



**REPUBLIC OF KENYA**

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

**HC. CR. C. NO. 17 OF 2015**

**(MURDER)**

**CORAM: J.A. MAKAU – J.)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SIMON OUMA NYAKIDI.....ACCUSED**

**JUDGMENT**

1. **SIMON OUMA NYAKIDI**, faces a charge of Murder contrary to section 203 as read with Section 204 of the Penal Code (Chapter 63) Laws of Kenya. The Particulars of the offence are that on the 20<sup>th</sup> day of October, 2012 at Mageta Island, Bondo District within Nyanza Province murdered one **WASHINGTON OTIENO**.
2. This case commenced on 31.10.2012, before Hon. Justice H.K. Chemitei at Kisumu High Court before it was transferred to this court on 26<sup>th</sup> September, 2015.
3. The Prosecution called seven (7) witnesses in support of the charge and upon the Accused being put on his defence, he opted to give sworn statement and called no witness.
4. The prosecution case is that on 20.10.2012 at around 10.30 p.m., PW1 Sarah Atieno Otiemo was at her bar known as Winker's with her assistant one Beatrice, Customers and a girl selling groundnuts outside, one Levina Okwiri Opere (PW4), who witnessed the deceased being stabbed with a knife by the accused. PW4 alerted PW1, of the stabbing of the deceased by the accused, at a distance of 10 feet from the bar. PW1 and PW4 went to search for the deceased and on the way they met one Charles (Vitalis) Otendo, (PW2) who informed them that there was a person lying on the ground near the door to his house. PW1 and Charles (Vitalis) Otendo (PW2) proceeded to where the person had fallen 50 metres from PW1's house and found the person lying on the ground. Report was then made to OCS, Mahanga Police Post, who eventually came to the scene, called Police Officers from Usenge Police Station, who came to the site, took photographs and picked the body of the deceased the following day at around 7.00 a.m.
5. PW3, Peter Otiemo Malomba, PW 5 Stephen Oloo Rabari, with others went to search for the accused on 23.10.2012, from his house but did not find him, however, they met him on the way and informed him he was required at Mageta Petrol Base and agreed to accompany them to the post where they handed him to the police. The Prosecution produced Post mortem Report through PW6 Dr. Biko Opidi on behalf Dr. Metho, exhibits P1. PW7 No. 40928 Snr. Sgt. John Ruto, the investigating Officer, received report of a murder on 21.1.2012, at around 3.00 a.m., proceeded to the scene with his officers, found the deceased body lying on the ground with stab wound on the right thigh hence he commenced investigation, by interrogating six (6) witnesses within the area. He had photographs taken, collected the body, transported the same to Usenge Police Station from where it was taken to Siaya Referral Hospital Mortuary on 23.10.2012, he later received a suspect, one Simon Ouma Nyakidi, who had been arrested by members of public who he rearrested, escorted him to Usenge Police Station and subsequently charged him with this offence.
6. Upon the accused being called to defend himself, he opted to give sworn statement and opted to call no witness. The accused denied the offence and gave a defence of alibi stating he was not at the scene but away in Uganda.
7. The accused is facing a charge of murder. The Prosecution in a murder case has to adduce evidence to prove that the accused caused the death of the deceased with malice aforethought. The Prosecution must show that the accused had formed the necessary malice aforethought to either cause death or do grievous harm to the deceased. Malice aforethought is also proved if it is shown; that the person charged knew that his actions causing death would probably cause death or do grievous harm.
8. **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 flight or escape from custody of any person who has committed or attempted to commit a felony.**

9. For the Prosecution to prove a charge of murder, it has to prove the following ingredients: -

**(a) Death of the deceased and cause of death.**

**(b) That the accused caused the death through an unlawful act or omission.**

**(c) That the accused possessed an intention to cause harm, kill or had malice aforethought.**

**(a) Whether the prosecution has proved the death of the deceased and it's cause?**

10. PW1, Sarah Atieno Otieno, PW2, Charles Otendo Ongana, and PW4, Levina Okwiri Opere saw the deceased's body lying next to PW2's house dead. PW2 proceeded to inform the Police who came to the scene. PW2 and PW4 witnessed PW7 No. 40928 Snr Sgt. John Ruto from Mageta Police Patrol Base, with other Police Officers, take photographs of the scene and collected the deceased's body to Siaya County Referral Hospital. Dr. Biko Opidi (PW6) produced postmortem report as exhibit P1 on behalf of Dr. Metho who carried out the postmortem examination on the deceased's body on 25<sup>th</sup> October, 2012, after the body was identified to PW6 by Michael Ogwano a relative of the deceased and PW7. The Doctor's evidence corroborates the evidence of PW2 and PW4, who testified how they Saw PW7 and Police Officers collect the deceased's body which had stab wound on the anterior aspect of the right thigh. The Doctor opined the cause of death was due to haemorrhage leading to cardiovascular collapse. I am there satisfied that the prosecution proved the death of the deceased and the cause of death to the required standard of proof.

**(b) Who caused the death of deceased?**

11. The accused denied having caused the death of the deceased and gave a defence of alibi. PW4, a vegetable seller, testified that on 20.10.2012 at around 10:00 p.m. she was selling groundnuts at Mageta Island, outside the Winker's Pub, when the deceased bought groundnuts worth KShs.10/=, when she heard Ouma, the accused speaking to the deceased telling him in Dholuo language, he had been searching for him and that day he has got him and as the deceased was bending picking the groundnuts, the accused removed a knife from his waist belt and stabbed the deceased near the groin. PW4 became afraid and proceeded to inform PW1 as the deceased walked towards the beach and the accused towards the hill. PW4 testified that the deceased was known to her for 5 months as a fisherman specializing in Omena and that she had known the accused for 2 years as a fisherman specializing in Nile Perch. She stated there was electric light. That the incident occurred from a close range to where she was. PW1, testified PW4 entered at her pub on 20.10.2012 at around 10.30 p.m. and informed her that there was a person who had been stabbed with a knife outside the pub. PW1 testified there was bright security light outside the pub and others at a distance. PW4 gave Police the name of Ouma, immediately she went to report and even stated the area the deceased was stabbed by the accused who had talked the deceased before stabbing him. I find the conditions were favourable for positive recognition, through the bright security light, and the accused's voice as the accused was a person known to PW4, who talked to the deceased before stabbing him and the stabbing was not done before the accused expressed his intention. PW4 gave Police the name of the assailant when she made the report. I am satisfied that there was no case of mistaken identity in this case of the Accused.

12. In the instant case, I am alive to the fact that only the eye witness was PW4 whose evidence should be tested with the greatest care being evidence of a single identifying witness. In **Maitanyi v. Republic (1986) KLR 198, the Court of Appeal** stated as follows:-

**“Although it is trite law that a fact may be proved by a testimony of a single witness, this does not lessen the need ....**

**2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether he witness was able to make a true impression and description.**

**3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when evidence is being considered and before decision is made.”**

13. I have very carefully considered the circumstances surrounding the commission of the offence and evidence of PW4. PW4 was selling her groundnuts outside the Winker's Pub where there was security light. The deceased was buying groundnuts from PW4 from a close range. The accused came to where PW4 was next to deceased, talked to the deceased and PW4 heard all what the accused told the deceased, saw him remove a knife from his waist belt. PW4 was, keen in her testimony as to what was happening and observed every movement made by the deceased and Accused. She knew both the deceased and the accused. PW4 identification of the accused is through recognition and

voice. I have considered and warned myself of the danger of relying on evidence of a single recognitions of witness. I therefore upon evaluation of PW4's evidence find it would be safe to rely on the evidence of PW4 as the conditions were favourable for positive recognition.

14. The Accused gave a defence of alibi. He stated that at the time of commission of the offence he was in Uganda, further stating he was arrested in the month of February or March 2012 and was at Kodiaga Prison for Kisumu High Court Criminal Case No. 70 of 2012 R v. Simon Ouma Nyakidi (now Siaya HCRC 17 of 2015 Republic v. Simon Ouma Nyakidi).

15. It is trite burden of proving the falsity, if at all, of an Accused's defence of alibi lies on the prosecution (**Karanja v. Republic (1983) KLR 501**). The Prosecution in this case as per PW3 and PW5 arrested the Accused on 23.10.2012 and handed him to Mageta Police Post. The Accused did not challenge the evidence of PW3, PW5 and PW7, by putting to them that he was arrested in February/March 2012 and that he was at Kodiaga Prison at the time of commission of this offence thus on 20<sup>th</sup> October, 2012. That the Accused did not challenge the prosecution's case as regards the date of his arrest was not on 23.10.2012 but before. PW1, PW2, PW3, PW4, PW5, PW6 and PW7 testified the offence was committed on 20.10.2012 and not before then. The evidence of PW4 placed the accused at the scene of crime on 20.10.2012. I observed the demeanor of PW4 and found her to be a credible witness. I have considered that the accused did not put his defence of alibi at an early stage in the case so that it could be tested by the prosecution for investigation and thereby prevent any suggestion that his defence was an afterthought as the prosecutions had closed their case. I therefore find and hold the accused defence of alibi is unsustainable and find that it is an afterthought and unbelievable.

16. I therefore find that prosecution has proved that the deceased's death was caused by the accused and no other person.

**(c) Whether malice aforethought is proved?**

17. According to the evidence of PW4 and PW6 the deceased had a deep stab wound on anterior aspect of the right thigh. PW4 testified the accused was armed with a knife which he removed from his waist belt and stabbed the deceased as he was telling him he had been searching for him and now he got him. From the evidence of PW4, the accused had been searching for the deceased and it was not by mere coincident that he met him, that the Accused Searching the deceased armed with a knife was a clear indication that the accused had planned to cause grievous harm or kill the deceased. He knew by stabbing the deceased so deeply and at a thigh where main artery passes he would either cause grievous harm or death to the deceased. The accused had on the material night pronounced himself loudly and clearly before stabbing the deceased. There was no evidence of provocation of the accused by the deceased. I find the accused intention was one, to carry out his pre-planned mission of causing grievous harm or death to the deceased. His utterance to the deceased in presence of PW4 was a clear demonstration that the killing of the deceased was pre-meditated. I find the accused had planned to kill the deceased. I therefore find that malice aforethought has been proved to the required standard of proof.

18. The upshot is that I find that the prosecution has proved the case against the accused beyond any reasonable doubt. I find the accused guilty of murder of Washington Otieno contrary to section 203 as read with section 204 of the Penal Code as charged and convict him accordingly.

**DATED at Siaya this 19<sup>th</sup> day of April 2018.**

**J. A. Makau**

**Judge**

**Delivered in Open Court**

**In the presence of:**

**Mr. Adiso for Accused**

**M/s. Odumba for the State**

**Court Assistants:**

**1. Laban Odhiambo**

**2. Brenda Ochieng**

**J. A. Makau**

**Judge**