



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
CRIMINAL CASE NO. 23 OF 2015

REPUBLIC.....PROSECUTOR

- VERSUS -

SIMION OWUOR OTIENO.....ACCUSED

JUDGMENT

1. **SIMION OWUOR OTIENO** was arraigned before this Court on 13/07/2015 and faced the information of the murder of his elder brother **ANTHONY OCHIENG OTIENO** (hereinafter referred to as **'the deceased'**). The particulars of the offence are as follows: -

"On the 22nd day of June 2015 at Riat Village, God Joppe Location within Migori County in the Republic of Kenya murdered ANTHONY OCHIENG OTIENO."

2. The Accused person denied committing the offence and the case was set for hearing. The prosecution availed seven witnesses who testified in support of the information. **MARTHA AWINO OSIR** was a neighbour to both the deceased and the accused person and testified as **PW1** whereas a granddaughter to **PW1** testified as **PW2**. She was **LIZ ADHIAMBO**. The mother to both the deceased and the accused person testified as **PW3** and was known as **FELERIA AWINO OTIENO** while the father to both the accused person and the deceased one **MICHAEL OTIENO OSANO** testified as **PW4**. The wife to the deceased was **BEATRICE ANYANGO NGARE** and testified as **PW5** and the Doctor who conducted the post mortem examination on the body of the deceased one **Dr. VITALIS OWUOR K'OGUTU** testified as **PW6**. The Investigating Officer No. **91830 PC NAHASHON AKUMU** testified as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was that on 22/06/2015 at around 07:30pm **PW3**, **PW4** and the accused person were at their homestead in Riat village. **PW3** and **PW4** were inside the main family house as **PW3** was preparing some eye medicine for **PW4** who had some eye problem. The accused person was chewing some sugar cane outside his house which was next to the main house. The deceased had his house next to the homestead but which was separated by a public road. He was also at his home with his wife, **PW5**.

4. It was **PW5's** testimony that the deceased returned home that evening while drunk and very angry. He called his son **Peter** (not a witness) but **Peter** was not around. **PW5** asked the deceased what the matter was but the deceased just kept quiet as he took a panga and some old motor cycle shocks. Since **PW5** knew the deceased to be very violent and hostile when drunk, she carried her baby on her back in readiness of any eventuality. The deceased then went out of their house and jumped over the fence as he proceeded to the homestead of his parents, **PW3** and **PW4**. **PW5** followed the deceased from a distance.

The deceased then called her mother, PW3, so loudly around four times and when PW3 came out of her house the deceased told her that the deceased was there to kill her son; referring to the accused person. PW3 asked the deceased why he was saying so but the accused person insisted that he must kill the accused person that night. PW3 pleaded with the deceased to cool down and go back to his house until the following day when they would sort out the issue between him and the accused person but the deceased declined and insisted that he must kill the accused person.

5. By that time the accused person had also moved to where the deceased and PW3 were and the accused person asked his brother, the deceased, what the problem was that he wanted to kill him and yet they were the only two of them in their family. The deceased insisted on his mission. As PW3 was standing between the deceased and the accused person, the deceased suddenly pulled PW3 and PW3 fell her on the ground. The deceased then charged towards the accused person while armed with the panga and the shocks. There was an encounter between the deceased and the accused person and shortly afterwards the deceased cried saying that the accused person had injured him. The deceased fell down. PW3 rushed to where the deceased was only to see him bleeding. The accused person was nowhere and PW3 together with PW5 raised alarm. The neighbours gathered only to find the deceased already dead.

6. Police were informed and visited the scene. They took photographs and collected the body to Migori District Hospital mortuary for preservation. The photographs were eventually produced in evidence. PW6 conducted the post-mortem examination on the body of the deceased and saw one deep cut on the left side of the neck. He opined that the cause of death was shock due to massive loss of blood. He filled in a Post Mortem Report and produced it in evidence.

7. Investigations went on and several witnesses recorded statements and the accused person (against whom no evidence of his arrest was led) was escorted to Migori District Hospital where he was examined and certified medically-fit to stand trial by PW6 who also produced the Mental Assessment Form in evidence. The accused person was then charged accordingly. PW7 who testified on behalf of the initial investigating officer one Derrick Moshi who had long been transferred from Migori Police Station produced the photographs, a sketch map and witness statements as exhibits.

8. 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. The accused person reiterated what PW3 and PW5 said and further stated that when the deceased attacked him they struggled as he wanted to disarm him. In the process the accused person slid and fell down and as the deceased was about to cut him with the panga, the deceased likewise slid and fell down. They wrestled on the ground and as they turned to the other side the panga cut the deceased on the neck and the deceased raised alarm that the accused person had injured him. The deceased asked the people to arrest the accused person as the accused person escaped. The accused person contended that he never provoked the deceased in any way and did not have any intention of fighting him and that all what he did was to defend himself as the deceased was so determined to kill him.

9. At the close of the defence case Counsel for the accused person Mr. Abisai filed written submissions and the State called upon the Court to be guided by the evidence on record. 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.

10. 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:

11. As to whether the deceased indeed died, the prosecution availed PW3, PW4, PW5 and PW6 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.

12. On the cause of the death of the deceased, PW6 produced a Post Mortem Report which he prepared upon conducting the examination. The said report gave the possible cause of death of the deceased to have been shock due to massive loss of blood. 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.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:

13. There is no doubt that the deceased died out of the injury he sustained in the struggle with the accused person. There were four people at the scene who were PW3, PW5, the accused person and the deceased. Except the accused person no one else could narrate how the deceased sustained the fatal injury. PW3 was still lying down from the fall when she heard the deceased cry that he had been injured. PW5 had stood at a distance and since it was dark she could not see what happened. She only heard metallic items hitting each other. That leaves us with the version of the accused person. There is evidence that the deceased was armed to the tooth and that he was so determined to kill the accused person. He did not heed the pleas by PW3 and the accused person not to engage in any confrontation. He pulled PW3 down and charged at the accused person. Whereas the deceased was armed, the accused person was not. PW3, PW4 and PW5 testified that the deceased was drunk, furious and very angry and spoke in a very loud voice. PW5 feared as well as PW3. The attack was sudden and the accused person also knew his end had come and the only way out was to engage the deceased. The encounter ended with the deceased sustaining the fatal injury.

14. The accused person now pleads self-defense. The question which now begs an answer is whether the accused person indeed acted in self-defense. The starting point is the law and judicial precedents. **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."

15. 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-defense 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-defense 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 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 acknowledged 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.'

16. By applying the subjective test and in taking the particular circumstances of this case into account, this Court is convinced that the accused person acted in self-defence. There is ample evidence that the accused person was attacked by the deceased who was armed and in such circumstances that the only way out was for the accused person to engage the deceased. The accused person did not imagine that the deceased would even attack him as he thought he was drunk and once talked to he will cool down. That was not the case. The threat and fear of death on the accused person was so eminent. There was only one way for the accused person to save his own life given that the deceased was well armed whereas the accused person was not. The defence therefore comes to the aid of the accused person since the prosecution has failed to show that the accused person acted beyond the parameters of self-defence. In so finding this Court echoes 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.”

17. This Court therefore finds that the accused person did not commit any unlawful act that went towards causing the death of the deceased as the accused person acted in self-defence. The second ingredient is hence not successfully demonstrated.

18. Having failed to prove the second ingredient it goes without say that the accused person cannot be said to have acted with malice aforethought. In fact a consideration of the last ingredient will not serve any purpose in this matter.

19. I hence conclude that the information of murder facing the accused person has not been proved. The accused person herein, **SIMION OWUOR OTIENO**, is hereby found **NOT GUILTY** of the murder of

ANTHONY OCHIENG OTIENO and is hereby set at liberty unless otherwise lawfully held.

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

A. C. MRIMA

JUDGE