



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HIGH COURT CRIMINAL CASE NO. 47 OF 2015
(CORAM: J.A. MAKAU – J.)

SAMUEL OCHIENG NGADA APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being a part heard murder case No. 33 of 2014 in Kisumu Law Court before Hon. Justice H.K. Chemitei – J.)

JUDGMENT

1. The Accused **SAMUEL OCHIENG NGADA** is charged with an offence of **Murder contrary to Section 203 of the Penal Code as read with Section 204 of the Penal Code Cap 63 of the Law of Kenya**. The particulars of the offence are that on 1st day of April 2014 at Bar Olengo Trading Centre in Siaya District within Siaya County, murdered one **JULIUS ONYANGO OMOLLO**.
2. The prosecution called six (6) witnesses and the accused gave unsworn statement and called no witness.
3. **PW1 Margaret Adhiambo Odawo**, testified that on 1.4.2014 that she went to Bar-Olengo Centre, to withdraw some money from her Mpesa account, using a phone of her husband (inheritor) one Simeyo as she is a widow. That at the time she was withdrawing the money one Oreta, brother to Simeyo was at the Centre with Simeyo who told her to go and prepare him lunch. She testified that the deceased who she used to see at the Centre and who she referred to as Magondi was also at the Centre. That PW1 went to prepare lunch and Oreta came to the house and found the meal ready which they took together. That before lunch Oreta was sent to buy changaa which he returned with and all shared. That the deceased, who PW1 referred to as Magondi came and PW1 asked him to join them at the table but he declined. The deceased also took alcohol. PW1's husband asked her to send Oreta for more alcohol and on being requested he declined. That Magondi went and brought the alcohol. That when the deceased returned PW1's husband was already drunk and lying on the bed. That when Magondi returned Oreta asked him whether the alcohol was worth Sh.100/=. PW1, stated they would all share the alcohol provoking Oreta to leave locking the three in the house. That PW1's husband was still lying on the bed when PW1 saw the deceased put something in his pocket. That Oreta returned asking for his phone, that he had left in the house. PW1 informed him she had seen the phone but in the deceased's pocket she saw only match box and by that time Magondi had left for his house. That Oreta went for Magondi and returned with him. Oreta demanded the three to produce his phone, locking them in the house and went only to return carrying a rungu. He demanded the deceased to state what he had said when he went for him in his house, to which the deceased said nothing. Oreta then told them that the deceased wanted to flee and that is why he brought him to their house because he had refused that he had taken Oreta's phone, that then

Oreta started beating up the deceased hitting him 4 times as PW1 screamed. Oreta hit PW1 and PW1 stopped screaming. PW1 testified that Oreta continued hitting the deceased till he died by which time PW1 was screaming. The deceased screamed for long time and people came to PW1's house door. PW1's asked Oreta how he could get someone from his house and kill him in her house. That people came to the scene including village elders. That Oreta had locked PW1 and her husband in the house. PW1 testified she was the only person sober at the time. That Oreta opened the door and explained to village elder what had happened. PW1 denied that he deceased had fallen down. PW1 testified that at 7 p.m. her husband found the deceased and stated Oreta had killed him. That he then dragged the deceased's body outside the house of Oreta which was about 10 meters from PW1's house. PW1 identified Oreta as the accused in the dock. During Cross-examination PW1 testified that both Simeyo and Magondi were drunk. She testified the deceased was hit all over the body like a snake. She stated the Phone had been taken for charging and was found with one Odhis.

4. **PW2 John Raler Obilo**, a resident of Bar Olengo and Assistant Chief of Bar Olengo sub-location testified that on 2.4.2014, he received a telephone call from one of his villagers, Caleb Omemo, informing him someone was found dead at Bar Olengo Market by the name Julius Onyango alias Magondi. He rushed to the scene and confirmed that the body of the deceased was that of Julius Onyango alias Magondi, that on the ground he saw foot marks from a nearby house. That he carried out investigation and found there was a fight between the deceased and Samuel Ochieng Ngada the previous night. He then called Chief of South Alego Mr. Johnnes Otieno Konyango, who advised him to refer the relatives of the deceased to Siaya Police Station. He also did a letter to O.C.S. Siaya Police Station and remained at the scene of the incident. Later Police came, did their investigations and took the remains of the deceased. He stated Samuel Ochieng is known to him as he is one of his villagers. He pointed him at the dock as the accused person. During cross-examination PW2 testified that he saw a cut on the deceased's head. He stated he got information of the fight of the previous night from members of the public. He testified that the ground was muddy and he saw foot marks from a nearby house. He added it appeared the deceased was killed in a house and his body pulled outside.

5. **PW3 APC Patrick Ekirapa** attached to Siaya County at Ratuoro A.P. Camp testified that on 4.4.2014 he was at A.P. Camp at Ratuoro around 6.30 p.m. when Samuel Ochieng reported that his mobile phone had been stolen by Julius Onyango. PW3 had earlier on 2.4.2014 received a report from PW1 that somebody had killed another one at his house. Then when Samuel Ochieng reported of stealing of his phone, PW3 transmitted the report to Siaya Police Station, who sent a police vehicle to take him to Siaya police station. PW3 stated they had Samuel Ngada arrested due to report of PW1. PW3 identified the accused as person he had arrested at the dock.

6. **PW4 Dr. Belinda Akinyi Omondi**, testified that she is a Medical doctor at Siaya Referral Hospital and have been at the said hospital since 2013. That she knows Doctor Willis Ochieng as she had worked with him at Siaya Referral Hospital for 1 year before he left for Malawi and thereafter to Mumias. That before then he was working at St Mary's Mumias, a private hospital. That she is familiar with his handwriting and signature. She testified that she wanted to produce a postmortem Report of one Julius Onyango Omollo dated 10.4.2014 at 4.20 p.m. at Siaya Referral Hospital Mortuary done by Dr. Willis Ochieng. She testified the body had a deep cut on the head, grossly swollen right upper limb (haematoma) swollen fore arm of the upper limb (haematoma), deep stab wound, on both legs, deep cut wound on the scalp. The report showed the cause of death was cardio respiratory arrest, resulting from haemorrhage's shock as a result of massive haematoma. That the death also was contributed to by hypoxia from strangulation. PW4 produced the post mortem Report marked as MFI-P1 and produced it as exhibit P.1. During cross-examination PW4 testified that circular mark at the neck could be due to strangulation.

7. **PW5 Benjamin Sila** testified that he identified the body of Julius Onyango Omollo at Siaya Mortuary on 10.4.2014 for postmortem purposes.

8. **PW6 No. 40553 I.P. David Wanjalla**, the O/C., Crime in Siaya Police Station, testified that on 2.4.2014 he was investigating officer in this case. That on 2.4.2014, he was assigned by his boss to investigate the matter. That as there was alleged Murder at Bar Olengo, he proceeded to the scene, with Police Officers namely, Cpl. Mugo, P.C. Muraguri and driver P.C. Munyua. That at the scene they found

the deceased lying on a pool of blood outside a certain house. That the owner of the house was brother to the deceased who was not there. That they checked the house and found a lot of blood in the house, which indicated the fight took place in the house. That they removed the body to Siaya Referral Hospital Mortuary. That in the evening the O.C.S. Went back to the scene of crime as he had information that PW1 who was at the scene at the time of the incident had been arrested. That PW1 was arrested and put in cells. That after investigation PW1 stated what had happened. He stated, PW1 was Margaret Odawa and had her record her statement. That on 4.4.2014 the accused was escorted at 8.30 a.m. to Siaya Police Station by A.Ps, who alleged the accused was arrested at Ratuoro A.P. Post, after he had gone to report of his lost phone. That they received the suspect and booked him and later charged him with this offence. He identified the person arrested by A.Ps at Ratuoro as the accused in the dock. He added the deceased's body was subjected to Postmortem by Doctor Willis and that he saw the Postmortem Report exhibit P.1. which was done on 10th April 2014. During cross-examination, PW6 testified that he charged the accused with the offence based on evidence of PW1. That the body was about 10 metres form the house and was stained with blood.

9. That at the close of the prosecution's case the accused's Counsel submitted that the accused had no case to answer, to which the State submitted that a *prima facie* case had been made against the accused. That this Court ruled the accused had case to answer and complied with the provisions of Section 306 of C.P.C. The Accused opted to give unsworn statement in his defence and opted to call no witness.

10. **DW1 Samuel Ochieng Ngada** in his unsworn defence stated that he recalled that it was on a Friday when he went to the drinking den where they usually used to drink changaa and found many people. That his phone disappeared at the drinking den. That he also found three other people complaining that their phones went missing. That he ordered changaa from the owner of the den worth Ksh.20/=. He stated the people who were complaining of their missing phones were sitting with Fredrick Ochieng Omollo as he had them asking him about their missing phones. He then asked the owner of the house to give him his phone who told him they had problems with the phones as they were missing. That the owner of the house told him, Fredrick Ochieng Omollo entered the house and took the phones, including his. That one of the person whose phone was missing went to the Centre, summoned many motorcycle riders who came and accused Fredrick Ochieng Omollo of having taken their phones. He stated Fredrick Ochieng Omollo is also known by the name Magondi. He stated the motor cycle riders descended on Fredrick Ochieng Omollo and started beating him, then he left for Centre from which he proceeded to his shamba returning to his house in the evening. He stated he does not know what transpired there. He added that the lady who was selling alcohol to them gave evidence at Kisumu Court and stated she does not know the person she called "Oreta" who she claimed assaulted the deceased. He also stated he got mixed up with the name of Fredrick Ochieng Omollo and that of Julius Onyango Omollo as that is a person he did not know very well. He added upon his arrest by A.Ps, his house was searched and nothing was recovered.

That he was escorted to Siaya Police Station and thereafter arraigned before the Court at Kisumu and charged with the offence of Murder. He concluded by denying having committed this offence.

11. That upon close of the defence case both the the learned State Counsel and the defence Counsel relied on their earlier summons which were made after close of the prosecution case on no case to answer.

12. The issue for determination in this case can be summed up as follows:-

(a) Whether the prosecution proved that the death of Julius Ochieng Omollo occurred and the cause of death?

(b) Whether the accused caused the death of the deceased herein with malice aforethought by an unlawful act or omission?

(c) Whether the accused defence is tenable?

13. The accused in the instant case is facing a charge of **Murder Contrary to Section 203 of the Penal**

Code, which provides:-

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

14. Malice aforethought is important ingredient for the offence of Murder. The prosecution is supposed to prove facts which establish malice aforethought. **Section 206 (a) & (b) of the Penal Code** sets down the facts which constitute Malice aforethought as follows:-

“(a) an intention to cause the death of 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;

15. The prosecution called one eye witness to the incident, PW1. The incident took place during day time. That according to PW1, this was immediately after lunch after PW1, and her inheritor Simeyo, Oreta thus the brother to PW1's inheritor, Simeyo and Magondi, thus the deceased Julius Onyango Omollo had been taking changaa, That Oreta, thus Samuel Ochieng Ngada, the accused left the three and immediately thereafter PW1 also left for a short call but on return she did not find the deceased. Oreta, returned later asking for his phone, that he had left in the house and as the deceased had left the accused went for him. That when he returned he demanded for his phone and locked the three in the house, went away and later returned armed with a rungu. He asked the deceased to state what he had said when he went for him in his house and the deceased said nothing. Oreta told them the deceased while at the centre he tried to flee and that is why he had brought him back to the house as he had refused he had taken his phone. PW1 witnessed the accused beating the deceased. She witnessed him hit the deceased four times and she screamed. He hit her and she stopped screaming. That the accused continued hitting the deceased till he died while PW1 was screaming.

16. The prosecution through the evidence of PW1, the eye witness, proved that the said Julius Ochieng Omollo was beaten to death by the accused. PW2 testified that upon receiving report of the death of Julius Ochieng Omollo he proceeded to scene of crime and found the deceased lying on the ground at Bar Olengo Trading Centre dead. PW4 a Medical Officer at Siaya Referral Hospital produced postmortem report exhibit P1 confirming the cause of death of the deceased herein was due to cardio respiratory arrest resulting from hemorrhage shock as a result of massive haematoma and due to hypoxia from strangulation. PW5 a resident of Bar Olengo identified the body of the deceased for postmortem. In view of the evidence of PW1, PW2, PW6 and PW5 I am satisfied that PW1's asked the accused how he could bring someone from his house to kill him in her house. That her husband found the deceased had died at around 7 p.m. and dragged the body outside the house of Oreta. PW1 further testified the accused hit the deceased all over the body, like a snake till he died. The prosecution has proved to the required standard that death of Julius Ochieng Omollo occurred and the cause of the death through production of postmortem report exhibit P1 was due to cardio respiratory arrest resulting from hemorrhage shock as a result of massive haematoma and due to hypoxia from strangulation which is consistent to beating using a rungu as witnessed by PW1.

17. Regarding identification, in the case of **Abdullah Bin Wendo V. Rex 20 EACA 166** the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification specially by a single witness, before basing any conviction on it. The court held as follows:-

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification specially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a

judge or jury can reasonably conclude that the evidence of identification although based on the testimony of single witness can safely be accepted as free from the possibility of error.”

18. The eye witness said she saw Oreta brother to Simeyo, her inheritor at the Centre before she proceeded to make lunch. This was day time. That Oreta went to the house and found meal ready and they had it together with him. That before they took lunch Oreta was send by her husband to buy changaa, that the deceased Magondi joined them. That PW1 saw Oreta bring the deceased to their house where he started beating him till he died. That her husband dragged the body of the deceased outside the house of Oreta. Pw1 was a relative of Oreta and who was known to her as her brother-in-law. She had not seen him for the first time. She knew him very well and had seen him before the incident and even as he assaulted the deceased from a close range. He even assaulted her for screaming. She stated her husband dragged the body of the deceased from Oreta's house. The accused did not through cross-examination deny being at the scene of crime. He did not challenge the evidence of PW1 as regards being at the scene and assaulting the deceased as narrated to the court by PW1. The accused did not deny being at the scene of the incident with the deceased on the day of the incident. The accused did not raise an issue of any grudge with the, PW1 and as such I see no reason why she would frame him. The condition were further favourable for positive and correct identification. In the circumstances, I find no need for other evidence, whether it be circumstantial or direct pointing to the guilt from which I can reasonably conclude that the evidence of identification by single witness can safely be accepted as free from a possibility of error. I therefore find that the accused was properly and positively identified by PW1 who clearly saw him and recognized him, as her brother-in-law and explained at great detail how the accused caused death of the deceased

19. On the issue of malice aforethought, I have considered the evidence of PW1 who testified that after lunch they started taking changaa. That the deceased, accused and the husband of Pw1 were all drunk. The accused in his unsworn defence admitted that he had gone to drinking den where he also took changaa worthy Ksh.20/= PW1 testified that she was the only person who was sober. The accused had suspected the deceased as the person who had stolen his phone. That when the accused locked the deceased, PW1 and PW1's husband in PW1's house he rushed for the rungu and on return which when he started beating the deceased all over the body he intended to either cause death of or do grievous harm to the deceased. I find that the accused unlawful acts and/or the omission caused the death of the deceased herein. The issue herein is whether the accused was so drunk that he could not have been able to form the necessary malice aforethought? Further whether the defence of intoxication is available to the accused?

20. **Section 13 (1) (2) of the Penal Code** provides as follows:-

“(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:-

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or temporarily or otherwise, at the time of such act or omission.”

21. In this case of **Republic V. Kimaiyo Eld. HCCRC No. 40 of 2005** the court held thus:-

“The main ingredients in a charge of murder are that the accused must have formed the criminal intention and have had a motive to cause death or bodily harm prior to killing the deceased and that the death act or omission on the part of the accused, while the first two ingredients would be lacking in the charge of manslaughter.

I have taken his statement into account and noted the fact that he has consumed busaa and changaa during the material day and night. The fact that he had even engaged in a fracas with his own brother earlier that evening when both were armed with bows and arrows would convince me that he was a state of intoxication which in my view was a condition graver and more extreme than just being mere drunk, or under the influence of drink. Such is a condition which exists “when as a result of his consumption of intoxicating liquor (a man's) physical or mental faculties, or his judgments, are appreciably and materially impaired in the conduct of the ordinary affairs or acts of daily life” (per Fair, J., in R. v. Ormsby, (1945) N.Z.L.R. 109.

Based on the above, I find that the elements of malice afore- thought and intention are lacking. Having found that the circumstances tend to incriminate him, I do however find that the accused would qualify for a defence of intoxication, and in such case then I find him guilty of the lesser charge of manslaughter.”

22. The accused unsworn defence is that he went to a drinking den where he ordered changaa worth Ksh.20/=. That he lost his phone in the changaa den. PW1 stated they started taking changaa immediately after lunch. That they drunk all the changaa they had and her husband send for some more for Ksh.100/=. That after they had taken changaa it was only PW1 who was sober. PW1 confirms that the accused was drank at the time of the incident of attack of the deceased. I have considered the evidence of PW1 and especially the conduct of the accused on the material day thus when he did not find the deceased at the house of PW1 he went for him and brought him to PW1's house, enquired about his phone, locked all the three in the house and went for a rungu. That on asking the deceased to state what he had told him and on keeping quiet, he told PW1 and her husband he had brought the deceased to the house because he had refused that he had taken his phone and then started beating him all over the body like a snake and on PW1 screaming he also hit her and continued to hit the deceased till he died. That after that according to the accused unsworn defence, he just went to Centre, then to his shamba and in the evening to his house. He further stated people who had lost their phones went for Boda Boda riders who descended on the deceased and caused injuries to him, thus blaming them for deceased death. This kind of defence was not raised early or cultivated in cross-examination of the prosecution witnesses. I have evaluated and considered the accused defence of *alibi* and note that PW1 placed the accused at the scene of incident and his defence is an afterthought. I reject the same and find that the same is a mere denial. All the same his conduct is not of a sane person. I find the accused conduct at the time of assaulting the deceased was that of a person intoxicated with alcohol as PW1 described him in her evidence. The accused was drank though he did not state that he was unaware of what happened before lunch hour and at around 6.00 p.m. does appear to have been contributed by his drunken state. I find that as a result of his consumption of intoxicating changaa the accused mental faculties, or his judgment were appreciably and materially impaired that the accused was incapable of forming an intention to cause death or grievous harm. I am convinced that he is the one who caused injuries on the deceased which caused his death. However, I find he did not have the mental capacity to form the intention to cause death due to the influence of alcohol.

23. Consequently I substitute the charge against the accused from **Murder Contrary to Section 203 of the Penal Code to Manslaughter Contrary to Section 202 of the Penal Code.**

24. **The upshot is that I find the accused guilty of the substituted charge of manslaughter and convict him accordingly**

DATED AT SIAYA THIS 21ST DAY OF APRIL, 2016

J.A. MAKAU

JUDGE

Delivered in Open Court:

In The Presence of:

Mr. R. Otieno for Accused.

M/s. M. Odumba for the State.

J.A. MAKAU

JUDGE