REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 8 OF 2015

REPUBLIC..... PROSECUTOR

-VERSUS-

MOSES OTIENO OLAMBO…….....ACCUSED

JUDGMENT

1. The accused person herein**, MOSES OTIENO OLAMBO,** is charged with the murder of his elder brother one **BENARD OCHIENG OLAMBO** (hereinafter referred to as '**the deceased')** on 14/02/2015 at their home in Akala village, Karapollo Sub-location in Nyatike Sub-County within Migori County.

2. The accused person pleaded to the information on 14/04/2015 where he admitted the offence and a plea of guilty was recorded. When the facts of the case were presented, the accused person denied them and a plea of not guilty was instead entered.

3. Five witnesses testified in support of the information facing the accused person. **SIPROSA ACHOLA OLAMBO,** an elderly woman testified as **PW1.** She was the mother of both the accused person and the deceased. **JOYCE ATIENO OCHIENG,** the wife of the deceased testified as **PW2**. **PW3** was **Dr. K'OGUTU VITALIS** and **DICKSON KUNG'A OLAMBO**, a cousin to both the deceased and the accused person testified as **PW4**. The investigating officer **No. 79586 Corp GEORGE STEPHEN MUTUNGA** testified as **PW5**. 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 in the afternoon of 14/02/2015, the deceased was seated on a stone which was between the house of PW1 and the main gate to their homestead. PW2 stood a short distance from where the deceased sat. The accused person then came out of his houuse and while folding his hands on his chest passed PW2 and stood next to the deceased. The accused person told the deceased that he had information that the deceased had vowed to assault the accused person and as such the accused person invited the deceased to a fight. The deceased denied having said so but the accused person insisted. The deceased wondered what was wrong with the accused person and asked him if the deceased had ever gone to his house. PW1 who was inside her house had the alcartation between her children and came out of the house to where the two were. PW1 asked the accused person if there was a problem and before the acccused person replied the deceased stood up. In a flash of a second the accused person stabbed the deceased on the stomach and the deceased began crying while holding his stomach. PW1 held the accused person but she was thrown away and as the decased attempted to run away the accused person caught up with him and fell him. The accused person continued stabbing the deceased with a knife.

5. PW2 pleaded with the accused person to leave the deceased but instead the accused person charged at PW2, stabbed her on her right hand and then went back and continued stabbing the deceased. The deceased pleaded with the accused person in vain. As PW2 raised alarm two male neighbours rushed to the scene and attempted to disarm the accused person. The two were repulsed by the accused person and he continued stabbing the deceased allover the body. PW2 saw the knife the accused person used on the deceased. It was blood-stained and the accused person licked the blood. PW2 lost consciousness as a result of the bleeding moreso that she was pregnant. PW2 came back to her senses at around 05:00pm while at the Migori County Refferal Hospital where she was admitted for 3 days.

6. PW4 who was watching a footbal match in a hall at Ong'er Trading Centre in Nyatike that very afternoon was informed of the incident by one **Daniel Odoyo Maranga** (not a witness). PW4 rushed to the homestead and saw the lifeless body of the deceased with several stab wounds lying on the ground next to the main entrance to the homestead. He called the police who visited the scene, took photographs, interogated people and then collected the body of the deceased alongside PW2. PW4 identified the body of the deceased before the post mortem examiantion was conducted by PW3.

7. PW5 was not the initial investigating officer. He only took over the case sometimes in April 2016 long after the accused person had been charged. He however studied the police file and revisited the scene. He also interviewed the witnesses who had recorded statements. PW5 confirmed that when the police collected the body of the deceased they took it to Migori County Refferal Hospital Mortuary for an autopsy which was conducted on 19/02/2015 by PW3 whereas PW2 was taken to the Migori County Refferal Hospital for treatment. The accused person then surrendered to Macalder Police Station on 16/02/2015 and he was taken for mental examination at Macalder District Hospital on 17/02/2015. PW5 produced a P3 Form for PW2 and the Mental Assessment Report for the accused person where the accused person was certified fit to stand trial as exhibits. He also produced a Sketch Map as an exhibit.

8. It was PW3 who conducted the post mortem examinaton on the body of the deceased. He confirmed that the body of the deceased had a total of 20 stab wounds spread allover the body from the back, shoulders, elbows, chest and the abdomen which were likely to have been caused by a sharp object. He opined that the cause of death was cardiorespiratory failure secondary to haemathorax lung collapse secondary to assault. He filled in a Post Mortem Report, signed and dated it. He produced it as an exhibit. The body of the deceased was then released for burial.

9. At the close of the prosecution's case, the accused person was placed on his defence. He opted to give unsworn testimony without calling any witness. The accused person raised two defences; that of provocation and intoxication and insited that he did not intentionally cause the death of the deceased. I will revisit the defences later in this judgment. At the close of the defence case the matter was left for judgment.

10. From the above evidence, this Court is now called to find if the ingredients of the offences 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>: -

11. There is no doubt that the deceased died. That fact was attested to by PW1, PW2, PW3 and PW4. The first limb is hence answered in the affirmative.

12. As to the cause of the death of the deceased, PW3 produced a Post Mortem Reports which he personally filled in after conducting the autopsy. The report opined that the possible cause of the death of the deceased was cardiorespiratory failure secondary to haemathorax lung collapse secondary to assault. 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 person:</u>
<u>-</u>

13. As stated above, the accused person stated in his defence that he indeed stabbed the deceased out of a struggle. However, the accused person raised two defences in law which are for consideration in the next ingredient. I now find that it is the accused person who caused the death of the deceased as a result of stabbing him. The second ingredient is also proved against the accused person.

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

14. Unless it is proved that the accused person caused the death of the deceased with malice aforethought, the offence of murder is not proved. The prosecution must prove the intention on the part of the accused person to kill the deceased. In doing so I will revisit the evidence of PW1, PW2 and PW4 as well as the twin defences raised by the accused person.

15. I have reiterated the evidence of PW2 when I was presenting the prosecution's case. PW2 was an eye-witness who stood near the deceased and the accused person. PW2 testified on the events as they unfolded. It was the evidence of PW2 that PW1 was also at the scene of the incident. However, PW1 denied so. PW1 stated that she never witnessed anything on that day as she was unconscious. I observed the demeanors of PW1 and PW2 as they testified. PW1 who was visibly hurt by the loss of the deceased was also unhappy that her last born, the accused person, was in custody. She flatly denied knowing what caused the death of the deceased and remained unaware if the body of the deceased had injuries. PW1 also stated that she never saw the accused person and the deceased on the day of the incident and she was not aware where they had gone to.

16. From the demeanor of PW2 and the way she testified candidly, was straight forward and not shaken in cross-examination, I find PW2 to be a truthful witness. Conversely, from the demeanor of PW1 and the way she was very evasive and intentionally withheld the truth, I find PW1 to be an untruthful witness and her evidence to be of no probative value. PW4 was a cousin to both the accused person and the deceased. I also observed his demeanor as he testified and from the way he presented himself and was cross-examined, I find PW4 to be as well a truthful witness.

17. I will now look at the evidence of PW2 and PW4 in considering the twin defences. Both testified on a love triangle between the accused person, the deceased and one **Beatrice Adesia** (hereinafter referred to as **<u>'Beatrice'</u>**). According to PW2 the deceased had initially married Beatrice and as such Beatrice was her co-wife but it seems that the deceased and Beatrice had parted ways. On the day of the incident, Beatrice was at the homestead and inside the house of PW1. As PW2 went to PW1's house, the deceased, who seemed aware that Beatrice was inside PW1's house, intentionally recalled PW2. PW2 obliged and after giving the deceased a shirt which he had requested for, PW2 escorted the deceased towards the main gate before the deceased sat on a stone which was not far from the gate.

18. PW4 was also aware of Beatrice. To him Beatrice had initially befriended the deceased and after a while the accused person also befriended Beatrice. The deceased was naturally against the relationship between Beatrice and the accused person. It occurred that Beatrice

had visited the accused person on that day and was inside PW1's house. The deceased knew about the presence of Beatrice and complained. That must have angered the accused person who then approached the deceased as the deceased sat on the stone. However, this piece of evidence was mainly heresay as PW4 stated that it was PW2 who told him but PW2 never testified to that.

19. PW5 also came across the issue of Beatrice when he took over the matter and re-interrogated the witnesses. PW5 ascertained from PW1 that Beatrice had befriended the deceased from 2002 to 2005 when they fell out. Thereafter, the accused person took over Beatrice. According to PW5 it was the visit of Beatrice to the homestead that prompted the incident as the deceased was not happy and protested thereby angering the accused person. PW5 testified that PW1 told him that the deceased and the accused person fought over Beatrice and that the deceased was also bitter with PW1 as PW1 supported the relationship between the accused person and Beatrice despite being aware of the history. Again, PW1 did not testify to that.

20. PW2 also testified that the deceased and the accused person did not relate well and that it was PW1 who made them so. PW2 was aware that PW1 used to talk evil of one of her sons to the other and vice versa and that created immense hatred between the deceased and the accused person.

21. PW2 did not testify as to whether the accused person was drunk during the incident. The accused person gave unsworn testimony. In respect to the aspect of **intoxication** the accused person stated that he had been angered by the demolition of a structure he had built at the Ong'er market and decided to take the local brew '*chang'aa'* before carrying some more as he returned home. That on returning home he met Beatrice inside PW1's house and went into his house and continued drinking the '*chang'aa'* he had carried. That a wife to the elder brother of the accused person went into his house and the accused person asked her for water to take a bath but he was not given. Later Beatrice went into the house of the accused person and asked him why he was shouting and that it was Beatrice who eventually gave the accused person the water to bath. The accused person further stated that as he entered the bathroom he fell and saw the deceased approach where he was. The deceased asked the accused person if he was drunk and asked those who were there to leave the place. That the deceased went into his house and returned with a club and asked the accused person about his speaker. That they differed and abused each other. The deceased then retreated to his house.

22. On the **provocation**, the accused person stated that after a short while he again saw the deceased seated outside his house smoking *cannabis sativa* (bhang) as he continued abusing the accused person. That the accused person was restrained from attacking the deceased by those who were there and went to sit yonder a tree but the deceased continued with the abuses on him. The accused person then approached the deceased to get the bhang but the deceased drew the club and asked the accused person to prepare for an ambush but the accused person declined to fight. That the accused person stumbled and as he was about to fall down the deceased thought that the accused person was going to attack him and held him. A struggle began. That the accused person had a kitchen knife which fell and the two began struggling for the same. The accused person overpowered the deceased and took the knife. The deceased held him on the waist and fell the accused person down. He sat on his chest and since the accused person had the knife he stabbed the deceased to free himself. The accused person later surrendered to Nyatike Police Station and was arrested and charged.

23. Intoxication has been provided for as a defence to a criminal charge under **Section 13** of the **Penal Code** Chapter 63 of the Laws of Kenya and provides that: -

> ***"13 (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.***
>
> **(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-**
>
> **(5) For the purposes of this section, "intoxication" includes a state produced by narcotics or drugs."**

24. From the reading of the entire section it appears that the defence of intoxication is very narrow in its application. The defence can be raised in two instances. **First**, under **sub-section 2(a**) in which case the burden of proof is on the accused person to satisfy the conditions therein. **Second**, under **sub-section 2(b)** in which case the burden remains on the prosecution. The Court of Appeal for Eastern Africa in the case of **Kangaro s/o Mrisho vs. R (1956) 23 EACA 532** referred to the case of **Cheminingwa vs. R**, in which it was stated: -

> **'It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused."**
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> See: Joshua Matata Ndonye v R, [2001]Eklr, CR NO. 122 OF 1991 (Kwach, Shah & O'Kubasu JJ.A).

25. The Court of Appeal cases of **Manyara v. R (5) (1955) 22 EACA 502**, **Nyatike s/o Oyugi (1959) EA 322** among others remain very relevant on this issue.

26. In this case the accused person contends that because of the intoxication he did not form the necessary intention to kill the deceased. In that case the burden squarely remains on the prosecution. It is hence for this Court to ascertain if the accused person was so drunk that he was driven to temporary insanity or that he was so drunk that he did not know what he was doing.

27. Although PW2 did not expressly state that the accused person was not drunk, the then conduct of the accused person may not be commensurate to one who is so drunk as not to know what he was doing. The accused person pushed PW1 to the ground, stabbed the deceased on the stomach, charged and attacked PW2, repulsed the two men who came to the aid of the deceased, chased and caught up with the deceased when he was attempting to run away, continued stabbing the deceased so severally, licked the blood on the knife used to stab

the deceased and when he was sure that he had done enough harm to the deceased escaped but later surrendered to the police.

28. Again, and in his own words, the accused person recollected how he returned home, saw Beatrice, asked for and was given some bath water, fell down, saw the deceased approach him, saw him return to his house to collect a club, exchanged abuses with the deceased, wanted to fight the deceased but was restrained, saw the deceased smoking bhang, went to him and wanted the bhang, a struggle ensued, the accused person overpowered the deceased and eventually stabbed him. In the case of **Joshua Matata Ndonye vs. R (2001) eKLR** the Court of Appeal accepted the argument by the appellant's wife that her husband was not so drunk as to be unable to form the necessary intention; if he had been he would have been unable to overpower her. In totality of the evidence, I find that the accused person, if at all he was drunk, he was not so drunk that he did not know what he was doing. He was well aware of what he engaged himself in and remained strong to overpower PW2, the two men and the deceased all by himself alone. The defence of intoxication therefore fails.

29. As to whether the accused person was provoked, the starting point is the law. **Sections 207** and **208** of the **Penal Code** states as follows: -

> **'207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of person caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.**
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> **208(1) The term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.**
>
> **(2) When such an act or insult is done or affected by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.**
>
> **(3) A lawful act is not provocation to any person for an assault.**
>
> **(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.**
>
> **(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality."**

30. In his unsworn testimony, the accused person stated that the deceased abused him severally and was only, but restrained from fighting him. PW2 stated that it was the accused person who insisted on a fight with the deceased and that the accused person is the one who stabbed the deceased severally. PW2's evidence does not tally with what the accused person stated. Given that the evidence of the accused person was not tested on oath and having found PW2 a reliable and truthful witness, I find that the allegation by the accused person that he was provoked by the deceased to be unproved.

31. There is however another angle to the provocation. There is evidence that the deceased and the accused person were entangled in a love triangle with Beatrice. That Beatrice had visited their home thereby prompting the deceased to protest over the relationship between the accused person and Beatrice since Beatrice initially had an affair with the deceased and then turned to the accused person and yet PW1 supported the relationship. The accused person was suddenly enraged by the protests and a confrontation ensued. Although there is no cogent evidence on this issue I will still look at it as it was loosely touched on by PW2, PW4 and PW5. I however note that the relationship between the accused person and Beatrice was not new. It had existed for about 10 years since 2005 and PW1 supported it. Infact there is no evidence that the deceased dealt directly with Beatrice or the accused person on that day or even before. Any assertion of provocation on this aspect can only be deemed as so remote and untenable.

32. To buttress the foregone, when the accused person approached the deceased as he sat on the stone, the accused person did not ask the deceased about Beatrice but prompted him to a fight on allegation that the deceased said he will fight the accused person.

33. But even if there was provocation, a Court must consider the degree of retaliation before an accused person can benefit from the defence. In the case of **Tei s/o Kabana vs. R. (1961) EA**, the Court of Appeal for Eastern Africa held that:

> **'…In considering whether provocation was sufficient to reduce offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and lethal nature of the weapon used.'**

34. I therefore find that there was no provocation on the accused person.

35. Although the accused person did not expressly raise the issue of acting in **self-defense**, that defence arose during the unsworn testimony and I am obliged to consider it. The accused person stated that as he struggled with the deceased to get the bhang from him, he had a knife which fell and each struggled for it. That he managed to get the knife but the deceased fell him and sat on his chest. That the accused person used the knife to stab the deceased to free himself.

36. Section 17 of the **Penal Code** 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.'

37. 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 alowing the appeal on the ground that the appellants acted in self-defence thus: -

***'"*The common law position regarding the defence of self-defence 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-defence 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 or not 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."

***I*t 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.'

38. The essential element of self-defense is that the accused person must have believed that he was being attacked or in imminent danger of being attacked but the belief must be based on reasonable grounds (See the Court of Appeal case of **Roba Gaima Wario v. Republic (2015) eKLR**). Looking at the evidence of PW2 and the accused person I find that the defence fails as there was no danger that might have made the accused person fear for his life. Infact it was the accused person who was armed. That defense equally fails.

39. Therefore, is malice aforethought demonstrated in the circumstances of this case? **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.

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

My Lordships in the above case went on to say that: -

"In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -

"There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR…"

41. And in the case of **Mary Wanjiku Gitonga –vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

"We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed……Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention "to do grievous harm to any person……" is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances, we see no reason to interfere with the appellant's conviction for murder. The conviction was fully justified by the evidence on record." (emphasis added).

42. There is evidence of longstanding bad blood between the deceased and the accused person which was mainly pumped up by PW1. According to PW2 the deceased and the accused person harbored grudges against one another. There was also the remote issue of the love triangle. The accused person must have dealt with the deceased in a manner tantamount to waiting for an opportunity to avenge at any time. It then presented itself. The number of stab wounds and the positions on the body of the deceased lay the intention bare. The accused person stabbed the deceased 20 times on the chest and the back. It is common knowledge that the areas the deceased was stabbed are those with vital body organs and that collapse of any of the vital organs leads to immediate death. The accused person also repulsed anyone who attempted to come to the aid of the deceased. Being happy of his achievement, the accused person even licked the blood of the deceased which was on the knife. The intention to kill the deceased is clearly demonstrated.

43. From the foregone discourse, the prosecution has proved all the ingredients of the offence of murder against the accused person.

44. Consequently, I find **MOSES OTIENO OLAMBO** guilty of the murder of **BENARD OCHIENG OLAMBO** as charged and I do hereby convict him under **Section 322(2)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

Orders accordingly.

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

A. C. MRIMA

JUDGE