accused person was **Eunice Akinyi Omondi** who testified as **DW2**. The third accused person did not call any witnesses.

18. The accused persons confirmed that the third accused person had accidentally knocked the table which was occupied by the group of the deceased, but denied any fight having ensued. They contended that the two groups just exchanged words and that they left. They however confirmed that as they were outside the bar with the other group and before they left on a motor cycle they saw the deceased taken by PW12 and Otis back into the bar as he was very drunk. They were really astonished to learn that the deceased was found dead with such injuries and contended that PW10 and PW12 were best suited to explain what happened to the deceased.

19. At the close of the defence case, Learned Counsels urged this Court to be guided by the evidence and render a 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 of the offence of murder.

Analysis and Determinations:

20. 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.

21. I will deal with the ingredients separately.

(i) Proof of the fact and the cause of death of the deceased:

22. There is no doubt that the deceased died. Several witnesses so confirmed. As to the cause of death, PW11 took this Court through the Post Mortem Form which he prepared after conducting the examination and opined that the cause of death was serious bleeding caused by the twin fractures on the head (caused by a sharp object) and the rupture of the spleen (caused by a blunt object). 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.

(ii) Whether the death of the deceased was the direct consequence of any unlawful act or omission on the part of the accused persons:

23. Whereas the accused persons denied that there was any fight in the bar, the evidence of PW2, PW3, PW4, PW8 and PW12 outweighed that of the accused persons. The evidence of the prosecution witnesses on the issue was very consistent and independently corroborated. It also withstood the test of examinations. I therefore find and hold that there was a fight in the bar which began when the deceased accidentally knocked the table occupied by the accused persons. I am further persuaded that the fight became so fierce as the two sides engaged and that the fight moved outside the bar.

24. As to whether the deceased left with his companions or was left in the custody of PW12 after the fight, two opposite versions came to play. The first version was by PW2, PW3, PW8 and the three accused persons and the second version was by PW4 and PW12. According to PW12, he did not work at the bar at all but had gone to watch a football match when he witnessed the fight. That, he took part in separating those fighting and followed them outside the bar. He witnessed the first accused person holding the deceased by the neck as the deceased fell on the ground and that the deceased called for his help. That, he intervened and rescued the deceased who was by then bleeding from the nose and the head. That, after successfully rescuing the deceased, the deceased joined his companions who were waiting in their car as he left the scene with one **Lawi** (not a witness) and went home. PW12 stated that he never went back into the bar after the fight, but proceeded home.

25. PW4 testified that when the fight extended out of the bar, the Watchman one **Clinton** (not a witness) locked the main front steel door and that he remained inside the bar with the watchman and the waiters. That, after the fight was over he was the first one to leave for home about an hour later and left behind the watchman, the Manager, a son to the Manager and the waiters. PW4 however did not disclose the names of the Manager and the son to the Manager.

26. PW12 testified that he was not involved in the running of the bar, but it was his father (PW10) and that PW10 did not allow any of his children to be engaged in the management of his businesses and that he had only gone to the bar to watch football. Even if this Court is to believe that piece of testimony and hold that the Manager of the bar was PW10, then according to PW4 the son to PW10 was at the bar an hour after the fight and that PW4 left the son behind as he left. There was only one son of PW10 at the bar during the fight and he was PW12. It therefore meant that PW12 was at the bar long after the fight ended and his contention that he left immediately the fight stopped is untruthful.

27. PW2, PW3, PW8, the first and second accused persons hailed from Osir area and were regular patrons in the bar and knew PW12 quite well. The first accused person testified that PW12 was the Manager of the bar. PW8 was also aware that PW12 related to the deceased by marriage. PW2, PW3, PW8, the first and second accused persons all confirmed that PW12 did not leave the bar after the fight but took the deceased and locked him inside a room as he was drunk. To that end, their testimonies corroborated that of PW4 that the Manager of the bar and his son did not leave the bar immediately after the fight.

28. The conduct of PW12 is also worth looking at. Whereas PW12 stated that he had only gone to the bar to watch football on the night of the fight and that he was not in any way in concerned with the running of the bar, PW8 testified that he met him at the bar the following day and enquired from him the whereabouts of the deceased only for PW12 to inform him that the deceased, whom he had left with the watchman, escaped and followed PW8. It was also PW12 who accompanied PW4 and reported the damage of the tables, chairs and bottles to the police. PW12 also avoided attending Court until the Court, on application by the prosecution, issued Witness Summons which were served through PW10 when he attended Court to testify. It was only after such efforts that PW12 attended Court and said he had all along lacked fare to attend Court.

29. The totality of the evidence of PW12 is that it lacked any corroboration. It was even controverted by PW4. That evidence is not holding and cannot stand. I hence find and hold that PW12 took custody of the deceased after the fight and took the deceased to rest as he was drunk as the two groups which had fought left the bar and that the deceased did not leave with his companions. It is therefore PW12 who ought to have explained the whereabouts of the deceased.

30. There was another lead pointing to the possible culpability of PW12. The bar had two rooms which served as its store in the building which was owned by PW13. One room was for empty bottles and breakages whereas the other was for beer yet to be consumed. The room wherein the police found the fresh blood and even took samples for further analysis was in the same building owned by PW13 and it was incomplete hence easily accessible. PW14 testified that he had collected blood samples from that room and forwarded them to the Government Analyst for analysis together with the blood samples of the deceased but the results were not out from 18/12/2014 until when PW14 testified on 28/11/2018. However, no effort was made to issue Summons to the Analyst to attend Court and explain the status of the analysis. By doing so, the police left out a crucial lead as to whether the blood which was inside the room was that of the deceased. Had the results been availed and proved that the blood in the room was that of the deceased then PW12 would have had to explain how the deceased found his way into that room and how his blood was on the door and the wall.

31. There was yet another angle to the matter. Two crucial witnesses were not called by the prosecution and no reasons were given for such. They were the Watchman and Joseph Otieno alias Otis. PW8 stated that when he went to enquire from PW12 on the whereabouts of the deceased a day after the fight PW12 told him that he had left the deceased in the company of the Watchman and PW12 only learnt that the deceased had escaped. Further, there was the said Joseph Otieno alias Otis who according to PW2, PW3, PW8, the first and second accused persons took the deceased together with PW12 into a room inside the bar after the fight. PW7 (the wife to the deceased) also stated that Otis had told her that he had taken the deceased together with PW12 and put him in a room in the bar to rest before he left the bar. The two were not only potential witnesses, but their evidence would have gone a long way to put PW12 to task on what happened to the deceased. That evidence was avoided.

32. Another issue worth consideration was raised by PW5. It was his testimony that he received information that two young boys had seen the workers at the bar remove the body of the deceased from a room and dump it inside the hole where it was found. That, he even accompanied PW14 to the homes of those children but the parents to the children were unco-operative. PW14 did not testify on the issue even after PW5 had raised it before Court. The issue was hence not denied. PW14 did not give any explanation as to why the children were not availed as witnesses or how he dealt with the issue and made a decision not to consider the children as witnesses. Had the said children testified and confirmed what PW5 said, it would once again be on PW12 to explain. This Court cannot therefore resist the inference that PW12 had a lot to do with the deceased and that he was untruthful in his evidence. This Court is also not lost to the fact that the absence of the Watchman, Otis and the children had the impact of shielding PW12 from the events that led to the death of the deceased.

33. The accused persons cannot therefore be called upon to account for the whereabouts of the deceased whom they left with PW12 neither are they in a position to explain the fatal injuries which the deceased did not sustain during the fight. It was the evidence of those who witnessed the fight including PW12 that the deceased did not sustain any deep injuries on the head. However, PW11 testified on the injuries and noted that the injuries on the head had fractured the head and were caused by a sharp object. Again, the witnesses confirmed that no sharp objects were used in the fight.

34. The foregoing analysis unveils the finding that the accused persons were not in any way connected with the death of the deceased. They were only charged to cover up the involvement of PW12 in the death of the deceased. I therefore find and hold that none of the accused persons caused the death of the deceased.

35. The upshot is that the charge of murder against the accused persons is not proved and the accused persons are hereby found **NOT GUILTY** of the murder of **John Ogweno Maganda alias Lule** and are hereby set at liberty forthwith unless otherwise lawfully held.

36. Lastly, I must highly appreciate the immense co-operation accorded to this Court by **Mr. Mudeyi** and the prosecution in enabling this Court to hear the matter at Rongo Law Courts when the third accused person was involved in a near fatal accident (not related to this case) and had to be carried to Court for the hearings.

37. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of March, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Mudeyi Counsel for the Accused person.

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

Evelyne Nyauke – Court Assistant