



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL CASE NO. 30(B) OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

REPUBLIC.....PROSECUTOR

AND

GEORGE OTIENO ABUTO.....ACCUSED

JUDGMENT

1. **GEORGE OTIENO ABUTO** (“the accused”) was charged with the offence of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on 16th December 2017 at Kachok Village within Kisumu County, the accused murdered **REAGAN OTIENO BUNDE** (“the deceased”).

2. The prosecution case was that on 16th December 2017, Derrick Otieno Bunde (PW 2), the deceased’s first cousin, went to a *Busaa* drinking den at around 6.30am where the deceased joined him at about 7.30am. While they were drinking, the deceased gave his two mobile phones to a young boy to go and charge them. After a while, they decided to attend a funeral in the neighbourhood as they waited for the phones to charge. Later that afternoon they returned to the drinking den to pick the phones but as the young boy was not there, they were referred to the accused. They went to ask the accused for the phones. PW 2 recalled that the deceased demanded that the accused give him his phones and that is when the accused removed a knife from his pocket and stabbed the deceased on the left side of the chest. PW 2 wanted to intervene but he was restrained by some boys who were present. The deceased then took off. PW 2 found a motorbike and rushed the deceased to Kisumu County Hospital but he was pronounced dead on arrival.

3. Eddy Otieno Odhiambo (PW 3) testified was drinking at the den on the material day recalled that the deceased and PW 2 arrived and asked for the phones. The accused called the deceased aside and they went to talk. After a short while, PW 3 heard someone screaming and saying that somebody had been stabbed. He rushed to see what was happening. PW 3 told the court that he saw the accused holding a knife as the deceased was collapsing while holding his chest with both hands. He also found PW 2 was being restrained by other boys. PW 3 recalled that the accused left the scene running. Shortly thereafter he was brought back by the crowd which had now gathered and which threatened to lynch him but the police arrived in time and left with the accused.

4. The deceased father, Daniel Otieno (PW 1) testified that on the material date at around 4.00pm, PW 2 called to inform him that the deceased had been stabbed and was being rushed to Kisumu County Hospital. He headed to the hospital but before he could arrive, PW 2 called again and informed him that the deceased had died. On 20th December 2017, he attended a post mortem of the deceased with Enock Ochieng Ojulu (PW 4) who assisted him identify his son’s body.

5. The investigating Officer, Police Constable Evan Wandere Omuia (PW 6) testified that on the material day at around 4.00pm he was on duty at Kisumu Central Police Station when PW 3 reported that the accused had stabbed the deceased. He and other officers rushed to the scene where they found an angry crowd ready to lynch the accused. PW 6 rescued the accused from the mob and took him to a neighbour’s house where he searched him and found a blood stained knife in his pocket. He later took the knife to Government Chemist for analysis. PW 6 also organised for the post-mortem to be conducted on the deceased body on 19th December 2017.

6. Richard Langat (PW 5), a Government Analyst, testified that on 21st December 2017, PW 6 brought a moderately stained knife, a blood sample from the deceased’s body and a buccal swab from the accused to conduct an analysis to determine the source of blood on the knife. PW 5 conducted a DNA analysis on all the items and in his report dated 21st February 2018, he concluded that the blood stains on the knife matched the blood sample of the deceased but had no genetic relation to the accused.

7. In his sworn testimony the accused denied killing the deceased. He stated that on that day he was selling alcohol at his mother's den when the deceased and PW 2 came and began beating his younger brother demanding a phone from him. He went where they were and demanded that they stop beating his brother. The two told him that the only way they would stop is if he paid for the lost phones. They began beating and followed him to his house. The accused stated that he went into his bedroom and found a knife and threatened them with it. When he got a chance he ran off. On cross examination, the accused stated that he threatened the two with the knife but he did not know if it cut the deceased.

8. The offence of murder is defined by **section 203** of the **Penal Code** as follows, “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” The prosecution must prove beyond reasonable doubt the following three ingredients; first, the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

9. The fact and cause of death is not in dispute. From the post-mortem report prepared by Dr R. Omollo, the deceased cause of death was haemorrhage due to cardiac injury from a penetrating sharp object to the heart's right ventricle. This conclusion is consistent with the testimony of PW 2, PW 3 and PW 6 who stated that the deceased was stabbed in the chest.

10. As to whether the accused stabbed the deceased, I find that there is overwhelming evidence from the testimony of PW 2, who gave a clear account of what transpired on that day and the corroborating testimony of PW 3 who was also at the scene. The accused in his defence did not deny that he was at the scene of the incident. He did not deny that he was with the deceased. What he stated was that he had a knife with which he threatened the deceased in a bedroom in the house. I reject his defence because there was no suggestion to PW 2 and PW 3 in cross-examination that the incident took place in a room in the accused's mother's house. Further, when PW 6 arrested the accused he found the blood stained knife in his pocket which according to the DNA test done by PW 5 confirmed that it had the deceased's blood. All this evidence leads to the inevitable conclusion that the accused stabbed the deceased and I so find.

11. I now turn to the question whether the stabbing was done with malice aforethought. Malice aforethought is the *mens rea* for the offence of murder. In **Nzuki v Republic [1993] KLR 171** the Court of Appeal stated that:

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 and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who 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 v Director of Public Prosecutions [1975] AC 55)

In most instances, the intention is established by or inferred from the surrounding circumstances. In **Nzuki v Republic (Supra)**, the Court of Appeal further observed that:

No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a proper direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount to manslaughter. See Rex v Steane, [1947] 1 KB 997; and Shampal Singh s/o Pritam Singh v R [1960] EA 762. [Emphasis mine]

13. It is thus the duty of the court to consider the entire evidence and consider whether the prosecution has established malice aforethought beyond reasonable doubt. Factors such as the part of the body that was targeted, the type of weapon used, if any, and the type of injuries inflicted upon the deceased are considered (see **Rex v Tubere s/o Ochen [1945] 12 EACA 63**).

14. The injury sustained by the deceased was not the kind that can be sustained by a person who did not intend to stab him. It was well calculated and aimed straight for the heart. The accused must have known that the deceased would come demanding for his phones and he stayed ready and armed. The accused, in his defence, stated that the deceased chased him into the house and that is where he found the knife. But from the evidence of PW 2 and PW 3, it is clear that the incident took place while people were watching and that is why they chased after him. The accused testified that the deceased and PW 2 were beating his brother and that he was either provoked or merely threatened them before they could assault him. The entirety of the evidence does not support this line of defence. The incident took place in the open and I find that at no point was the accused provoked or threatened by the deceased or PW 2. Nothing was suggested to PW 2 and PW 3 in cross-examination that the deceased and PW 2 were beating his brother. In short, his defence is weak tea. The stabbing of the deceased was clearly intended to cause grievous harm or kill the deceased. The knife was plunged with such force that it penetrated the heart. I find and hold that the prosecution established malice aforethought.

15. I find the accused, **GEORGE OTIENO ABUTO** guilty of the murder of **REAGAN OTIENO BUNDE** contrary to **section 203** of the **Penal Code** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 20th day of April 2018.

D.S. MAJANJA

JUDGE

Mr Maua, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.