



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 10 OF 2012

REPUBLIC-----PROSECUTOR

VERSUS

DAVID EMOJONG OMONYA-----ACCUSED

J U D G M E N T

1. DAVID EMOJONG OMONYA (**The Accused herein**) faces the charge of Murder contrary to Section 203 as read with Section 204 of The Penal Code. The Particulars of the offence are that on 27TH August 2012 at Kakapel village, Kakapel sub location in Teso North District within Busia County the Accused murdered one PHILIP IYEZE ECHUKU (**The Deceased herein**).
2. The Prosecution case as constructed by 7 witnesses and is not involved. Okadapau Amuron Carolyne (PW1), one Harriet and the Deceased were friends. On 27th August 2012, at about 2.00 p.m. , the three met at Kakapel shopping Centre. After refreshing themselves with soft drinks, PW1 escorted her two friends home. It was the evidence of PW1 that on reaching Lango Kuu Kakapel Primary School, the three met a boy described by PW1 as David Emojong. David was known to PW1 and is the Accused Person herein.
3. Boys will always be boys! The Accused person was walking from the opposite direction from the three. That the Accused Person and the Deceased refused to give each other way and started to exchange abuses. Then the verbal abuse deteriorated into violence. The Deceased slapped the Accused Person and the two wrestled each other. Harriet asked the Deceased to stop fighting. He heeded the call and there was some peace, albeit for a very short while.
4. The three continued with their journey, while the Accused Person continued to walk in the opposite direction. Not too long afterwards, the Accused Person now riding on a boda boda followed the three. He jumped off the Boda Boda. PW1 noticed that he was armed with a knife. The Accused Person started a fight with the Deceased. At first, it was fist fight but later the Accused Person stabbed the Deceased on the right side of his head. After he did so, the Accused run off from the scene.
5. PW1 and Harriet were left with their injured friend and they raised an alarm. One of those who heard the screams of the girls on this day at about 8.00p.m was Simon Etyang Odeke (PW2). He heard one of the girls cry out in Kiswahili language “ **David has stabbed someone.**” He responded to the distress call and on reaching the scene, he found two girls and a boy lying on the ground.
6. PW2 knew PW1 but not the other two. PW2 saw that the Deceased was bleeding from his head. The Deceased was not moving. Using transport provided by Pastor Nyayo, PW2 and the two girls took the Deceased to Amurai Health Centre. At about 9.00 p.m. Mercyline Omusolo (PW3) attended to the patient. On examining him, she found that his heartbeat had stopped and he was no longer breathing. And the Deceased was bleeding from his head.
7. PW3 walked to the nearby Cheptais Administration Police Camp where she met APC George Isikota (PW4) who was on duty and informed him of the dead person who had been brought to the

- Health Centre. PW4 accompanied PW3 to the clinic and there he was able to see the body of the Deceased. It had a stab wound on the right side of his head.
8. The information of the death of the Deceased was in turn relayed to CIP Bernard Kenyatta (PW5) who investigated the matter. He sent out his officers to the clinic one of whom was PC Tom Onyancha (PW6). On arrival at the clinic, PW6 found a crowd of people who had gathered. This was now in the earlier hours of 28th August 2012. The witness put the time at 2.00a.m. The body of the victim was lying in the veranda to the clinic. The Police Officers removed the body from there and took it to Bungoma Hospital Mortuary.
 9. PW6 was to later to learn from the father of the Accused Person that the Accused Person had left home and escaped to the home of his Aunt at Machakus. On 29th August 2012, in the company of the Accused person's father and PC Wetachum, (PW6) visited the home at Machakus where they arrested the Accused person. The Accused Person was taken to Malaba Police Station and subsequently charged.
 10. The police at Malaba Police Station requested Dr. Emirundu to ascertain the cause of death of the Deceased. The Doctor conducted the Post mortem on 30th August 2012 at 11.45 a.m. The Doctor made some observations. On the External appearance of the body, the Doctor noted a cyanosis of the lips and a penetrating cut wound over the temporal bone measuring approximately 2cm. On the internal appearance, the head of the Deceased had a fracture of the temporal region and epidural and subdural hemorrhage. The Doctor formed the opinion that the cause of death was intra cerebral hemorrhage secondary to a head injury. This report was produced on behalf of the Examining Doctor by Dr. Harun Ombongi (PW7) who is familiar with his handwriting and signature.
 11. Invited to make his Defence, the Accused Person confirms meeting three people on 27th August 2012 at about 8.00 p.m. as he made his way home. The three were 2 girls and 1 boy. One girl was PW1 who is known to him. That he reached out to greet the three but the boy responded rudely by inquiring of him whom among them he knew. The boy then held the Accused Person by the neck, slapped and punched him. The Accused Person tried to stop the assault by holding the hands of the boy. The two struggled and fell. At this point the girls separated them. The Accused then proceeded home without returning to the scene. He denied stabbing the Deceased. He confirmed having been arrested two days later.
 12. There can be little doubt that sometime in the evening of the 27th August 2012, the Accused person had a run-in with a boy who was in the company of PW1 and another girl. It was sometime between 7.00 p.m. to 8.00p.m. The Accused Person was known to PW1. And as confirmed by the Accused person in his defence, he in turn knew PW1. On that evening, PW1 was able to recognize the Accused Person because there was moonlight. In her words;

“I saw this because there was a full moon that provided light”

That there was moonlight on that evening was confirmed by PW2 who testified;

“I was able to recognize Carolyn because there was moonlight and I saw her”

The Accused Person himself, in his Defence stated that he, was able to recognize PW1 and that says something about the quality of light on that night.

13. Secondly, when the Accused Person met the three, they exchanged some greetings and some words before a fight broke out between the Deceased and the Accused Person. The Accused Person was at a close distance to the three and the confrontation gave PW1 sufficient opportunity to recognize that it was the Accused Person who had fought with the Deceased.
14. The above is in respect to the first encounter. In his Defence, the Accused denies that there was a second encounter between him and the Deceased. This differs with the Prosecution case that after the two separated, the two went separate ways but the Accused Person returned shortly thereafter and attacked the Deceased. It was on this second occasion that the Accused Person is said to have been armed with a knife. Which of the two versions is to be believed?

15. PW1 narrated how after the two boys were separated she walked away with Harriet and the Deceased. After the three had covered about 4 kms, the Accused Person followed riding on the back of a motor bike. He jumped off the motor bike and confronted the deceased. It was the evidence of PW1 that,

“I begged David to leave Philip and Harriet but he did not heed. David started again to fight Philip”.

David is the Accused Person. PW1 was emphatic and firm even in cross examination that she was at the scene when this second confrontation began and ended shortly and tragically. The witness explained why she and Harriet could not intervene. This is what the witness said

“We feared to separate them as the Accused had a knife”

Again the witness stated that there was moonlight and she was able to see the Accused Person stab the Deceased.

16. That PW1 was at the scene at this time is believable because of the evidence of PW2. He was at his home on that night when he heard a distress call and some girls crying out,

“David amedunga mwingine kisu”

These are Kiswahili words for

“David has stabbed a person”

When he responded and went to the scene, he found two girls and close to them a boy on the ground. PW1 was one of the girls. PW2 knew PW1 before this day. PW2 saw the boy bleeding from the head and he arranged for him to be taken to Amurai Health Centre. PW2 accompanied the boy to the clinic and was present when the Doctor there pronounced him dead.

17. The Prosecution theory that it was the Accused Person who stabbed the Deceased was further supported by the behavior of the Accused Person after the incident. PW6 who arrested him had to execute the arrest at the home of the Accused Person's Aunt at Machakus. The Accused Person left home after the incident and went to stay with his Aunt. In his Defence the Accused Person did not explain why he moved away from his home. It can only be presumed that it had something to do with the fatal incident of the evening of 27th August 2012.

18. From my analysis of the evidence put forward by the Prosecution, I find that the Prosecution has proved beyond reasonable doubt that the Accused Person stabbed the deceased on the evening of 27th August 2012. I reach this decision notwithstanding that one Harriet who is said to have also witnessed the assault did not testify. It was the evidence of the Investigating Officer (PW5) that Harriet Diana Echutu was one of the persons who recorded a statement in respect to the death of the Deceased. In the course of hearing the State Counsel explained that the State was unable to summon Harriet to testify as she could not be traced. This infact necessitated adjournments on two occasions. It was further explained that she had moved out of the Country. This Court accepts that explanation and is unable to impute any negative motive on the part of the Prosecution for not availing this witness. The Court further finds that the evidence of PW1 as corroborated with that of PW2 and PW3 was sufficient to establish that the Accused Person stabbed the Deceased.

19. The Doctor who conducted the Post Mortem (P Exhibit 1) returned an opinion that the cause of Deceased's death was an Intra cerebral hemorrhage secondary to a head injury. This was consistent with what PW1 told court. She saw the Accused Person stab the Deceased on the head. This Court comes to a conclusion that it was the stab injury inflicted by the Accused Person to the head of the Deceased that caused his death.

20. In his closing submissions, Mr. Obiri for the State asked this Court to find that mens rea had been established because after the first confrontation, the Accused Person had sufficient time to cool off but he chose to fight a second time and this time with a knife. A clear manifestation that he

wanted in the words of the Counsel, to eliminate the Deceased.

21.This Court has made an anxious consideration on the issue of mens rea. The evidence is that on the first confrontation of the evening, the Accused Person provoked the fight by insulting the Deceased. Nevertheless it was the Deceased who threw the first punch. In the words of PW1

“Philip was the aggressor while the accused tried to defend himself”.

After the end of the first confrontation, there was some passage of time as the Deceased with the two girls in his company had walked about 4 kms before the Accused Person launched the second attack on the Deceased. The Court, therefore finds merit in the argument that the Accused Person had some opportunity to cool off and reflect on his next course of action.

22.That said, what initially happened at the beginning of the second fight may be suggestive of the mindset of the Accused Person. It was the evidence of PW1 that, although armed with a knife, the Accused Person first engaged the Deceased in a fist fight. Only as the fight progressed that he used the knife. If the intention of the Accused Person was to kill the Deceased Person, why did he not stab him right at the outset of the fight? Why engage him first in a fist-fight? This question sways me towards giving the Accused Person the benefit of doubt in respect to the question of mens rea.

23.For all the reasons stated above, I find the Accused guilty of committing the Lesser Offence of Manslaughter contrary to Section 202 as read with Section 205 of The Penal Code and I convict him accordingly.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 24th DAY OF JUNE 2015.

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

OILE.....COURT CLERK

MIANOFOR THE ACCUSED

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