



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**CRIMINAL CASE NO. 36 OF 2009**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**BENARD WERE OKOME.....ACCUSED**

**JUDGMENT**

1. **BENARD WERE OKOME** (“the accused”) was charged with the murder of **GEORGE OTIENO ODERO** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. In the information, it was alleged that on the 24<sup>th</sup> day of September 2009 at Rachar Sub-location in Rarieda District within Nyanza Province, the accused murdered the deceased. After the accused pleaded not guilty, the prosecution called 6 witnesses while the accused gave sworn testimony.

2. The deceased’s brother, Wilfred Odhiambo Odero (PW 4) told the court that on the material date, at around 5.30pm, his friend, Ndire, came calling and they decided to go and take chang’aa at the home of Susan Adhiambo Odhiambo (PW 3). Although they did not find PW 3, they found the accused who seemed to be intoxicated in the house. PW 3 arrived and informed them that she no longer sold chang’aa. She left them in the house and went to sit outside at the veranda. At around 6.30pm, the deceased arrived and went to sit with PW 3 where they conversed for some time before the deceased got into the house.

3. When the deceased entered the house, the accused began insulting him. PW 4 got up ready to fight the accused but PW 3 stopped him and ordered them to leave her house. As they all left, PW 4, Ndire and the accused walked away in the same direction while the accused was left standing. The deceased went back to PW 3’s house. After walking for short distance, PW 4 and Ndire heard the deceased screaming, “*Were why are you killing me.*” They rushed back only to find the accused trampling on the deceased’s chest while he lay on the ground screaming. PW 4 further testified that he identified the accused because he had a spotlight which he flashed on him and asked him why he was assaulting the deceased. The accused immediately fled the scene. Because of the noise, other neighbours came to find out what was happening.

4. According to PW 3, after the PW 4, Ndire and the accused left, the deceased returned but after a while PW 3 told him to leave as she wanted to go and buy paraffin. After leaving the house, PW 3 heard the deceased screaming and shouting that he was being beaten and killed by the accused. She immediately ran to the scene and found the deceased lying on his back. She assisted PW 4 and the other people who had gathered carry the deceased to his house where he later died. The Assistant Chief of Rachar Sub-location, George Agola Ochola (PW 2), was informed of the incident and went to the deceased’s home

and found the deceased had already died. When he called the police, he was told that the accused had already surrendered.

5. Sergeant Suleiman Mohammed (PW 6) testified that on 25<sup>th</sup> September 2009, while on duty at Aram Police Station, he received information concerning the deceased's murder. Together with other officers, he went to the deceased's house where confirmed the death. He transported the body to Owens Mortuary where the autopsy was done on 26<sup>th</sup> September 2009 by Dr S. K. Tarus after Tom Mboya Odera (PW 5) identified the body. Doctor Bolly Amimo (PW 1) produced the post mortem prepared Dr Tarus under **section 77 of the Evidence Act (Chapter 80 of the Laws of Kenya)**. The significant observation by Dr Tarus was that the deceased had fractures of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> and 5<sup>th</sup> ribs on the left side which punctured the lung, pleura and lung tissue. This caused severe bleeding in the chest cavity and lung collapse. The doctor concluded that the deceased died from multiple rib fractures with bilateral lung collapse.

6. In his sworn testimony, the accused (DW 1), denied any involvement in the deceased's death. He recalled that on the material day he was at his home studying when his friends PW 4, Ndire and the deceased came and asked him to accompany them to PW 3's house for a drink. At PW 3's house, PW 4 bought chang'aa and they all encouraged him to drink even though they knew he had never taken alcohol as he was still in school. After taking one glass of alcohol, he got really drunk and his friends started demanding that he also buys them some chang'aa. Since he did not have any money, the three friends began bullying him. In the course of the scuffle, he fell and his groin area was badly injured. PW 3 chased all of them out of her house following which he went straight home. On the next day, he went to hospital for treatment and later reported the matter to the police. At the police station he found, PW 4 who immediately pointed him out as the one responsible for killing the deceased.

7. For the prosecution to secure a conviction for murder, it must prove the fact and cause of death of the deceased, prove 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. It must also prove that the said unlawful act or omission was committed with malice afterthought which constitutes the "*mens rea*" of the offence.

8. PW 1 testified that the deceased's cause of death was due to multiple fractures of the ribs severely puncturing the lungs thereby causing bilateral lung collapse. This is consistent with the testimony of PW 4 that he found the accused trampling on the deceased's chest.

9. On the issue of whether it is the accused who caused the unlawful act that led to the deceased death, the prosecution relied on the direct testimony of PW 4. Since the incident took place at night, the court ought to warn itself of the danger of relying on the evidence of such a witness and should scrutinize the evidence carefully before proceeding to convict the accused (see ***Abdalla Bin Wendo & Another v Republic [1953] 20 EACA 166***). The guidance from the Court of Appeal is that 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***). This requirement is, 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.

10. PW 4 identified the accused because he had a spotlight which he shone on the accused and even called him by name and asked him why he was beating the accused. This was not a case of identification of a stranger but rather recognition by PW 4 of a person well known to him. I am also satisfied that there was sufficient light from the spotlight and given the interaction and close proximity he had with the accused, who was in the course committing the felonious act, leaves no doubt that it is the accused who trampled on the deceased.

11. In addition to the direct evidence of PW 4, the prosecution relied on dying declarations of the deceased. Both PW 3 and PW 4 heard the deceased name the accused as the person who was assaulting him. These statements, having been made by the deceased as he was being assaulted and prior to his death, fall within the definition of dying declarations and are admissible under the provisions of **section 33(a)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Such statements must however be received with the necessary caution and circumspection although it is not a requirement of law that they must be corroborated to support the conviction (see *Choge v Republic [1985] KLR 1* and *Pius Jasunga s/o Akumu v R [1954] 21 EACA 331*). In my view, the accused and the deceased were well known to each other. After all they had been together prior to the incident at PW 3's place. There was no reason for him to lie that he was being assaulted by the accused. The dying declarations were of course corroborated by the testimony of PW 4 who found the accused trampling on the deceased.

12. In his defence the accused stated that it is the deceased, PW 4 and his friend who attacked him. That after PW 3 chased them out of her house, he went straight home and the following day he went to hospital for treatment. This testimony is in direct conflict with the clear and credible testimony of PW 4 who witnessed him trample on the deceased and the deceased's dying declaration and I therefore reject it. I also reject the accused's testimony that he was attacked by PW4 and Ndire. PW 3 stopped prevented them from fighting and told them to leave the house and after they left, PW 4 and Ndire walked ahead while in waited for the deceased.

13. There is evidence to suggest that the accused may have been provoked by the deceased or that he acted in self-defence which I must consider. **Section 207** of the *Penal Code* describes as "killing on provocation" as follows;

*When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.*

**Section 208(1)** of the Penal Code defines "provocation" as follows-

*The term "provocation" means and includes, as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.*

14. The implication of **section 208** of the *Penal Code* is that an unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation. It is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation (see *Wero v Republic [1983]EA 549*). Furthermore, while the accused does not shoulder the burden of proving the defence, the prosecution must marshal evidence to disprove the defence beyond reasonable doubt (see *Kenga v Republic [1999] 1 EA 141*).

15. Implicit in the accused's case is that he also acted in self-defence. The law regarding self-defence is to be found at **section 17** of the *Penal Code* which states as follows;

*17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.*

16. The Court of Appeal recently considered the law regarding self-defence in *Ahmed Mohammed Omar & 5 others v Republic NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014]eKLR* stated as follows;

The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in **DPP v Morgan [1975] 2 ALL ER 347**, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in **DPP v Morgan (Supra)** it was held that:

*.....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.*

17. Accordingly, the issue for determination is whether under the circumstances, the accused was provoked to act in the manner he did and whether he believed that his life was in imminent danger to the extent that he was entitled to use force to protect himself. It is true from the testimony of PW 3 and PW 4 that there was an exchange of words between the accused and the deceased but no fight took place as PW 3 prevented it and told them to leave her house. According to PW 2, the accused called the deceased a dog while according to PW 3, he told that accused that he would die a poor man. There is nothing in the evidence that shows that the deceased said anything to the accused to cause him to lose self-control in that moment and act the way he did later. After all, PW 3 intervened and decided to chase them away. The accused let PW 4 and Ndire to walk away while he waited for the deceased to come from PW 3's house in order to assault him. Likewise, PW 3 found the accused trampling of the deceased chest when he was already on the ground. It is difficult to imagine that the accused would be defending himself against a person who was already on the ground praying for his life.

18. Finally there is evidence that the accused was intoxicated when he was at PW 3's house. The issue of intoxication is dealt with in **section 13** of the **Penal Code** as follows;

*13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.*

*(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—*

*(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*

*(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.*

*(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) relating to insanity shall apply.*

*(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.*

*(5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs.*  
[Emphasis mine]

19. While intoxication is not in itself a defence, it may be taken into account whether in determining whether the accused had a specific intent to cause death or grievous harm. In the case of **Manyara v R [1955]22 EACA 502**, the court noted that, "It is of course correct that if the accused seeks to set up a

*defence of insanity by reason of intoxication, the burden of establishing the defence rests on him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this on the accused.”* (see also **David Munga Maina v R NYR CA Crim App. No. 202 of 2005 [2006]eKLR**).

20. In determining whether the accused was intoxicated to the extent that the intent was negated, the court must have regard to all the facts. In this case, the collective testimony of PW 3 and PW 4 is that after the altercation, PW 3 told them to leave. PW 4 and Ndire went ahead and left the accused behind while the deceased was returned to the house to talk to PW 3. The act of waiting for the deceased and then assaulting him in the manner he did to my mind implies a deliberate and pre-meditated act hence I find that his intoxication did not affect his state of mind.

21. What the prosecution evidence points to, is the fact that it is the accused who had earlier on insulted the deceased. In a short while, the accused was seen trampling on the deceased's chest with such force that it fractured the deceased ribs which then punctured his lungs causing them to collapse and lead to death. The act of stepping on someone's chest with such force cannot be unintentional. It can only lead to the conclusion that the accused intended to cause grievous harm or death within the meaning of **section 206(a)** of the *Penal Code*.

22. I find that the prosecution has proved that the offence of murder beyond reasonable doubt. I therefore find the accused, **BENARD WERE OKOME** guilty of the murder of **GEORGE OTIENO ODERO** and I convict him accordingly.

**DATED and DELIVERED at KISUMU this 27<sup>th</sup> day of April 2017**

**D.S. MAJANJA**

**JUDGE**

Mr Ayayo, Advocate for the accused.

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