



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL CASE NO.52 OF 2010**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**DOUGLAS OSORO SIANYI NYABONGOYE.....ACCUSED**

**JUDGMENT**

1. The accused herein, DOUGLAS OSORO SIANYI NYABONGOYE was charged with the offence of Murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence were that on 3<sup>rd</sup> September 2004 at Nyamware Sub-location in Kisii Central District within Nyanza Province murdered DANIEL NYABONGOYE MOTAROKI. The accused pleaded not guilty to the charge and a trial ensued.

2. The accused had initially been tried and convicted by this court (*differently constituted*) on 13<sup>th</sup> March 2009. However, the said conviction was quashed and sentence set aside by the Court of Appeal sitting in Kisumu on 18<sup>th</sup> June 2010 in Criminal Appeal No. 105 of 2009. The appellate court then ordered for a retrial.

3. The prosecution tendered the evidence of 4 witnesses during the retrial whose testimonies were taken by Asike Makhandia J. as follows:

4. PW1 KENNEDY OTWORI OTUCHO testified that he was on 3<sup>rd</sup> September 2004 at about 8 p.m. at his home in Keumbu waiting to take supper when he heard screams emanating from the deceased's home. He rushed to the scene and found the deceased lying down and bleeding profusely with cut wounds all over his body. He assisted in taking the deceased to hospital but he unfortunately died while undergoing treatment. On cross examination, PW1 said that it was dark by the time he arrived at the home of the deceased and he did not see the accused at the scene.

5. PW2 ISAAC OGUCHO OTUCHO also heard screams from the deceased's home on the night of 3<sup>rd</sup> September 2004. He went to the scene and found the deceased lying on the ground and pleading for assistance. He noted that the deceased had cut wounds on his face, neck and left hand. He stated that one Baya Otucho informed him that the accused had cut the deceased. He saw a panga and one shoe at the scene. The deceased was taken to hospital where he died on the same night.

6. PW3 WILFRED MBAYA OTUCHO testified that on the material night he heard the deceased screaming and while saying that "Boyi" had killed him. He proceeded to the home of the deceased to find out what had happened. He found the deceased seated and saw that he had been beaten. He tried to apprehend the accused who overpowered him and escaped into the tea plantation. He added that when he tried to grab the accused, by his shirt, he (accused) managed to escape leaving the shirt in his hands. He

stated that the accused was the deceased's son while the deceased was his cousin. On cross examination, he stated that he was the first person to arrive at the scene where he found the accused and that many people later came to the scene. He further stated that even though it was dark, he was able to see the accused clearly for about 2 minutes as he assaulted the deceased before he attempted to apprehend him.

7. PW4 was MELLEN NYABOKE NYABONGOYE, the deceased's widow and mother of the accused. Her testimony was that on 3<sup>rd</sup> September 2004 at about 8 p.m. she was called by the deceased who seemed to be in a lot of distress and on going to where the deceased was, under an avocado tree, he found him lying down in a pool of blood. She added that there was nobody else at the scene and she screamed for help after which many people came and started beating her on suspicion that she had a hand in the deceased's assault. The deceased later died in hospital that same night and once again the people who had responded to her scream wanted to assault her on suspicion that she had caused the death. She was categorical that she did not see the accused at the scene.

8. On cross examination by Mr. Omwega, counsel for the accused, she stated that the scene of assault was in a field about 70 metres away from her house and that the night was very dark and she had to use a lamp to be able to see the deceased. She confirmed that she was the first person to arrive at the scene and that she did not see PW3 and PW2 at the scene. She further stated that she did not attend the deceased's funeral as she was chased away from her matrimonial home on suspicion that she was the one who had murdered the deceased.

9. On 12<sup>th</sup> October 2011, directions were taken before Sitati J that the case proceeds from where it had reached. The case was thereafter adjourned, on several occasions, at the instance of the prosecution who stated that they were unable to secure the post mortem report in respect to the deceased, and on 13<sup>th</sup> September 2016, the prosecution closed its case after which a ruling was made that prima facie case had been established against the accused to warrant his being placed on his defence.

10. In his unsworn testimony, the accused denied any involvement in the death of the deceased and blamed his woes on a conspiracy between in his uncles and the police to implicate him in the murder case.

11. At the close of the trial, Mr. Omwega advocate for the accused submitted that the prosecution had not discharged its burden to prove the case against the accused beyond reasonable doubt in view of the fact that no post mortem report had been tendered in court to establish if indeed the deceased actually died and the cause of his death. He urged the court to acquit the accused.

12. I have carefully analysed the evidence tendered by the prosecution's witnesses, the accused's unsworn testimony and the submissions made by the advocate for the accused.

13. As I have already stated at the beginning of this judgment, this case came up for hearing on retrial before this court for the second time after the accused's earlier conviction had been quashed by the Court of Appeal. Under those circumstances, this court will only be guided by the evidence tendered before it by the 4 prosecution witnesses during the retrial.

14. **Section 203 of the Penal Code** provides as follows:

**"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

15. In **Republic v Andrew Mueche Omwenga [2009] eKLR**, Maraga J. (as he then was) stated as follows on the definition of murder:-

***"What is murder? Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by criminal law before conviction can result. Whether a conviction results will depend further on the***

*accused's state of mind at the time; usually intention or recklessness is required. The Latin maxim—actus non facit reum, nisi mens sit rea—“the act itself does not constitute guilt unless done with a guilty mind,” encapsulates this principle.”*

16. From the above definition, the three key ingredients of the offence of murder that must be proved by the prosecution beyond reasonable doubt are firstly; the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused had *malice aforethought*.

17. In the instant case however, the actual cause of death of the deceased was not established in view of the fact that the post mortem report was not produced. In the case of **Ndungu v Republic [1985] KLR 487** the Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial unless the cause of death is too obvious. The Court stated at page 493 as follows:-

*“Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.”*

18. Malice aforethought on the other hand is the *mens rea* or the *intention* to kill another person. **Section 206 of the Penal Code** defines it 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 flight or escape from custody of any person who has committed or attempted to commit a felony.”**

19. From the above provision, it is clear that malice aforethought can be express, constructive, implied or inferred from a set of circumstances. Where the murder is committed in furtherance of a felony or when resisting or preventing lawful arrest, notwithstanding the absence of an intention to kill or to cause grievous bodily harm, the accused is deemed to have constructive malice aforethought. See **Raphael Mbuvi Kimasi v Republic Court of Appeal at Nyeri, Criminal Appeal 61 of 2013 [2014] eKLR**.

20. The three main ingredients of malice aforethought are; firstly, the intention to cause *death*; secondly, the intention to cause grievous bodily harm; and, thirdly if it is shown that the accused knew that there was a serious risk that death or grievous bodily harm could result from his conduct but he proceeds to do so without any lawful excuse. See **Nzuki v Republic, [1993] KLR 171, Republic v Andrew Mueche Omwenga [2009] eKLR**. Motive can strengthen the prosecution's case but it is not obliged to prove it. See generally **Republic v Shampal Singh s/o Pritam Singh [1962] EA 13** at page 17.

21. Applying the above principles to the evidence in this case, I find that the deceased was attacked on the night of 13<sup>th</sup> March 2009 and he died on the same night while undergoing treatment. The accused was subsequently charged with murder and the key question which arises is whether the accused assaulted the deceased on the night in question. The question that follows is whether the accused was positively

identified as the deceased's assailant.

22. PW1, PW2 and PW4 heeded to the distress call of the deceased on the night he was assaulted but were categorical that they did not see the assailant.

23. PW1 testified that the incident took place at about 8pm and that it was dark. He maintained that he did not see the accused at the scene. PW2 stated that one Baya Otucho informed him that the accused had assaulted the deceased. PW4, on the other hand, was clear that she did not see the accused at the scene of the assault.

24. This then leaves this court with the evidence of PW3 who stated that he was the first person to arrive at the scene of the assault where he found the accused in the act of assaulting the deceased and that his attempts to apprehend the accused were not successful as the accused over powered him and ran away thereby leaving his shirt behind in the hands of PW3. He maintained that he was able to identify the accused because there was adequate moonlight. He did not however give evidence on the intensity of the moonlight. Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. 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 subsequently (**see Abdalla bin Wendo & Another v R, [1953] 20 EACA 166 and Maitanyi v R [1986] KLR 198**).

25. The testimony of PW3 on the subject of moonlight and on who arrived at the scene first was however contradicted by the testimony of PW4 on key points. Firstly, according to PW4, she was the first person to arrive at the scene of the attack and secondly, PW4 stated that the night was so dark that she had to use a lamp to enable her see the deceased. PW4 also confirmed that she did not see the accused at the scene. The evidence PW4 sharply contradicted that of PW3 who stated that not only was he the first person to arrive at the scene but that there was moonlight which enabled him to see the deceased's assailant. I find that the contradictions on the testimony of PW3 and PW4 were on key and material points which this court cannot overlook or wish away. Such contradiction does not augur well for the prosecution's case as they create a doubt in my mind as to guilt or involvement of the accused in the crime in question. According to PW3, he found the accused red-handed in the act of assaulting the deceased while PW4, who claims that she was the first person to arrive at the scene, states that she did not find anyone at the scene. My take is that the circumstances under which the offence was committed calls for positive and unequivocal identification of the assailant considering the offence took place at night.

26. In **Wamunga v Republic [1989] KLR 424**, the Court of Appeal held as follows:-

***“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”***

27. In **Republic v Turnbull & others [1976] 3 All ER 549**, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken and **Kiarie v Republic [1984] KLR 739**, the Court of Appeal had this to say-

***“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”***

28. Guided by the above cited authorities, I am not satisfied that the identification of the accused was positive considering it was at night and, as I have already stated in this judgement, PW3 did not testify on the intensity of the moonlight. Furthermore, no evidence was tendered to the effect that the shirt that PW3 said that he managed to grab from the attacker belonged to the accused. In any event, neither the shirt nor the panga and shoe that were allegedly recovered from the scene were produced as exhibits in court. I find

that even though there were strong assumptions and suspicions that the accused was the person who attacked the deceased, the said assumptions cannot suffice in a criminal trial where the burden of proof is always upon the prosecution to prove its case beyond reasonable which burden does not shift to the accused at any stage whatsoever. In **Sawe v Republic [2003] KLR 364**, the Court of Appeal had the following to say at page 375:-

***“There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused”***

**29. Section 111 of the Evidence Act**, provides that the legal burden of proof rests with the prosecution. See also **Woolmington v DPP [1935] AC 462**, **Bhatt v Republic [1957] E.A. 332 at 334**, **Abdalla Bin Wendo & another v Republic (1953) EACA 166**, **Kaingu Kasomo v Republic, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported)**.

30. PW4 testified that she was also suspected of killing the deceased and that she was even chased away from her matrimonial home following the incident. PW3 was however categorical that he found the accused in the act of assaulting the deceased. The above scenario makes me wonder why the widow of the deceased was deemed a suspect if PW3 was sure that he saw the real assailant. To my mind, the fact that PW4 was also suspected of the murder is an indication that the people who heeded to the deceased's distress call were not sure of who the assailant was.

31. In the end and having regard to my above findings coupled with the fact that no medical evidence was adduced to prove not only that the deceased died but also the cause of his death, I am not satisfied that the prosecution proved, beyond reasonable doubt, that the accused with malice aforethought caused the death of **Daniel Nyabongoye Motaroki** by unlawful act or omission. Consequently I find that the accused is not culpable and I therefore acquit him under Section 215 of the Criminal Procedure Code. I direct that the accused shall be set at liberty forthwith unless he is otherwise lawfully held.

32. It is so ordered.

**Dated, signed and delivered in open court this 25<sup>th</sup> day of May, 2017**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Otieno for the State

Miss Nyanaro for the Accused

Omwoyo -court clerk