



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

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

**CRIMINAL CASE NO. 21 OF 2017**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**1. JOHN OTIENO OKUMU**

**2. SAMUEL ONYANGO ODHIAMBO.....ACCUSED**

**JUDGMENT**

1. **Samuel Otieno Oyoo** (hereinafter referred to as '**the deceased**') did not know that his physical life on this earth would come to an end on 29/09/2017. The day was just an ordinary one for him until the night. The events that followed that night led to his death. The deceased hailed from Ombasa village, West Sakwa Location in Awendo Sub-County within Migori County. That is the very place the deceased met his death.

2. The incident was reported to the police. Investigations were commenced. On 03/10/2017 **John Otieno Okumu** and **Samuel Onyango Odhiambo** were arraigned before Court facing a joint charge of murder of the deceased. They formally took plea on 09/10/2017. They denied the information and a trial was held.

3. Ten witnesses testified in support of the information facing the accused person. Three brothers testified in this case. They were **Joshua Owino Osee** as **PW1**, **Amek Bismark Osee** as **PW2** and **Johnson Otieno Osee** as **PW4** who was the father of the deceased. The father of the first accused person was also a brother to PW1, PW2 and PW4. He was **Gilbert Okumu Osee**. He did not testify. The four were also brothers to the deceased. All the four brothers lived with their families next to each other in Ombasa village. **Jenifa Achieng Otieno** testified as **PW3**. She was the mother of the deceased and the wife of PW4. **Caroline Aoko Otieno** was **PW5**. She was a co-wife to PW3 and a second wife of PW4. **Simon Ochieng Osee** testified as **PW6**. He was a brother to the deceased and a son of **PW4**. **Isaiah Omondi Okumu** testified as **PW7**. He was a boda boda rider from Ombasa village. **Dr. David Keboy** testified as **PW8**. **Richard Kimutai Langat** a Government Analyst attached at the Kisumu Government Chemist Office testified as **PW9**. The investigating officer **No. 66776 PC. Moses Wambua** testified as **PW10**. I will refer to the witnesses in the sequence in which they testified before Court.

4. The prosecution's case was that in the night of 29/09/2017 the deceased was attacked by three people while at the homestead of his uncle one Gilbert Okumu Osee, the father of the first accused person. The mother of the deceased (PW3) testified that she was in her house that evening at around 08:00pm when she heard the first accused person call out the name of the second accused person. The first accused person asked the second accused person to get out of the house he was in. By that time the deceased had returned home. He had been served some food by PW3. The deceased sat and ate. Shortly, the first accused person went to the house of PW3 and called out the name of the deceased. The deceased left the food behind and went out of the house to meet the first accused person. The deceased and the first accused person then left.

5. After a while PW3 went to see her co-wife one Silpa. As PW3 was on her way to Silpa's house she met her other co-wife one Caroline (PW5) who was hurrying on the opposite direction. Caroline told PW3 that the deceased was fighting with the first accused person at the house of the first accused person. PW3 and PW5 rushed to the scene.

6. On arrival PW3 saw the deceased and the first accused person engaged in a serious physical fight. The second accused person was also at the scene. He held one of the hands of the deceased. PW3 began separating the two who were fighting. She also asked the second accused person to assist her in separating them. Elisha Otieno Amek (hereinafter referred to as '**Elisha**') arrived at the scene. Elisha was a brother to the first accused person.

7. As the fight was intense PW3 screamed. People readily responded. PW3 saw her husband (PW4), PW2 among others at the scene.

8. PW4 was informed of the fight by the wife of Elisha. He rushed to the scene. He saw the accused persons and the deceased fighting. PW4 tried to separate them. He managed to disarm the first accused person of the panga he held. He gave the panga to PW3 who in turn threw it into a nearby sugarcane farm. According to PW4 the second accused person had a stick and he called Elisha through his cellphone. Elisha readily arrived while armed with a panga. Elisha hit PW4 on the hand and PW4 felt a lot of pain. He realized that his hand was broken. PW4 watched Elisha cut the deceased with the panga he had on the neck. The deceased fell instantly. He was motionless on the ground. Elisha then took a hoe (jembe) and hit the deceased three times as he was on the ground. PW3 reiterated the violence Elisha unleashed on the deceased and PW4. The deceased was seriously injured on the head, neck and chest. He bled profusely.
9. PW1 also arrived at the scene while the fight was still on. He witnessed the first accused person hit the deceased with a hoe on the head. The deceased was not armed. He also saw the second accused person beat the deceased although he was not armed. PW1 intervened and pulled the first accused person away. PW1 asked the first accused person what the issue was and the first accused person told him that he was fighting the deceased over a woman. PW1 also saw Elisha holding a panga and escaping from the scene.
10. PW2 was asleep in his house at around 09:00pm. He was called by PW5 and informed of the fighting at the home of his elder brother Gilbert Okumu Osee. He rushed to the scene. He found Elisha and the deceased fighting out at the compound. Elisha was holding a handle of a hoe. PW2 disarmed him and threw the handle away. He did not see the accused persons at the scene.
11. PW5 was taking supper when she heard screams from the home of Gilbert Okumu Osee. Shortly, the wife of Elisha came and called her husband, PW4. She rushed to where the screams came from. On arrival she witnessed the fight between the accused persons and Elisha on one side and the deceased on the other. Elisha was armed with a panga and a hoe. She also saw PW3 and PW4 separating the deceased from his aggressors. PW5 saw Elisha cut the deceased with the panga on the head. The deceased fell. PW5 rushed to the home of PW2 and informed him of the fight.
12. PW7 went to the scene awhile after hearing the screams. He did not see any of the accused persons or the deceased.
13. Those who witnessed the fight stated that although it was in the night there was ample moonlight. They also used lights from phone torches and motor cycles to see. Visibility was not hindered.
14. PW2 and PW4 were among those who rushed the deceased to Rapcom Hospital in Awendo. The deceased was however pronounced dead on arrival. The body was preserved in the mortuary. PW2 reported the matter to Awendo Police Station.
15. PW10 accompanied the Deputy DCIO and other police officers in visiting the scene. That was on 30/09/2017. They found the family members of the deceased who gave the police an account of what had happened. The police interrogated the family members. They were taken to where the fighting took place. The police recovered a big kitchen knife (which the witnesses described as a panga), a jembe and a stone at the scene. They were all blood-stained. Several witnesses recorded their statements with the police later.
16. PW10 led the investigations. He organized for a post mortem examination of the body of the deceased. It was conducted on 04/10/2017 by PW8 at Rapcom Mortuary. PW4 and PW6 identified the body of the deceased prior to the autopsy. PW8 saw 5 cut wounds on the head. One of the wounds was very extensive and had caused a fracture of the skull. There were two cut wounds on each shoulder. PW8 opined that the cause of death was severe head injury due to assault. PW8 filled in the Post Mortem Report.
17. PW10 collected blood samples during the autopsy from the body of the deceased. He prepared an Exhibit Memo Form and forwarded the blood samples from the deceased together with the jembe, stone and big knife he recovered from the scene to the Government Analyst in Kisumu for analysis. The purpose was to ascertain the sources of the blood stains on the jembe, stone and big knife.
18. PW9 conducted the analysis and prepared a Report. PW9 concluded that the blood on the jembe, stone and big knife was of the deceased.
19. PW10 had asked the family members to look for the suspects who had then disappeared from home and arrest them. PW7 in the company of the family members of the deceased arrested the accused persons in Migori town and handed them over to the police. That was on 02/10/2017. PW10 collected the accused persons from Awendo Police Station and took them for mental examination on the same day at Rongo Sub-County Hospital. They were both found fit to stand trial.
20. During the trial PW9 produced the Analyst Report as an exhibit. PW8 produced the Post Mortem Report as an exhibit. PW10 produced the jembe, stone, the big knife, the Exhibit Memo and the Mental Assessment Reports as exhibits.
21. It was the prosecution's position that the jembe, stone and the big knife were the murder weapons and that the accused persons together with Elisha who was still at large were the aggressors.
22. The prosecution closed its case and this Court placed the accused persons on their defences. They both opted to give unsworn testimonies without calling any witness.
23. The first accused person denied killing the deceased. He narrated the events of the night of 29/09/2017. He stated that he was a boda boda rider and had borrowed a jacket from the second accused person as he rode his motor cycle home. Reaching his home the second accused person called and informed him that he had forgotten to pick his keys from the jacket pocket. Shortly, the second accused person arrived at the home of the first accused person to collect the keys.
24. The deceased also went to the house of the first accused person. He told the first accused person that he wanted to talk to him over an issue. The first accused person asked the deceased to discuss the issue the following day but the deceased insisted. The deceased then told the

first accused person that he had information that the first accused person had carried a girlfriend to the deceased on his motor cycle the previous week and disappeared with her to an unknown place.

25. The first accused person partly admitted the averment. He however clarified that he carried the girlfriend to the deceased as a passenger who paid for the services rendered. The deceased was very angry and asked the first accused person to leave his home if he wanted to stay alive. The first accused person left to his grandfather's house. The deceased followed him there. The deceased then left. The first accused person returned to his house where the second accused person was still there.

26. After a while, the first accused person saw the deceased accompanied by PW3 and PW4 approaching his house. The first accused person was seated on the verandah to his house. The deceased was armed with a spear, but PW3 and PW4 were not armed. The deceased wanted to spear the first accused person. Sensing danger the first accused person shielded himself behind PW4. The second accused person, PW3 and PW4 disarmed the deceased. The first accused person was asked to leave and he did so. He returned to his house the following day.

27. The second accused person reiterated the evidence of the first accused person. He however stated that when the deceased came to see the first accused person for the first time the deceased wanted to fight the first accused person, but he prevailed upon him. The deceased instead left. The deceased had only hid himself at the rear of the first accused person's house.

28. The deceased surfaced again and insisted that he was not yet done with the first accused person. The deceased rushed to his house and returned with a big stick. The deceased was very hostile to the second accused person. The deceased hit the first accused person's motor cycle with the stick. He ran back to his home. He returned with a spear. He was followed by PW3 and PW4. The deceased wanted to spear the first accused person but those present restrained him. The accused persons then left the deceased behind with PW3 and PW4. The second accused person was shocked to learn of the death of the deceased the following morning.

29. At the close of the defence case the Defence Counsel and the prosecution left the matter to the decision of this Court.

30. It is from the foregone evidence that this Court is now called upon to determine whether the ingredients of the offence of murder were proved. The offence of murder carries three ingredients which are: -

***(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.***

31. I will deal with each ingredient seriatim.

32. On the first ingredient, there is no doubt that the deceased died. That fact was attested to by all the witnesses save PW9. The first limb is hence answered in the affirmative.

33. As to the cause of the death of the deceased, PW8 produced a Post Mortem Reports which he personally filled in after conducting the autopsy. The report opined that the possible cause of the death of the deceased was severe head injury due to assault. Since there is no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

34. On the second ingredient, the accused persons admitted having an engagement with the deceased, but denied killing him. There are two versions of what transpired on that night. The version by the prosecution and that of the accused persons. I have already reproduced the versions above.

35. The prosecution availed several witnesses who were at the scene. They variously narrated what transpired. The prosecution evidence was well corroborated. This Court carefully observed the demeanors of the prosecution witnesses. They were candid and forthright. They remained firm during examinations. Some testified of even talking to the accused persons at the scene. I did not find anything to doubt their testimonies. I believed their testimonies.

36. On the other hand, the effect of the defence was that the accused persons did not know how the deceased met his death. However, the evidence of the prosecution squarely placed the accused persons with Elisha at the scene. They were indeed the aggressors. The defence did not outweigh the prosecution evidence.

37. The accused persons acted together with Elisha to further a common intention and as such the doctrine of common intention under **Section 21** of the **Penal Code Chapter 63** of the Laws of Kenya comes to play. The Court of Appeal in **Njoroge v. Republic (1983) KLR 197** explained the doctrine as follows:

***...If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavor to effect the common object of the assembly...***

38. In the case of **R v. Tabulayenka s/o Kirya (1943) EACA 51** the Court of Appeal of East Africa held that common intention may be inferred from the accused presence, their actions and omissions of either of them to disassociate himself from the assault.

39. I therefore find that the accused persons were part of the orgy of violence that was visited upon the deceased. Each one played a defined active role in causing the death of the deceased. The totality of the evidence is that the second ingredient is likewise answered in the affirmative.

40. I will now deal with the issue of whether the accused persons acted with malice aforethought. **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.**

41. 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).

42. 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.***

43. In this case there was evidence that the first accused person called the deceased for a talk. No one knows exactly what transpired until the fight broke out. In such circumstances it is not possible to infer malice. I therefore fail to find that the accused persons acted with premeditated intention to kill the deceased.

44. The accused persons are hence found not guilty of the murder of the deceased and they are hereby acquitted. However, the deceased lost his life as a result of the actions of the accused persons, but of course without any malice aforethought.

45. 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 each of the accused persons guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code. Each of the accused persons is hereby convicted accordingly.

Orders accordingly.

**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. Mwita** 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