



**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL CASE NO. 14 OF 2017**

**CORAM:D.S.MAJANJA J.**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**KEVIN OSORE BABU.....ACCUSED**

**JUDGMENT**

1. **KEVIN OSORE BABU** (“the accused”) was charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 11<sup>th</sup> May 2017 at Mayenya village, Kolwa East Sub-Location, Kisumu East Sub-County within Kisumu County, the accused murdered **JOHN BILLY OWUOR** (“the deceased”). The prosecution called 8 witnesses to prove its case while the accused gave sworn testimony in his defence.
2. The offence of murder is defined by **section 203** of the *Penal Code* 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, it must prove 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*.
3. The fact and cause of death of the deceased is not in dispute. The post mortem on the deceased body was done on 17<sup>th</sup> May 2017 at Jaramogi Odinga Oginga Teaching and Referral Hospital (“JOOTRH”) after it was identified by his father, Naftali Matengo Abuor (PW 2). Dr. Sehdeva observed that the deceased had linear wound on the right side of the neck about 2 cm long. It was directed laterally to the right side and was 4 cm deep. Internal examination revealed that the right lung was lacerated and had collapsed. Following these observations, the doctor concluded that the cause of death injury or trauma on the right lung consistent with a stab wound on the right side of the neck.
4. The key question is whether the accused stabbed the deceased on the material night. Washington Ayub Alago (PW 4) testified that on the material day at about 8:30pm, he was walking home with the deceased when suddenly the accused came from behind holding a knife. The deceased asked him why he had a knife and the accused pushed the deceased to the ground and asked him to stay out of his business. PW 4 told the court that when the deceased got up from the ground, the accused stabbed him with the knife and took off. PW 4 testified that he was clearly able to see the accused stab the deceased because there were street lights along the road. He stated that he knew the accused because they hailed from the same locality.
5. After a while, Enock Owuor Amala (PW 5) arrived at the scene. He recalled that the deceased was crying that accused had stabbed him. PW 4 and PW 5 carried the deceased to the nearby St Elizabeth Chiga Hospital. PW 4 testified that when they arrived at the gate, PW 5 left them there and went looking for the accused. After a while the accused came to the hospital gate and collapsed next to the deceased. Upon looking at the accused, PW 4 realised that he also had an injury on his head.
6. PW 5 testified that when he arrived where PW 4 and the deceased were, the accused ran away. After they assisted the deceased to the hospital gate, PW 5 went looking for the accused. He however denied hitting the accused on the head and stated that when he found the accused, he was being beaten by a mob.
7. The deceased’s brother, Stephen Otieno Matengo (PW 1) testified that on the material night he was at home with his mother when, at around 9:00pm, his mother received a call informing her that the deceased had been stabbed and was at St Elizabeth Chiga Hospital. PW 1 went to the hospital and found the deceased, accused and PW 4 at the hospital entrance. The deceased seemed unconscious with a wound on his neck while the accused was injured on the head. The hospital management advised them to take the two to JOOTRH but on arrival there, the deceased was confirmed dead while the accused was admitted. PW 1 later reported the matter to Kondele Police station.
8. PW 1 testified that inquired from PW 4 what happened. PW 4 told him that he left Chiga with the deceased and the accused. On the way,

PW 5 came after them and began fighting with the accused and when the deceased tried to separate them the accused stabbed him with a knife.

9. The investigating officer, PC Jeremiah Sagiti (PW 8) testified that he was on duty at Kondele Police Station when PW 1 reported the incident. PW 8 went to Chiga where he found that Administration Police Officers had already arrested PW 4 and PW 5. He re-arrested them and escorted them to Kondele Police Station where he recorded their statements. He arrested the accused and after conducting investigations and recording witness statements, he charged him with the offence of murder. On cross examination, PW 8 stated that when he took PW 5's statement, PW 5 told him that it is PW 4 who informed him that the accused had attacked the deceased and that he attacked the accused with a metal rod that he had with him and took away the knife the accused had used to stab the deceased.

10. In his sworn statement, the accused told the court that at about 9.00pm on the material night, he was walking home from Chiga. On his way he met PW 4 and PW 5 in the company of other young men quarrelling in the middle of the road. When they saw him they turned against him because there existed a grudge between them. They beat him up and he collapsed and lost consciousness. The following day he woke up in Hospital where he stayed for two days and then left to stay with his relatives in Nyando as he was still unwell. The accused testified that on the material date he did not see the deceased and he did not fight with him.

11. As I have already held, there is no doubt that the deceased died as a result of a stab wound inflicted on his neck. The main issue for determination is whether the accused is the person who stabbed the deceased. The accused admitted that on the material night he was at the Chiga with the deceased, PW 4 and PW 5. The question then is whether, as the accused contends, the deceased could have been stabbed by PW 4 or PW 5 or the other people who were present or by the accused. In this case, there was the clear and direct testimony of PW 4 who stated that he saw the accused holding a knife and stab the deceased.

12. Counsel for the accused in cross-examination suggested that PW 5 could have stabbed the accused. The testimony of PW 4 and the recorded statement of PW 5 points to the fact that PW 5 arrived after that accused had stabbed the deceased and when he asked what had happened, PW 4 told him that the accused had stabbed the deceased. Although PW 5 denied in his testimony that he had a metal bar with which he beat and that he grabbed the knife from the accused, his recorded statement stated otherwise. This inconsistency in my view, is not material to the main finding that it is PW 4 who saw the accused stab the deceased. PW 4's testimony was consistent and unshaken in cross-examination and could stand alone even without that of PW 5 which was merely corroborative.

13. I am also satisfied that the conditions obtaining at the time were favourable for positive identification. PW 4 testified that the was street lighting and he was thus able to see the accused stab the accused. Further, the undisputed evidence of PW 4, PW 5 and the accused is that they all knew each other and given the close proximity with each other and the level of interaction, the chance of mistaken identity was therefore diminished.

14. Before I proceed to the last issue, I would like to deal with the evidence of the Government Analyst, Richard Langat (PW 7). He testified that he received from PW 8 the following items; blood stains from the entrance of the hospital gate at Chiga (A), blood clot from the hospital gate at Chiga (B), blood stained collected from the scene of the incident (C), blood stained T-Shirt marked D from the deceased and blood stained white vest marked E. He was instructed to examine the items and determine the genetic relationship. PW 7 conducted a DNA analysis of the blood and concluded that blood stains from the samples from the hospital gate, A and B, the vest and T shirt belonged to the same person probably the deceased. He noted that the sample of blood collected at the scene of the incident belonged to a different male.

15. Although the conclusion reached by PW 7 introduces the element of another male person, it does not change the conclusions I have reached. First, there was direct testimony of PW 4 who saw the accused stab the deceased. Second, PW 7 did not take reference samples from the deceased and accused to affirmatively determine the origin of the blood stains.

16. The last issue for determination is whether the accused killed the deceased with malice aforethought. From the testimony of PW 4, the accused approached them from behind holding a knife and when the deceased confronted him about the knife, he pushed him to the ground and when the deceased rose, the accused stabbed him on the neck. The testimony of PW 1 was that PW 4 told him that it is PW 5 was fighting with the accused and that when the deceased tried to separate them, the accused stabbed him with a knife. When counsel for the accused put this to PW 4, he denied that this happened. In my view, the fact that the accused intended to stab PW 5 would not change the fact that the accused stabbed the deceased with malice aforethought. **Section 206(a)** of the **Penal Code** provides that malice aforethought includes, "*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.*" Thus it would not matter whether the accused intended to stab PW 5 but stabbed the deceased. The fact is that the accused inflicted an injury on the neck of the deceased with a knife and this could only have been intended to cause grievous harm or death. within the meaning of **section 206(a)** of the **Penal Code**. I therefore find that the prosecution proved malice aforethought.

17. I find that the prosecution has proved that the offence of murder beyond reasonable doubt. I therefore find the accused, **KEVIN OSORE BABU** guilty of the murder of **JOHN BILLY OWUOR** and I convict him accordingly.

SIGNED AT NAIROBI BY

D. S. MAJANJA

JUDGE

DATED and DELIVERED at KISUMU this 31<sup>st</sup> day of May 2018.

F. A. OCHIENG

JUDGE

Mr Okoth, Advocate for the accused.

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