



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL CASE NO. 13 OF 2018**

**THE REPUBLIC.....PROSECUTOR**

**=VRS=**

**1. HASSAN SHARIF AHMED.....1<sup>ST</sup> ACCUSED**

**2. EVANS ANYOKA MONGARE.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

The accused persons are charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 31<sup>st</sup> August 2018 at Nyamira Township in Nyamira South Sub-county within Nyamira County the accused persons murdered Roberto Carlos Ouma.

The accused persons pleaded not guilty to the charge and were represented at the trial by Mr. O M Otieno and Mr. Bwonwong'a Advocates respectively.

The prosecution called a total of ten witnesses after which the 1<sup>st</sup> accused testified on oath and the 2<sup>nd</sup> accused made an unsworn statement.

Briefly the facts of the case are that the occurrence that led to the death of the deceased took place at Seasons Bar in Nyamira Township on the night of 31<sup>st</sup> August 2018. The deceased had arrived at the Club at about 10pm in the company of his friend David Ochieng Opondo (Pw1) who at the time was working as a guard at Riley Security Limited. They soon settled at a table and started drinking and when a more comfortable table was vacated they moved there. Then the deceased left Pw1 at the table and went outside. Pw1 initially thought he had gone to the washroom and did not take much notice of it but when the deceased took an inordinately long time to return he decided to go find him only to find him in what appeared to be a discussion with four men who had surrounded him. Pw1 called the deceased by his name and they went back into the Club but the deceased did not despite prodding by Pw1 disclose what the discussion with the four men was about or whether he knew the four men. Then the deceased who seemed a bit disconcerted told Pw1 he was looking for a girl to marry. After about 40 minutes the deceased left the table again. This time Pw1 waited for two minutes then followed him outside and found there were six or seven people with the deceased at the same spot he had found the deceased earlier. He called the deceased but as the deceased turned towards him in order to enter the bar he was grabbed by the 1<sup>st</sup> accused person. Soon a fight broke out between them. Pw1 went and got hold of the deceased by the waist and pulled him into the bar with the help of a guard at the Club but part of the group followed him (Pw1) while the other group followed the deceased. The 1<sup>st</sup> accused then pulled the deceased outside and the brawl continued. It was then that the guard (Pw4) went and pushed the warring parties away from the parking. Pw4 stated that after a while the deceased was overpowered by the assailants and he saw him go to the place he had parked his motor cycle and returned with a panga but before he could do anything with it the 1<sup>st</sup> accused took it from him and started brandishing it saying people would know he was a police officer from Somali. This court heard that initially brawl was between the deceased and the 1<sup>st</sup> accused but soon others including the 2<sup>nd</sup> accused joined in saying that they could not watch the deceased engage their boss. Pw1 stated that he saw the 2<sup>nd</sup> accused hit the deceased as he lay down. He also stated that the accused persons and the other assailants continued beating the deceased while he lay on the ground and that he saw the 2<sup>nd</sup> accused stepping on the deceased. Pw4 stated that the other assailants joined the 1<sup>st</sup> accused when he pushed them (1<sup>st</sup> accused and the deceased) away from the cars in the parking lot. The witnesses stated that there was security light at the scene and they could see what was happening.

Pw1 stated that some time into the “fight” the deceased went silent and would not make a sound even when he was hit. It was at that juncture that he decided to leave the scene and report the matter. However, as he was walking towards the station he saw and heard people who were on a motor cycle identifying him as the person who had been with the deceased and fearing for his life he went and hid somewhere and later went home. It was not until the next day that he learnt of the fate that had befallen his friend.

After Pw1 left the scene the 1<sup>st</sup> accused and the 2<sup>nd</sup> accused went to the Administration Police Lines and called two officers (Pw6 and Pw7) and the 1<sup>st</sup> accused claiming that he was under attack requested them to accompany him back to the scene which they did but upon seeing

them the crowd at the scene dispersed and melted into the night. It was these officers who advised the 1<sup>st</sup> accused to take the deceased to hospital. They put the deceased on the 1<sup>st</sup> accused's motor cycle and the 1<sup>st</sup> and 2<sup>nd</sup> accused who was its regular rider took the deceased to the Nyamira County Hospital in the company of the 1<sup>st</sup> accused and his colleagues Pw6 and Pw7. After that they all went to Nyamira Police Station and made a report. About an hour later the deceased succumbed to the injuries.

James Ouma Achanja (Pw2), the deceased's father told this court that it was him and two other people who knew the deceased who on 3<sup>rd</sup> September 2018 identified his body to the doctor who performed the post-mortem. According to the post-mortem report the deceased was bleeding from the nostrils and both ears and had injuries on both left and right temporal regions, a bruise on the forehead, a cut wound on the left wrist measuring about 4cm and injuries to both lower parts of his eyes. Cause of death was opined to be cardiopulmonary arrest with major cause being intracerebral haemorrhage. In his testimony Dr. Ombati (Pw10) simplified that to mean bleeding to the brain which caused it not to work properly. He opined that the type of weapon used was a sharp object.

Sgt. Jerida (Pw8) confirmed that the two accused persons lodged a complaint at the station that very night. She also confirmed that (Pw4) a guard at the Club had also reported an assault on him by the 1<sup>st</sup> accused the same night. She stated that after causing the reports to be recorded she left the matter to her superiors. The case was thereafter assigned to Corporal Njeru (Pw9) who testified that after recording statements from the witnesses he charged the accused persons with this offence.

In his defence the 1<sup>st</sup> accused maintained he did not kill the deceased. He testified that on the material day at about midnight he called the 2<sup>nd</sup> accused, who used to ride his motorcycle, to his house at the Administration Police line so that he could take him (1<sup>st</sup> accused) to buy a soda and because there was no shop that was open at that hour they went to a shop adjacent to Seasons Bar. He stated that before he got into the shop he was attacked by a man he had not seen before. The man held him by the collar, slapped him on the face and continued raining blows on him. He stated that being a police officer all he could do was ward off the man's blows. After a while he fell and got injured on the palm and it was at that point that his attacker went for a panga from his motor cycle. The attacker attempted to cut him but missed him. As the attacker made a second attempt to cut him he got hold of his hand and they fell and rolled on the ground. Bystanders separated them and he disarmed the man. He then moved away and called his colleagues but the man was very angry and would not surrender and tried to free himself from the men who were restraining him. The accused testified that he did not hit the man at all. He stated that when his colleagues delayed in going to the scene he went to the police lines and told APC Samuel Matanga and the other colleague what had happened and requested them to accompany him to the scene to arrest the man. After informing their superior they proceeded to the scene. He stated that when people at the scene saw them they fled. He testified that the man who had attacked him was injured and was lying on the ground. He contended that the man did not have injuries when he left to get his colleagues and maintained that he did not know how the man sustained those injuries. He stated that it was his superior who instructed him and the 2<sup>nd</sup> accused to take the man to hospital which they did and he was admitted. He stated that he did not know the people at the scene. He contended that him and the 2<sup>nd</sup> accused did not participate in the assault on the man at all. He described the evidence of the prosecution witnesses as falsehoods. He however admitted that evidence by Pw4 that he slapped him was true and stated that he slapped Pw4 because he tried to snatch the panga from him.

The 2<sup>nd</sup> accused stated that he is a boda boda operator employed by the 1<sup>st</sup> accused. He narrated how the 1<sup>st</sup> accused called him at about midnight and asked him to take him a soda. When he told the 1<sup>st</sup> accused the money he had was not enough the 1<sup>st</sup> accused told him to pick him at the camp. He stated that after that they went to Seasons and he remained on the motor cycle as the 1<sup>st</sup> accused went to the shop. After about 5 minutes the 1<sup>st</sup> accused came back with a panga and his phone in his hand. He stated that the 1<sup>st</sup> accused used the phone to call his colleagues but the colleagues did not come so they went and picked them. After that they went back to Seasons but when the people saw the 1<sup>st</sup> accused's colleagues who were in full uniform they fled the scene. He stated that there was a man lying on the ground. They took the man to the hospital and then the officers told him to take them to the police station to make a report. From the police station he went home and slept. He stated that thereafter he went about his business as usual until the chairman told him his motor cycle was suspected to have been involved in a crime. He contended that he was shocked to hear he had killed someone.

For the prosecution to prove the charge against the accused person, it was required to prove the following ingredients of murder beyond reasonable doubt: -

- (a) The death of the deceased and the cause of that death.**
- (b) That the death was caused by an unlawful act of the accused persons.**
- (c) That the accused persons acted of malice aforethought.**

The death of the deceased is not in doubt. The two accused persons admitted that they took him to hospital on the material day and the deceased's friends David Ochieng Opondo (Pw1) and William Ayodo Okinyi confirmed that it was his body that they saw at the Nyamira Hospital Mortuary the next day. His father James Ouma Achanja (Pw2) also testified, and this was confirmed by Dr. Ombati, that he identified his body during the post-mortem. The identity of the deceased was therefore proved beyond reasonable doubt.

The cause of death as established by the post-mortem was cardiopulmonary arrest due to intracerebral haemorrhage subdural haematoma or in simple language bleeding into the brain thereby causing it not to function properly. That opinion as to the cause of death was not controverted and it therefore stands. The post-mortem shows that the deceased had sustained other injuries on his body.

As to whether the death was by an unlawful act of the accused persons I have analysed and evaluated the evidence on record and the submissions of Learned Counsel and my finding is that there is overwhelming evidence that the accused persons occasioned the death of the deceased. Whereas the accused persons dispute that they went to Seasons Bar they admit that they went to a shop adjacent to the Bar. This and the 1<sup>st</sup> accused's further admission that there was confrontation between him and the deceased and the 2<sup>nd</sup> accused's admission that he too was there albeit not a party to the confrontation places them at the scene. As to their evidence that they did not assault the deceased there is credible and cogent evidence from Pw1 and Pw4 that the two of them assaulted the deceased. Evidence points to the fact that what started

as a brawl between the deceased and the 1<sup>st</sup> accused soon transformed into a full-scale war in which the 2<sup>nd</sup> accused and others turned on the deceased saying they could not watch as he engaged their boss (the 1<sup>st</sup> accused). Pw1's evidence that he pulled the deceased back into the bar after the deceased went outside the second time and he found him surrounded by a group of five people was corroborated by Pw4's evidence that it was the 1<sup>st</sup> accused who pulled the deceased out when Pw1 pushed him inside. Pw4 also testified that he saw the deceased and the 1<sup>st</sup> accused and other people fighting and he in fact went and steered them from the vehicles in the parking lot. It was his evidence that initially the brawl was between the deceased and the 1<sup>st</sup> accused who was soon joined by the 2<sup>nd</sup> accused and other people who were acting in his defence. I find it a fact from the evidence that it was after the deceased was overwhelmed by the 1<sup>st</sup> and 2<sup>nd</sup> accused and their accomplices that he went and got a panga from the motor cycle. The 1<sup>st</sup> accused's evidence that the deceased attacked him with the panga at first instance is therefore not true. Even then we have it on record from Pw4 that as soon as the deceased came with the panga he was disarmed by the 1<sup>st</sup> accused. The 1<sup>st</sup> accused was therefore no longer in danger of being cut with the panga yet he watched as his "gang" assaulted the deceased. It is also my finding and that is borne by the testimonies of Pw1 and Pw4 that it is the 1<sup>st</sup> accused who started the fight. Although he himself did not go into the bar it was him who pulled the deceased outside after he was pushed inside by Pw1 to stop the argument he was engaged in with the 1<sup>st</sup> accused and his companions. Like Pw1, Pw4 testified that the 1<sup>st</sup> accused got hold of the deceased by the jacket and pulled him outside and started beating him. The incident happened at a place that was well lit by electricity and I am satisfied that the witnesses saw what was happening clearly and their identification of the 1<sup>st</sup> and 2<sup>nd</sup> accused and their deduction of the events was free from any possibility of error. The 1<sup>st</sup> accused totally denied assaulting the deceased but as I have stated there is overwhelming evidence that he did. He did not raise the defence of self-defence but it is my finding that even if he had, the same would not have availed him given that although he may not have been the one who started the arguments, there is evidence that it is him who started the fight that subsequently degenerated into an assault upon the deceased. Secondly it was him and five others against the deceased who was alone and thirdly he was able to disarm the deceased of the panga immediately and was not therefore in any imminent danger. Moreover, the deceased had himself gone for the panga to defend himself after being overwhelmed by the accused persons and their accomplices. It is also clear from the evidence that the accused persons and their accomplices continued to assault the deceased even as he lay there helpless as narrated to this court by Pw1 and Pw4. Pw4 was a guard at the bar and was not known to the deceased and although the accused persons were familiar to him, he had no reason to lie against them. This court therefore found his evidence reliable and trustworthy. Pw4's evidence also confirmed that Pw1 was a witness of truth and his evidence was also credible. I find that the accused persons and their accomplices assaulted the deceased without lawful cause thereby inflicting upon him injuries that led to his death. I could not however find evidence that they had planned this assault or that they intended or had knowledge that the same could lead to the death of the deceased or cause him grievous harm. It was an assault in which no weapons were used and so malice aforethought was not established. I therefore find them guilty of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict them accordingly.

**Signed, dated and delivered in open court this 19<sup>th</sup> day of December 2019.**

**E. N. MAINA**

**JUDGE**