



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 2 OF 2015

REPUBLIC..... PROSECUTOR

-VERSUS-

MARTIN OWUOR JOHN.....ACCUSED

JUDGMENT

1. Had **PATRIC MARK JOHN** (hereinafter referred to as **'the deceased'**) known that he was going to lose his life in the night of 10/01/2015 at Awendo Township, high are chances that he would not have availed himself at the said place. That however was not the case.

2. As a result of the death of the deceased, **MARTIN OWUOR JOHN** was arraigned before this Court on 13/02/2015 and faced an information of the murder of the deceased whose particulars were as follows: -

"On the 10th day of January 2015 at Awendo Township in Migori County in the Republic of Kenya murdered PATRIC MARK JOHN."

3. The Accused person denied committing the offence and the case was set for hearing. The prosecution availed nine witnesses who testified in support of the information. They were **AMWAYI LEVINE LIBESE (PW1)** who was an eye-witness and a girlfriend of the deceased. **PW2** was **MATHEW OBIERO OPURO** who was a friend to the deceased. The Doctor who conducted the post mortem examination on the deceased one **Dr. RUWA SAMMY MWATELA** testified as **PW3**. **PW4** was the Manager of the Jam Rock Bar in Awendo town one **EDWIN OTIENO GARI**. The father to the deceased testified as **PW5**. He was one **JOHN BABO OMBOK**. **JOHN PAUL OYOO OGUOSI** who was the owner of a motor cycle registration number KMDD 045X testified as **PW6**. **No. 2008128072 APC MORRIS OYOO OLAIRO** of Nyelima AP Post in Rarieda Sub-County within Siaya County testified as **PW7**. He was the arresting officer. A motor cycle mechanic one **SAMUEL AWENDA ODINDO** testified as **PW8** and the Investigating Officer **No. 61096 Corp. PETER MUTUA** testified as **PW9**.

4. The prosecution's case was fairly straight forward. In the afternoon of 10/01/2015, the deceased visited his girlfriend, PW1, at PW1 mother's home in Pehill School and requested her to join him at Jam Rock Bar (hereinafter referred to as **'the bar'**) in Awendo town later that afternoon. The deceased then called the accused person herein who was a motor cycle operator and whom he had known for around 5 years who picked him and dropped him at Awendo town. As the deceased entered the town, he met PW2 and they both went into the bar. They had drinks and were later joined by PW1 at around 06:00pm. As PW2 and the deceased took alcoholic drinks, PW1 only took a soft drink. After a short while and on the instructions of the deceased, PW1 called the accused person and asked him to join them at the bar since he was to take them home later that night. However the deceased rushed to a nearby Mashela Bar and booked a room which he intended to spend the night with PW1 just in the event they decided not to go back home. The accused person thereafter joined them and by then the deceased had returned from the

said Mashela bar. The accused person was also bought an alcoholic drink.

5. They all continued drinking and at one point the deceased ordered some food for the accused person. Both the deceased and PW1 had put on black Coca Cola promotional caps. After a while the group left for the Mashela bar and they all rode on the accused person's motor cycle. On reaching the said Mashela bar but before entering inside the deceased realized that PW1 and himself did not have their caps. On enquiry PW2 informed him that it was the accused person who had taken them. The accused person so admitted and informed the deceased that he had left the caps at the bar but would not go back for them until he was paid Kshs.100/= for the services he had so rendered to them. The accused person was then paid and despite having all agreed to ride back to the bar to pick the caps, the accused person instead quickly rode off and left the three behind who then walked back to the bar.

6. As they entered the bar, PW2 was the first to meet the accused person who was walking downstairs and asked him about the caps. The two were joined by the deceased and PW1 who were just behind PW2. As the accused person did not have the caps, the deceased became so hard on him and a confrontation between the two arose. The four of them then went to the Counterman and asked about the caps and they were informed that the accused person had truly left the caps behind but had returned and taken them. The accused person then revealed that he had taken the caps to his rental room which was just behind the bar. The accused person was however reluctant to go for the caps into his room. The deceased then dragged and pushed the accused person to his room and upon entering the two engaged in a very fierce fighting. PW1 and PW2 stood at the door to the accused person's room and watched them fighting. The deceased later on managed to recover the caps and the three; that is the deceased, PW1 and PW2 left. The three went up to the main road where PW2 left the deceased and PW1 who were then heading towards Mashela bar to spend the rest of the night. PW2 went to his home.

7. As the deceased and PW1 walked to Mashela bar, PW1 saw the accused person following them. The accused person caught up with them and asked the deceased why he had injured him. PW1 stood between the two as they exchanged words. PW1 then felt something like a weapon on the body of the accused person and informed the deceased that the accused person was armed. Fearing for her life, PW1 retreated to behind the deceased as she pulled him away. In a flash of a second the deceased screamed that the accused person had injured him and truly PW1's hand was full of blood. PW1 saw the accused person hide across the road as the deceased fell down. She observed that the deceased had been stabbed on the chest. PW1 rushed to get a motor cycle and managed to take the deceased to Awendo Sub-County Hospital for medical intervention. As the deceased received treatment, he unfortunately lost the battle and passed on. PW1 informed her mother and the mother to the deceased who were workmates of what had transpired. The hospital staff called and informed the police from Awendo Police Station of what had happened and PW9 immediately visited the hospital and saw the body of the deceased.

8. The body of the deceased was then taken to Rapcom Medical Centre Mortuary for preservation. A post mortem examination was then conducted by PW3 who opined that the cause of death was due to massive loss of blood as a result of the injury at the chest. PW5 identified the body of the deceased before the examination by PW3.

9. The accused person then disappeared from Awendo town with the motor cycle belonging to PW6 and PW6 immediately reported the disappearance of his motor cycle with the accused person at Awendo Police Station. The accused person was arrested in Siaya County by PW7 on 20/01/2015 and the motor cycle was recovered at the workshop of PW8 before both were handed over to PW9. The accused person was later taken for mental examination where he was found fit to stand trial. Upon PW9 concluding investigations, the accused person was charged.

10. The prosecution then closed its case and by a ruling of this Court, the accused person was placed on his defence. He opted to give sworn testimony without calling any witness. Whereas the accused person admitted that there was a fracas between him and the deceased and that the deceased was injured in the process he denied that he intentionally caused the death of the deceased. He contended that it was the deceased, PW1 and PW2 who jointly assaulted him repeatedly and mercilessly and that as he was in his room where the beating was so intense to a point of thinking that he was about to die, he rushed and

picked a kitchen knife in self defence. As he held the knife, it was PW1 and PW2 who pushed the deceased towards him and that is how the deceased sustained the chest injury. The accused person denied that the injury was sustained at the road as alleged by PW1.

11. At the close of the defence case Counsel for the accused person made oral submissions in urging this Court to discharge the accused person as the information was not proved as required in law. Counsel submitted that the parties were so drunk and the accused person who had been severely attacked by the three hence acted in self defence. The State called upon the Court to be guided by the evidence on record in finding that the accused person did not act in self defence but indeed murdered the deceased.

12. It is on the basis of the above evidence that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder.

13. The offence facing the accused persons is an information of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

(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 now consider the above issues as follows: -

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

14. As to whether the deceased indeed died, the prosecution availed PW1, PW2, PW3, PW5 and PW9 in such proof. All those witnesses saw the lifeless body of the deceased. The Court therefore finds as a fact that indeed the deceased herein died.

15. On the cause of the death of the deceased, PW3 produced a Post Mortem Report which he prepared upon conducting the examination himself. The said report gave the possible cause of death of the deceased to have been due to massive intra-thoracic haemorrhage secondary to sharp object trauma to the chest. 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.

16. 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. There is no doubt that the deceased died out of the injury he sustained in the process of the confrontation with the accused person. It is also clear that the deceased and the accused person had indulged in hard drinks for a while but there is no indication that they were so intoxicated to a point of not knowing what was happening or what they were indulging themselves in. Each of them was still quite conscious and knew pretty well what was happening. That was also the position with PW2. On the part of PW1, she only partook soft drinks and as such remained sober.

17. The accused person, PW1 and PW2 were all in consensus that the confrontation arose due to the issue of the missing caps. It is also not disputed that there were two confrontations at the bar, another one outside Mashela bar and yet another one inside the accused person’s room. What is in dispute is whether there was another confrontation on the way to Mashela bar where the deceased was allegedly injured or whether the deceased was injured inside the room of the accused person. I have carefully revisited the entire body of evidence on record. I also observed the demeanor of the witnesses as they testified before me and I believed the prosecution witnesses to be truthful and straight forward. Their respective

testimonies were credible.

18. PW1's evidence was largely corroborated by PW2 and PW4. The defence taken by the accused person was to the effect that the accused person was jointly assaulted by PW1, PW2 and the deceased. That was however denied by PW4 who was the Manager at the bar and who took part in convincing them to leave the bar so as not to interfere with other revelers. On the basis of the evidence of PW1, PW2 and PW4, I find that the position taken by the accused person that he was jointly assaulted by the three to be highly doubtful. If it is to be taken that PW1, PW2 and the deceased jointly assaulted the accused person for such a long period then the accused person would have certainly sustained so serious injuries and would have either been taken to hospital or collapsed or even died. That did not otherwise happen. Further, the accused person never reported the alleged assault on him to the police but instead left Awendo town and went back to his home in Rarieda in Siaya County.

19. PW1 and PW2 then in the company of the deceased left the room of the accused person after recovering the caps and as they reached the main road PW2 left the two after agreeing to link up with them the following day and went home to spend the rest of the night. The deceased and PW1 walked to Mashela bar. The next thing PW2 heard the following day was that the deceased had died. When the three left the room of the accused person, PW1 and PW2 did not see any injury on the deceased. They all walked by themselves and went their way. PW1 and PW2 as well did not see the accused person with a kitchen knife at his room. According to PW3 the injury sustained by the deceased was a deep stab wound on the chest which resulted into a massive blood loss. It was therefore not possible for PW1 and PW2 not to have seen such an injury as they left the room of the accused person and walked away. The deceased did not also complain of any such injury as they left the room and managed to walk by himself all along. That therefore goes further to confirm that the deceased did not sustain the injury at the room of the accused person and it further gives credence to what PW1 stated to have been the cause of the injury: It was as a result of the attack by the accused person on the road as PW1 and the deceased walked to Mashela bar and after parting ways with PW2.

20. The accused person must have decided to follow the deceased after he had left with the PW1 and PW2 to retaliate the beating he had received from the deceased. To that end, he armed himself with a knife and followed the deceased. It was not clear whether the accused person waited for PW2 to part ways with the deceased and PW1 before he confronted the deceased or it was just coincidentally. It was out of that confrontation that the deceased sustained the fatal injury. This Court having considered the circumstances that then prevailed in light of the fact that PW1 was the only eye-witness and having so warned itself of the dangers of relying on such testimony and the events having taken place at night and upon reference to various settled judicial decisions including that of **R -vs- Turnbull & Others (1973) 3 ALL ER 549** among others now finds that it was the accused person who fatally stabbed the deceased as the deceased walked to Mashela bar with PW1. PW1 stated that the place where the attack took place was on a road that was well lit with electricity.

21. It is now on that background that the accused person contends that he acted in self defence. Does therefore the defence of self-defence hold in such circumstances? In dealing with the issue I will first start with a look at the law. **Section 17** of the **Penal Code** Chapter 63 of the Laws of Kenya 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.'

22. The common law position has evolved with time from an objective approach to a subjective one. The Court of Appeal in **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** dealt with the aspect of self-defence in great detail. I fully concur with the analysis in that decision not only because the decision is binding upon this Court but also given that the legal position was rightly and clearly settled. I will herein below reproduce how the Court of Appeal expressed itself in allowing the appeal on the ground that the appellants acted in self-defence thus:

"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 mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not the 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.”

In BECKFORD v R (supra) it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.

In R. v WILLIAMS [1987] 3 ALL ER 411, Lord Lane,C.J. held:

“In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistaken was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”

It is acknowledge that the case of DPP v MORGAN (supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also SMITH AND HOGAN'S CRIMINAL LAW, 13TH Edition, Page 331.

Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test.'

23. By applying the subjective test and in taking the particular circumstances of this case, this Court is not convinced that the accused person acted in self-defence. There is cogent evidence that it was the accused person who attacked the deceased. There is however no evidence that the deceased was armed at the time the accused person attacked him, but the accused person was. Indeed there is as well no evidence that the deceased confronted the accused on the road but it was the accused person who attacked him on retaliation. The defence does not therefore come to the aid of the accused person as it is so remote and far fetched. I now echo the holding in the case of Palmer v. Regina (1971) All ER 1077 where the Court stated that:

'Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence.'

24. It is therefore find that it was the accused person, who by an unlawful act, caused the death of the deceased.

25. On the third ingredient, I have no hesitation in finding that no malice aforethought was proved in this case. Both the deceased and the accused person were drunk. There had been some confrontations between the accused person and the deceased for sometime but the injury was sustained later after PW2 had left. It was however not proved how long it took between the deceased, PW1 and PW2 left the room of the

accused person and the time the accused person attacked the deceased on the road to Mashela bar. That would have had an indication on whether the accused person would have had time to cool off from the confrontation. That being so, the attack cannot hence be taken as an isolated occurrence. I find that it was still part of the sustained confrontations. The accused person and the deceased had known each other for such a long period and were indeed friends. Infact it was the deceased who bought the alcohol and food for the accused person. There was no evidence of running bad blood between the deceased and the accused person and even the accused person admitted that there was no love affair between himself and PW1 who was a girlfriend to the deceased.

26. The foregone finding is guided by **Section 206** of the **Penal Code** which defines '**malice aforethought**' and the following decisions of the Court of Appeal. 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).

27. 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 that: -

“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 grievous 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.”

28. As 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 and he is hereby acquitted. 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.

29. 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 hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is accordingly convicted accordingly.

30. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of April 2017.

A. C. MRIMA

JUDGE