



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 7 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

CLIFFORD OTIENO ODUNY.....ACCUSED

JUDGEMENT

Clifford Otieno Oduny hereinafter referred as the accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 2nd day of May 2014 at Orata areas in Kitengela Township within Kajiado County, the accused murdered **Duncan Onyango Owocha**, hereinafter referred as the deceased.

When the accused was arraigned before court he pleaded not guilty to the charge and the particulars. At the trial he was represented by Mr. Itaya Advocate whilst the prosecution was conducted by Mr. Akula, the Senior Prosecution Counsel.

THE CASE AGAINST THE ACCUSED:

The prosecution called a total of six (6) witnesses. The accused who is a nephew to the deceased was working at a workshop located at Kitengela owned and operated by the deceased. Besides the accused, PW3 Petro Omondi and PW4 Peter Otieno also worked at the said workshop as technicians.

On the 2nd May 2014 the accused, deceased, PW3 and PW4 all of them reported for work as usual. However in the early morning hours at about 10.00 a.m the deceased left Kitengela for Kajiado in order to obtain a birth certificate for his children. The deceased returned back almost at the close of business for the day. PW3 further testified that on arrival the deceased demanded to know whether they attended to any customers and how much money was paid for work done so that it is appropriated accordingly.

PW3 testified that the accused and PW4 told the deceased of having been paid Ksh.2500 by one of the customers. According to PW3 the deceased instructed the accused to share the money amongst themselves and a balance of Ksh.500 be paid to him. It was PW3 testimony that the accused rejected the deceased proposal of sharing the money on grounds that he was absent from work the whole day hence not entitled to any payment.

PW3 further stated that they all left for home. While in the house the accused and PW4 were watching TV as he washed the dishes in the kitchen. PW3 further stated that the accused left for the deceased house to go and follow up on his mobile phone. The accused came back after a few minutes rushed to the kitchen pushed him aside and took two knives in his possession.

According to PW3 the accused compared the two knives and chose the sharpest of them and went to sit with it at the TV area. It was PW3 testimony that the deceased came to their house and punched the accused twice over his stubbornness not to share the money. There was a bit of commotion in the house as he went out to pour some water outside. PW3 saw the deceased exiting the house holding his stomach; uttering the words '*the young man has killed me*'. This made PW3 telephone the wife to the deceased (PW1) explaining what had transpired between the accused and the deceased. On arrival of PW1 they made arrangements to take the deceased to Shalom Hospital Kitengela for treatment. This is when the deceased passed on while undergoing treatment.

PW4 PETER OTIENO also a nephew to the deceased stated that he used to stay with the accused and PW3. PW4 testified that earlier in the evening the deceased had demanded some share of the money from the accused and the rest to be shared between them. PW4 testified that the accused did not take it kindly the persistence by the deceased demanding that they share the Ksh.2500. According to PW4 the accused in response told the deceased that there was no money to give and if they (deceased and PW4) do not take care, one of them must die. With those words the accused left the deceased house and in a little while the deceased followed him as they remained behind with PW1 the wife of the deceased. PW3 came running delivering the sad news that accused had stabbed the deceased with a knife.

PW1 SERPHINA ATIENO OMONDI wife to the deceased also testified that she rushed to the scene and had confirmed that accused had inflicted physical injuries. PW1 testified that on arrival at the hospital the deceased succumbed to death while undergoing treatment. According to PW1 in consultation with PW4 they made arrangements to have the deceased taken to Shalom Hospital, Kitengela for treatment.

PW5 DR PETER NDEGWA testified that he was called in by the police to conduct a post-mortem on the body of the deceased at Shalom Mortuary on 14/5/2014. In his autopsy report PW5 stated that the deceased sustained a penetrating stab wound severing abdominal aorta (right sacral vessels petropentoneal haematoma. PW5 opined that the cause of death was exsanguinations due to severe abdomino-pelvic injuries due to penetrating stab wounds. The report was admitted in evidence as exhibit 2.

PW6 LEAH WANJIRU the investigating officer explained to the court on how she correlated the evidence that linked the accused with the offence. PW6 further testified that the report to the police from the family was made late resulting in the difficulty of retrieving the knife used by the accused. PW2 PC Balesa a scene of crime officer evidence centered on the photographs taken of the deceased at Shalom Hospital Mortuary showing the area he suffered the stab wounds on his body. PW2 in support of photographs taken and certificate under his signature tendered them in evidence as exhibit 1 (a) (b).

THE DEFENCE CASE:

The accused was put on his defence where he elected to give unsworn statement under the provisions of section 306 (2) of Criminal Procedure Code. In his defence the accused denied the offence. He explained to the court that on 2/5/2014 they had worked and paid Ksh.2500 in absence of the deceased. The deceased later in the day demanded that they pay for materials used before they could receive their entitlement of the daily commission. The accused further stated that since he did not have money to buy food he thought it was unfair to wait for payment the following day. He therefore decided to leave the deceased house to go where they stay with PW4.

According to the accused testimony the deceased followed him there and started beating him severely demanding the money. In the course of the fight the accused stated that the deceased drew a kitchen knife which he aimed at stabbing him but he managed to struggle and both of them fell down. The accused further alleged that in that confusion the knife cut the deceased who sustained harm. He denied that he was the one in possession of the knife and that he used any to inflict injuries upon the deceased. The accused further testified that he later learnt of the deceased death and subsequently arrested and charged with the offence.

ANALYSIS AND RESOLUTION:

In the consideration of the case as a whole, what has to be determined here in respect of the accused is whether the prosecution has proved beyond reasonable doubt that the accused committed the murder of Duncan Onyango Owocha. The starting point is to scrutinize the evidence against the background of the ingredients of the offence set to be proven by the prosecution.

The essential elements requiring proof in the offence of murder under section 203 as read with section 204 of Penal Code are:

- (1) The death of the deceased.
- (2) That the death was as a result of unlawful act of omission or commission.
- (3) That the death was occasioned with malice aforethought.
- (4) That the accused person is the one who caused the death of the deceased.

I therefore proceed to consider each of these ingredients *visa vis* the evidence presented by the prosecution.

1. The death of the deceased

PW1 Serphina Omondi the wife to the deceased testified that on 3/5/2014 at Shalom Hospital the deceased passed on while undergoing treatment. PW3 Petro Omondi corroborated the evidence of PW1. The police on receipt of the report visited Shalom Hospital took photographs of the deceased as confirmed by PW2 PC Balesa. The photographs admitted in evidence show the body of human being identified by PW1 and PW3 as that of the deceased. The postmortem was conducted by Dr. Ndegwa who gave evidence and tendered the postmortem report as exhibit 2 under section 77 of the Evidence Act Cap 80 of the Laws of Kenya. There is no dispute in his defence that accused confirmed the death of the deceased who was also his uncle. The evidence therefore by the prosecution proves this ingredient beyond reasonable doubt.

2. The second ingredient to be proved is whether the death of the deceased was unlawful.

Actus reus is Latin for guilty act. Black's Law Dictionary 2009, "that is for a prosecutor to establish *actus reus* for the crime evidence must show that an accused person engaged in acts that occasioned the death of the deceased that are prohibited by law. The second element being the *mensrea*. Under Black' Law Dictionary, 2009 *mensrea* stands for guilty mind.

In order to prove *mensrea* the prosecution must demonstrate that the accused had the criminal objective and knowledge of the unlawfulness of the act at the time of committing the offence.

The principle under this ingredient was well enunciated in the case of *Gusambizi Wesonga v Republic [1948] 15 EACA 65*. The court held inter alia as follows:

"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized to be excusable, it must have been caused under justifiable circumstances, for example, self defence or in defence of property."

Under this ingredient the prosecution has to lead evidence to demonstrate that the unlawful act on the part of the accused caused the death of the deceased.

In the instant case the prosecution case as inferred from PW1 confirms that a few minutes to the assault incident the deceased was alive and in general good health. PW3 testimony was to the effect that the accused and the deceased had an argument in the house over his disrespect and stubbornness on that particular day. PW3 stated that there was commotion when the deceased slapped the accused twice. According to PW3 he went out of the house to pour some water and on return he saw the deceased

walking out holding his stomach; alleging to have been stabbed by the accused.

The first action taken by PW3 was to inform PW1 and PW4 that accused has assaulted the deceased. In response to the message PW1 and PW4 rushed to the scene confirming the stab wounds. PW1, PW3 and PW4 in their testimony made arrangements to have the deceased taken to Shalom Hospital for treatment. The nature of injuries suffered were later confirmed by PW2 the scenes crime officer from the photographs taken at the hospital. The pathologist PW5 further in his report stated that the deceased had suffered injuries to the abdomen, right superior iliac chest and right side vessels.

The accused and the defence counsel at the trial put forth an argument that the injury was accidental. It was further the defence case that the deceased action triggered the retaliation from the accused. The defence counsel contended that the accused did not intend to stab the deceased. Under section 213 of the Penal Code (Cap 63 of the Laws of Kenya) provides for circumstances in which the accused would be held responsible for another person's death although his act of omission or commission was not the immediate cause if:

- a. He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death.
- b. He inflicts injury on another person which would not have caused death if the injured person had submitted to proper medical or surgical treatment.

With regard to this ingredient the death of the deceased does not fall under any of the exceptions known in law. The prosecution has therefore proved the ingredient beyond reasonable doubt.

3. Whether in causing death the prosecution proved malice aforethought on the part of the accused.

Mr. Itaya learned counsel for the accused submitted that the prosecution failed to prove malice aforethought on the part of the accused. Learned counsel relied on the evidence of PW1, PW3 and PW4 that it was the deceased who went to the accused house and caused the commotion.

As far as the prosecution case is concerned Mr. Akula, Senior Prosecution Counsel in a rejoinder submitted that malice aforethought can be deduced from the testimony of PW1, PW3 and PW4. Learned prosecution counsel invited the court to draw conclusions from the evidence on the conduct of the accused, the nature of the weapon used to inflict injuries, the accused taking flight from the scene immediately he committed the offence, the denial on the part of the accused to share the money with PW3 and the deceased as they were entitled to earn from the proceeds of the day. It was learned prosecution counsel submission that the accused hatched the plan to cause grievous harm or death on the deceased hence the reason he armed himself with a sharp knife. He relied on the following authorities to buttress the submissions on malice aforethought; *Daniel Lentiyo v Republic [2006] eKLR, Republic v Jared Otieno Osumba [2015] eKLR*. In the circumstances he urged the court to find that the prosecution presented sufficient evidence on malice aforethought.

Under section 206 of the Penal Code malice aforethought is deemed to be proved by the prosecution where any of the following circumstances exist:

- a. An intention to cause the death of another.
- b. An intention to cause grievous harm to another.
- c. Knowledge that the act of omission causing death will probably cause death or grievous harm to some person, whether that person is the one killed or not accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
- d. An intent to commit a felony; and

e. An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.

It is trite that the intention to kill may be inferred from the facts of the case. This was stated by the court in the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** it was held that it was the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it is used and the part of the body injured. In **Yoweri Damuliza v Republic [1956] 23 EACA 501** it was observed that an inference of malice aforethought would flow more easily from the use of a spear or of a knife than from the use of a stick.

In the case of **Ernest Asami Bwire Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990** the court held that malice can be inferred from the manner of the killing. In this case the court considered the fact that brutal killing was well calculated and planned by the appellant to conclude that he had an intention to kill the deceased. In the case of **Karaki & 3 Others v Republic [1991] KLR 622** the Court of Appeal held inter alia that malice aforethought can be deemed from the nature of injuries caused on the deceased and the weapons used.

In this case the postmortem report put in evidence which showed deep injuries to the head of the deceased which had caused death due to shock due to intracranial haemorrhage due to skull fracture. The court concluded that the intention of the assailants was clearly to kill or do grievous harm to the deceased.

In applying the legal principles to the facts of this case, I am of the following conceded view:

There is direct evidence from the testimony of PW3 that the accused went to the kitchen took out two knives. PW3 further stated that the accused compared the knives and picked the sharpest knife leaving the rest. During this time the deceased was not within or outside the house of the accused. The deceased was not even within close proximity or quarrelling with the accused in any event it is on record from the testimony of PW3 that the accused went and sat in the TV room while armed with that sharp knife picked from the kitchen.

It is also clear from the testimony of PW4 that when the deceased demanded money from the accused he threatened them with death. That time the deceased had done nothing to provoke or irritate the accused save for asking him to do the right thing and share the money paid by a customer at the workshop. The knife though not recovered was a lethal weapon when used to cause maim or grievous harm or death.

It is not in dispute that the accused and deceased had a misunderstanding which was work related. This quarrel did not turn violent until when the accused remained adamant to share the money. What can be inferred from the testimony of PW3 the deceased initially punched the accused twice, as a way of demanding an explanation for his behaviour. The deceased was the one who armed himself with the sharp knife. As at the time the deceased was stabbed, there was no other person in the house except the accused. He was the only one who had the time and opportunity to commit the offence.

There is sufficient evidence that the sharp knife was used to inflict injuries on the deceased abdomen. The deceased had severed abdominal aorta and the right vessels. The doctor PW5 conducted a postmortem which confirmed the injuries. The deep abdominal/pelvic cut wounds caused the death of the deceased. The preparations and hatching the plan to attack the deceased is a manifestation of malice aforethought on the part of the accused. The deceased was taken to Shalom Hospital however his condition worsened in the course of undergoing treatment.

I have evaluated the defence by the accused in answer to this issue where he told the court that the deceased was the one armed with a knife. That piece of evidence has been confronted with the direct testimony of PW3. The accused further alleges that there was a struggle where he held firmly to the deceased causing them to fall down and in that confusion deceased injured himself.

The circumstances as explained by PW3 do not indicate any struggle. In a span of few minutes PW3 pouring water outside, the deceased was groaning in pain holding his abdomen. There is no evidence that

the accused accidentally stabbed the deceased. It is clear that the accused went for the vulnerable part of the deceased body being the stomach. The nature of injuries as described by PW5 were deep in nature which the aorta and vessels were severed by the sharp knife.

What can be deduced from the evidence and the law in this case is that the accused had set himself to cause harm against the deceased. The circumstances to me are crystal clear capable of giving rise to a positive finding on malice aforethought. The defence impliedly submitted relying on the principle of self defence. ***What is the law on self defence in homicide cases?*** In the case of ***Republic v Have [1958] 100 CLR 460*** stated as follows:

“On the plea of self defence where the courts laid down an objective test of necessity in the following terms:

That is to say it is assumed that an attack of a violence and felonious nature, or atleast of unlawful nature, was made or threatened so that the person under attack reasonably feared for his life or the safety of his person from injury, violation or indescent or insulting usage. This would mean that an occasion had arisen entitling the person charged with murder to resort to force to repel force or apprehended force.

The questions to be answered under a plea of self defence constitute the following:

- 1. Whether what the accused did was for the genuine purpose of defending himself against an attack.**
- 2. Whether the accused honestly believed on reasonably grounds that what he did was necessary to protect himself from injury.**
- 3. Whether a reasonable man in the accused’s position would not have regained what he did as being out of all proportion to the danger to be guarded against.”**

This principle was also discussed in the case of Republic v ***Jogovic [1921] VR 810, in Republic v Mchinus [1971] 3ALL 298*** where the court observed interalia:

“Self defence falls on the ground that the force used were already beyond that which was reasonable in the light of circumstances as they reasonably appeared to the accused is it the law that the inevitable result must be that he can be convicted of manslaughter only and not murder. If self defence falls for the reason stated it affords the accused no protection at all.”

The question whether the accused action was necessary and proportionate to the danger in which he acted the way he did was extensively dealt with in the observations made by **Musyoka J** in his book on ***Criminal Law on Defence of Self at 127*** citing the case of ***Uganda v Mbululi [1975] HCB 225*** where the court held interalia:

- (1) Whether the accused demonstrated preparedness to temporise and disengage, and perhaps to make some physical withdrawal.**
- (2) The seriousness of the attack – whether the attack was with a weapon or not. The nature of the weapon used.**
- (3) If the attack was so serious that it put someone in immediate peril then the immediate defensive action ought to be necessary.**
- (4) The state of mind of the deceased viz the relationship of the accused and the deceased before the attack is relevant.**
- (5) Whether the attack was upon a sudden quarrel or the attack was completely unprovoked.**

(6) Whether the accused fought back, raised an alarm or whether he used force immediately.

(7) The nature of the force used by the accused to repel the attack must be proportionate to the attack.”

It is thus clear from these principles that the court has to determine the defence of self upon the evidence. If the prosecution adduces evidence that the force used was excessive and went beyond the test of necessity and proportionate self defence fails. If the prosecution establishes from the circumstances that the accused had the intention and premeditation to cause grievous harm or to cause death to another in my view the defence of self fails.

This brings me to the next question whether or not legal provocation as defined under section 208 (1) of the Penal Code (Cap 63) of the Laws of Kenya was disclosed in this case. The section defines provocation as follows:

“The term provocation means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

It is important in the instant case to apply the above legal principles to the prosecution evidence to establish whether the accused acted under provocation on the day the alleged offence was committed. The prosecution evidence by the testimony of PW3 was that in the early hours of 2/5/2014 he reported on duty together with the accused at workshop managed by the deceased.

According to PW3 they attended to a client who paid them Ksh.2500. The deceased who left for some other engagement returned later in the day and was informed what transpired at the work place. PW3 stated that the deceased instructed the accused who was in possession of the money to apportion it with a sum of 500 being paid to him. The accused could not hear of it and that became a bone of contention soon thereafter when they went home.

PW1 the wife to the deceased confirmed that while at home in the presence of accused her husband demanded of the accused to comply with instructions on the money. However according to PW1 the accused left their house to where they stay with PW3. The deceased according to PW1 thought the accused was being disobedient without any justification left the house to follow up the issue. She learnt in a few minutes later from PW3 that the deceased has been stabbed by the accused.

PW3 testified that when the deceased arrived he slapped the accused twice. PW3 further stated that before the arrival the accused had armed himself with a sharp knife retrieved from their kitchen. He sat with it while watching television. According to PW3 the accused was still in possession of the knife when the deceased came in their house. As he left to pour water out of the house moments later PW3 saw the deceased holding his stomach uttering the words ‘*young man has killed me*’. The report of the attack was made to PW1 who made arrangements for the deceased to be rushed to the hospital. PW3 stated that the knife was never recovered as the accused left the scene after the incident.

What the testimony of PW3 confirms is that the accused was armed with a knife earlier before the deceased came to their house. The accused sat patiently watching TV without uttering any word with PW3. PW3 had also alluded to the threats issued by the accused to cause death to either of them (deceased) if they continued demanding the sharing of the money.

This testimony provided proof on intention to cause death or do grievous harm to the deceased. The premeditation can be deduced from the time he gave threats without any provocation to PW3. The accused preparation to look for a lethal weapon among the knives in their kitchen. The picking of the

sharpest knife from the rest of the knives available.

It could not therefore be said that the accused assaulted the deceased while deprived of self-control by grave of provocation arising out of the two slaps from the deceased. The evidence by the prosecution taken in totality viz the accused defence would not amount to legal provocation in terms of section 208 (1) of the Penal Code so as to bring the accused conduct within section 207 of the Penal Code. The prosecution evidence negatives the accused claim that the deceased injuries were self inflicting and the lethal weapon was also in custody of the deceased.

Accordingly in my opinion provocation and heat of passion is not available to the accused in this case. In addition considering the sequence of events and the legal principles elucidated herein on defence of self the accused used excessive force disproportionate to the attack. The action by the accused was intentional as opposed to the spur of the moment. I rule out self defence as a basis to impugn the prosecution case against the accused person.

Last but not least is the issue on identification and placing the accused at the scene of the crime. There is evidence of PW3 who was at the scene when the attack between accused and deceased happened. The testimony of PW1 and PW4 corroborates PW3 evidence on identification as to the accused being in the house where the killing took place. The accused in his defence alluded to confrontations between him and the deceased on the material day save that he did not inflict the fatal injuries.

I am therefore satisfied that prosecution adduced cogent and credible evidence on identification to link the accused as the perpetrator of the offence. In the end the prosecution has established firmly the essential ingredients of the offence of murder as outlined under section 203 of the Penal Code beyond reasonable doubt against the accused.

Accordingly i find the accused guilty of the charge of murder contrary to section 203 as read with section 204 of the Penal Code. I do hereby convict him of the offence with the sentence to be imposed as provided for under section 204 of the Penal Code.

It is so ordered.

Dated, delivered in open court at Kajiado on 21st day of December, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Accused - present

Mr. Akula for the Director of Public Prosecutions

Mr. Onchiri for Itaya for the accused - present

Mr. Mateli Court Assistant – present