



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 65 OF 2011

REPUBLIC PROSECUTOR

VERSUS

GEORGE OTIENO ONYANGO ACCUSED

JUDGMENT

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The information states that on 19th July 2011 at Mayange Beach he murdered George Ochieng Ondijo.

He pleaded not guilty to the charge.

Briefly the prosecution case is that on the material day the accused and the deceased started disputing and even fought at the home of one Paul Oteto. The fight culminated in the deceased stabbing the accused. The two of them were fighting in the home of the said Paul Oteto while he was away. It was at night but there was moonlight. Soon thereafter Paul Oteto emerged and went to report the matter to the Beach chairman. It was while the two of them were conversing that the deceased came with a knife and charged at the accused – saying he would finish him. Paul Oteto and the Beach chairman restrained him. The deceased calmed down and started narrating what had happened but as he was doing so the accused suddenly appeared from his house about 5 meters away with a knife and stabbed him on the chest and said he had avenged himself. The accused then fled to his house. It is alleged that the deceased's reaction was that that was a small matter and that he would go to hospital and come back. He did not however make it as he died before being taken to hospital. The Court heard that the fight between the accused and the deceased arose from an allegation that the accused had falsely accused the deceased of stealing his phone. The matter was reported to the police who went and removed the body to the mortuary. The accused person was subsequently arrested. He had surrendered himself to officers at Ndigwa Administration Police Post.

A post mortem done on 27th July 2011 revealed the cause of death was severe internal haemorrhage secondary to puncture of the right ventricle due to a stab wound. According to the post mortem report the stab wound was in the middle of the chest. The same measured 4 centimeters and extended between the 3rd and 4th ribs on the right side. The heart was punctured on the right side and there were 700 millilitres of blood in the right cavity. A knife and a blood stained curtain alleged to have been recovered from the house of the accused were exhibited and produced as exhibits. A report from the government analyst, which was also tendered in evidence showed that the blood found on the knife found in the house of the accused matched that of the deceased as well as the accused.

The accused gave sworn testimony but did not call witnesses. He stated that on the material day at about 8PM he went to Domnic's shop (PW2) to buy medicine for his sick child. There he found George Odijo (the deceased) and Paul Ateto. The deceased asked him about a phone and when he said he had no

knowledge of it the deceased cut him with a panga on the right wrist. It was then that he (accused) saw on the counter of the shop a knife used to cut bar soap. He took it and stabbed Odijo on the chest. He then proceeded to Ndigwa Police Post and made a report. He was arrested and later handed over to police officers from Aram Police Station. He contended that the deceased attacked him first and that as for the knife he just took it from the shop but not from his house. While admitting that he stabbed the deceased he stated he did not know if that was what killed him. He further contended that he and the deceased were fishermen and had never disputed.

In his summing up, Mr. Anyumba, the Advocate for the accused submitted that the evidence adduced falls short of what is required to prove murder. That it had been proved that the accused and the deceased enjoyed a cordial relationship. He stated that the accused did not know he was going to meet the deceased at the shop and so it cannot be said he had a motive to kill him; that it was the deceased who attacked the accused and the deceased reiterated by stabbing him in the chest. He submitted that PW2 had confirmed the accused's testimony that he took the knife with which he stabbed the deceased from the shop. He dismissed the evidence of the other witnesses as not having much to offer. He contended that the accused acted in self defence and that the accused would not have surrendered to the police if he had ill motive. He urged this Court to find that the accused acted in self defence.

On his part, Mr. Muia, Prosecution Counsel submitted that as the accused had admitted stabbing the deceased and the cause of death was proven to be a stab would the only issue for determination is whether he had a motive. He stated that according to the evidence the accused walked all the way to his house to pick a knife and plan a strategy of accosting the deceased. He submitted that there was enough time for cooling down. He contended that the fact that the accused went all the way to his house, got a knife then waylaid the deceased was confirmed by all the witnesses and this Court should find him guilty of murder.

The post mortem report has conclusively proved that the cause of death of the deceased was a stab wound to his chest. The accused, has in his testimony submitted that he stabbed the deceased in the chest with a knife. There is therefore no doubt in my mind that the accused killed the deceased. What remains to be seen is whether he did so of malice aforethought.

It is the accused's case that he acted in self defence. The test to establish whether he acted in self defence is subjective. However I have no difficulty finding that this was not a case of self defence. From the eye witness account the accused and the deceased disputed and actually fought because the deceased had allegedly labelled the accused a thief. It is also on record that the deceased cut the accused on the right hand (wrist) with a panga. However, and this is the reason I hold the accused was not acting in self defence, there is evidence that when their quarrel reached their beach chairman (more or less a village elder) he tried to talk sense into them to stop disputing. Indeed the deceased who had once again tried to cut the accused with a panga was restrained from so doing and had calmed down completely. Nevertheless the accused went to his house which was about five meters from where the deceased was narrating the events to the Beach chairman, and suddenly attacked the deceased. He was heard saying that he had avenged himself. It is not correct that Victor (PW2) testified that the accused got the knife from the shop. Evidence which I find credible, is that the accused actually went to his house and returned with the knife with which he stabbed the deceased. By this time whatever danger that was posed to him by the deceased had passed. The deceased was no longer a threat to him. He had been talked out of it by Dominic (PW2) and the Beach chairman. I do agree that save for Dominic (PW2) the other witnesses came onto the scene after the deceased had already been stabbed and therefore nothing much turns on their evidence save to confirm there was a quarrel between the accused and the deceased. I am however satisfied that Dominic (PW2) was a credible and reliable witness and that his evidence is confirmation that the accused did not act in self defence; rather he deliberately took a knife and stabbed the deceased to avenge for what the deceased had done to him earlier. It is my finding that this was unlawful and that the death of the deceased arose from an unlawful act of the accused. Be that as it may murder is only proved if it is demonstrated beyond reasonable doubt that the accused acted of malice aforethought. Section 206 of the Penal Code sets out the circumstances from which malice aforethought is established. In this case I find that none of those circumstances were established. Firstly there is nothing in the evidence to demonstrate that the accused had formed an intention to kill the deceased. It is evident that although, cooling time had passed, he acted in anger and in the heat of the moment so to speak. They had been

fighting with the deceased and the deceased had stabbed him in the hand. Secondly there is no evidence that the accused had knowledge that stabbing the deceased in the chest would lead to his death. In other words I find nothing in the evidence to suggest that the accused's action of stabbing the deceased in the chest was a calculated move. Indeed the deceased himself did not think so. The Court heard that after he was stabbed the deceased's reaction was that it was no big deal and that he would go to hospital and come back. My finding therefore is that whereas I am not convinced the accused acted in self defence or even that the knife he used was from the shop I find no evidence to prove murder beyond reasonable doubt. I am however satisfied that there is evidence beyond reasonable doubt to prove manslaughter. Accordingly I find the accused guilty of the lesser offence of Manslaughter Contrary to Section 202(1) as read with Section 205 of the Penal Code and convict him accordingly.

Signed, dated and delivered at Kisumu this 30th day of May 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Muia for the State

Mr. Anyumba for the Accused Person

Court Assistant – Serah Sidera

Accused person

MR. ANYUMBA: The accused person did not intend to kill the deceased and we pray for leniency. If he can be given a non-custodial sentence. He is a young man with a wife and children and is sole bread winner. That is all.

E. N. MAINA

JUDGE

COURT: The plea in mitigation has been considered. However the offence cannot be taken lightly as a life was lost. Accordingly the accused person is sentenced to serve seven (7) years imprisonment. Right of Appeal is explained.

E. N. MAINA

JUDGE

30/5/2017