



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**HC CRIMINAL CASE NO. 11 OF 2011**

**REPUBLIC ----- PROSECUTOR**

**VERSUS**

**BRAMWEL ORONE ETYANG-----1<sup>ST</sup> ACCUSED**

**NICHOLAS ETYANG ORONE-----2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. On the morning of 2<sup>nd</sup> December 2011, Patrick Karani Ejogol (The Deceased) succumbed to the wounds to his head. It is alleged by the State that Bramwel Orone Etyang (A1) and Nicholas Etyang Orone (A2) are the Persons who had on the previous night jointly caused the injuries that led to the death of the Deceased. The two are jointly charged with the Murder of the Deceased contrary to Section 203 as read with Section 204 of the Penal Code.
2. The Prosecution put together seven (7) witnesses in a bid to prove its case. On the other hand, the Accused Persons and Christine Nekesa (DW2) gave evidence on behalf of the Defence.
3. Aturet village is within Busia County. Innocent Murunga (PW1), Wycliffe Okodoi Orone (PW2) and Max Orone Emusugut (PW3) all hail from Aturet village. The three were together in their home in that village on 1<sup>st</sup> December 2011 at about 9.00 p.m. when they heard screams from the direction of the Deceased's house. It was the evidence of PW1 that the house of the Deceased is about 50 metres from where they were. It was the further evidence of each of the three witnesses that the screams were of someone familiar. That they were of the Deceased. The three responded to the distress call by going towards the house of the Deceased.
4. PW1 says that he was carrying a torch and that on reaching the scene, and using the torch light, he was able to see A2 holding the hands of the Deceased while A1 was brandishing a machete (a panga). He also noticed that the Deceased had a cut on the back of his neck. Shortly thereafter A1 left the scene and while PW2 snatched the weapon from A2.
5. PW2 who arrived at the scene together with PW1 and PW3, also says that he had a torch. Shinning the torch, 10 metres away from where some people stood, he saw A1 with a panga while A2 was holding his hands. At that time the Deceased was lying on the ground. The witness feared getting too close to where the three people were because A1 warned him that anyone who dared to go near there would face the same fate as the Deceased. After strategizing, PW2 approached A1 from the behind. On noticing this, A1 dropped the panga and ran away. Soon thereafter his father followed.
6. The evidence of PW3 was similar to that of the first two witnesses. He however added that when he heard the Deceased scream out, **“come and rescue me Bramwel and Nicholas his father are killing me”**. That on reaching the scene he found Bramwel (A1) brandishing a panga while his

- father Nicholas (A2) was holding the Deceased by his hands. Both Accused Persons dared them not get any closer. At this time he was with A1 and A2 and they stood 3 metres away from where the Accused Persons stood. The witness says that he was able to see the Accused Persons well because PW2 had a torch which he used to shine towards the scene. It was his evidence that PW2 alone had the torch. This was in line with the evidence of PW2 but contradicted the evidence of PW1 that he too had a torch. The witness saw PW2 snatch the machete from A1 and soon thereafter both A1 and A2 ran away in different directions.
7. What then followed was the effort to get the Deceased to Hospital. The Deceased had an injury to his head. The three witnesses administered First Aid on the Deceased and then put him on a bicycle. That did not prove to be an efficient means. As they made their way to hospital, the Deceased asked that he alights because of the discomfort of his injuries. On doing so, the Deceased decided to abandon the trip and returned to his home. The following morning, using Boda Boda transport, the Deceased was taken to hospital, unfortunately he passed on at the gate of the hospital.
  8. On the night of 1<sup>st</sup> December 2011, at about 9.00p.m., PW2 told Stephen Okwara Emusugut (PW5) that A1 had attacked and injured the Deceased. As he was indisposed, PW5 requested PW1, PW2 and PW3 to take the Deceased to hospital. On the morning of 2<sup>nd</sup> December, PW5 learnt that the Deceased had not been taken to hospital on the previous night because PW1, PW2 and PW3 had not found appropriate means of transport. PW5 visited the Deceased on the morning of 2<sup>nd</sup> December 2011 and saw that the Deceased had a cut wound to his head and had bled profusely. When the Deceased was taken to Amukura Hospital on that morning, PW5 remained behind and later learnt that the Deceased had died before he got to the hospital.
  9. Peter Ekol Emusugut (PW6) and Cosmas Orone (PW7) identified the body of the Deceased to Dr. Oluoch who performed a Post Mortem on the body on 7<sup>th</sup> December 2011 as it lay at the mortuary at Bungoma District Hospital. At the time of trial Dr. Oluoch had been transferred to Mumias and was unavailable to give evidence. For that reason the Post Mortem Report was produced by Dr. Haron Ombongi (PW4) who is familiar with the handwriting and signature of his colleague. PW4 explained the contents of the Post Mortem Report (exhibit 1). From the external appearance of the body, the Examining Doctor noted blisters on the limbs and a cut wound to the head. The cut wound was approximately 5cm in length and penetrated the skull on the occipital region. On the internal appearance of the body, there was a fracture on the skull measuring 5cm in length. There was also a cut to the brain tissue with cerebral hemorrhage. The Doctor formed the opinion that the cause of death was a severe head injury secondary to trauma from a sharp object.
  10. Senior Sgt. Johnstone Ogola Martin (PW8) was working at Kotur Police Base in December 2011. On 2<sup>nd</sup> December 2011, at about 9 a.m., members of public from Aturet village brought A1 under arrest. It had been alleged that he had murdered Patrick Karani Ejugol on the previous night. After questioning the suspect, he placed him in custody pending further investigations. The members of public also brought with them a panga and a rungu which were said to be the murder weapons.
  11. PC Charles Ochieng Okatch (PW9) investigated the murder complaint. Alongside Chief Inspector Ndungu and Cpl. Rotich, they visited Aturet village on 1<sup>st</sup> December 2011 and found the body of a person said to be of Patrick Karani which was lying in a grass thatched house. He noticed that the body had an injury to the back of the Head and was covered with blood stained clothes. It was his evidence that they collected the body and took with them a panga and a rungu which were said to be the weapons of murder. That the weapons were inside the house and were brought by members of the public. After recording the statements of witnesses he recommended that A1 be charged. He was not aware who had made the recommendation that A2 also be charged.
  12. At the close of Prosecution case this court reached a decision that the evidence of the prosecution witnesses was sufficient to require both A1 and A2 to make their defences. Having explained to the Accused Persons the rights available to them under the provisions of Section 306 (2) of Criminal Procedure Code, both the Accused Persons chose to give unsworn evidence. In addition they called Christine Nekesa DW2 to testify on their behalf. A1 is a farmer at Aturet village. He was at his home on 1<sup>st</sup> of December 2011 at 9.00 p.m. with his wife Christine (DW2) and children. After they took supper, they heard a knock on the door and DW2 responded to the knock by opening the door to the visitor. The visitor was an unhappy man and asked “**why did**

- Bramwel chase away my pig. Does he want me to be like him who has nothing?”** At this point DW1 retreated into the house and closed the door. The Visitor tried to force the door open by hitting it with a club, but A1 reinforced the door by placing a table behind it.
13. After a short moment of calm, A1 opened the door and stood at the door step. Unknown to him someone was hiding inside a nearby banana plant. Suddenly, he was hit twice with a club on his head. A1 retreated into the house but was followed by his assailant. In order to protect himself, A1 took a piece of firewood which he also used to hit the assailant. That he hit him only once. At that point the assailant ran away but A1 did not pursue him. The rest of the evidence were the events leading to his arrest and arraignment in court.
  14. DW2 supported the version given by her husband A1. But she added that the person who assailed her husband on that night was the Deceased person. In cross-examination she denied that the A1 left the house at any point during the confrontation. She also added that the Deceased owned some pigs which had on at least three occasions eaten their maize and peanut crop. It was also her testimony that in the course of the fateful night A2 was not at home because he was away on duty at Malaba.
  15. When Nicholas Etyang Orone (A2) took the witness box he sought to persuade the court that he was completely innocent of the charges he faced. Prior to his arrest, A2 was a night watchman at Malaba working with a firm known as Kamaliza. He was on duty on 30<sup>th</sup> November 2011. The next morning he signed out from the offices of his employer at Malaba at 7.00 p.m. On his way home he met a Boda Boda operator who stopped him and told him that there had been a fight at the home of A2 and one of those involved had died. He was also told that his son Bramwel (A1) had been arrested by members of the public and subjected to mob justice.
  16. It was the evidence of A2 that he continued his journey home and he was there on that morning when brothers of Deceased called on him. They attempted to beat him but he was saved by a village elder. After 3 days the same brothers visited him and asked him to finance the burial of the Deceased. As a consequence, A2 was forced to sell half an acre of his land and he gave the purchase price of 40,000/- to the Area Chief for onward transmission to the family of the Deceased. It was his testimony that he attended the funeral of the Deceased Person. He was therefore surprised that about 3 years later he was arrested from his home and charged with this offence.
  17. The mainstay of the Prosecution case is the evidence of PW1, PW2 and PW3 who are said to be eye witnesses. The Prosecution asked this court to find that the witnesses positively identified the two Accused Persons as the people who assaulted and injured the Deceased. And that as the two assailants were well known to the witnesses at the time of the assault, that evidence would be of recognition. The incident happened at night, at about 9.00 p.m. The witnesses say that they used torch light to see the Accused Persons. This Court is therefore obliged to examine the quality of that identification. This is because even though recognition may be more reliable than identification on some occasion mistakes in recognition can be made.
  18. There was a contradiction in the Prosecution case as to which of the three witnesses carried a torch on that night. PW1 stated that he had a torch on that night but PW2 testified;

**“Amongst the three of us, I alone had a torch”**

According to PW3, it was Wycliffe (PW2) who had the torch. Would this amount to material inconsistency? This Court shall return to this later.

19. That contradiction notwithstanding, what is the evidence on the quality of the light and of the recognition generally? PW1 said as follows:-

**“I recognized their voices and saw them**

**using torch. The torch uses 3 small batteries”**

The evidence, is in my view extremely tenuous. There was no probe as to how often the witness on one hand and the Accused Persons on the other spoke and the last time they spoke. The answers would inform about the reliability of the voice recognition. As to the quality of light, the battery capacity of a torch by

itself may not tell much about the amount of light it produces. What was the state of the batteries? Were they new or old? A more useful probe would have been the distance of the beam the torch light produced and the strength of that beam.

20. The evidence of PW2 suffers the same fate. PW2 in examination in chief stated that

**“I shone the torch on them about 10 metres away. I saw Bramwel and his father Nicholas.”**

Under cross examination he said

**“I had a small torch with 3 AAA batteries.”**

21. As to PW3 he stated that we were three (3) metres away from where the Accused stood and stated,

**“I saw them well because there was a torchlight”.**

The witness later added under cross examination-

**“I identified the Accused Persons using torch light from the torch which Wycliffe (PW2) had. He also had a torch. It was a small torch which could shine 5 metres away. It was new. It could shine upto outside the door of the Court room (about 10-20 metres) It was new. I could see”**

For this witness there is a little more detail about the quality of light and recognition. It was his evidence that he saw the Accused Persons as he and PW1 and PW2 stood 3 metres away. That the torch would shine more than 5 metres away and that is why he was able to see the Accused Persons. This witness gave some evidence as to the intensity of the light.

22. While the evidence of PW3 was more detailed than that of PW1 and PW2 in respect to the quality of light and recognition, I am unable to say, with certainty, that the quality of the recognition evidence was so good as to rule out the possibility of mistaken identity. The inquiry by the Prosecution in this respect was weak and, with respect, superficial. No attempt was made to probe how the witness recognized the Accused Persons. For instance, did he see their faces? For how long were the Accused Persons under the observation of the witness? No question was posed as to whether or not the view of the witness was impeded.

23. The weakness of this evidence also needs to be taken in the context of the contradiction between the evidence of PW1 on the one hand and that of PW2 and PW3 on the other as to the number of torches that the witnesses had on that night. PW1 was unequivocal that he had a torch and it was the light from his torch that helped him to recognize the assailants. PW1 did not say whether the other two witnesses had torches. That evidence by PW1 was not supported by the evidence of PW2 and PW3 that it was PW2 who had a torch and as for PW2, he states-

**“Amongst the three of us, I alone had a torch.”**

What seem to be an insignificant contradiction cannot be minimized because, according to the witness the source of light was torch light and there was little evidence as to the quality of that light. That makes the contradiction material.

24. If there had been nothing more to this matter then this Court would have been obliged to acquit both Accused Persons. However what A1 and his witness DW2 told Court aided the Prosecution case. These two witnesses confirmed that there was a fight between the Deceased and A1 on the night of 1<sup>st</sup> December 2011 at about 9.00 p.m. The evidence was that the Deceased was the aggressor and A1 simply hit him once in self-defence. There is however Prosecution evidence that on that same day at about 9.00 p.m., PW1, PW2 and PW3 found the Deceased Person with some serious injury to his head. And according to the Medical opinion of the Doctor, the cause of

death was a severe head injury due to trauma from a sharp object. Given the proximity of the time when Accused 1 and DW2 say A1 fought with the Deceased and when PW1, PW2 and PW3 found the Deceased with serious injuries, I hold and find that it was A1 who caused the injuries to the head of the Deceased that eventually led to his death.

25. However, because the Court has found that the Prosecution had failed to establish the circumstances under which A1 caused the injuries to the Deceased, it believes the account of A1 and his witness that A1 caused the injuries to the Deceased as he tried to defend himself. That is consistent with what was indicated in the Post Mortem Form to be the circumstances of the Deceased's death. The Police stated,

**“The Deceased picked a quarrel with the Accused in this case who cut him with a panga, he then died on his way to hospital.”**

26. There is however an aspect of the Defence theory which may or may not be believable. The Medical opinion of the Doctor who performed the Post Mortem on the body of the Deceased was that the cause of death was-

**“a severe head injury secondary to a trauma from sharp object”**

What may not be clear is whether a piece of firewood could be the sharp object..

27. Section 17 of the Penal Code provides as follows:-.

#### **Defence of person or property**

**Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.**

28. The Court of Appeal in *Anthony Njue Njeru vs Republic (2006) eKLR* said as follows on the plea of self-defence

**A killing of a person can only be justified and excusable where the accused's action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack. In the present case, it is not in dispute that the appellant being a police officer on duty who was lawfully armed with a pistol shot the deceased and that the Deceased died as a result of that shooting. It was therefore upon the appellant to show that at the time of the shooting he was in the course of averting a felonious attack and not greater force than necessary was applied. The appellant was bound to show that he was in immediate danger or peril arising from a sudden and serious attack by the deceased.**

The holding of the Court of Appeal is that an Accused Person putting forward a plea of self-defence bears the evidential burden of proving the plea on a balance of probabilities.

29. A1 did not establish before this Court that the force he used was no more than was necessary and given the medical evidence, the force and the weapon used caused some severe injuries that eventually led to the death of the Deceased. For this reason the Defence put forward by A1 may not be tenable. That said, this Court is unable to find that the Accused Person intended to cause the death of or grievous harm to the deceased. For that reason I find A1 Guilty of the Lesser Offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

30.As to A2, I am unable to find any evidence that connects him to the death of the Deceased. That may explain why it took the police three (3) years to prefer the charge against him. This court gives him the benefit of doubt and acquits him accordingly. He shall be set at liberty forthwith unless held for some other lawful reason.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 23<sup>rd</sup> DAY OF JUNE 2015.**

**F. TUIYOTT**

**J U D G E**

**IN THE PRESENCE OF:**

**OILE.....COURT CLERK**

**ASHIOYA H/B FOR JUMBA.....FOR THE ACCUSED**

**OWITI.....FOR THE REPUBLIC**