



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 4 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

BONFACE OUMA OCHIENG.....ACCUSED

JUDGMENT

1. Vincent Okello (The Deceased) passed away on 13th February 2012 while undergoing treatment at Khayungu Sub District Hospital, Busia County. Bonface Ouma Ochieng faces the charge of Murdering the Deceased contrary to Section 203 as read with Section 204 of the Penal Code.

2. Prior to his Death, the Deceased had on 12th February 2012 at about 8.30 p.m. visited the home of Lucy Apiyo Namwinje (PW1). PW1 noticed that the Deceased had injuries to his left hand and on the right side of his head. She administered first aid on the Deceased. The Deceased told her that he had been cut by one Bonface Ouma Ongero. After administering the first aid, the witness escorted the Deceased to the path leading to his house. On the morning of the 13th February 2012 at about 7.00 a.m. the witness visited the Deceased to check on him. She found that the Deceased was in serious condition and found vomit next to where he was sleeping. PW1 called Judith Ojwang (PW2) and one Judy Atieno to see the Deceased. She also sent PW2 to fetch the Deceased's Uncle and Grandmother.

3. PW2 is the co-wife to PW1. Upon being called by PW1, she went to the house where the Deceased was lying. She found the Deceased breathing heavily and that he had vomited. His state shocked PW2 who decided to call the Deceased's grandmother. But unable to find her she decided to call the Accused whom she knew as the uncle to the Deceased. The Accused responded to the call and took the Deceased to hospital. Although PW2 did not accompany them to the hospital she later learnt of the passing of the Deceased.

4. At about midnight on 13th of December 2012, APC Ester Awinja (PW3) was at her place of work at Tingolo Administration Police Post. While there, she received the Deceased who was crying and in pain. The Deceased had an injury to his left hand and his head. Tied around the left hand was a lesso which was bloody. The Deceased told the Police Officer that he had been cut by his uncle Bonface Ouma Ochieng. Upon entering the complaint in the Occurrence Book, PW3 advised the reportee to seek medical attention. On the evening of 14th February 2012, the police officer learnt that the Deceased had died while undergoing treatment. Under cross-examination the witness clarified that the Deceased was brought to the Police Post by his Grandfather one Bernard Omondi (PW6).

5. PW6 was called out of his sleep sometime after midnight on the night of 12th and 13th February 2012.

He was called out by the Deceased who informed him that the Administration Police had summoned him. He visited the officer who had summoned him where he recorded a statement. It was his evidence that he never saw any injuries on the Deceased although he had some mud on his face. It was also his evidence that he was present when the Police interviewed the Deceased.

6. Sgt William Mesopirr (PW7) was at the material time attached to Bumala Police Patrol base. At around 12 noon on 12th February 2012, he received a call from the in-charge of Patrol Base Sgt. Charles Munari who informed him that a young person had attempted to commit suicide at Tingolo Sub Location. PW7 passed by Tingolo AP camp where he learnt that the Deceased had made a report of assault at the camp and the same had been duly booked in the occurrence book. The officer then visited the scene where he was shown the hut in which the Deceased had slept on the night he was assaulted. Inside the hut he found a blanket which had some vomit. He also saw a blood stained T-shirt inside the house. Also in the house was some cotton wool which had been used to first- aid the victim. The Officer recorded the statements of PW1, PW2 and PW3 who were at the scene at the time he visited.

7. When the Deceased died his body was removed to the Mortuary at Busia District hospital and on 21st February 2012, a postmortem was conducted on the body by Dr. Chacha Mwita. This Court was told by Dr. Rabare Nina (PW4) that Dr. Mwita was at the time when he took the witness stand based in Narok town. There being no objection by the Defence, PW4 produced the report on behalf of the examining Doctor. PW4 was familiar with both the handwriting and signature of Dr. Mwita. PW4 took the Court through the Post Mortem Report and explained that on the external appearance the Doctor made the following findings:-

1. Left big toe crush injury
2. Lateral left wrist cut wound
3. Left temporal cut wound

In respect to the internal appearance of the body, the Doctor observed abnormalities to the head and nervous system of the Deceased. The Deceased had a fracture on the temporal skull and an intra-cranial hemorrhage. Dr. Chacha Mwita, as a result of the examination, formed the opinion that the cause of death was due to traumatic brain injury.

8. The evidence of Christopher Libuku (PW5) would prove troublesome. When he took the witness stand on 8th October 2014, he gave evidence which significantly departed from the contents of a statement he had recorded with the police on 14th February 2012. In his initial evidence to the Court he stated that on the 12th February 2012 he and the Deceased were in the house of his uncle Wilson Omondi and the two slept upto morning. And at about 7.00 a.m. the witness went to school not having noticed anything unusual on the previous night.

9. On the application of the State, the Court declared the witness as hostile to the Prosecution. On cross-examination by the State Counsel, the witness changed his evidence. He told Court that on the night of 12th February 2012, his uncle Boniface whom he identified as the Accused, assaulted the Deceased. He told Court that this was after the Deceased had beaten up someone by the name Shadrack. That a fight had broken up between the Deceased and the Accused after the Accused had confronted the Deceased accusing him of disrespecting him as his uncle. In concluding his testimony the witness told Court, in answer to a question posed in cross-examination, that the State Counsel Mr. Obiri (who had the conduct of this matter on behalf of the State) had on 8th October 2015 threatened him with unspecified consequences if he did not cooperate with the State. The witness further said that if he did not give true evidence he would be arrested. The witness then admitted that he had given two versions to the Court.

10. Disturbed by the allegation made against him, Mr. Obiri sought to cross-examine the witness. This however never came to be as the witness left the Courtroom after the Court session had taken a short break. The witness was never to return for further cross-examination.

11. In a short statement of Defence the Accused person denied ever assaulting or killing the Deceased.
12. At the close of the taking of Evidence, Mr. Ashioya for the Defence asked this Court to acquit the Accused. The crux of the Defence submissions was while the cause of Death of the Deceased was established as having been caused by a blunt object, the bearer of the blunt object was not confirmed as the only purported eye witness was declared hostile. That witness would be Christopher Libuku (PW5). That having recanted his statement to the police, his evidence was worthless.
13. The State, through Mr. Owiti, conceded that the evidence of PW5 was indeed worthless and should be overlooked. The State Counsel however submitted that the foundation of the Prosecution case was the Dying Declaration of the Deceased made to PW1 and PW3. On Malice Aforethought, this Court was asked to find that it had been established that the Accused Person had caused the Deceased to suffer grievous harm.
14. As I turn to determine this matter I need to make a comment on some procedural aspect of the Proceedings.
15. The hearing of this matter commenced before Kimaru, J who took the evidence of 3 witnesses. On 2nd October 2013, I became seized of the matter and heard the remainder of the 4 Prosecution witnesses and the Accused Person. When I retired to prepare my decision, I noticed that I had failed to comply with the provisions of Section 200 as read with Section 201(2) of the Criminal Procedure Code. Section 200 reads-

1. Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-

a. Deliver a judgment that has been written and signed but not delivered by his predecessor; or

b. Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

2. Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment

3. Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.

4. Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused persons was materially prejudiced thereby, set aside the conviction and my order a new trial.

While Section 201(2) makes the above provisions applicable, *Mutatis Mutandis*, to Trials in the High Court. The failure to comply was not brought to the attention of this Court by either the Prosecution or Defence.

16. On noting this lapse, I asked the Prosecution, the Accused and his Counsel to State their position in view of the overt irregularity in the Proceedings. After explaining to the Accused Person the Rights available to him under Section 200 of the Criminal Procedure Code, the Accused responded in Kiswahili-

“nisomee tu, nataka uandike judgment’

Mr. Ashioya for the Accused stated,

“I agree with what my client says notwithstanding the irregularity”.

The State Counsel, Mr. Owiti states,

“no objection.”

17. This Court holds that the position taken by the parties to these proceedings and in particular the Accused (who is the owner of the Rights of Section 200) cures the irregularity in the succeeding Proceedings.

18. On the evidence and submissions made by Counsel, the following emerge as issues for determination;

a. Did the Deceased make a dying Declaration?

b. If the answer to (a) is in the affirmative, did the Dying Declaration implicate the Accused?

c. If the answers to (a) and (b) are in the affirmative, was Malice Aforethought proved against the Accused?

19. It is agreed by the opposing sides that the evidence of PW5 who was declared hostile after recanting his statement to the police is all but worthless. Attention necessarily then shifts to the evidence of PW1 and PW3 who allege that the Deceased spoke to them before his death.

20. The evidence of PW1 is that on 12th February 2012 at about 8.30 p.m.. the Deceased visited him at his house. The Deceased had injuries to his left hand and on the right side of the head. The witness then stated;

“He told me that his uncle Bonface Ouma Ongero had cut him. He did not tell me why he was cut”

In cross-examination the witness said,

“I did not witness the deceased being beaten. I was told by the Deceased that the Accused had assaulted him. He told me on 12.2.2012 when I was alone.”

21. On the day following, that is, 13th February 2012, both PW1 and PW2 were present when the Accused took the Deceased to hospital. The Deceased died later at Busia District Hospital.

22. PW3 says that on 13th February 2012, the Deceased visited Tingolo AP Post. The witness put the time of the visit at 12.18 a.m. It however seems more likely that the visit was in the early minutes of 14th February 2012. This is perhaps so because the visit was booked in the Occurrence Book as OB No. 2 of 14th February 2012 (see the evidence of PW7)

23. During the visit, the Deceased was crying and in pain. He had an injury to his left hand and on his head. PW3 stated,

“he told me that had been cut by his uncle Bonfiace Ouma Ochieng”

24. On the evening of 14th February 2012, PW3 learnt that the Deceased had died while undergoing treatment at Busia District Hospital. Although the Postmortem Report indicates the date of Death as 13th

February 2012, the evidence of PW1, PW2 and PW3 points to the fact that the Death happened on 14th February 2012. I hold that the deceased died on 14th February 2012.

25. The evidence by PW1 and PW3 that the Deceased mentioned the person who injured him to the them was not challenged by the Defence. The two as well as PW2 saw the Deceased prior to his Death. The three saw that the Deceased was injured. PW1 and PW3 stated that the injuries were on the left hand and on the head. The evidence of the three witnesses was consistent and supported each other.

26. So was the statement made to PW1 and PW3 Dying Declarations? Section 33 of the Evidence Act instances when statements made by the Deceased person gives are admissible. Section 33(a) includes the following instances.

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question” (my emphasis)

As is clear from the emphasized part, a statement may be admitted even when the maker is not in expectation of imminent death.

27. The Statements made by the Deceased to PW1 and PW3 related to the cause of his death. The statement was made to PW1 on 12th February 2012 and to PW3 on 14th February 2012. The Deceased died on 14th February 2012. Whether or not the Deceased expected his death to be imminent is unclear. However, from the explicit provisions of the law, the expectation of imminent death is immaterial. I therefore have little difficulty accepting that the statements made by the Deceased to PW1 and PW3 were Dying Declarations.

28. In the Dying Declaration to PW1, the Deceased stated that he had been assaulted by his uncle Boniface Ouma Ongero. But the name of the Accused is Boniface Ouma Ochieng not Boniface Ouma Ongero. The last name differs. There is no evidence that the Accused also bears a name Ongero. However, in her evidence PW3 stated that the Deceased told her that she had been cut by his uncle Boniface Ouma Ochieng. Boniface Ouma Ochieng is, it bears repeating, the Accused. There is also evidence by PW1 and supported by PW2 that the Accused is an uncle to the Deceased. There is sufficient evidence that the person implicated by the Deceased in the Dying Statement was the Accused Person.

29. The Post Mortem conducted by Dr. Chacha Mwita revealed that the Deceased had a crush injury to the left big toe, cut wound to left wrist and cut wound to left temporal. The injuries described here were consistent with the injuries that Deceased was carrying when he was seen by PW1 and PW3. Those were the injuries which the Deceased attributed to the Accused. Internally the Deceased had suffered a skull fracture and intra-cranial hemorrhage. The Doctor formed the opinion that the cause of Death was **“Traumatic brain Injury”** There is sufficient Medical Evidence that the Deceased died as a result of the injuries inflicted on him by the Accused.

30. This Court is aware that, generally, it is unsafe to base a conviction solely on the Dying Declaration of a Deceased unless there is satisfactory corroboration. However, the Court has found that the Deceased implicated the Accused in Statements made separately to two different people. And there is no evidence that the Deceased was mistaken as to who assaulted him. That strengthens the weight I place on the Dying Declarations.

31. Before I turn to determine whether Malice Aforethought was proved, let me briefly consider the argument by the Defence that much weight needs to be placed on the evidence of PW6 that although he escorted the Deceased to the AP camp to lodge the report he never saw any injuries on him. It would be strange that PW6 would not see any injuries on the Deceased when PW1, PW2 and PW3 saw him with serious injuries. Who is to be believed? The accounts of PW1, PW2 and PW3 were consistent and

supported each other. In addition, the outcome of the Postmortem by an Independent witness supports the evidence of these three witnesses. There would be another reason to believe that the three were more truthful, at least on this aspect, than PW6. In his statement to the police he had stated that the Deceased had injuries. This, of course, contradicted his testimony in Court. This Court chooses to believe the Account by PW1, PW2 and PW3 as corroborated by the Medical evidence of the Postmortem.

32. The evidence of PW5 has been disregarded. There was no direct evidence as to the motive or reason for the assault. However from the evidence of PW3, the Deceased stated as follows;

I asked him why they had disagreed. He told me that his children had disappeared for some time. He suspected the uncle. He asked the uncle. That is the time the fight started. This happened on 12.2.2012. He went to the place he used to sleep. His uncle followed him there where he cut him.

It would seem that the assault of the Deceased was immediately preceded by a fight between him and the Accused. It may not be safe, in the circumstances described above, to infer malice aforethought.

33. Can malice aforethought be deduced from the injuries inflicted on the Deceased? Under the provision of section 206(a) and (b) of the Penal Code Malice Aforethought is deemed to be established by evidence proving, inter alia,

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;

34. The Postmortem was conducted by Dr. Chacha Mwita who could not attend Court. For that reason his report was produced by Dr. Rabare Nina (PW4) who simply highlighted the findings by the examining Doctor. An important finding was the opinion as to the cause of Death. The Doctor opined, that it was due to

“Traumatic brain injury.”

Neither the examining Doctor nor PW4 who produced the Report, described the severity of the Brain injury. Although the classification of Degree of injury should, generally, be left to Expert opinion, there would be occasion when the Degree of injury is so obvious that even the opinion of a lay person should be accepted. An example is where there is decapitation. That said, this may not be such occasion. It is not obvious to me that a traumatic brain injury or the other injuries suffered by the Deceased were so severe as to be classified grievous. And as there is no expert opinion that they were indeed grievous, there is no basis for me to find that Malice Aforethought has been established. Murder has not been proved.

35. The Decision I reach is that Boniface Ouma Ochieng (The Accused) caused the Death of Vincent Okello (The Deceased) by an unlawful Act. I accordingly convict the Accused of the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

Dated, signed and delivered at Busia this 27th day of May 2016

F. TUIYOTT

J U D G E

In the presence of

.....C/Assistant

.....for the State

.....For the Accused