



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 37 OF 2014
(FORMERLY KISII HCCR NO. 11 of 2013)

BETWEEN

REPUBLIC PROSECUTOR

AND

STEPHEN ODHIAMBO ONYANGO ACCUSED

JUDGMENT

1. **STEPHEN ODHIAMBO ONYANGO** (“the accused”), an administration police constable, is charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge are that on 26th January 2013 at about 2.00am, the accused murdered **JOHN KERARIO** (“the deceased”) in Kehancha Township in Kuria West District within Migori County. The accused denied the charge and the trial proceeded a pace with the prosecution calling 9 witnesses. The accused elected to make an unsworn statement in his defence.

2. On the night of 25th January 2013 at 11.00pm Mwita George Mboiro (PW 1), a businessman in Kehancha, was at Rocks Bar, Kehancha drinking alcohol with the deceased and Corporal Joseph Wangwe (PW 6). As they were drinking, four armed administration police officers in uniform entered the bar and sat at a table close to them. After a while, one of the officers moved from the table and to sit alone at the far end of the bar. He testified that the deceased followed him and as the two were talking, the officer pushed the deceased and he fell on the table. The officers who were seated at the table next to them stood up and the bar became chaotic. PW 6, who was seated with them, introduced himself as a police officer from Nyeri. He talked to them, they cooled down and the four officers walked out.

3. PW 1 further testified that after about 10 minutes or so, PW 6 offered to escort the deceased home and the two of them left the bar. After 10 to 15 minutes, PW 6 came back and asked for assistance to take the deceased to hospital. PW 6 told him that the deceased had been hit by the same officer who hit him in the bar. When he got out he found the deceased in a pool of blood, blood was oozing from the left side of his head. He called a taxi driver he knew, Jones Robi Marwa (PW 4). After receiving the call, PW 4 immediately came to the bar where he found the deceased, whom he knew, lying outside the door of the bar. He did not notice any visible injuries. He assisted PW 1, PW 3, PW 6 and others carry the deceased to the taxi. The deceased died on arrival at Kehancha District Hospital. PW 1 identified the accused as the officer who had an altercation with the deceased at the bar.

4. Harrison Waisiko Muherai (PW 3) was at Rocks Bar on the material night with other people including the deceased. He testified that at about 9.00pm, administration police officers came into the bar and asked

them to leave as the regulation time was over. The deceased asked them why they were in the club in uniform. An argument then ensued between the officers who came into the bar and the deceased who was removed from the bar. PW 3 testified that the owner of the bar intervened and he was told to shut down the bar. Calm returned and they continued drinking. After a while the deceased came back into the bar. PW 3 heard the deceased saying that the officers wanted to leave with him. After a while the deceased went outside. He could hear people arguing. When he went outside the bar, he found the deceased lying on the ground in front of the door of the bar. He saw blood coming from his head but did not see any visible injuries.

5. On 25th January 2013, Corporal Joseph Wankwe (PW 6), a police officer from Nyeri, was on leave. His cousin, the deceased, called him on that day and after spending the afternoon together, they ended up at Rocks Bar. When they entered the bar, found four AP officers in uniform seated at another table near them. PW 6 testified that after a while, one officer moved from the table and went to sit with other customers on another table. One of the customers introduced them to the officers who were present as Cpl Mwasya (PW 8), PC Tanui (PW 5) and PC Nyaboke. They continued drinking as they chatted. After a while the deceased left through the back door to go and relieve himself. When he came back he went to the table where the other officer was seated with the other customers. PW 6 saw a scuffle between the deceased and the officer but he could not hear what they were saying. He saw the officer holding or pushing the deceased. PW 6 immediately stood up, went and separated them. He led the deceased through the corridor and then the back door out as he felt it was not safe. Before he could call PW 4, a taxi driver to take them home, the four AP officers emerged from the back door and the one who was struggling with the deceased asked in Swahili, “*Yuko wapi yule alikuwa akibishana na sisi?*” Before they could answer, the officer saw the deceased and rushed towards him. The officer got hold of the gun with his two hands, held it up to shoulder level. His right hand was holding the nozzle which was pointing away and the left hand the body of the gun which he used to hit the deceased once on the left side of the head with the butt of the gun. PW 6 got hold of the officer and asked him what he had done. The officer replied in Swahili, “*sijali hata nikienda kufungwa.*” PW 6 went back to the bar and called PW 4 to assist him take the deceased to hospital. PW 6 identified the accused as the officer who assaulted the deceased.

6. APC Geoffrey Tanui (PW 5) was on patrol at Kehancha Town with other officers on the material night. He recalled that while they were patrolling the town, they heard a noise from Rocks Bar. They rushed there to see what was happening. The front door of the bar closed and there was commotion inside. They entered the bar through the back door where they found people drunk and fighting. He saw the deceased, whom he had not known before, abusing a waitress. He tried to throw a bottle at the waitress but the accused blocked the bottle. The deceased started abusing the accused. PW 6 took the deceased outside through the corridor to the back. The accused then followed them while he and the other officers remained as the owner of the bar closed the business down the bar. When he reached outside, he found the deceased lying down with blood oozing from his head and the accused standing about a metre away together with PW 6. When he asked the accused what had happened, the accused told him that the deceased tried to grab his rifle.

7. Corporal Antony Masya (PW 8), who was also on patrol that night with PW 5 and APC Delphi Nyaboke, testified that at about 1 pm they passed by Rocks Bar. They entered the bar and found people still drinking. One of the people in the bar was a police officer, PW 6, who welcomed them for a drink. They sat down at a table where PW 6 and the deceased were. Before they finished the drink there was a scuffle between the deceased and a waitress at the bar. The deceased tried to hit the waitress with a bottle but it missed him. The waitress ran towards the accused. The deceased tried to follow the waiter who ran towards the accused. PW 6 removed the deceased from the bar and took him outside and the accused followed them. When PW 8 left the bar, he found the deceased lying down bleeding. PW 6 told him that it was the accused who injured the deceased by hitting him with the gun.

8. Charles Kipchumba (PW 9), an Assistant Superintendent of Police recalled that on 26th January 2013 at about 3.00 am, he received a call from members of the public who informed me the some AP officers have killed somebody. He instructed his junior officer to follow up the matter while he proceed to Kehancha Police Station where he found members of the public reporting that the deceased, John Kerario, had been assaulted by an AP officer and that he had died in hospital. He went to the Rocks Bar at about

4.00 am where he found some fresh blood outside about 10ft from the bar. He was told that that was the place the assault took place and the weapon used was a firearm. The witnesses identified the accused as one of the officers who present at the bar. He then went to Kehancha District Hospital Mortuary where observed the deceased's had a swollen wound on the left side of the head. He organized for a post mortem to be done.

9. On 31st January 2013, PW 9 summoned all AP officers on duty on the night of 25th and 26th January 2013. The officers were brought by Sgt Mugendi. He interviewed the officers and learnt the officers were at Rock Bar on the material night and that the deceased picked a quarrel with the accused while the officers were in the bar. When they were leaving the bar the assault of the deceased took place. Since it was alleged that a firearm was used, PW 9 obtained the G3 Rifle – Serial No. 77095060 from the armory and confirmed from the arms movement register for DAPC Kuria West, Kehancha for the period 15th November 2012 to 20th May 2014 that the accused had been issued with the G3 Rifle No. 77095060 on 25th January 2015 and he returned it on 26th January 2015. On the same day, he arrested the accused for the offence of murder.

10. Dr Joseph Otieno (PW 7) testified and produced the post mortem report prepared by Dr Emmanuel Oyier under the provisions of **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. The post-mortem of the deceased's body was done on 31st January 2013 after the body was identified by the deceased's brother, Peter Chacha Kerario (PW 2). The significant observation was that there was a blood stain on the left temporal region and a swelling on the same spot. There was a stab wound on the same spot extending deep into the head. When he opened the head, he found a depressed skull fracture measuring about 1cm in diameter. There was hemorrhage into the brain. He formed the opinion that the cause of death was severe hemorrhage and severe assault with a sharp object on the left temporal side of the head.

11. When put on his defence, the accused elected to make an unsworn statement. He confirmed that he was an Administration police constable stationed at Kuria West district headquarters, Kehancha. He recalled that on Saturday, 26th January 2013 at about 8.00 am, he was resting in the camp when he heard some noise from outside from people complaining that their person had been killed that morning. He informed the officer in charge at the material time Sgt Mugendi that he was with four officers that morning and that there was no report of a death. Sgt Mugendi called the four officers who were on patrol that night and escorted them to the DCIO who received them and asked whether he was on patrol. He told PW 9 that he was on patrol. He told him that he did not hear or witness anything on that night. He stated that the PW 9 refused to accept his explanation and that he arrested and charged with murder. He denied that he had killed anyone.

12. The accused further testified that on 25th January 2013 at about 8.00 pm, he went on patrol with PW 5, PW 8 and APC Nyaboke after they had taken guns from the armoury. At about 12.00 midnight, PW 8 received a call while they were on patrol. PW 8 stated that he had been informed by the public that there was a fight at Rocks Bar. They proceeded there and found the front door locked. The watchman was outside and he could hear noise from the inside. The customers were using the back door. They found drunken people inside. PW 8 ordered that the bar be closed and all customers to leave. Everyone started leaving as per the order. The bar was closed and everyone left. Only the watchman remained. They proceeded with the patrol until 5.00 am when they went back to the camp and returned the guns. He stated that PW 8 filled the Occurrence Book confirming that all was well and he proceeded to his house to rest.

13. In order to secure a conviction for the offence of murder under the provisions of **section 203** and **204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;

- a. Proof of the fact and the cause of death of the deceased.
- b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.

c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the *Penal Code*.

14. As regards the first ingredient that is the fact of death and cause of death, I agree with the conclusion drawn by Dr Emmanuel Oyier that the cause of death was severe bleeding in the brain caused by assault with a sharp object on the left temporal side of the head. This finding is consistent with the testimonies of PW 1, PW 3, PW 5 and PW 6 who saw a head injury on the deceased at Rocks Bar after he had been assaulted.

15. The next issue is who caused the deceased death. The prosecution led direct evidence on this point. PW 6 saw the accused hold his gun with his two hands. The right hand was holding the nozzle which was pointing away and the left hand the body of the gun which he used to hit the deceased once on the left side of the head with the butt of the gun.

16. The prosecution witnesses; PW 1, PW 3, PW 5, PW 6 and PW 8 all confirm that the accused was present at the bar and he had some form of altercation with the deceased before they left together to go outside. Further, PW 9 confirmed that the accused was issued with and was in possession of a G3 rifle on the material night which he used to assault the deceased. I therefore find from the totality of the evidence that the accused was present at Rocks Bar and that he assaulted the deceased with the butt of the gun on his head on the material night.

17. Was the assault with malice aforethought? To establish malice aforethought, under the provisions of **section 206** of the *Penal Code*, the evidence must demonstrate be an intention to cause death or to do grievous harm to any person, whether that is the person killed or not, knowledge that the act or harm causing death will probably cause the death of or grievous harm to the person, an intention to commit a felony and lastly an intention by the act or omission to facilitate the flight or escape from custody of any person who committed or attempted to commit a felony.

18. In this case, there is evidence that the accused and the deceased had an altercation that night. PW 1, PW 3 and PW 6 did not know what the scuffle between them was about while PW 6 and PW 8 testified that the argument arose over the assault by the deceased on a waitress which the accused blocked. Whatever the genesis of the quarrel, PW 6 intervened and calmed the accused and the deceased down.

19. PW 6 was the only eyewitness who gave a description of what happened. He stated that he took the deceased outside so that he could take him home and before he could call the taxi the accused came out and asked for the deceased. The fact that he took the deceased outside is corroborated by PW 5 who confirmed, in cross-examination, that the deceased was led out by PW 6. Likewise PW 8 stated that PW 6 removed the deceased from the bar and it them that the accused followed them. When the deceased came out of the bar, he asked for the accused and deliberately hit the accused on the head with his rifle butt. The accused's words, "*Sijali hata nikienda kufungwa ...*" ("*I do not care if I am jailed*") betray his intent.

20. Learned counsel for the accused suggested, in cross-examination of PW 6, that the deceased tried to grab the accused's gun causing the accused to act the way he did. PW 5 also stated that the accused told him as much. I reject such a suggestion as the PW 6 had actually removed the deceased from the bar in order to get a taxi to take him home. There is no evidence that the accused was under any threat of use of force from the deceased which he needed to repulse. In his defence, the accused testified that no such incident happened as all the officers did was to ensure that the bar closed and everyone left. This in direct contrast to the collective testimonies of PW 1, PW 3, PW 5 and PW 6 and PW 8 which is clear that the accused was involved in an altercation with the deceased and that the deceased later died. His defence that nothing untoward happened that night is a sham.

21. The accused aimed the butt of the gun at the deceased's head with such force which resulted in a skull fracture. This implies that the accused had, "*knowledge that the act or harm causing death will probably cause the death of or grievous harm to the person*" within the meaning of **section 206(b)** of the *Penal Code*. I find that the prosecution proved malice aforethought.

22. I find the accused **STEPHEN ODHIAMBO ONYANGO** guilty of the murder of **JOHN KERARIO** and I convict him accordingly.

DATED and DELIVERED at MIGORI this 16th day of November 2015.

D.S. MAJANJA

JUDGE

Mr Kisia, Advocate for the accused.

Ms Owenga, Principal Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.