



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 5 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

ISHMAEL ODUOR ODONGO.....ACCUSED

JUDGMENT

1. **JM** (hereinafter referred to as '**the deceased**') died on 22/01/2016 at their home in [particulars withheld] village in Nyatike Sub-County within Migori County from injuries on the head and body. He was a minor aged 6 years old. On completion of investigations the accused person herein, **Ishmael Oduor Odongo** was charged with the murder of the deceased.

2. The accused person denied the offence and a trial was ordered. The prosecution availed six witnesses in a bid to prove the charge. **PW1** was one **HOO** who is the father of both the deceased and the accused person. He is a retired teacher and a Catholic priest. The mother of the deceased testified as **PW2**. She is **MM. HM**, a brother to the deceased and a half-brother to the accused person testified as **PW3**. **Dr. Awinda Victor Omollo** was **PW4** and **No. 89124920 AP Sgt. Richard Obwenyo** was the arresting officer and testified as **PW5**. **No. 83878 PC Gailod Amanyang** of Nyatike CID offices was **PW6**. He was the investigating officer in this case. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. **PW1** was married to the mother of the accused person and they were blessed with several children. The accused person was their last born. On the demise of the mother to the accused person **PW1** married **PW2**. **PW2** came into **PW1**'s home with three children of her previous marriage. The children are **DO** (aged 17 years old and not a witness), **HM** (**PW3**) and **JM** (the deceased). **PW1** and **PW2** were then blessed with a daughter one **RO** (not a witness). **PW1** stayed with **PW2** and the children whereas the accused person stayed elsewhere but used to take meals at **PW1**'s house. It appears that **PW2** and the accused person did not get along well. At one time **PW2** left her home due to the incompatibility with the accused person. **PW1** looked for her and when he found her, **PW2** insisted that the issue must first be discussed before a government administrator prior to returning to her home. **PW1**, **PW2**, the accused person and one **MAA** (**PW1**'s daughter with the first wife and not a witness) proceeded to the police and discussed the matter. It was resolved that the accused person should forthwith prepare his own meals.

4. As they left the police station the accused person asked **PW1** to give him Kshs. 100/= to organize his way forward. **PW1** did so. As they parted with the accused person, **PW1** bought some meat and returned to his home with **PW2**. At around 07:00pm on the very day, the accused person went to **PW1**'s home and on seeing the meat being cooked he took a bowl and scooped some pieces of meat, ate and threw the bowl away as he left. **PW1** and **PW2** witnessed the incident but just kept quiet.

5. But that was not the end of the matter. The accused person returned to **PW1**'s house later at night. It was almost mid-night and demanded that the main door be opened as he wanted to pick his tobacco which was still inside. **PW1** opted to give him the tobacco through the window but the accused person insisted on the door being opened. **PW1** eventually opened the door and the accused person entered. He looked for the tobacco and managed to get it. The accused person asked **PW3** to get him a newspaper to prepare a cigarette and **PW3** obliged. The accused person then prepared a cigarette and started smoking. **PW1** asked the accused person to leave the house as he was chocking them but the accused person refused and demanded some money from **PW1**. When **PW1** told the accused person that he did not have any money, the accused person insisted as he picked a twisted metal rod from one corner of the sitting room which **PW1** used to dig holes during constructions. The accused person quickly hit **PW1** on the forehead and **PW1** bled profusely. **PW1** then told the accused person that he only had Kshs. 50/= in his bedroom and asked the accused person to accompany him to his bedroom for the same. The accused person did so and when he was given the Kshs. 50/= he demanded for more.

6. The accused person then called **PW3** and hit him on the back and hands with the metal rod and ordered him to go and sleep. As the accused person wanted to hit **PW3** on the head with the metal rod **PW2** intervened and got hold of the metal rod. She wanted to disarm the accused person and a struggle ensued. During the struggle, the accused person hit **PW2** with blows and kicks. As the two fought, **PW1** escaped into a nearby bush and hid himself. He was about 20 metres from his house and heard all what was happening. **PW3** also escaped to a neighbor's homestead. **PW1** then heard a sound of someone being pounded inside the house and the deceased cried three times. The accused person overpowered **PW2** and in the process of the fight **PW2** managed to escape to a neighbor's homestead which was about 25 metres away and sought for help. As she ran for her life, **PW2** left behind one of her children, the deceased, who was unwell and sleeping inside the house and the accused person as well. While at the homestead, **PW2** heard her son, the deceased, cry.

7. After a short while PW2 returned to her house with some neighbours but did not find the accused person, instead she found her son, the deceased, injured and bleeding profusely. She observed the deceased and noted that he was dead. She screamed and more neighbours came to her home including the Area Chief one **John Opiyo** (not a witness).

8. PW5 was called by the Area Chief at around 12:30am on 23/01/2016 and informed of the incident. He quickly rushed to PW1's homestead and saw several people gathered. He saw and observed the body of the deceased. PW5 was then accompanied by some youths and proceeded to where the accused person resided and arrested him. He took the accused person to the Khaler Administration Police Post and handed him over to the CID officers from Nyatike. The officers then visited the scene where PW6, as the investigating officer, drew a sketch plan and recovered the metal rod which he produced in evidence as exhibits. They collected the body of the deceased to Migori County Referral Hospital Mortuary for preservation and autopsy. He also took PW1, PW2 and PW3 to the Migori County Referral Hospital where they were treated and discharged. P3 Forms were filled accordingly.

9. The post mortem examination was conducted by **PW4** on 29/01/2016. The deceased's body was identified by PW1 and one **Masila Mukerya** (not a witness). PW4 made general observations on the deceased's body and noted that it was a body of a male African of about 6 years old in good nutritional status. It was very soft and there was blood on dependent areas. There were two deep cuts on the forehead and a wound at the back of the head. PW4 formed the opinion that the deceased's cause of death was head injuries due to an assault caused by a blunt object. He filled in the Post Mortem Report which he produced in evidence.

10. On completion of the investigations, PW6 escorted the accused person to Macalder District Hospital for mental assessment on 30/01/2016 and the accused person was certified mentally-fit to stand trial. The accused person was later charged before Court.

11. At the close of the prosecution's case, the accused person was placed on his defence and elected to give unsworn evidence without calling any witnesses. The accused person denied committing the offence and reiterated how he was arrested and assaulted in the night of 23/01/2016 by people unknown to him and taken to Nyatike Police Station. He also denied knowing any of the prosecution witnesses and stated that they were all untruthful.

12. At the close of the defence case, Learned Counsel for the accused person indicated his intention to file written submissions which he failed to do. The prosecution relied on the evidence as tendered on the record.

13. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether or not the accused persons are guilty of the offence of murder.

14. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(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.

15. There is no doubt that the deceased died. All the witnesses so confirmed. As to the cause of death, PW4 took this Court through the Post Mortem Report he prepared and opined that the cause of death was as a result of the head injuries caused by assault from a blunt object. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

16. On the second ingredient as to whether the accused person caused the death of the deceased, there is ample evidence that there was violence in PW1's house caused by the accused person. That was witnessed by PW1, PW2 and PW3. As the violence escalated, all the three escaped from the house leaving the accused person and the deceased behind. No one witnessed the accused person injuring the deceased but when they eventually returned they saw the deceased having been injured and dead.

17. Since there is no eye-witness account on how the deceased died, reliance is now on the circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

18. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (supra)** and have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo vs. Republic (2014) eKLR** among many others.

19. The Court of Appeal in the case of **Musii Tulo (supra)** in expounding the above principles expressed itself as follows:-

“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

20. The way the violence was visited on the family of PW1 has been clearly captured hereinabove. The accused person assaulted PW1, PW2 and PW3 and when they fled from their home the accused person was left with the deceased inside the house. PW1 and PW2 heard the deceased crying inside the house. PW1 heard someone pounding inside the house as the deceased cried three times. When PW1, PW2, PW3 and the neighbours shortly returned to the house, the accused person was not there and the deceased was already dead.

21. From the evidence, the logical inference is that the accused person was the last person to be with the deceased shortly before he met his death. The accused person was armed with a metal rod and was terrorizing the family members resulting to their escape. The deceased was only six years old and unwell having been taken to hospital in the morning before he died where he was diagnosed with malaria and treated. As he lay on the bed, he became the easiest prey as the others escaped. According to the sketch map, the deceased lay dead on a mat where PW3 stated that he had slept with him for the night.

22. The upshot of the foregone discourse is that the events in this case taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person and none else. I equally find that there are no other co-existing circumstances which would weaken or destroy that inference. The second ingredient of the offence of murder was therefore proved.

23. As to whether there was malice aforethought in the accused person causing the death of the deceased, the starting point is the law. **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 flight or escape from custody of any person who has committed or attempted to commit a felony.

24. 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...)”

25. 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.”

26. In this case malice can be gleaned from the events as they unfolded towards the death of the deceased. PW1 testified that the accused person had always been so rough on him and demanded money at will. PW1 narrated that the accused person used to demand his share of the family land and PW1 had at one time allocated the accused person a portion thereof which he sold and squandered the money. The accused person was henceforth so dependent on PW1 for food and his upkeep and he used violence to get money from PW1. It was PW1’s evidence that out of his bad conduct the accused person had previously been jailed in Kakamega and Migori prisons for many years.

26.7 The relationship between the accused person and PW2 was not either good. The two did not get along well and at one time PW2 left her home and went away. On the intervention of PW1, the dispute had to be settled by the police where it was agreed that the accused person was to start preparing his own meals and on request PW1 gave the accused person Kshs. 100/= to start off with. That very evening the accused person returned to PW1’s home, although he used to spend elsewhere, and forcefully took some pieces of meat which were being cooked with a bowl, ate them and threw away the bowl all in the presence of PW1 and PW2.

28. The accused person returned later that night and forced his way into the house. He refused to leave as he smoked tobacco. He again demanded for money and when PW1 said he did not have any, the accused person became violent and attacked PW1 using a metal rod which was inside the house. He managed to get a further Kshs. 50/= as he still demanded for more money. He then assaulted PW2, PW3 and the deceased.

29. It is clear that the accused person was not happy with the decision reached at the meeting with the police that he be on his own. The accused person must have seen PW2 and her children as the stumbling block in his life as he would not be able to deal with his father as before. The accused person must have hatched a plan to reverse the whole arrangement. Ample time passed from the meeting with the police to when he came to PW1’s home at around 07:00pm. Further time again passed from that incident up to when he returned at midnight. The accused person started assaulting PW1 and then turned to PW3 before assaulting PW2 and the deceased. The accused person must have carefully planned to execute his ill intentions on all or any of his family members. The way he hit the young boy on the head and public area with a metal rod left no other intention but to kill. By taking all the circumstances into account there is a clear manifestation of malice. The accused person pre-planned to kill the deceased or any member of his family. It is therefore this Court’s finding that the prosecution likewise proved malice aforethought in this matter.

30. The prosecution having proved all the ingredients of the offence of murder against the accused person leaves this Court with the only option of finding the accused person **ISHMAEL ODUOR ODONGO** guilty of the murder of **JUSTUS MAKORI** and so does. The accused person is hereby convicted under **Section 322(2)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

DELIVERED, DATED and SIGNED at MIGORI this 24th day of July 2017.

A. C. MRIMA

JUDGE