REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 18 OF 2016

REPUBLIC..PROSECUTOR

VERSUS

MOI RIOBA NYAITIKA..................................ACCUSED

JUDGMENT

1. The facts leading to the death of **JOHN RIOBA NYAITIKA** (hereinafter referred to as **'the deceased'**) on 22/06/2016 at Gosese village, Mohere sub-location in Kuria West Sub-County within Migori County in the Republic of Kenya are not in dispute in this case.

2. It is fairly agreed that the deceased and the accused person herein, **MOI RIOBA NYAITIKA,** who were brothers met at a drinking den on 16/06/2016. The two were in the company of one **ANDREW MANYURA MOGAKA** (not a witness). In the curse of the drinking, the said **Andrew Manyura Mogaka** relayed some greetings to the accused person from the accused person's estranged younger wife whom Andrew had met at the local market. The accused person was really angered by that message and sought to know under what circumstances Andrew had met his wife. As the disagreement became hot, the deceased intervened and told the accused person that the greetings were in good faith. The accused person then decided to leave the drinking place and as he rose up, he got hold of the stool he had used to sit on and hit the deceased on the forehead. The deceased collapsed as the accused person disappeared into the nearby maize field.

3. The deceased was then rushed to Akidiva Hospital in Migori town where he was admitted for a day and was then transferred to Migori District Hospital. As his condition deteriorated the deceased was rushed to Kisii Level 5 Hospital and later on to Tenwek Hospital in Bomet County where he succumbed to the injuries on 22/06/2016. The police were informed and the accused person was later on arrested by the members of public through the intervention of his other brother one **HANDSON NYAATA SAGERA (PW4)** on 24/06/2016. A post mortem examination was conducted and the cause of death was opined to have been due to the injuries on the head. The deceased was later laid to rest. Upon completion of the investigations the accused person was arraigned before Court accordingly.

4. The prosecution called a total of five witnesses whose evidences were taken in a record two days; that is on the 11/01/2017 and 12/01/2017. **PW1** was one **DENNIS PETER MARWA** who was an eye-witness and knew the accused person and the deceased well as he was their neighbour. **ALICE SOFIA** testified as **PW2**. She was the wife to the deceased. **PW3** was one **ALEX ANYONA RIOBA** who was an uncle to the deceased and the accused person. **HANDSON NYAATA SAGERA** testified as **PW4.** He was a brother to the deceased and the accused person. The Investigating Officer **No. 61403 Cpl. JAMES KIOGORA** testified as **PW5.** He as well produced the Post Mortem Report and the Mental Assessment

Form as exhibits.

5. At the close of the prosecution's case the accused person was placed on his defence. He opted to give an unsworn statement. He reiterated the prosecution’s case and claimed that although he fought with the deceased the death was purely accidental as he never desired that outcome.

6. The foregone are the facts upon which this judgment is premised on. I have carefully considered the evidence on record as well as the exhibits. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

> ***(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.***

I will therefore consider each of the issues independently.

7. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by all the prosecution witnesses. The first limb is hence answered in the affirmative.

8. As to the cause of the death of the deceased, the Post Mortem Report which was produced upon conducting a post-mortem examination on the deceased’s body gave the probable cause of death to be subdual haemorrhage due to head injury due to assault. Since there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

9. I will now turn to the second ingredient as to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person. The accused person does not deny that the deceased died out of his actions. He only contends that he never desired that outcome. From the evidence on record it is clear that there was no fight between the deceased and the accused person. It is the accused person who unilaterally hit the deceased with a stool. There was no provocation by the deceased, to say the least. The stool was produced in Court. It was a heavy hard wood one capable of causing serious injury on impact. The accused person ought to have known so. The death of the deceased was therefore caused by an unlawful act on the part of the accused person. The second ingredient was therefore proved in the affirmative.

10. On the third ingredient as to whether there was malice aforethought, this Court has carefully revisited the events as they unfolded. As pointed elsewhere above, there seems to be no evidence that the accused person planned to engage the deceased into any fight. It was a spontaneous act which went overboard. That alone cannot constitute malice aforethought or *mens rea* for murder.

11. For a complete consideration of this ingredient, I will nevertheless look at the law on malice aforethought. **Section 206** of the Penal Code defines *'malice aforethought'* as follows:

> ***“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -***
>
> ***a) 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;***
>
> ***b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or***

not, or by a wish that it may not be caused.

c) An intent to commit a felony.

d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.

12. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR,** the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171,** held as follows: -

> ***"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-***
>
> ***i) The intention to cause death;***
>
> ***ii) The intention to cause grievous bodily harm;***
>
> ***iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.***
>
> ***It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975)AC 55".*** (emphasis added).

13. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed: -

> ***"There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him gracious harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."***

14. The foregone analysis perfectly fits the case before this Court. I therefore find that the ingredient of malice aforethought was not proved in the circumstances of this case.

15. The foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased. However, it is clear that the deceased lost his life as a result of the actions of the accused person, but of course without any malice

aforethought.

16. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed herein before, this Court however finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is accordingly convicted accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 30th day of March 2017.**

A. C. MRIMA

JUDGE