



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 3 OF 2016

REPUBLIC..... PROSECUTOR

-versus-

CHARLES ODHIAMBO.....ACCUSED

JUDGMENT

1. There is no doubt in this matter that one **Dickson Okombo** (hereinafter referred to as '**the deceased**') lost his life on 27/12/2015 as a result of the acts of the accused person herein, **Charles Odhiambo**. That so happened within Wiga Sub-Location, Suna Raha Location in Migori County.

2. The deceased and the accused person were first cousins who lived in different homesteads but within the same larger compound. The accused person was married to two wives whereas the deceased was a student who had sat for his Standard 8 KCPE National examination in the very year 2015 shortly before he met his untimely death.

3. With that state of affairs, the accused person raised the defence of provocation and as such this discussion will avail an opportunity to revisit the facts and circumstances in this matter in ascertaining whether the accused person is to benefit from the said defence, but the evidence first.

4. The accused person was formally charged with the murder of the deceased on 27/01/2016. He admitted the information and a plea of guilty was entered. The facts of the case were set for another day to accord the accused person more time to reflect on the position he had taken. The facts were presented on 12/04/2016 after the information was read to the accused person for the second time and he again admitted it. Upon presentation of the facts of the case the accused person admitted the same and Counsel for the accused person made submissions that it was not an appropriate case for a conviction of murder. By a ruling delivered on 12/03/2017, this Court declined to enter a conviction on murder and directed the matter to be fully heard.

5. Six witnesses testified in support of the information facing the accused person. **Sammy Ooko Onimbo**, testified as **PW1**. He was an uncle both to the deceased and the accused person whose fathers were his elder brothers. An elder brother to the deceased and a first cousin to the accused person one **Philip John Okongo** testified as **PW2**. **PW3** was the Assistant Chief of Wiga Sub-Location one **Jared Kidika Odhiambo** whereas **PW6** was one **David Odhiambo Otieno** who was a friend and a neighbour to the deceased and who worked together with the deceased in the gold mines. **Dr. Awino Victor Omollo** testified as **PW5**. The investigating officer **No. 70665 PC John Mwithia** testified as **PW4**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

6. The prosecution's case is fairly straight forward. On 27/12/2015 at around 10:00 am **PW1**'s attention was drawn by his wife one **Quinta Ooko** (not a witness) to what had happened to the deceased. **PW1** rushed out of his house and saw the deceased running towards the main gate of their compound while bleeding from his head. **PW1** ran and caught up with him at the gate. The deceased pleaded with **PW1** to take him to hospital and told him that it was the accused person who had beaten him. **PW1** managed to take the deceased to the nearby God Kwer Dispensary where he died as he was organizing for transport to transfer him to Migori County Referral Hospital for further treatment. As the events were unfolding **PW2** was not at home. He only learnt of the incident on return from his farm and saw **PW1** with the deceased on a motor cycle heading towards the local dispensary. He followed them and saw the deceased die after a short while at the dispensary.

7. **PW3** received information on the death of the deceased at around noon. He rushed to the dispensary and confirmed the death. He informed the police of the incident and on learning that the accused person had fled to Giribe Sub-Location he called his counterpart thereat who allegedly arrested the accused person at the Giribe market. **PW4** arrived at the dispensary in the company of his fellow police officers and collected the body. They were led by **PW3** to the homestead of the accused person but did not find him thereat. As they were still at the scene **PW3** received information that the accused person had surrendered to the Giribe AP Post and they proceeded to that Post and re-arrested the accused person whom they led to Migori Police Station and took the body of the deceased to the Migori County Referral Hospital Mortuary for preservation. An autopsy was conducted by **PW5** who opined the cause of death was a head injury likely caused by a blunt object. The accused person underwent mental assessment prior to being arraigned before Court.

8. However, PW6 had a different version of the arrest of the accused person. According to him, the accused person had gone to see him on 27/12/2015 as he was attending a Church service and informed him of the incident that led to the death of the deceased. PW6 advised him to report the matter to the police and the accused person agreed. The accused person then called one of his uncles and when he arrived at the church the two accompanied the accused person to the Giribe AP Post where he surrendered.

9. Be that as it may, at the close of the prosecution's case, the accused person was placed on his defence. He opted to give unsworn testimony without calling any witness. The accused person narrated how he caught the deceased ready-handed sleeping with his second and younger wife inside his house. That, in the heat of the moment he hit each of them once using a stick before the deceased fled. He later learnt that the deceased had died and he surrendered to the police. At the close of the defence case the matter was left for judgment.

10. It is from the foregoing evidence that this Court is now called upon to determine whether the defence of provocation holds in this case as it also determines if the ingredients of the offence of murder have been 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.

I will consider each ingredient separately.

(a) Proof of the fact and the cause of death of the deceased: -

11. There is no doubt that the deceased died. That fact was attested to by PW1, PW2, PW3, PW4 and PW5. The first limb is hence answered in the affirmative.

12. As to the cause of the death of the deceased, PW5 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 a head injury secondary 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.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:

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13. As stated above, the accused person stated in his defence that he indeed assaulted the deceased when he caught in the act with his second and younger wife. out of a struggle. However, the accused person raised the defence of provocation which is for consideration in the next ingredient. I now find that it is the accused person who caused the death of the deceased as a result of assault. The second ingredient is also proved against the accused person.

(c) Proof that the said unlawful act was committed with malice aforethought:

14. Unless it is proved that the accused person caused the death of the deceased with malice aforethought, the offence of murder is not proved. The prosecution must prove the intention on the part of the accused person to kill the deceased. In doing so I will revisit the evidence as I look at the defence of provocation.

15. The starting point is the law. Sections 207 and 208 of the Penal Code states as follows: -

'207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

208. (1) The term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or affected by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person

who knows of the illegality.”

16. In his unsworn testimony, the accused person stated that he caught the deceased sleeping with his wife on his bed during the day. He then reacted by hitting the deceased and his wife each once. He hit the deceased on the head and the deceased fled. The accused person did not go after the deceased when he fled. Apart from the evidence of the accused person there is no one who witnessed the events leading to the assault. The wife of PW1 who may have had something to tell did not testify. Likewise, the deceased only told PW1 that the accused person had beaten him, but he did not give the reason thereof. That only leaves the evidence of the accused person on what exactly happened.

17. The evidence of the accused person seems to have been corroborated by some witnesses. According to PW1, the family of the deceased and the accused person was aware of what prompted the assault. Whereas PW1 could have availed such more information, he clearly withheld it and opted to be evasive. PW2 confirmed that all was not well between the deceased and the accused person as the accused person had severally complained of the sexual relationship between the deceased and his younger wife. The Chief, PW3, informed the Court that he confirmed that there was an extra-marital affair between the deceased and one of the wives of the accused person. PW4 did not pursue the aspect as the younger wife of the accused person had fled and all his efforts to interrogate her were unfruitful. PW6, a neighbor, was also aware of the relationship.

18. There is no doubt that the younger wife of the accused person stood in a conjugal relationship with the accused person. Faced with such a scene as the accused person, it is not far-fetched to expect that the unfolding events would deprive one of the power of self-control and induce such a person to commit an assault.

19. In interrogating the defence of provocation, a Court must also consider the degree of retaliation. In the case of **Tei s/o Kabana vs. R. (1961) EA**, the Court of Appeal for Eastern Africa held that:

‘...In considering whether provocation was sufficient to reduce offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and lethal nature of the weapon used.’

20. In this case the accused person used stick and only hit the deceased once. The accused person was from grazing his cattle and carried the stick which he used to hit the deceased. He did not look for the weapon elsewhere. He also did not pursue the deceased upon fleeing from his house. From the nature of the weapon used and the single assault on the deceased, it can be safely found that the degree of retaliation was within the expected parameters. I now hold that the accused person must benefit from the defence of provocation.

21. The accused person is hereby found guilty of the offence of manslaughter contrary to **Section 202** of the **Penal Code** and is accordingly convicted.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February, 2018.

A. C. MRIMA

JUDGE