



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL CASE NO. 13 OF 2017**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**GEORGE OWUOR OTIENO.....ACCUSED**

**JUDGMENT**

1. Arising out of a commotion at the Ulanda Trading Centre in South Sakwa Location within Migori County in the afternoon of 24/06/2017, the deceased herein, **Gadafi Lucas Owino Warinda**, was found lying dead at the said centre with injuries on his head and body. Out of police investigations, the accused person herein, **George Owuor Otieno**, was charged with an information on the murder of the deceased. He denied the information and a trial was held.

2. Eight prosecution witnesses testified in support of the information. **PW1** was **Francis Juma Onyango** who partly testified-in-chief and was stood down due to the lateness of the hour but was never recalled. **PW2** was **Samuel Rairo Okello** then an Assistant Chief whereas **PW3** was an arresting officer **No. 218785 A. Corp. Paul Rop** attached at Mariwa AP Camp. The father to the accused person testified as **PW4**. He was **Samuel Owuor Owuor** whereas an uncle to the accused person one **Pharis Peter Ngesa Okwaro** testified as **PW5**. **Dr. Ian Omolloh** who conducted the post mortem examination on the body of the deceased testified as **PW6** and a Government Analyst **Mr. R.K. Langat** based at the Government Chemist Laboratory in Kisumu City testified as **PW8**. The investigating officer one **No. 235511 Insp. Simon Mateva** who was then attached at Awendo Police station testified as **PW7**. I will refer to the witnesses in the sequence in which they testified before Court.

3. The prosecution's case was based on circumstantial evidence as there was no eye-witness account on how the deceased met his death. Since **PW1** did not even finish his examination-in-chief and was therefore not cross-examined I will disregard his evidence. **PW2** was called by one of his village elders **Jacob Okello Wanga** (not a witness) on 24/06/2017 at around 1700Hrs and was informed that the accused person had killed the deceased. He rushed to the scene at Ulanda trading centre and saw the lifeless body of the deceased. He called and informed the D.O. Awendo and the OCS Awendo Police Station. **PW2** observed the body of the deceased and noted injuries on the head, stomach and the back. Shortly **PW4** arrived at the scene and informed **PW2** that he had received information that the accused person (who is his son) was hiding in a sugarcane farm near **PW5's** homestead. When the police officers from Awendo Police Station arrived at the scene **PW2** left with some Administration Police officers from Mariwa AP Post including **PW3** to search for and arrest the accused person.

4. **PW5** had also received information about the killing of the deceased by the accused person and was further told that the accused person had been found around his homestead. **PW5** quickly called **PW2** and asked him to avail police officers at his homestead to arrest the accused person. **PW5** rushed to his home and searched the accused person in the sugarcane farm in vain. He then called the name of the accused person and the accused person responded from a latrine. **PW5** went and politely talked to the accused person and asked him to co-operate with the administration for the sake of his life. The accused person agreed and when **PW5** arrived with **PW3** and other police officers **PW5** handed over the accused person to the police and the police rushed the accused person to Mariwa AP Post as *boda boda* riders pursued him. The accused person was later that evening taken to Awendo Police Station.

5. In his testimony **PW2** identified the clothes the accused person wore at the time of arrest. They were a grey long trousers and an orange T-Shirt. **PW7** investigated the case. On receiving a call from **PW2** about the death of the deceased he quickly mobilized some officers and rushed to the scene. They found the body of the deceased lying facing up with fresh stab injuries on the face and abdomen. He interrogated several people at the scene and collected the body which was taken to Rapcom Mortuary in Awendo for preservation and further police action.

6. On 25/06/2017 **PW7** revisited the scene and also proceeded to **PW5's** homestead where the accused person was arrested by **PW3**. **PW7** conducted a search of the area around the latrine where the accused person was found hiding and recovered a knife. **PW7** went back to the station and took possession of the clothes the accused person wore which had visible blood stains.

7. **PW7** organized for a post mortem examination of the body of the deceased and **PW6** conducted it on 27/06/2017 at Rapcom Medical

Centre in Awendo. PW6 confirmed several stab wounds on the body with a lot of internal bleeding. The cause of death was opined to be exsanguination secondary to hemorrhagic shock due to assault. PW6 filed in a Post Mortem Report and produced it as an exhibit.

8. During the post mortem examination, PW7 obtained blood samples of the deceased and forwarded the same alongside the accused person's clothes and the knife to the Government Chemist in Kisumu for analysis. It was PW8 who conducted the examination. PW8 successfully generated DNA profiles from all the four items received from PW7 being the long trousers, the T-Shirt, the knife and the blood samples and subjected them to a DNA Analyzer where the DNA profiles generated from the long trousers, the T-Shirt and the knife all matched the DNA profile of the deceased. PW8 concluded that the long trousers, the T-Shirt and the knife had the blood of the deceased. PW8 prepared a Report which he produced as an exhibit.

9. PW7 processed the accused person by escorting him for mental examination at the Migori County Referral Hospital on 03/07/2017 where he was found fit to stand trial. PW7 then formally charged the accused person with the murder of the deceased and produced the Mental Assessment Report, the knife, the long trousers, the T-Shirt and the Exhibit Memo Form as exhibits.

10. At the close of the prosecution's case, the accused person was placed on his defence and elected to give unsworn evidence without calling any witness. The accused person denied committing the offence and raised an *alibi* defence that he was instead with his grandmother at Utoma village at the alleged time the incident took place.

11. At the close of the defence case, Learned Counsels left the matter for this Court's judgment. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether the accused person is guilty of the offence of murder. As the accused person is charged with the offence 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.**

12. There is no doubt that the deceased died. All the witnesses so confirmed except PW8. As to the cause of death, PW6 took this Court through the Post Mortem Report which he personally prepared and opined that the cause of death was exsanguination secondary to hemorrhagic shock due to assault. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence and finds that the deceased was fatally wounded.

13. As to who caused the fatal injuries on the deceased, the prosecution relies on circumstantial evidence. The Court is hence called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

**(i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;**

**(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**

**(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.**

14. The foregone principles were set out in the *locus classicus* case of ***R -vs- Kipkering arap Koske & Another (supra)*** and have repeatedly been used in subsequent cases including the Court of Appeal cases of ***GMI -vs- Republic (2013) eKLR***, ***Musii Tulo vs. Republic (2014) eKLR*** among many others.

15. The Court of Appeal in the case of ***Musii Tulo (supra)*** in expounding the above principles expressed itself as follows:-

**4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v. R (1958) EA 715* citing with approval *Teper v. R (1952) AL 480* thus: -**

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

16. The prosecution heavily relies on the scientific evidence contained in PW8's Report in an attempt to connect the accused person with the commission of the offence. PW7 contend that the knife was the murder weapon and the presence of the blood of the deceased on the clothes of the accused person confirm that it was the accused person who stabbed the deceased whose blood stained the accused person's clothes. But the accused person raised an *alibi* defence.

17. In his Report PW8 stated as follows: -

**Every person has a unique DNA which is acquired from his/her parents who contribute half each from biological mother and father. By examining the DNA from a blood sample or any body fluid, it is possible to determine the origin of the blood or body fluid given the blood samples or body fluid of the suspects.**

18. PW8 examined the blood stains which were on the accused person's clothes and the knife and compared them with the blood sample of the deceased and they all matched. As PW7 puts it, and with the approval of this Court, the only reasonable conclusion one can make is that the knife is the murder weapon and the one who wore the clothes which had blood stains of the deceased is the assailant. The *alibi* defence cannot therefore stand in the face of the scientific evidence and is for rejection.

19. Looking at the whole body of evidence, this Court is convinced that the events in this case taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the deceased was fatally wounded by the accused person and no one else. I equally find that there are no other co-existing circumstances which would weaken or destroy that inference. The second ingredient of the offence of murder is therefore proved.

20. As to whether there was malice aforethought in the accused person causing the death of the deceased, 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: -**

**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.**

21. 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).**

22. 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.***

23. In this case there was no evidence of what exactly happened leading to the accused person stabbing the deceased. There was also no

evidence of bad blood between the deceased and the accused person. In those circumstances I find no evidence of any motive on the part of the accused person and the third ingredient fails.

24. A fortiori, the foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

25. 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 the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and is hereby convicted accordingly.

26. These are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 26<sup>th</sup> day of July 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Mwita Kerario**, 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.