



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 10 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

1. MICHAEL OUMA OSIANI *alias* AROJI

2. KENNEDY OUMA OBANDO *alias* NEDDY.....ACCUSED

JUDGMENT

The Background:

1. **Moses Onyango Magak** (hereinafter referred to as '**the deceased**') died on 08/02/2015 while undergoing treatment for injuries he sustained during a fight the day before. Out of police investigations **Michael Ouma Osiani *alias* Aroji** and **Kennedy Ouma Obando *alias* Neddy** were charged with the murder of the deceased. I will refer to **Michael Ouma Osiani *alias* Aroji** as '**the first accused person**' and **Kennedy Ouma Obando *alias* Neddy** as '**the second accused person**'.
2. The accused persons pleaded to the information on 04/03/2015 whose particulars were that on the 7th day of February 2015 at Chamgiwadu Shopping Centre, Migingo Bar in South Kamagambo Location within Migori County in the Republic of Kenya jointly murdered the deceased.
3. The accused persons denied committing the offence and the case was set for hearing with seven witnesses testifying.

The Evidence:

4. The witnesses who testified in this case were **Brian Omondi Omondi** as **PW1**, **John Origa Ongong'a** as **PW2**, **Isaiah Odhiambo Magak** who was an elder brother to the deceased as **PW3**, **No. 44237 PC Martin Muli** who was **PW4**, **Dr. Emmanuel Odhiambo Oyier** who testified as **PW5**, **Jeremiah Oliech Magambo** was **PW6** and **No. 64781 Cpl. James Thuva** attached to Kamagambo Police Station and who was the investigating officer who testified as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.
5. To have a clear picture of how the events in this matter unfolded, I will revisit the evidence of the said witnesses. **PW1** was a young man who used to engage in the business of splitting timber for firewood or for other uses. He used to work with the first accused person using a power saw belonging to **PW3**. On 07/02/2015 at around 10:00pm **PW1** went to see **PW3** at his business premises. **PW3** was the proprietor of one of the bars at Chamgiwadu Shopping Centre known as Migingo Bar. **PW3** had hired **PW1** and the first accused person to split some timber for him and **PW1** wanted to find out if he would continue with the work the following day. **PW1** reached Migingo Bar (hereinafter referred to as '**the bar**') and since it was at night the place was well lit with fluorescent tubes and bulbs. There were many patrons inside as well. **PW1** recognized some people he knew including **Caleb Oluoch Magak** ('**Caleb**' and not a witness), the deceased and **PW2**. **Caleb** was a brother to the deceased and **PW3**. He also saw the first accused person seated with one of the waitresses called **Idah** (not a witness) inside the bar. **PW1** approached the first accused person and asked him whether they were continuing with their work the following day. Before **PW1** finished his conversation with the first accused person he briefly talked to **Idah** who told him that **Caleb** and the deceased were planning to attack the first accused person over the issue of the tree. **PW1** told the first accused person of what was being planned against him. **PW1** was informed by the first accused person that they were not going to work on the following day.
6. **PW1** was aware that **Caleb** was not in good terms with the first accused person. The cause was that at one time the first accused person was cutting down a tree and it fell on the house of **Caleb** and destroyed it. Since then, whenever **Caleb** met the first accused person he used to threaten him that he will one day show him. **PW1** witnessed one such threat on 06/02/2013 where people had gathered to witness a fight between the deceased and **PW3**.
7. As **PW1** was inside the bar he witnessed a fight. The fight was a culmination of verbal abuses the deceased hurled onto the first accused person over the tree that destroyed **Caleb's** house. The first accused person did not respond and just kept quiet. The deceased was visibly

drunk and staggered as he walked. The deceased then picked a bottle and threw it aiming to hit the first accused person. The bottle missed the target and hit a wall and some pieces injured PW1 on the neck. PW1 sensed danger and rushed outside the bar.

8. PW1 met the second accused person at the main entrance walking into the bar as he rushed outside. He stood outside the bar and watched what was happening inside through the glass door. PW1 saw the second accused person approach the deceased and calmly talked to him. All over a sudden the deceased picked a bottle and hit the second accused person. The second accused person then left the bar crying. PW1 followed the second accused person for a short while and decided to just remain around the bar and see what will then happen. PW1 saw the main door to the bar then closed from inside by the staff. PW1 also stated that there was heavy fighting inside the bar and chairs were being thrown all over.

9. After a short while, PW1 saw the second accused person returning to the bar while armed with a *panga*. As the main door to the bar was closed PW1 saw the deceased coming from the direction of the bar's rear door to the front of the bar. The deceased and the second accused person met. PW1 witnessed the second accused person slapping the deceased with the *panga* with a view to contain him but not to cut and injure him. To PW1, had the second accused person wanted to injure the deceased then he would have instead cut him. PW1 stood just 5 metres away from the deceased and the second accused person. The deceased then cried in *Dholuo* language that the second accused person had killed him using a *panga*. PW1 quickly moved and disarmed the second accused person. PW1 then saw the first accused person coming from the bar armed with a stick and hit the deceased on the head. The deceased fell. Caleb then came out of the bar lamenting that the first accused person had killed the deceased and wanted to get the *panga* from PW1 but PW1 crossed over the road and threw the *panga* away to avoid further casualties and then returned to where the deceased had fallen. PW1 saw the first accused person being disarmed.

10. Several people had then gathered due to the commotion and when the deceased was rushed to hospital PW1 returned home and informed the family of the deceased who were his neighbors what had transpired at the bar. PW1 was later called by the police and recorded a statement.

11. **PW2** walked into the bar at around 07:30pm for a drink. He saw the deceased occupying one of the tables with one of the waiters and other people. PW2 occupied a separate table and called for his popular drink; a 500ml moonwalker whisky and a soda. About 30 minutes later Caleb walked into the bar and joined PW2. He indeed shared his drink. Later the first accused person walked into the bar and occupied another table. Caleb then told the deceased that the first accused person was '*one of those people.*' The first accused person kept quiet even as Caleb kept on talking about him in a manner that showed that Caleb and the first accused person were at loggerheads. Surprisingly PW2 stated that although he was seated with Caleb he could not recall the words Caleb uttered.

12. The deceased then went out of the bar with Caleb (his brother) and shortly called the first accused person outside. The first accused person obliged. While outside the bar, the deceased and the first accused person made noise as a sign of a disagreement. The deceased then walked back into the bar and sat at his table. As PW1 was taking his second bottle of moonwalker whisky he saw three people entering the bar. They were the first accused person, the second accused person and one **Boy** (not a witness). On seeing the three walking into the bar, the deceased stood and took his drink and proceeded towards the door. Shortly, PW2 saw the deceased throwing the bottle of the drink he had carried and heard a sound of the bottle hitting a wall. He also saw the second accused person armed with a *panga*. PW2 ran out of the bar and rushed to the house of PW6 and informed him of the commotion at the bar. PW2 then rushed to the home of a former Councilor and informed him as well. The Councilor called PW3. PW2 then returned to the bar to collect his sweater which he had left behind while fleeing. He found the main door locked, but the fight was over. PW2 then saw PW3 coming to his bar and saw the deceased lying on the ground. PW2 also saw the first accused person standing at a distance with a piece of wood and the second accused person with a *panga*.

13. PW2 observed the deceased and saw blood oozing from the nose. He also had been cut on the side of the stomach. There were many people at the scene. PW3 called for a taxi and took the deceased to hospital. PW2 then returned home and learnt later that the deceased had died. He recorded a statement with the police. PW2 clarified that he did not witness any of the accused persons attacking the deceased, but the people who had gathered at the scene were the ones who said that it was the accused persons who had injured the deceased.

14. **PW6** was watching the 09:00pm local news in his house which is within the Chimgiwadu Shopping Centre and just next to the bar on 07/02/2015. He heard the dogs barking heavily and on opening the door he saw PW2 without a shirt who asked him to assist him reach the home of the former Councilor to aid him get his shirt which he had left inside the bar as there was a serious fight going on. PW6 showed PW2 the home of the said Councilor and went to the bar. He saw many people gathered and someone was lying down with his face facing the ground just across the road which passed at the front of the bar. He observed the person using his spotlight and saw some fluids oozing from the mouth and he was breathing with a lot of difficulty. He recognized the person as the deceased. PW3 arrived and took the deceased to hospital. PW6 learnt the following day that the deceased had died.

15. PW6 saw the accused persons at the scene holding each other's shirts and struggling over something at the main road. PW6 did not witness any fight at the scene.

16. **PW3** had passed by his bar and proceeded to a meeting of the *boda boda* riders which was held at the Mingo Centre that night. He was later called by one of his staff at the bar and asked to rush there as there was some commotion at the bar. PW3 rushed there and found many people gathered there and the deceased was lying down wriggling in a lot of pains. PW3 called the name of the deceased but the deceased just cried louder. PW3 asked the people what had happened and PW2 told him that it was the second accused person who could explain. PW3 stated that the second accused person said that he had injured the deceased upon a disagreement.

17. PW3 organized for transport and took the deceased to Rapcom Hospital where he was admitted. PW3 returned home and in the morning, he was called by Caleb who was with the deceased at the hospital and told that the deceased's condition was worsening. PW3 rushed there only to find his brother already dead. He then reported the matter to Okumba Police Post and proceeded to the bar where PW3 met the OCS and other officers from Kamagambo Police Station who interviewing several people. PW3 recorded his statement at the Okumba Police Post. He also witnessed the post mortem examination on the body of the deceased at Rapcom Mortuary.

18. **PW4** was attached at Okumba Police Post. He was called by one of the members of the Community Policing in Chimgiwadu area in the

morning of 08/02/2015 and informed of what had transpired the night before at the bar. PW4 accompanied one **Corp. Okumu** (not a witness) to the scene at around 10:00am, but as they were on the way they met PW3 who informed them that the deceased had died. They all returned to the Police Post and recorded the report. PW4 then called and informed the OCS Kamagambo Police Station of the report as they left to the scene. On reaching the scene, they found the OCS already there with other police officers interviewing people. PW4 observed the scene and saw blood drops running from the entrance of the bar into the road. There was however no blood or broken glasses inside the bar and the chairs and tables were in order. He then accompanied his colleagues to Rapcom Mortuary where they viewed the body of the deceased.

19. PW4 was then asked by his colleagues at Kamagambo Police Station where the matter was handled from to arrest the accused persons. PW3 aided PW4 and other officers to arrest the accused persons and PW4 took them to the said Police Station.

20. **PW5** carried out the post mortem examination on the body of the deceased at Rapcom Hospital in Awendo on 17/02/2015. The head had a swelling on the right side. There was a blood clot on the right eye caused by a cut wound and a blood clot on the nose. There were several bruises on the left elbow joint and a cut wound on the right elbow joint. Internally, the head had a fracture of the skull on the right side and there was a blood clot under the skin. There was intracerebral hemorrhage. PW5 formed an opinion that the death of the deceased was caused by a blunt trauma to the head consistent with an assault. PW5 produced the Post Mortem Report as an exhibit. PW5 also produced two P3 Forms for the accused persons on their mental assessment which confirmed that they were both fit to stand trial.

21. The case was investigated by **PW7**. He was one of the police officers who visited the scene on 08/02/2015. He interviewed several people at the scene. He learnt of the fight that had occurred the night before at the bar between the deceased and the first accused person over a tree and that the deceased had hit the accused persons with bottles of beer which broke. That, the two were separated and later another fight broke out outside the bar between the accused persons and the deceased where the deceased was fatally wounded. He also learnt that the deceased had been taken to Rapcom Mortuary and proceeded to view the body there and attended the post mortem examination on 18/02/2015. He later charged the accused persons.

22. PW7 confirmed that according to PW5 the deceased did not die out of a *panga* cut. He also confirmed that there was a grudge between the deceased and the first accused person and he was satisfied that the death of the deceased was caused by the accused persons. PW7 also confirmed that an attack with a bottle can be fatal.

23. The prosecution then rested its case with the foregone evidence and on consideration of the evidence this Court placed the accused persons on their defenses. The accused persons opted for and gave sworn testimonies and the first accused person called a witness, **Benard Onyango Okinyi (DW1)**.

24. The first accused person testified that he went to the bar on the said day earlier and met the one whom he had worked for and who paid him his money which was Kshs. 10,000/=. That, left the bar and returned at around 04:00pm and met PW3 who bought him some drinks. As he continued drinking he was joined by a lady and later some other people came in. He saw the deceased, PW2 and Caleb walk in and occupy a table. There was also the second accused person and PW1 who also came in and occupied another table. That, two groups among those inside the bar differed, and a fight broke out. Bottles were thrown, and he was injured on the face. He showed the resultant scar to the Court. The people were variously injured and described the fight a very serious one. He was given first aid by a waitress and left for further treatment.

25. The second accused person stated that on the said day he went to the bar at around 07:00pm and took drinks. That, he met the first accused person, the deceased, PW1, PW2 and Caleb inside the bar. That, he occupied a table at the middle of the bar with PW1. That, Caleb reminded PW1 how PW1 had injured his eye sometimes back and threw two bottles of beer to PW1 who was seated with the second accused person. That, the second accused person was injured on the neck and showed the Court the resultant scar. He then left the bar for hospital and denied ever carrying *panga* as alleged.

26. DW1 stated that he grew up with the accused persons in the same village near the Chamgiwadu Shopping Centre. He lived just about 10 metres from the bar. As he was taking supper he heard some heavy commotion at the bar which persisted for about a whole minute and the music was eventually stopped. He heard the first accused person asking why he had been beaten with a bottle. He quickly went out of his house and rushed to the bar. As the place was well lit with electricity he clearly saw four people fighting and moving from the veranda of the bar towards the road. They were the deceased, Caleb, PW1 and the second accused person.

27. DW1 further testified that the second accused person was fighting with the deceased and the second accused person slapped the deceased severally with a *panga* on the head and back but did not cut him. PW1 was fighting with Caleb and they were pulling each other. That, he did not see the first accused person at the scene, but only heard his voice. That, he witnessed the deceased and the second accused person placed in a vehicle and rushed to hospital. Later the bar was opened, and the first accused person came out as he was taken to the nearby hospital by one of the bar attendants. DW1 confirmed that the second accused person was also injured on the head and hands and that the serious fight which lasted for about 10 minutes took place at the roadside.

28. The accused persons then closed their cases and the Counsels were directed to file their written submissions as the matter was set this judgment. It was only the Counsel for the second accused person **Mr. Abisai** who duly complied. Counsel submitted that the prosecution's case was based on circumstantial evidence which evidence did not meet the required legal standard as laid down in the cases of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990** (unreported), **Republic vs. Michael Muriuki Munyuri (2014) eKLR** and **Sawe vs. Republic (2003) KLR 364**.

Analysis and Determination:

29. As the accused persons were charged with the offence of murder the following three ingredients must be proved to uphold a conviction: -

(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.

30. The said ingredients will be considered singly hereunder.

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

31. It is not in dispute that the deceased person in this matter died. That position was confirmed by all the witnesses. The first limb is hence answered in the affirmative.

32. As to the cause of the death of the deceased, PW5 produced a Post Mortem Report which he prepared upon conducting a post mortem examination on the deceased. The said report gave the possible cause of death as a blunt trauma to the head consistent with an assault. Since there is no any other evidence contradicting that of PW5 on the cause of death of the deceased, this Court so concurs with that medical finding. The second limb of the ingredient is hence proved.

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

33. Contrary to the submissions by the second accused person that the prosecution’s case was based on circumstantial evidence, the correct position is that there was at least one eye-witness. PW1 and PW2 were eye-witnesses. There is no doubt that there was a fight in the night of 07/02/2015. PW2 went to the bar earlier than PW1. He was there at 07:30pm whereas PW1 went in at around 10:00pm. PW2 sat with Caleb as they took drinks. As they continued drinking Caleb informed his brother (the deceased) that the first accused person was ‘one of those people’ and then started insulting the first accused person who was also taking drinks. The first accused person remained calm. Then Caleb and the deceased went out and had a discussion and then called the first accused person outside. After a short while there was a disagreement and only the deceased returned inside the bar. That means Caleb and the first accused person remained outside the bar. There was calm and PW1 as well as the deceased continued drinking separately though.

34. According to PW2, when the first accused person walked back into the bar he was accompanied by the second accused person and one Boy and the deceased attacked them using bottles while they were still at the main entrance. PW2 also saw the second accused person holding a panga. When PW2 heard the sound of a bottle hitting a wall he ran out of the bar very fast that he left his shirt. He proceeded to PW6’s house where he sought to be led to a Councilor’s house.

35. The evidence of PW2 is however not in tandem with that of PW1. Although PW1 went into the bar at 10:00pm he stated that he found the first accused person seated with Iddah and talked to Iddah first before he engaged the first accused person. That, PW1 also witnessed the deceased hurling insults to the first accused person about the house of Caleb. Therefore, according to PW1 it was the deceased insulting the first accused person whereas according to PW2 it was Caleb insulting the first accused person.

36. Further, according to PW2 when the second accused person entered the bar in the company of the first accused person and Boy, he was armed with a *panga*. It was the sight of the *panga* and the sound of a bottle hitting a wall that indeed made PW2 to escape leaving his shirt behind. However, according to PW1 the second accused person did not enter the bar while armed with a *panga* for two reasons: one, the bar was closed from inside and two, PW1 disarmed the second accused person at the road where the second accused person met the deceased. PW1 explained that he met the second accused person at the entrance as he was also fleeing the fight after the deceased had thrown a bottle and injured him. That, by then the second accused person had no *panga* and went to calmly talk to the deceased. That, when the deceased hit him with a bottle the second accused person then rushed to his house and came back with a panga and that is when PW1 disarmed the second accused person outside the bar.

37. PW2 took time and ran to PW6 where he was later shown the way to the Councilor’s home. He went and reported what was happening to Councilor who then called and informed PW3. PW2 then returned to the scene. When he reached, he found that the fight had stopped, the deceased was injured while lying down, the first accused person holding a stick and the second accused person still holding the panga. Could that be a different panga from the one which PW1 allegedly disarmed the second accused person at the road? PW2 also stated that he observed the deceased while lying down and saw that he had been cut on the stomach. But, that observation was not made by any other witness not even PW5 who conducted the autopsy.

38. PW1 also stated that when the second accused person attacked the deceased with the panga at the road, Caleb came out of the bar lamenting that his brother had been killed. But, according to PW2 Caleb never returned to the bar after he went out with the deceased and called the first accused person and that was long before the alleged encounter at the road.

39. The foregone sharply varying and irreconcilable testimonies lead me to a very considered finding and I so hold that PW2 was so drunk that he was not in a position to clearly see and give a narration of what happened. Further, if PW2 had been brought up in the village and knew it so well how come that he had to be shown the way to the house of the former Councilor by PW6 to seek his assistance to retrieve his shirt from the bar? Why couldn’t he have just asked PW6 to do so? It is PW2 who had been drinking some whisky from 07:30pm until the incident occurred well past 10:00pm. He confirmed that he had finished a 500ml bottle of whisky and that he was on his second one. One cannot allege to be still in a position to comprehensively perceive and know what goes around after consuming such a large amount of whisky; not even normal beer. The evidence of PW2 is hence unreliable and is hereby disregarded.

40. There is however the evidence of PW1. He stated that he had stopped drinking when he went to the bar to find out from PW3 whether he was continuing with the work PW3 had given him and the first accused person. His evidence however must be weighed against the

remainder of the evidence. PW6 testified that when he reached the scene he had to use his spotlight to see how the deceased was injured. PW1 however stated that the bar was well lit with electricity bulbs inside and that there was a bulb at the entrance. He further stated that there was no moonlight and that the other neighboring bars had lights. The record is silent on how far the other bars which PW1 described as neighboring were and the positions and the intensity of the lights they had. Likewise, PW1 did not describe the intensity of the light at the entrance of the bar and the distance between the entrance and where the alleged encounter between the accused persons and the deceased was. Given that there was no moonlight and in light of the evidence of PW6 that he had to use a spotlight to see who had been injured and where, there hence exists a doubt on how well lit the outside of the bar was. There is hence a very high likelihood that PW6 was truthful on how the lighting was outside the bar otherwise he would not have used his spotlight in a well-lit place. That therefore casts serious doubts on the evidence of PW1 on by who and how the deceased was attacked.

41. In reaching that finding I am guided by the need to treat evidence of identification, and even in cases of recognition, in difficult situations with a lot of caution as it can easily cause injustice to an accused person. (See the decisions in **Wamunga vs. Republic (1989) KLR 426**, **Nzaro vs Republic (1991) KAR 212**, **Kiarievs Republic (1984) KLR 739**, **R -vs- Turnbull & Others (1973) 3 ALL ER 549** among many others).

42. There is also the undisputed fact there was a fight inside the bar. It was an intense fight with all available arsenal including bottles, chairs and tables. All those who took part in that fight were variously injured. Given that PW5 stated that the cause of death was a blunt trauma on the head caused by possible assault, it cannot be said with precision that the fatal injuries were caused by the accused persons. Whereas that possibility remains, the possibility that the injuries may have been caused by the others who also took part in the fight inside the bar, including the staff and the other people who were drinking therein, cannot be ignored. A doubt is hence created as to who exactly occasioned the fatal injuries.

43. I must find, which I hereby do, that the prosecution did not sufficiently prove that it was the accused persons who caused the death of the deceased. That being so, the consideration of the third ingredient in this matter will not add any value to this judgment.

44. The upshot is that the accused persons herein, **Michael Ouma Osiani *alias* Aroji** and **Kennedy Ouma Obando *alias* Neddy**, are found **NOT GUILTY** of the murder of **Moses Onyango Magak** and that each of them is hereby acquitted accordingly. Each of the accused persons is therefore set at liberty unless otherwise lawfully held.

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

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Ojala Counsel for the first accused person.

Mr. Abisai Counsel for the second accused person.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Prosecution.

Evelyne Nyauke – Court Assistant.