



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CRIMINAL CASE NO. 22 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS..**

**GEORGE ODHIAMBO OTIENO.....ACCUSED**

**JUDGMENT**

1. **George Odhiambo Otieno**, the accused person herein, was charged with the murder of his son, **FOO**. The particulars of the information were that the accused person murdered his son on 17/10/2017 at Olando village, God Bondo-Lower Kanyaruanda Location in Nyatike Sub-County within Migori County.
2. The accused person denied committing the offence.
3. A trial was held. The prosecution called six witnesses. **PW1** was the father of the accused person and the grandfather of the deceased. He was called **MOW**. The mother of the deceased one **PA**, testified as **PW2**. **PW3** was a Nurse at Staken Nyarombo Nursing & Maternity Home in Nyatike Sub-County. A younger brother to the accused person testified as **PW4**. He was **JO. Dr. K'ogutu Vitalis Owuor** conducted the post mortem examination on the deceased's body. He testified as **PW5**. The Investigating Officer was **No. 68288 Cpl. Kimel Rono** who testified as **PW6**.
4. The prosecution's case was that on 17/10/2017 at around 01:00pm the accused person tied the deceased and severely assaulted him thereby inflicting serious injuries that led to the death of the deceased. The incident occurred at the home of the accused person in Nyatike Sub-County. **PW2** who was at home by then witnessed the incident. **PW2** intervened but the accused person threatened her with an equal beating. **PW2** retreated and watched as the accused person beat the deceased with a club and a rope until the deceased bled from his ears. The accused person had tied the deceased and later freed him. The accused person who was a fisherman then left.
5. **PW2** observed the deceased. He was injured all over his body. He had visible injuries on the forehead, shoulders and the knees. The forehead was swollen. **PW2** called a neighbour and they administered first aid on the deceased.
6. **PW2** asked the deceased what had happened. The deceased informed her that the accused person did not want him to go to school. That, instead the accused person wanted the deceased to look after some cattle at home.
7. **PW1's** home was adjacent to that of the accused person. As **PW1** was at his home in the afternoon of 17/10/2017 he heard noises from the home of the accused person. He rushed there. He found the deceased crying and bleeding from the ear. The deceased was badly injured. **PW1** asked the accused person what had happened and the accused person told him that he had been informed that the deceased had stolen Kshs. 3,000/= from one of the neighbours. **PW1** directed the accused person to take the deceased to hospital. He then left.
8. The deceased was not taken to hospital, but instead he was treated to a local first aid. In three days the deceased's health had steadily deteriorated. **PW4** and **PW2** rushed the deceased to Staken Nyarombo Nursing & Maternity Home. The deceased was attended to by **PW3**.
9. **PW3** observed the deceased closely. The deceased could not talk or walk and had been carried to the hospital. The deceased was swollen all over his body. As **PW3** was organizing to refer the deceased to Migori County Referral Hospital, the deceased passed on.
10. **PW1** reported the matter at Migori Police Station the following morning. The body of the deceased was transferred from the facility in Nyatike to Migori County Referral Hospital for preservation and further police action.

11. PW6 investigated the matter. He visited the scene which was at the home of the accused person and recovered a rope alleged used in beating the deceased. He also interviewed several people and recorded their statements. On 21/10/2017 PW6 arrested the accused person. PW6 escorted the accused person to the Macalder District Hospital in Nyatike for mental assessment on 22/10/2017. The accused person was certified mentally fit to stand trial. On 23/10/2017 PW6 attended a post mortem examination of the body of the deceased which was conducted by PW5. The accused person was arraigned before Court later that day.

12. PW5 conducted the autopsy at St. Joseph Mission Hospital in Migori. The body had deep bruises on the left leg, left shoulder and the right ear. The forehead was swollen and blood was noted on the right ear. The heart, spleen and liver were enlarged but were not life threatening. There was internal haemorrhage on the forehead. PW5 opined that the cause of death was subdural haemorrhage due to assault caused by a blunt object. PW5 confirmed that the injuries the deceased sustained could not have been caused by a fall due to epileptic fits neither were the enlarged internal organs.

13. PW5 produced the Post Mortem Report as an exhibit. PW6 produced the rope and the Mental Assessment Report as exhibits.

14. At the close of the prosecution's case the accused person was placed on his defence. He opted to give a sworn statement without calling any witness.

15. The accused person admitted having chastised the deceased. He stated that he had received a report from his wife, PW2, that the deceased had stolen some Kshs. 3,000/= from a neighbour's house. As a parent intent on instilling discipline to his son the accused person stated that he administered corrective and reasonable punishment on the deceased. He was emphatic that he had no slightest intention of causing any injury on the deceased or at all since he loved him although the deceased was of general bad behavior. He was remorseful.

16. It is on the foregone evidence that this Court is called upon to render this judgment. I have carefully considered the evidence on record as well as the exhibits. As the accused person was 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 aforethought which constitutes the 'mens rea' of the offence.**

I will consider each of the ingredients separately.

17. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by all the witnesses as well as the accused person. The first limb is hence answered in the affirmative.

18. As to the cause of the death of the deceased, PW5 produced a Post Mortem Report which he prepared upon conducting the examination himself. The said report gave the possible cause of death of the deceased to have been subdural haemorrhage due to assault caused by a blunt object. As there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

19. Turning to the second ingredient; that is to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person, the accused person admitted assaulting the deceased. Since PW5 confirmed that the injuries sustained by the deceased were are result of assault and going by the evidence of PW1 and PW2 I find the second ingredient also proved.

20. I will now consider the third limb as to whether there was malice aforethought on the part of the accused person in committing the act complained of in this case. As the safest tradition is, 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 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 evidence that the accused person's reaction was spontaneous. Whether the deceased had refused to take care of the family cattle or had stolen the alleged money, I am not convinced that the accused person planned to kill the deceased. This was a case where the chastisement, although in itself unlawful, went overboard. In those circumstances I find no evidence of malice aforethought and the third ingredient fails.

24. With the finding that the accused caused the death of the deceased but without malice aforethought, the information of murder cannot stand and the accused person herein is found not guilty of the murder of **FOO**. However, since the accused unlawfully caused the deceased's death then pursuant to **Section 179(2)** of the **Criminal Procedure Code** the accused is hereby found guilty of a lesser offence of **Manslaughter** contrary to **Section 202** as read with **Section 205** of the Penal Code and is hereby convicted accordingly.

25. These are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 19<sup>th</sup> day of December, 2019.**

**A. C. MRIMA**

**JUDGE**

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

**Mr. Sam Onyango** 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.