



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: D. S. MAJANJA J.)

CRIMINAL CASE NO. 23 OF 2016

BETWEEN

REPUBLIC.....PROSECUTOR

AND

STANLEY MUSIMI MBALIWA.....1ST ACCUSED

ELIAS ONGUDI ODIE.....2ND ACCUSED

JUDGMENT

1. The accused, **STANLEY MUSIMI MBALIWA** and **ELVIS ONGUDI ODIE** were 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 31st July 2016 at Korando 'B' Sub-location, Kisumu West Sub-County within Kisumu County together with others not before court, they murdered **ELVIS OMONDI OTIENO** ("the deceased"). After the accused denied the charge, the prosecution marshalled seven witnesses in support of their case. The accused elected to give sworn testimony in their defence.

2. On the fateful day at around 1:40am, Michael Otange Ouma (PW 4) was at a disco *matanga* in Korando. He recalled that he was standing in a tent near the public address system while the deceased was seated near him. Suddenly the accused persons together with three other men, all whom were well known to him, went to where the deceased was and began assaulting him while demanding a phone. They frog-marched him to a nearby open field and continued beating him with sticks. PW 4 testified that he followed group but when he got too close, he retreated when they threatened to beat him. He called the area chief on his mobile phone for help but the chief told him he could not make it to the scene.

3. Joseph Gaya Misumi (PW 5) was also present at the disco *matanga* on that night. He recalled that the deceased was present and was at the verandah while he was some distance away. He recalled that some people including the accused came to take the deceased outside the compound. He told the court that he saw them beating deceased. He decided to follow them but they threatened him and other people who tried to intervene.

4. As the assault continued, PW 4 and PW 5 decided to look for help at the nearby Kisumu County Governor's residence which was guarded by Administration Police officers. They returned to the scene with two police officers. PW 4 testified that when they returned, they found the accused persons and the other three men still assaulting the deceased but they all fled when they saw police officers. PW 5 told the court that they called the deceased's brother and father and later took the deceased to his sister's home on a motorbike.

5. The deceased father, Michael Otieno Nyagute (PW 1) recalled that on the material night he received a phone call from his son, Joseph, who informed him that the deceased had been badly assaulted at the disco *matanga*. PW 1 also received another call from PW 4 who informed him of the assault. PW 1 could not make it to the scene due to insecurity in the area. His daughter also called and informed him that the deceased had been taken to her house and that she had found a *tuk tuk* owned by Abdallah Apondi Abdallah (PW 3) to take him to hospital. PW 1 met his daughter and PW 3 and they took the deceased to Kisumu County Hospital where he was pronounced dead on arrival. PW 1 testified that he reported the matter to Kisumu Central Police and was referred to Maseno Police station.

6. Phillip Otieno Nyaguti (PW 2) testified that on the fateful night, he was informed by his step-mother that the deceased was being assaulted by among others, the accused. He rushed to the scene but was informed that the deceased had been taken to his sister's house. He went there and found the deceased badly injured. He decided to go home. After learning that the deceased had passed away, he decided to go and look for the assailants as he knew them well. PW 2 recalled that he together with other members of the public arrested the accused and took them to the Kisumu Central Chief, Simon Osege Orwa (PW6), who informed then Commanding Officer, Maseno Police Station.

7. Sergeant Beatrice Kimutai (PW 7) testified she went to Otonglo Chief's camp where the accused were being held after being informed of

the incident by her Commanding Officer. PW 7 re-arrested the accused persons and later organised for a post mortem on the body of the deceased which was performed by Dr. Otieno. PW 7 further testified that after conducting investigations and recording witness statements, she arraigned the accused persons for the murder of the deceased.

8. After the prosecution case, both accused elected to give sworn testimony. The 1st accused recalled that on the fateful night, he was with the deceased and 2nd accused watching soccer together at around 7:00pm. The deceased decided to go elsewhere to watch news. Suddenly there was commotion outside and they also went outside to ascertain what was going on. They heard people shouting, "Police!". The 1st accused told the court that he decided to go home to avoid being arrested. The following day he went to the lake and that is where he was accosted by members of the public who accused him of killing the deceased. On his part, the 2nd accused stated that after they heard commotion he went back to watch soccer and only left after the soccer game was over. He denied that he attended the disco *matanga*.

9. 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*.

10. The fact and cause of death of the deceased is not in dispute. The post-mortem report on the deceased's body was done by Dr Otieno at Kisumu County Hospital on 9th August 2016 after the body was identified by PW 1. According to Dr Otieno, there were no obvious visible injuries on the deceased's body. The deceased had fractures on the right and left wrist joint and the left elbow joint. Internal examination revealed a liver haematoma measuring about 8 X 5 cm, a ruptured spleen accompanied by accumulation of blood. There was a minor bruise on the head with swelling on the forehead and a slipped disc on the spinal cord. Dr Otieno concluded that the cause of death was cardiovascular arrest secondary to internal bleed and ruptured spleen following blunt trauma.

11. The key issue for determination is whether the accused were part of the group of persons who assaulted the deceased thereby causing his death. I would point out at this stage that the prosecution case was founded on the identification of the accused by a witnesses in admittedly difficult circumstances. This calls for careful examination of the evidence to exclude the possibility of mistaken identity. Such evidence must be watertight before a court can return a conviction (see ***Abdalla Bin Wendo & Another v R* [1953] 20 EACA166**, ***Wamunga v Republic* [1989] KLR 42** and ***Maitanyi v Republic* [1986] KLR 198**). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See ***R v Turnbull* [1967] 3 ALL ER 549**). These requirements are, however, relaxed when dealing with the case of recognition because, "*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other*" (see ***Anjononi & Others v Republic* [1980] KLR 59**). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

12. PW 4 testified that he was about a metre away from the deceased when the accused and their accomplices came to get him. He told the court that there was not only moonlight but that were electric lights at the funeral. He was able to name the assailants as he knew them as they were fellow villagers. The testimony of PW 4 was corroborated by the testimony of PW 5 who stated that he was present when the accused persons escorted the deceased from the compound and he was clearly able to see the accused persons because there was electricity lighting in the compound and the accused persons were well known to him. Apart from the fact that this was a case of recognition given that the witnesses and assailants were from the same village and they knew each other, I find that the conditions of lighting, the distance between the PW 4 and PW 5, the accused and deceased and the time taken from when the accused came to the compound and escorted the deceased were all conditions conducive for positive recognition and negated any chance of mistaken identity.

13. The accused denied that they were at the disco *matanga* and that they did not beat the deceased. Counsel for the accused suggested that because the witnesses were related in some way to the accused, their testimony should not be believed. I reject this suggestion as there was no evidence of any animus or a grudge between PW 4 and PW 5 and the accused to lead them to lie against the accused. Their testimony was clear and consistent and it put them at the scene of the incident thus extinguishing their defence which in any case puts them in the vicinity of the offence. The accused also suggested that failure to call the administration police officers undermined the prosecution case. I also reject this argument as there was evidence of two direct witnesses and in any case, the officers arrived at the scene, the accused and their accomplices fled. Their testimony would only be corroborative of that of PW 4 and PW 5. I therefore find and hold that the accused were part of the group that escorted the deceased from the funeral as they were assaulting him.

14. The prosecution did not prove that it is the accused inflicted the fatal blow. In order to find the accused guilty of murder, the prosecution had to prove that the accused together with the mob of people shared a common intention to kill or to do grievous bodily harm (see generally ***Augustino Orete & Others v Uganda* [1966]EA 430** and ***Dracaki s/o Afia & Another v R* [1963]EA 363** and ***Peter Gachoki Njuku & Another v R* NYR CA Crim. App. No. 115 of 2002 [2002]eKLR**). **Section 21** of the **Penal Code** states as follows;

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

15. In ***Wanjiro d/o Wamerio v R*, 22 EACA 521**, the Court stated that;

Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.

16. Although the accused were part of the group that assaulted the deceased, there is no evidence that they were part of a pre-meditated plan to cause grievous harm or kill the deceased. In the circumstances, I find that although the accused engaged in an unlawful act by taking from the disco *matanga* and assaulting him and therefore causing his death, such death may not have been intended or anticipated by the accused.

17. I therefore find the accused, **STANLEY MUSIMI MBALIWA** and **ELIAS ONGUDI ODIE**, guilty of the lesser offence of manslaughter contrary to **section 202** of the *Penal Code* and I convict them accordingly.

SIGNED at NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISUMU this 31st day of May 2018

F. A. OCHIENG

JUDGE

Mr. Emukule, Advocate for the 1st accused.

Mr Oguso, Advocate for the 2nd accused.

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