



**REPUBLIC OF KENYA**

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

**CRIMINAL (MURDER) CASE NO. 1 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JARED ODHIAMBO ABUTO.....ACCUSED**

**JUDGMENT**

1. **Jared Odhiambo Abuto**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

**On 6th February, 2017 at Mibisi village in Muhoroni Sub-County murdered Gordon Otieno Abuto**

2. The prosecution summoned a total of 8 (eight) witnesses in support of its case while the defence called accused and two witnesses.

**Prosecution Case**

3. **PW 1 Dr. Dickson Mchana**, of *Jaramogi Oginga Odinga Teaching and Referral Hospital* stated that he conducted an autopsy on the body of **Otieno Abuto** on 15.2.17 at Ahero County Hospital and found it with the following injuries:

- *Non-extensive abrasions and contusions on face, head, trunk and both lower and upper limbs*
- *Dried bloody secretions on nostrils*
- *3 linear lacerations on the spleen*
- *2 litres of blood in abdomen*
- *Bleeding under skin of head, face, legs and hands*
- *Inflamed abdomen*

The doctor formed an opinion that deceased died of internal bleeding following slow leaking spleen laceration due to blunt force trauma. He produced the postmortem form **PEXH.1**.

4. **PW 2 Domnic Bosire**, a clinical officer examined David Ouma on 8.4.17 after he alleged he had been assaulted and he found him with blunt injury on left cheek bone, blunt injury on back which was septic and bruises on right upper arm. He produced Ouma's P3 form PEXH. 2.

5. **PW 3 David Ouma**, recalled that on 5.2.17 at about 7.30 pm, he was in deceased's house with the deceased when accused went there and for no apparent reason injuring them. It was his evidence that he managed to escape and left accused beating the deceased. That on 7.2.17, he was informed that deceased was admitted in hospital where he later died. Witness told court that he was also treated for the injuries he sustained and was issued with a P3 form.

6. **PW4 Bernard Ogade Okoth**, assistant chief Sidho East Sub-Location recalled that on 7.2.17 at about 8.30 am, accused reported that his brother Gordon Otieno who was a drunkard and sickly had died and his body had been taken to the morgue. That he later received information that accused had attacked David Ouma and Gordon Otieno as a result of which the latter died.

7. **PW5 Andrew Amuok Onyango**, recalled that on 6.2.17 at about 8.00 am, accused reported that his brother Gordon Otieno had died at home. That he went to the scene and found the body of the deceased which had visible injuries on the face. That deceased's body was removed to the mortuary the following morning where the witness managed to see injuries on its head, right hand and face.

8. **PW7 Angelina Adhiambo Odhiambo**, accused's wife stated that on 5.2.17 at about 5.00 pm, his son informed him that deceased was

fighting with someone in his house. That the same day at about 7.30 pm, he saw deceased who was drunk fall at his gate due to drunkenness. She told court that accused went to deceased's house and threatened to beat PW2 who then escaped. She said she did not see accused beat deceased.

9. **PW6CPL Joraam Ndungu**, the Investigating Officer stated that on 7.2.17, he visited Sidho East Sub-Location after receiving a murder report of murder. That in the course of investigations, he met –W2 who informed him that accused had beaten him and deceased on 5.2.17 and he issued PW3 with a P3 Form. That he later recorded witness statements and arrested accused and caused him to be charged for the murder of the deceased.

### **The Defence Case**

10. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put her on her Defence. In his sworn defence, accused denied the offence. He stated deceased was his brother and used to stay in his compound. He stated that on 5.2.17 he returned home at about 6.00 pm and found deceased and PW2 drinking alcohol. He denied attacking deceased and PW2. He said that PW2's clothes were bloodstained and he was informed by his wife that deceased and PW2 had been quarreling the whole day. He said he didn't see deceased again until the night of 6.2.17 when he discovered that he had died in his house. He confirmed that deceased's body had injuries on it. **DW2 Ibrahim Ouma**, accused's son told court that on 5.2.17 at about 1.00pm, he saw deceased and PW2 fighting. It was further his evidence that later that day, deceased hit him with a stick and when he reported the matter to accused later in the evening, accused went to deceased's house where deceased and PW2 were. He said he didn't see accused beat deceased and PW2.

### **ANALYSIS AND FINDINGS**

11. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari Vs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

*(a) the death of the deceased occurred;*

*(b) that the accused committed the unlawful act which caused the death of the deceased; and*

*(c) that the accused had malice aforethought.*

#### **(a) The death of the deceased**

12. The death of the deceased has been proved by the PW2, 3, 4, 5 and 6 who saw deceased's body and by postmortem form **PEXH. 1** produced by PW1 that confirms that deceased had extensive injuries on his body and had died of *internal bleeding following slow leaking spleen laceration due to blunt force trauma*.

#### **(b) Proof that accused committed the unlawful act which caused the death of the deceased**

13. PW2 told court that accused beat him and the deceased with a stick on 5.2.17 at about 7.30 pm. It is not denied that accused went to deceased's house on 5.2.17 at about 7.30 pm when deceased and PW2 were assaulted. This was confirmed by **PW7 Angelina Adhiambo Odhiambo** who told court that accused went to deceased's house on 5.2.17 at about 7.30 pm and threatened to beat PW2 who then escaped. Accused himself confirmed he went to deceased's house on the evening of 5.2.17 where he found deceased and PW2. Further evidence was given by **DW2 Ibrahim Ouma**, accused's son who told court that on the evening of 5.2.17 he informed accused that deceased had beaten him with a stick and accused went to deceased's house where deceased and PW2 were. Consequently, I find that accused was at the scene of crime when it was committed.

14. I have considered evidence by DW2 that deceased and PW2 had fought on 5.2.17 and that accused had seen PW2 with blood stained clothes but I find it unbelievable especially because this evidence was not put to PW2 when he testified. In my considered that evidence is an afterthought and I reject it.

15. That leaves the court with evidence that accused assaulted deceased and PW2 on the evening of 5.2.17. Evidence that PW2 was injured has been confirmed by a P3 form produced as PEXH. 2. Evidence that deceased was injured is also contained in the postmortem form which shows that deceased had multiple injuries among them *non-extensive abrasions and contusions on face, head, trunk and both lower and upper limbs, Dried bloody secretions on nostrils, 3 linear lacerations on the spleen, 2 litres of blood in abdomen, bleeding under skin of head, face, legs and hands and inflamed abdomen*.

16. As we know from **Republic –vs- Taylor Weaver and Donovan (1928) 21Cr. App. R. 20**

*“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”*

17. **I am satisfied that accused was at the scene of crime. PW2's evidence that accused assaulted him and deceased is corroborated by the P3 form and the post mortem report.** PW1, Dr. Mchana, told court that injuries on deceased were consistent with death that did not occur immediately after he was injured. That in essence confirms the explanation that deceased was discovered dead on the night of 6.2.17 which was a day after he was assaulted. From the foregoing; I find that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which constitutes the '*actus reus*' of the offence. Accused's defence that deceased fell or fought with PW2 is not supported by the evidence on record. Such evidence is in my considered view an afterthought and it

is rejected.

**(c) Proof that deceased had malice afterthought**

18. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. The ingredients of murder were explained in the case of **ROBA GALMA WARIO VS REPUBLIC [2015] eKLR** where the court held that;

*“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”*

19. Malice aforethought was defined in the following cases;

**(a) NZUKI VS REPUBLIC [1993] KLR 171** where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- *Intention to cause death*

- *Intention to cause grievous bodily harm*

- *Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.*

**(b)** In the case of **DANIEL MUTHEE VS REPUBLIC Criminal Appeal No. 218 of 2005 (UR)** cited in the case of **REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR**, Bosire, O’kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

*“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”*

20. Upon a careful evaluation of the evidence, the court finds that the prosecution evidence was overwhelming and effectively dislodged the defence offered by the accused. I am satisfied that accused inflicted considerable injuries that led to the death of the deceased. From the severity of the attack, I find that it was the intention of the accused to cause the deceased grievous harm if not death.

**Disposition**

21. Consequently, I have come to the conclusion that the state has proven its case beyond reasonable doubt. Accused is found **GUILTY** of the offence of murder and he is accordingly convicted.

**DATED, DELIVERED AND SIGNED THIS 26TH DAY OF JULY 2018**

**T. W. CHERERE**

**JUDGE**

Read in open court in the presence of-

**Court Assistant - Felix**

**Accused - Present in person**

**For Accused - Mr. Onyango/Mr. Okoyo**

**For the State - Ms. Barasa**