



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL (MURDER) CASE NO. 03 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

EVANS OTIENO ADONGO alias DESIGN.....ACCUSED

JUDGMENT

1. **EVANS OTIENO ADONGO alias DESIGN** 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 the night of 27th December, 2017 at around 19.00 hrs at Kinyimon village, Okot Sub-location, Kisumu East Sub-County, within Kisumu County murdered BRIAN OCHIENG KAROGO

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

Prosecution Case

3. **PW 1 Salome Atieno Agumba** stated that she is the mother of **BRIAN OCHIENG KAROGO (hereinafter referred to as the deceased)**. She recalled that on 27.12.17 at about 7.00 pm, she was sitting outside her house with the deceased making supper while her other children Frank Odhiambo, Fenny Achieng and Ronny Otieno were in the house. She stated that she sent the deceased into the house to collect water and after he went, someone stabbed her on the back. That as the deceased came out of the house, she saw the assailant, Evans alias Design (*hereinafter referred to as the accused*) herein stab him on the abdomen after which he ran away. She said that the deceased tried to give chase but collapsed and was later taken to hospital where he succumbed to the injuries. It was her evidence that the accused had previously been giving trouble to the family after her daughter Lavender refused to befriend him to an extent of trying to burn Lavender's room and that he had even been beaten by the deceased and another of his sons Ronny for his waywardness and the matter had been reported to a village elder.

4. **PW 2 Ronny Otieno Karogo**, deceased's brother recalled that on material date at about 7.30 pm, he was in the house with his siblings Frank Odhiambo and Fenny Achieng whereas the deceased and their mother were sitting outside the house. That the deceased was sent by their mother to collect water from the house and once inside, he heard their mother screaming and he and the deceased rushed out to find that their mother had been stabbed on the back. That they also found the accused and when the deceased attempted to repulse him, accused stabbed with deceased on the stomach. He said that the deceased tried to give chase but collapsed and was later taken to hospital where he succumbed to the injuries. He also told court that the accused had previously been troubling the family after he fell out with their sister Lavender and the deceased had warned him not to visit their home.

5. **PW 3 Lilian Muhunja Malova**, deceased's husband arrived at the scene after deceased had been stabbed, took him to hospital where he died on 28.12.17.

6. **PW4 PC Frank Odhiambo Karogo** deceased's brother recalled that on material date at about 7.30 pm, he was in the house with his siblings Frank Odhiambo and Fenny Achieng whereas the deceased and their mother were sitting outside the house. That the deceased was sent by their mother to collect water and when he returned to take the water was accompanied by Fenny Achieng. He stated that immediately thereafter, he heard their mother screaming. He said he went out to find that the deceased and their mother had been stabbed. He said he did not see the assailant. He similarly told court that the accused had previously been troubling the family after he fell out with their sister Lavender and the deceased had warned him not to visit their home.

7. **PW5 Lavender Akinyi Karogo** deceased's sister was not at home when the incident occurred but she stated that the accused who used to be her boyfriend had been troubling the family since she fell out. **PW6 George Otieno** recalled that he and another motorcyclist escorted the deceased and his mother to hospital on the night of the incident and he later learnt that deceased had died. **PW7 Fenny Achieng Karogo**

deceased's sister aged 16 years also stated that on material date at about 7. 30 pm, she was in the house with his siblings Frank Odhiambo and Ronny Otieno whereas the deceased and their mother were sitted outside the house. That the deceased was sent by their mother to collect water from the house. She said she accompanied deceased to take water to their mother and that she saw accused pull a knife off their mother's back and that when deceased went to defend their mother, accused stabbed him on the stomach. She similarly said that he deceased tried to give chase but collapsed and was later taken to hospital where he succumbed to the injuries. She also told court that the accused had previously been troubling the family after he fell out with their sister Lavender and the deceased had warned him not to visit their home.

8. **PW8 PC Kimeli Elis** the investigating officer received report of the incident from PW1 and after visiting the scene and recording statements arrested the accused and had him charged. He said he searched accused's house and recovered a kitchen knife **PEXH. 1** which was suspected to be the murder weapon. With the consent of the defence counsel, he produced the deceased's post mortem form **PEXH.2** which shows that he died of *severe intraabdominal hemorrhage from laceration of the spleen secondary to penetrating abdominal injury from a sharp object.*

The Defence Case

9. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put her on his Defence. Accused gave sworn defence in which he denied the offence. He said he returned home at about 9.00 pm on 27.12.17 and did not leave the house until the following morning when he went to visit his sister at Nyahera and it was from there that he was arrested.

ANALYSIS AND FINDINGS

10. 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

11. The death of the deceased has been proved by the postmortem form **PEXH. 2** produced by PW8 that confirms that deceased *died of severe intraabdominal hemorrhage from laceration of the spleen secondary to penetrating abdominal injury from a sharp object.*

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

12. PW1, PW2 and PW7 testified that accused was well known to them having been PW5's boyfriend. They told court that the incident happened outside their house near the doorway where which was illuminated by solar lighting from the house. The three witnesses told court that when the deceased tried to repulse the accused who had stabbed PW1, the accused turned the knife on the deceased and stabbed him on the stomach.

13. Evidence by PW1, PW2 and PW7 that deceased was stabbed with a knife which is a sharp object has been corroborated by the postmortem form **PEXH. 2** that shows that deceased *died of severe intraabdominal hemorrhage from laceration of the spleen secondary to penetrating abdominal injury from a sharp object.*

14. I have considered accused's defence. He stated that he returned to his home at 9.00 pm on the material night. Evidence by PW1, PW2 and PW7 has placed him at the scene of crime at about 7.00 pm to 7.30 pm. Accused did not give an account of his whereabouts between 7.00 pm to 7.30 pm when the offence was committed. His defence has therefore not dislodged the well corroborated prosecution case that he was at the scene of crime and is the one that stabbed the deceased.

15. The deceased may have succumbed to injuries inflicted by the accused. I therefore find that the prosecution has proved that accused committed the unlawful act which caused the death of the deceased which constitutes the 'actus reus' of the offence.

(c) Proof that the said unlawful act or omission was committed with malice afterthought

16. 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.”

17. 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.”

18. The attack on deceased leaves no doubt in the mind of the court that accused must or ought to have known that the act of stabbing the deceased on the stomach with a sharp instrument would cause him grievous harm or death. I am therefore satisfied that malice aforethought has been established in terms of Section 206(b) of the Penal Code.

Disposition

19. 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.

DELIVERED AND SIGNED IN KISUMU THIS 20th DAY OF DECEMBER 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Accused - Present

For Accused -

For the State - Mr Muia