**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL CASE NO. 3 OF 2017**

**REPUBLIC.....................................................PROSECUTOR**

***-versus-***

**1. C O S**

**2. CALEB OTIENO SWAO……............................ACCUSED**

**JUDGMENT**

**1. C O S,** the first accused person herein and a minor at law, was charged with the murder of **GEORGE OCHIENG ADENY** (hereinafter referred to as '**the deceased')** with another not before Court allegedly having committed the offence on 04/01/2017 at Kolanya village, North East Kadem Location in Nyatike Sub-County within Migori County. That was on 23/01/2017. He denied the charge and the case was set for hearing.

2. Two weeks later, that is on 07/02/2017, the second accused person herein, **CALEB OTIENO SWAO,** was also charged with the murder of the deceased in **Migori High Court Criminal Case No. 5 of 2017**. As he denied the charge as well, the two cases were consolidated and this file became the lead file. The two accused persons took a joint plea on the same day; 07/02/2017. They both denied committing the offence and the case was set for hearing.

3. A total of nine witnesses testified in support of the information facing the accused persons. **PW1** was the father to the deceased. He was one **PETER OGALO ADENY. PW2** was **HCO** aged 15 years old and in Class 7 at [Particulars Withheld] Primary School. He was a brother to PW1. **PW3** was **OKOTH AUGUSTINE NYAMBOK** one of the elders from the Kolanya village. **O K O**, a Form 3 student at [Particulars Withheld] High School testified as **PW4**. A neighbour to the deceased one **JAPHETH OCHIENG OGOLA** testified as **PW5** whereas the Assistant Chief of Deroma Sub-Location one **PAUL ONYANGO ORWA** testified as **PW6**. A cousin to the deceased one **AWUOR OKOTH ERICK** testified as **PW7.** PW4's school-mate one **M A D** testified as **PW8**. The investigating officer **No. 72993 PC JONATHAN KATINGO** attached to the DCIO offices in Nyatike District testified as **PW9.** The accused persons were neighbours to the deceased**.** For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. The prosecution's case is that the village of Kolanya in Nyatike Sub-Location lost one of its senior members, **JOSIAH OGUNA WAGESA**, who was laid to rest on 04/01/2017 at his homestead. Many people from near and far attended the burial. After the burial, and as usual within the Kolanya village, there was an overnight stay in the homestead and the people were entertained by a music. The homestead was lit by lights powered by a generator and people generally enjoyed the night with dancing and drinking.

5. At around 11:00pm that night, PW2 witnessed an incident that led to the death of the deceased. PW2 was just standing in one of the tents which was near the music system and watched people dance into the night. He was near the deceased who was also standing. PW2 then saw the second accused person call the deceased. They stepped aside and stood about 5 metres from where PW2 was and started talking. Although PW2 was seeing the two talk he could not hear what they talked about due to the music. He however saw the two very well as the place was well lit. The first accused person, who was in a '*maasai*' wrapper, stood behind the two as they talked and he held a club (*rungu*).

6. PW2 then saw two people join the deceased and the second accused person. He recognized them as people he knew well. They were **ODHIAMBO ONDISO** and **LAIKA KANINI MARIKO**. The first accused person used his club and tuoched Odhiambo Ondiso who joined him and they briefly talked before the two left. Shortly, the first accused person returned and went straight to where the deceased and the second accused person were standing, still talking. PW2 saw the first accused person remove his club and held it properly as if he wanted to use it. PW2 immediately thought that the first accused person wanted to attack the deceased and in a split of a second, the first accused person raised the club and hit the deceased on the head. The deceased fell instantly. The first accused person continued with the assault on the deceased as he was on the ground. He hit him twice in the stomach with the club. Odhiambo Ondiso and Laika Kanini Mariko surfaced and told the first accused person to leave the deceased, who was a friend to the first accused person, alone. The first accused person heeded and left.

7. The deceased did not raise up from where he had fallen. The music was stopped and an announcement made through the public address system that the deceased was injured and was to be taken to hospital. PW5 was sought for and he urgently organized for a motor cycle which rushed the deceased to the nearby Ndhiwa Dispensary. The deceased was assisted by PW4 and one **PRADUS OCHIENG** (not a witness), who was a brother-in-law to the deceased, to the hospital as he could not sit on his own. PW2 then left with his brother to their home and reported what he had witnessed.

8. Due to the nature of the injuries sustained by the deceased, he was instead reffered to Nyatike Sub-County hospital for further and better treament. When they reached there, the condition of the deceased was steadily deteriorating and the deceased was placed in an Ambulance and rushed to Migori County Refferal Hospital from where he was again reffered to Kisii Level 5 Hospital before he was transferred to Tabaka Hospital and then transferred to Tenwek Hospital in Bomet County where he succumbed to the injuries on 05/01/2017.

9. PW1 then reported the matter to the CID offices at Nyatike where he recorded his statement. PW6, the Assistant Chief, had also received information that morning that the first accused person has assaulted the deceased at the funeral. He went to the home of the first accused person where he learnt that the family was already awarde of the matter and advised them to sort the matter amicably with the family of PW1. PW6 later received a call and was informed that the deceased had died while undergoing treatment at Tenwek Hospital. PW6 then instructed the parents of the first accused person to ensure that they take the first accused person to the police. It was the second accused person who took the first accused person to PW6 on 15/01/2017 who in turn handed him over to the police.

10. PW9 commenced investigations. He recorded statements from variuos witnesses and on 12/01/2017 accompanied the family members of the deceased to Tenwek Hospital where he witnessed the post mortem examination on the body of the deceased conducted by a Dr. Mutai. The body was identified by PW1 and PW7. PW9 also witnessed Dr. Mutai fill in the Post Mortem Report which he signed in his presence and he collected it. It was dated 12/01/2017. PW9 observed the body and noted a penetrating cut wound on the skull and a laceration on the left big toe. When the head was opened up, PW9 noted that the cut wound had penetrated and caused a fracture of the skull and that there were blood clots inside the skull. The cause of death was opined to have been cardiopulmonary arrest due to the severe head injury.

11. PW9 also visited the homestead where the deceased had been assaulted at and drew a Sketch Plan. On 17/01/2017, PW9 escorted the first accused person to Nyatike Sub-County Hospital (also known as Macalder District Hospital) where he was assessed to be mentally fit to stand trial. The first accused person was however arraigned before Court on 16/01/2017, a day after his arrest, and was ordered to be

released to the police to complete their investigations. He was formally charged on 23/01/2017.

12. It was PW9 who arrested the second accused person on 23/01/2017 at the Law Courts as the second accused person had attended the plea-taking for the first accused person who is his young brother. He was as well taken to Nyatike Sub-County Hospital on 24/01/2017 where he was assessed to be mentally fit to stand trial and then arraigned before Court on that very day. He was formally charged on 07/02/2017. PW9 produced the Sketch Plan, the Post Mortem Report and the two Mental Assessment Reorts for the accused persons as exhibits.

13. At the close of the prosecution's case, the accused persons were placed on their defences and they both opted to give unsworn testimonies without calling any witnesses. The first accused person who stated that he was 17 years old and in Form 3 at [Particulars Withheld] Secondary School informed the Court that a day before the alleged incident that led to the death of the deceased, the deceased had sought for him while armed with a panga as the deceased believed that he was a lover to his sister PW8. The deceased however did not find the first accused person and the first accused person only heard that the deceased had been injured at a funeral.

14. The second accused person stated that he attended the funeral and during the night he met the deceased and his old time friend from Nairobi who was also related to the deceased and the three talked. As he left the two, he heard a commotion and heard like someone hitting something and since people were scampering, he as well ran away only to learn that the deceased had been injured.

15. At the close of the defence case, Learned Counsel for the accused persons Mr. Awino indicated that he was intent on filing written submissions. The prosecution relied on the evidence as tendered on the record. The matter was fixed for judgment with liberty to Counsels to file their respective submissions within three weeks which submissions seem not to have been filed.

16. From the above evidence, this Court is now called to find if the ingredients of the offence of murder have been proved in this case. The offence of murder carries three ingredients which are: -

> ***(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 consider each ingredient separately.

**(a) <u>Proof of the fact and the cause of death of the deceased</u>: -**

17. There is no doubt that the deceased died. That was attested to by PW1, PW3, PW7 and PW9. The first limb is hence answered in the affirmative.

18. As to the cause of the death of the deceased, PW9 produced a Post Mortem Report which was filled in by Dr. Mutai after conducting the autopsy in his presence. The report confirmed the head injury and opined that the possible cause of the death of the deceased was cardiopulmonary arrest due to the severe head injury. Since there is no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

> **(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the <u>accused persons: -</u>**

19. The second accused person stated that he was at the funeral that night and even met and talked with the deceased and a friend from Nairobi who had also attended the funeral. As he left the two, there was

some commotion and he ran away as people were scampering.

20. The first accused person denied that he was at the funeral at that time. Undoubtedly, there were many people at the funeral including PW2, PW3, PW4 and PW5. The four witnesses testified on how the homestead was lit that night. All of them confirmed that the homestead was well lit with bulbs powered from a generator and one could see very well.

21. It was only PW2 who testified that he saw the first accused person that night. He knew him very well as his neighbour. He also knew the second accused person. He was standing near the deceased and saw the second accused person call the deceased and they stepped aside to engage in a talk. They were about 5 metres from where he was although he could not hear what they were talking about since there was loud music. He also saw the first accused person standing behind the deceased and the second accused person. The first accused person had a '*maasai*' wrapper. The second accused person and the deceased were joined by two other people whom PW2 also knew. As the four talked, PW2 saw the first accused person stretch his hand towards one of the two people who had just joined the second accused person and the deceased and using a club which he held in that hand tapped one of the said two people and the two stepped aside and talked briefly before they left,

22. As PW2 just stood and generally watched the crowd and the dancing, he saw the first accused person walk towards where the second accused person, the deceased and the other person stood and talked. PW2 saw the first accused person remove his club and held it properly as if he wanted to use it. PW2 immediately thought that the first accused person wanted to attack the deceased and in a split of a second, the first accused person raised the club and hit the deceased on the head and the deceased fell instantly. The first accused person continued with the assault on the deceased on the ground. He hit him twice in the stomach with the club. Odhiambo Ondiso and Laika Kanini Mariko then told the first accused person to leave the deceased, who was a friend to the first accused person, alone. The first accused person heeded and left the homestead. The attack generated commotion that left PW2 on the ground. PW2 then went home after the deceased had been taken to hospital.

23. This Court is under a legal duty to weigh the evidence of PW2 who is the only identifying witness with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence on recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under: -

> ***"It is trite law that where the only evidence against a defendant is evidence 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 possibility of error before it can safely make it the basis of conviction."***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

24. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger***

***but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

25. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***
>
> *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

26. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night:-

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***

27. The evidence of PW2 was well corroborated by PW3, PW4 and PW5 who were at the scene as far as the lighting and the general being of the homestead is concerned. The second accused person also corroborated what PW2 stated in confirming that he was at the funeral that night and even called and talked to the deceased with his other friend. The Post Mortem Report also confirmed a severe injury on the head. That is the same part PW2 stated that he saw the first accused person hit the deceased with a club. PW9 also saw the injury. That was adequate corroboration in the circumstances.

28. Suffice to add, even in cases of uncorroborated single-witness-evidence there can still be a legal conviction. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus:

> ***"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. .........This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."***

29. Going by the above evaluation of the evidence and on the strength of the case law, this Court finds that PW2 positively recognized the first accused person as the one who hit the deceased with a club on the head. The first accused person was properly placed as the assailant and his defence that he was not at the scene as alleged can only be deemed as an afterthought. That identification by recognition was free from

any error.

30. Turning to the second accused person, PW9 contended that the second accused person was a joint and principal offender as he was the one who called the deceased aside so as for the first accused person to hit him. The second accused person denies that. There is no doubt that there was music at the homestead and people were engaged in various activities including dancing, talking, drinking, moving around, among others. I do not find it strange for one in such circumstances to ask someone he/she intends to have a talk with to step aside and talk. If the second accused person was out to lure the deceased to where the first accused person was then I am sure the first accused person would have rather placed or hidden himself and most likely away from the general lighting. However, the second accused person called the deceased and they stood only 5 metres from where PW2 was.

31. The deceased and the second accused person talked for a while and PW2 did not state that they appeared to have differed. The first accused person on the other hand dealt with one Odhiambo Ondiso who was in the company of the deceased and the second accused person. The two left together before the first accused person shortly returned. It was also the same Odhiambo Ondiso who appeared after the first accused person had hit the deceased and asked the first acused person to leave the deceased alone after all the deceased was a friend to the first accused person. However, the said Odhiambo Ondiso was not even interrogated. That was also the case with the other person who was left with the second accused person and the deceased when the first accused person stepped aside with Odhiambo Ondiso.

32. Although the second accused person is a brother to the first accused person, that is not sufficient to link him with the actions of the first accused person. **Sections 20** and **21** of the **Penal Code**, Cap. 63 of the Laws of Kenya provides for instances under which people may be jointly charged as principal offenders. It has not been demonstrated how the second accused person fits in those instances. It is worth to note that unless demonstrated otherwise, each of the accused persons were at the funeral on their own right.

33. Another equally important issue was the role played by the second accused person in the matter. He is the one who took the first accused person to PW6 before PW6 took the first accused person to the police. He even attended Court to know of the progress of the case. Those are not actions of one who commits an offence and knows that he is liable to be arrested. There is no evidence that the second accused person escaped or was summoned by PW6 or the police or that he was interrogated over the matter. That may have been the rationale behind PW2 saying that ***'I do not know what mistake Caleb did as I only saw him with the deceased. I personally saw the one who hit the deceased…***'

34. This Court is not persuaded that the second accused person, **CALEB OTIENO SWAO,** played any role in the incident that led to the death of the deceased. I therefore find him **NOT GUILTY** of the murder of **GEORGE OCHIENG ADENY** and he is hereby acquitted accordingly. He is therefore at liberty unless otherwise lawfully held.

35. The second ingredient is hence proved against the first accused person.

**(c) <u>Proof that the said unlawful act was committed with malice aforethought:</u>**

36. **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.***

37. The Court of Appeal has on several occasions dealt with this aspect. In the case of **Joseph Kimani Njau vs R (2014) eKLR** in concurring with an earlier finding of the 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).

38. 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."***

39. By weighing the circumstances under which the incident occurred and the foregone discourse I do not find evidence of malice aforethought. The deceased was only hit once and in circumstances which were not brought out by the prosecution. The last ingredient is answered in the negative.

40. As the last ingredient is not proved, the offence of murder is not proved as against the first accused person. The first accused person, **C O S**, is hence **NOT GUILTY** of the murder of **GEORGE**

**OCHIENG ADENY**. However, the deceased lost his life as a result of the actions of the first accused person, but of course without any malice aforethought.

41. 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 however finds the first accused person, **C O S** guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

42. As stated above the second accused person, **CALEB OTIENO SWAO,** stands acquitted of the charge of murder and remains at liberty unless otherwise lawfully held.

43. As I come to the end of this judgment, I sincerely thank the Counsels who took part in this matter for their commitment, diligence and industry that led to the finalization of this case in a record 5 months. They are **Mr. Ezra Awino**, Counsel for the accused persons and **Miss Monica Owenga**, Senior Principal Prosecutions Counsel who appeared for the State.

**DELIVERED, DATED** and **SIGNED at MIGORI this 29th day of June 2017.**

**A. C. MRIMA**

**JUDGE**