



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 15 OF 2016

REPUBLIC.....PROSECUTOR

-versus-

ASMAN ODIWUOR ABUOR.....ACCUSED

JUDGMENT

1. When **ZEBEDI OCHIENG TINDI** (hereinafter referred to as '**the deceased**') attended the funeral of one of his neighbours in the night of 10/06/2016, little did he know that he only had some few hours to live. As the deceased joined other mourners in sending off **Mzee Wasonga Odongo** at Ogwamrondo village, Kanyagwala Sub-Location within Migori County he danced with a young lady as hours went into the night.

2. Then the unfortunate happened. The deceased was attacked and on being rushed to hospital he passed on as he underwent treatment. The incident was reported at Awendo Police Station and upon conclusion of investigations the accused person herein was charged with the murder of the deceased. He denied the charge and the case was set for hearing.

3. Six witnesses testified in support of the information facing the accused person. **WICKLIFE OTIENO OGINA**, an uncle to the deceased and who was the Master of Ceremony during the disco time at the funeral of Mzee Wasonga Odongo testified as **PW1**. **MICHAEL ODHIAMBO OWUD** testified as **PW2**. He was also an uncle to the deceased and was at the funeral of Mzee Wasonga Odongo during the night the incident happened. **MOLLEN AKOTH WASONGA** was a daughter to Mzee Wasonga Odongo and was at their home during the very night. She testified as **PW3**. The investigating officer **No. 55472 PC REUBEN NGUYA** testified as **PW4** whereas **Dr. RUWA SAMMY MWATELA** testified as **PW6**. **GORDON OTIENO OWOUR**, a member of the Community Policing testified as **PW5**. For 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 in the night of 10/06/2016 the village of Ogwamrondo had gathered in the homestead of Mzee Wasonga Odongo who was one of the senior members in the community who had passed on. So as to give Mzee Wasonga Odongo a befitting send-off, there was a disco and mourners danced into the night. Among those present that night were PW1, PW2, PW3, the deceased and the accused person.

5. The deceased danced with a young lady who was among the visiting mourners who had travelled to the funeral. PW1 was the Master of Ceremony during the disco time. PW2 did not dance but was behind the crowd that danced and he enjoyed watching all what went on. PW3 was busy in the kitchen preparing for the visitors who had come for the funeral. The accused person did not dance. He stood not far from where the deceased danced but between PW2 and the crowd that danced.

6. At around 11:00pm, the deceased called and asked PW1 to danced with the lady he was dancing with. Since PW1 was busy in steering the dance he instead asked one **Wycliffe Okuro** (not a witness) who danced with the lady. The deceased then stepped back and met the accused person. The two jovially laughed and held each other in a true state of friendship. The two were schoolmates and villagemates as well. The two drifted further backwards and stood near PW2. Both PW1 and PW2 saw the accused person remove a panga which he had tucked into his trousers, lift it up and cut the deceased on his left hand. When people saw what happened they started running away. PW2 quickly held the accused person and asked him why he had injured the deceased. PW1 also reached where the incident had occurred and indeed slapped the accused person demanding to know why he had injured the deceased. The incident brought the disco to an abrupt end.

7. As the crowd began assaulting the accused person, the deceased was bleeding profusely. PW2 held the deceased and sought for transport to take the deceased to hospital. It was during that time when PW3 saw the deceased with PW2 and also saw the deep cut on his hand. PW3 asked the deceased what had happened and the deceased told her that it was the deceased who had cut him with a panga without any reason.

8. When the accused person was released by the crowd he ran away and did not return to the homestead. The deceased was rushed to the local Dede Dispensary where he was referred to Migori County Referral Hospital for further treatment. As the deceased received treatment at the Migori County Referral Hospital, he passed on. The body was taken to Rapcom Medical Centre Mortuary at Awendo town for preservation and further police action. PW2 reported the incident to the police at Ranen at around 05:00am on 11/06/2016 and later to Awendo Police Station at around 10:00am. The village then embarked on looking for the accused person.

9. On receipt of the report by PW2, PW4 was accompanied by his other colleagues and visited the scene. He drew a Rough Sketch Plan which he later prepared a Fair Sketch Map. He also interrogated some witnesses. PW4 then proceeded to the Mortuary and viewed the body of the deceased. He noted a big cut on the left arm. PW4 recorded several statements from witnesses and on 17/06/2016 PW5 accompanied the accused person to the Awendo Police Station where PW4 arrested the accused person and placed him in police custody. According to PW5, he had seen the accused person seated in PW5's sugar cane farm and since he knew him well as one of the well-behaved boys within the village, he was eager to find out if the accused person had any problem. PW5 talked to him and on learning that the accused person was actually running away from the villagers PW5 advised him to surrender to the police for his own safety. PW5 then accompanied the accused person to the Awendo Police Station.

10. PW4 accompanied the family members of the deceased to Rapcom Medical Centre on 17/06/2016 where he witnessed the post mortem examination on the body of the deceased conducted by PW6. The body was identified by PW2 and **Amos Were Arago**. PW4 also witnessed PW6 fill in the Post Mortem Report which he signed in his presence and he collected it. It was dated 17/06/2016. PW6 observed the body and noted a 14cm long cut injury on the left arm with severe tissue damage. There were no any injuries on the entire body. PW6 opined that the cause of death of the deceased was cardiac arrest due to severe blood loss following soft tissue injury in the forearm. The Post Mortem Report was produced in evidence by PW6.

11. Upon completion of investigations, PW4 accompanied the accused person to Rapcom Medical Centre on 17/06/2016 where the accused person was examined and found mentally-fit to stand trial. He then preferred the information against the accused person and produced the Sketch Map in evidence. On the issue of how the scene was lit that night PW1, PW2 and PW3 confirmed that the homestead was well served by sufficient light from the bulbs powered by a generator. PW4 also so confirmed and showed the exact location of the lights in the Sketch Map with the respective distances.

12. At the close of the prosecution's case, the accused person was placed on his defence and he opted to give unsworn testimony without calling any witness. The accused person denied committing the offence. He narrated how he was arrested on 13/06/2016 at around 01:00pm at his work place and taken to the Chief where he was handcuffed and taken to Awendo Police Station and later charged. At the close of the defence case the matter was left for judgment.

13. 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) Proof of the fact and the cause of death of the deceased: -

14. There is no doubt that the deceased died. That was attested to PW1, PW2, PW4 and PW6. The first limb is hence answered in the affirmative.

15. As to the cause of the death of the deceased, PW6 produced a Post Mortem Report which he personally filled after conducting the autopsy. The report opined that the possible cause of the death of the deceased was cardiac arrest due to severe blood loss following soft tissue injury in the forearm. 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 accused person:

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16. The accused person denied taking part in the death of the deceased. The evidence pointing to the accused person was by PW1, PW2, PW3, PW4 and PW5. PW1 and PW2 were eye-witnesses. They saw how the accused person removed a panga from his trousers and cut the deceased on the hand. The deceased also told PW3 that it was the accused person who had injured him. PW1, PW2 and PW3 knew the accused person and the deceased very well. They were all from the same village and interacted on many fronts. Although the incident took place at night there is adequate evidence that the homestead was well lit by bulbs powered by a generator. PW2 arrested the accused person immediately the accused person cut the deceased. PW1 even slapped the accused person in demanding to know why he had injured the deceased.

17. It was the accused person who explained what had happened during the night in issue to PW5 who was not at the scene. On advice, the accused person accompanied PW5 to the police and surrendered. The name of the accused person was readily given to the police who visited the home of the accused person but was not there.

18. By taking into account the caution that evidence of identification and recognition especially during night must be weighed carefully as so held in several Court of Appeal cases including **Wamunga Vs Republic (1989) KLR 426**, **Nzaro vs Republic (1991) KAR 212**, **Kiarie vs Republic (1984) KLR 739** and the English case of **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, there is no doubt that the prosecution's evidence was well corroborated and on evaluation of the evidence and on the strength of the case law, this Court finds that the accused person was positively identified by recognition as the one

who attacked the deceased. This Court saw the witnesses testify and observed their demeanors. They were truthful and credible witnesses. It was also confirmed that there was no grudge between any of the witnesses and the accused person. The accused person was therefore properly placed as the assailant and his defence that he knew nothing about the matter can only be deemed as evasive and afterthought. The identification of the accused person by recognition was free from any error.

19. The second ingredient is also proved against the accused persons.

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

20. 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.

21. 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).*

22. 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 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.”

23. By weighing the circumstances under which the incident occurred and the foregone legal discourse I do not find any evidence of malice aforethought. The deceased was only cut once and on the hand. Further, the circumstances surrounding the attack were not brought out well since the witnesses alluded to a very good relationship between the accused person and the deceased even on that night. In fact, there is no evidence as to why the accused person attacked the deceased. Since malice is not proved, the last ingredient is answered in the negative.

24. As the last ingredient is not proved, the offence of murder is not proved as against the accused person. The accused person **ASMAN ODIWUOR ABUOR** is hence **NOT GUILTY** of the murder of **ZEBEDI OCHIENG TINDI**. However, the deceased lost her life because

of the actions of the accused person, but of course without any malice aforethought.

25. 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, **ASMAN ODIWUOR ABUOR** guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and is hereby convicted accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 31st day of July 2017.

A. C. MRIMA

JUDGE