



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 22 OF 2011

BETWEEN

REPUBLIC.....PROSECUTOR

AND

KENNEDY NGESA MARENYA.....ACCUSED

JUDGMENT

1. The accused, **KENNEDY NGESA MARENYA**, was charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information were that he murdered **JOSEPH OMONDI OREK** (“the deceased”) on the morning of 6th March 2011 at Lihanda Sub-location withing Siaya County.

2. The fact and cause of death of the deceased is not in dispute. The post-mortem form was produced by Dr. Solomon Sava (PW 5) on behalf of Dr. Muturi who conducted the post-mortem at the New Nyanza General Hospital on 9th March 2011. According to his observations, the deceased had a head injury and internal examination revealed an extensive scalp haematoma on the left parietal region, a depressed skull fracture on the temporal region and brain lacerations and internal bleeding. He concluded that the cause of death was a severe head injury occasioned by blunt trauma.

3. The prosecution evidence relating to the circumstances of the offence were that on the 5th March 2011, there was a funeral at the home of the deceased’s father, David Ogomba who had died. Mourners had come for the burial during the day and in accordance with traditions, a *disco matanga* was organised that night. Susan Akinyi Orek (PW1) recalled that on the material night as the guests were seated outside, some people started throwing stones. The deceased, who was seated with the guests, stood up and also picked up stones and a stick and began to hit one Benard, who was with the accused, and who was the one throwing stones. The accused then suddenly hit the deceased on the back of the head with a rungu and he took off. In cross-examination PW 1 admitted that she was woken up by the noise and saw the deceased chase the boy who had thrown stones.

4. Shadrack Omondi (PW 2), recalled that during the *disco matanga*, the crowds became unruly and some young men who were present refused to move. They went and hid and started throwing stones at the visitors whereupon the deceased started chasing one of the boys who was throwing stones. PW 2 suddenly saw the accused came from behind the deceased with a club and hit the deceased on the head causing him to collapsed. The accused then ran away.

5. Cornel Otieno Genga (PW3) was also at the funeral and he recalled that when the commotion started, the deceased stood and started to ask who the culprits were. He ran to find out who it was. He then saw

the accused, who had a rungu, follow the deceased. In a moment and after hearing some noise, he found that the deceased had collapsed with after sustaining a head injury.

6. After the deceased had collapsed, the gathered villagers took him to Rabuor Hospital but due to his condition, he was taken to Maseno and thereafter to the then New Nyanza General Hospital where he succumbed to the injuries.

7. The incident was reported at Sinaga Police Post on the next day. Sgt Samuel John Bichanga (PW 6) confirmed that PW 1 made the complaint. He investigated the matter and took the witness statements. The accused was later arrested in Kericho and charged.

8. In his sworn testimony, the accused admitted that he was at the *disco matanga* but denied that he intentionally hit the deceased. He told the court that the accused and others were chasing his brother and when he tried to intervene he was surrounded after he had fallen on one of the people chasing him. He grabbed the stick the person was holding and threw it back as he ran away. He feared for his life as there were threats to burn his house. He therefore went to Kericho where he was arrested.

9. The incident took place at night hence the circumstances under call for caution in examining the evidence in order to avoid a case of mistaken identity. However, the testimony of PW 2 is that there was a generator light at the disco which was sufficient to illuminate the compound. PW 2 and PW 3 recall that they both saw the accused follow the deceased with a rungu. PW 2 saw the accused hit the deceased with a rungu over the head. I am also assured that there could be no case of mistaken identity as they accused was well known. Furthermore, the accused admitted he was at the funeral.

10. The accused raised the defence of provocation and self-defence. He stated that he was provoked by what was happening to his brother and tried to defend himself as he was being attacked. I reject, this defence. The totality of the evidence is that both PW 2 and PW 3 saw the accused armed with a rungu following the deceased. He was part of the group that had become wild and unruly at the *disco matanga*. PW2 clearly saw the accused hit the deceased from the back. The post mortem confirm that the deceased was hit at the back of the head which displaces any notion of self-defence. All the evidence points to the fact that the deceased was not a threat to the accused.

11. The deliberate hitting of someone at the back of the head with a rungu is not an innocent act. It is intended to cause grievous bodily harm or death. I therefore find that the prosecution proved malice aforethought with the meaning of **section 206(a)** of the *Penal Code*.

12. I find the accused, **KENNEDY NGESA MARENYA**, guilty of the murder of **JOSEPH OMONDI OREK** and I convict him.

DATED and DELIVERED at KISUMU this 17th day of November 2017.

D.S. MAJANJA

JUDGE

Ms Nabifo, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.