



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 6 OF 2016

(MURDER)

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....PROSECUTION

VERSUS

DOO.....ACCUSED

JUDGEMENT

1. DOO is charged with an offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code (Chapter 63), Laws of Kenya. The particulars of the charge are that on the 13th day of March 2016 in Ugenya Sub-county within Siaya County, murdered **COO**.

2. The Prosecution in this case called a total of 7 witnesses, while the Accused testified on oath and called no witness. The Prosecution was led by M/S Maurine Odumba, Learned Prosecution Counsel, while Mr. Odhiambo B.F, Learned Advocate, represented the Accused.

3. The deceased herein COO, was a brother to the Accused. PW1, Susan Aloo Auma, testified that on 13.3.2016 at around 5:00pm on her way from the Church as she approached the home of T the Accused herein, she found him assaulting his brother W, the deceased, who was lying on the ground using a stick, while at the home of the deceased. She witnessed the incident from a distance of 10 metres from where she was and then continued to go home. She testified she knew the Accused and the deceased as both come from the same family. That the following day, she was picked by Assistant Chief to go to Ukwala Police Station to record her statement as W, the deceased, was found dead. PW1 identified the stick used by the Accused as MFI-P1. She testified the two used to stay at their father's home alone. PW2, VO, a minor, told Court that on 13.3.2016 at around 5:00p, while at his grandmother's home he heard screams of people disagreeing and on checking he saw T, the Accused and W, the deceased having a dispute. He stood by the fence and observed what was happening. He observed the two were abusing each other. That the deceased said something and T, the Accused picked a stick and beat W within their compound as PW2 watched the two fight. He saw the deceased being beaten at the knees with a stick, MFI-P1. PW2 left and later on his way from where he had been send he met the Accused on the road. He decided to go and check what had happened to W, who asked him to assist take him to his house but he declined fearing to be found by T, the Accused. On 14.3.2016, the Chief went to PW2's school, who informed him W had passed on and asked PW2 to go and record statement with the Police. PW2 testified that when he went to check on W, he found him bleeding from the left side of the head and left leg. PW2 clarified that T is also known as DOO, who he has known since 2013 as his maternal uncle and a villager and that he knew him as brother to W and at their home, they lived the two of them.

4. PW3, MO, testified that on 13.3. 2016 at around 5:30pm, she was on her way to the trading centre passing near the home of O at the rear side, when she heard people quarrelling. She did not see the people but heard their voices. That she recognized the voices as that of W and T O, who are brothers; who she knew very well as they are her brothers-in-law. That she knew their voices as she was married within their family for many years. PW3 identified the Accused in the Court. PW3 later recorded her statement with Police after she became aware of the death of W the following day. On cross-examination, PW3 stated she did not witness the fight but heard W, the deceased telling T to get out so that he could take T to his birth place as he was using strong language and the Accused asked the deceased if he would be taken to his place where would W be taken. PW3 did not see PW1 Susan Aloo Ouma and PW2 at the scene but far away on the road.

5. PW4, Norbert Otieno Ooko, Assistant Chief of Simur sub-location testified that on 14.3.2016 at 12:30pm, a village elder, one Owino Oduor, informed him COO, commonly known as W and DOO also known as T had a fight and it seemed CO apparently had died. He proceeded to the scene and at their home he did not find anyone. He called APs from Siranga APs' Camp; who arrived, opened the door to C's house, which he knew, found COO, lying on the floor of his *Simba* house dead. He observed blood on the back of the head of the deceased. He organized with the youth to go and look for DOO, who returned with the Accused after 5 minutes. PW4 called Police Officers from Ukwala who came to the scene, collected the body of the deceased and took it to Ukwala Sub-County Hospital mortuary, while the Accused was taken to Ukwala Police Station. PW4 testified he knew both the deceased and Accused for over 8 years. PW4 identified the Accused as DOO.

6. PW5, ROM, testified that on 18.3.2013 at Ukwala Sub-County Hospital Mortuary, he identified the body of OO, his cousin in company of a Police Officer to the Doctor for postmortem examination.

7. PW6, No. 67215 Cpl Benson Ndambuki, told court that he was the Investigating Officer in this case. That on 14.3.2016 at around 1:30pm, he recorded a report of murder from PW4, an Assistant Chief. That he and his Police Officers rushed to the scene at Ngonglo village, where he found a crowd of people, APs at the scene and the Assistant Chief (PW4). He was directed to the house where he found the deceased lying down dead with a cut on his linear head and bruises on both hands and legs. The Accused was later brought to him under arrest by members of public and he then re-arrested him. He collected the body and took it to Ukwala Sub-County Hospital Mortuary. That postmortem was conducted on 18.3. 2016. He took the Accused to Ukwala Police Station and after completing investigations charged him with the offence of murder. PW7 further testified he established the people staying at the compound were the deceased and the Accused. PW7 recovered of piece of wood which was said to have been used by the Accused to beat the deceased (MFI-P1) which he produced as Exhibit P1. He also witnessed the postmortem examination. He identified the postmortem report as MFI-P2. He also identified the Accused as the person he had re-arrested from members of the public.

8. PW7, Dr. Ochieng Odhoch, performed the postmortem on the body of the deceased and he produced the report before Court as Exhibit P2. The Doctor found that the deceased had sustained cut wound on the parietal right side, multiple bruises on the head, left thigh, right leg, and forearm. The doctor was of the opinion that the cause of the death was anaemic hypoxia and hypovolemic shock resulting from massive haemorrhage.

9. When the Accused was put on his defence, he gave his defence on oath. The accused defence was a defence of alibi. He testified that on 13.3. 2016 that he went to church for service in the morning. That in the afternoon his friend Morris Ouma Mahulo invited him to a place called Jera at about 11:00am where he left at around 2:00pm and proceeded to his home where he was staying with his brother COO, where he relaxed and around 5:30pm he met COO, who greeted him and he told him he was going to Ukwala. That the deceased asked him to assist him with a jerrican to go and fetch water so as to wash his clothes but he did not give it to him, stating that someone was urgently waiting for him and he would give him the jerrican the following day. That he left for Ukwala whereby he arrived at 7:30pm and returned home at 8:00pm where he did not find his brother, got into his house and slept as each of them had his own house. That the following day, he got up and did not see his brother as he used to leave home very early and return at night. That the following day he got a jembe and a pangala proceeded to his shamba. That at

10:00am, he returned to his home to prepare his breakfast, after which he left, went to cut trees from family land far from home. That while cutting trees, he heard people wailing at their home, he proceeded there, found Assistant Chief (PW4) and two APs from Siranga who asked him whether he knew what had happened at their home to which he told him he did not know. He was told his brother had died and was lying inside the house. He accompanied them to the house and confirmed that was so. He stated when he observed the deceased's body he did not see any injury. The deceased body was collected and taken to Ukwala Sub-County Hospital Mortuary. That the Accused was arrested, taken to Ukwala Police Station and subsequently charged with the offence. He said two witnesses who gave evidence being PW1 and PW2 lied. He denied having fought or having assaulted his brother. He denied having committed the offence.

10. At the close of defence case, Mr. Odhiambo B.F, Learned Advocate, for the Accused and M/S Maurine Odumba, for the State made their respective submissions. Mr. Odhiambo B.F, Advocate, urged that the Prosecution failed to prove the charge of murder beyond any reasonable doubt whereas M/S Odumba, Prosecution Counsel urged the Prosecution proved their case beyond reasonable doubt.

11. The Accused is facing a charge of murder, the burden of proving the charge of murder lies with the Prosecution to prove the charge against the Accused beyond any reasonable doubt. Under **Section 203 of the Penal Code**, murder is defined as follows: -

“203. Any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder.”

12. The Prosecution in a murder case must prove that the Accused had formed the necessary intention to cause death or grievous harm to the deceased. **Section 206 of the Penal Code**, describes circumstances which constitute the same as follows: -

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

an intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or not;

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, by a wish that it may not be cause;

an intent to commit a felony; an intention by the act or omission facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony”.

13. To prove a charge of murder, the Prosecution has a duty to establish the following ingredients: -

a) death of the deceased and its cause.

b) that the accused caused the death through an unlawful act or omission.

c) the accused possessed an intention to cause harm/kill or had malice aforethought.

14. **The first issue for consideration is whether the Prosecution has proved the death of the deceased and its cause?** PW4 and PW6 were at the scene of the incident where they found the deceased body lying at his house on the floor. PW6 collected the deceased body and took it to Siaya County Referral Hospital Mortuary. PW5, cousin to the deceased identified the deceased body to the Doctor (PW7) for postmortem examination. PW7 carried out a postmortem on the body of the deceased in presence of PW5 and PW6, on 18.3.2016 at 4:30pm. The evidence of PW7, the Doctor, corroborated the evidence of PW4, and PW6 who told the Court they saw the deceased's body at the scene of crime already dead. The

postmortem report Exhibit P2 reveals the deceased's body had cut wounds, and multiple bruises and the cause of death was due to anaemic hypoxia and hypovolemic shock resulting from massive haemorrhage. In this case, there is no dispute on the death of the deceased as the Accused also stated that the deceased was dead when he went to his room with PW4 and PW6. The prosecution therefore proved the death of the deceased and the cause of death.

15. I now turn to the next issue of who caused the death of the deceased? The Accused in this case denied having caused the death of the deceased and gave a defence of alibi. In the instant case as per evidence of PW1, PW2 and PW3, the offence was committed between 5:00pm to 5:30pm at the deceased's home. PW1, PW2 and PW3, neighbours to the Accused testified that they knew both the Accused and the deceased very well for a considerable period of time and that in their home they were the only people staying there. PW1 testified that while on her way home on 13.3.2016 at 5:00pm, at a distance of 10 metres to where the deceased and accused, where she saw the accused armed with a stick beating the deceased who was lying on the ground. PW2 testified also at around the same time while at his grandmother's home, which is about 8 metres to the home of the Accused and the deceased he heard screams from their home, went and stood at the common fence and observed, the two abusing each other. That the deceased said something that provoked the Accused to pick a stick with which he beat the deceased, PW2 watched them fight. PW2 identified the stick as MFI-P1. He then left and later passed by the deceased's home, found the deceased badly injured, as he asked him to assist him to get into his house but he declined as he feared, that the Accused would find him and beat him. PW1 and PW2 never met at the scene as they came to the scene at different intervals. PW3 who came to the scene later testified that on 13.3.2016 at around 5:30pm on her way to the trading centre while passing at the rear side of the Accused and the deceased's home, she heard the Accused and the deceased quarrelling, she heard and recognized their voices, as that of the Accused and the deceased who she had known for a long time by virtue of having known them very well being her brothers-in-law and having been married within their family for many years and being a neighbor, as her home is ½ kilometer from that of the Accused and the deceased. She also heard the deceased telling the Accused to get out so that he could take the Accused to his birth place and that if he did not want to go alone he would take the Accused. That the deceased was using a strong language. That the Accused asked the deceased if he will be taken to his birth place where would the deceased be taken.

16. I have evaluated the evidence of PW1, PW2 and PW3 and I observed that they were credible witnesses who though they were at the scene at different times impressed me as credible witnesses. They had no grudge with the Accused nor is there reason for them to frame the Accused. I believe that they told the Court the truth.

17. The Accused denied having assaulted his brother as he was away at the alleged time. I note PW1, PW2 and PW3 witnessed the incident at different times between 5:00pm and 5:30pm and none was with one another though PW3 testified at the time she heard the Accused and deceased quarrel, She saw PW1 and PW2 far away on the road. This evidence of PW3 corroborates the evidence of PW1 and PW2 that each witnessed the incident at different time. The accused in his defence testified that on 13.3.2016 between 2:00pm and 5:30pm he was at home and that by 5:30pm when he was leaving for Ukwala trading centre he even saw and talked to the deceased. That it was only the two of them who were staying at their home. I have considered the evidence of PW1, PW2 and PW3 and I find that the three Prosecution witnesses knew the Accused and the deceased very well being their neighbours, that they observed what happened from a close range and were not mistaken at all as to the identity of the Accused and the deceased. That they placed the Accused at the scene of crime at the time the Accused stated he was at his home with his brother. The evidence of PW1, PW2 and PW3 dislodged the Accused's defence of alibi. I therefore find the Accused's defence of alibi is an afterthought and it was never raised early enough and as such it is not sustainable. I reject the same as an afterthought.

18. I therefore find and hold that it was the Accused who caused the death of the deceased as no other person assaulted the deceased using a stick as evidenced by PW1 and PW2 and caused serious injuries to the deceased which led to his death.

19. Whether the Accused had malice aforethought? PW1 told the Court she saw the Accused beating

the deceased using a stick. She did not state whether she had witnessed anything else prior to the assault; while PW2, a neighbour who stated a life fence separated their home and that of the Accused was categorical, he heard screams of people who were disagreeing. He witnessed the deceased and the accused abusing each other till when the deceased said something that made the Accused pick a stick and beat the deceased. That he watched them fight. PW3 talked of the Accused and the deceased quarrelling. None of the Prosecution witnesses talked of there having been bad blood between the two brothers whom I believed as the two were living in the same compound. From the evidence of PW2 and PW3, there was a quarrel between the two brothers. PW3 heard the deceased threatening to take the Accused to his birth place. PW1 heard the deceased tell the Accused something that provoked him to pick a stick which he used to beat the deceased with. I find the attack of the deceased by the accused was spontaneous act. The evidence show that, the act was unplanned attack of the deceased by the Accused. In the circumstances of this case, it cannot in my view be said the circumstances supports the necessary malice aforethought. I find no evidence that the Accused had planned to commit the offence. I will therefore find and hold that the Accused killed the deceased but had no intention to cause death. Malice aforethought is therefore not proved.

20. The Upshot is that I find the Accused guilty of the lesser charge of Manslaughter under Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

DATED AND SIGNED AT SIAYA THIS 27TH DAY OF JULY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

IN THE PRESENCE OF:

MR. ODHIAMBO B.F: FOR ACCUSED

M/S ODUMBA: FOR STATE

COURT ASSISTANTS:

1. LABAN ODHIAMBO

2. ATIKA LEONIDAH

J.A. MAKAU

JUDGE