



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 29 OF 2012

(FORMERLY KISII HCCR. CASE NO. 144 OF 2012)

BETWEEN

REPUBLIC PROSECUTOR

AND

JULIUS OUMA NYAMBERE ACCUSED

JUDGMENT

1. On 22nd November 2012, this court was informed that **JULIUS OUMA NYAMBERE** (“the accused”) had murdered **CALVINCE OTIENO OBONYO** (“the deceased”) contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. It was alleged that on 20th November 2012, the accused murdered the deceased at Kaguria Sub-location in Ndhiwa District of Homa Bay County.
2. After the accused pleaded guilty, the trial commenced before Maina J., and was completed under **section 200** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. The prosecution marshaled 8 witnesses. Its case was that on the night of 19th November 2012, the deceased person left his home for a disco *matanga* in company of two friends. At around 1.00 am, they decided to walk back home and on the way they met the accused who was with another person he could not identify. There was a confrontation and the accused, who was armed with a panga, slashed the deceased who later died in hospital.
3. In order to prove 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 which is the *actus reus* of the offence.
 - c. Proof that the unlawful act or omission was committed with malice aforethought as defined in **section 206** of the **Penal Code**.
4. The fact and cause of death of the deceased is not really in dispute. PW 1, Duncan Omondi, and PW 2, George Ochieng, both testified that they went to a disco *matanga* with the deceased on 19th November 2011 at about 11.00 pm where they stayed until about 1.00 pm. As they were headed I

- home, they met two people standing by the left side of the road. PW 1 stated that he only knew one of the two people as Kale, whom he identified as the accused, and who was holding a panga. He heard the deceased tell the accused, “*why are you cutting me?*” He heard a thump and when he turned he saw the deceased had fallen down and was bleeding on the head. The accused and the other person fled and he was left with the deceased.
5. PW 2 recalled also after the deceased fell, he rushed to call the deceased’s father, Samuel Obonyo Liech, PW 3, who came with a motorbike. PW 3 testified that at around 1.00 am, PW 2, came to his home and informed him that his son had been cut by someone. He immediately looked for a motorbike and went to the scene where he found the deceased lying on the ground unable to talk. He took him to Pala Hospital whereupon he was referred him to Homa Bay District Hospital where he was treated but died the next day at about 8 am.
 6. PW 7, Dr Ayoma Ojwang, a doctor working at the Homa Bay District Hospital testified that he conducted a postmortem on the body of Calvince Otieno Obonyo on 23rd November 2012 at the District Hospital Mortuary. PW 3 identified the body as that of his son. He observed that there was an extensive cut wound measuring 12 x 3 x 2cm on the left side of the scalp up to the skull bone which severed all the blood vessels above the left ear. The major finding upon internal examination of the body was on the head where he noted a long linear skull fracture of the left temporal bone measuring about 11cms in length. He formed opinion that cause of death was severe bleeding probably caused by a sharp weapon.
 7. PW 4, Corporal Godfrey Mumo, recalled that on 20th November 2012, he visited the scene of the incident at about 1.30pm. From his investigations, he confirmed that there was a fight at the scene where they noticed blood on the grass. He thereafter went in search for the suspect and arrested him. PW 5, APC Wycliff Otieno, accompanied PW 4 to the scene of the incident and after visiting the scene, they went in search for the accused at his home but he was not there and then they proceeded to Dede Shopping Center in Awendo District where he was arrested. PW 5, Joash Osuju, the Assistant Chief for Kobita Sub-location, assisted in mounting a search for the accused and he is the one who spotted the accused on a motorcycle at Dede Center when he was arrested and taken to Ndhiwa Police Station.
 8. The testimony of PW 1, PW 2 and PW 3 prove that the deceased is the person who was assaulted on 19th November 2012, taken to the Pala Dispensary and thereafter to Homa Bay District Hospital where he died. The head injuries observed by PW 7 at the post-mortem are consistent with those described by the PW 1, PW 2 and PW 3. I find that on the basis of the evidence, the deceased died as a result of the severe bleeding caused by a sharp weapon.
 9. The next issue is who caused the death of the deceased. In this case both PW 1 and PW 2 testified how they met the accused whom they knew as Kale. The incident took place at night and in circumstances not favourable to positive identification. This calls upon the court to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction.
 10. In addition to the testimony of PW 1 and PW 2, the accused in his defence testified that he met people whom he did not identify. He slashed on them and ran home. His testimony puts him at the scene of the incident and corroborates the testimony of PW 1 and PW 2 that a person did slash the deceased. I therefore find and hold that it is the accused who is the person who caused the unlawful act that led to the death of the deceased.
 11. The final issue is whether the prosecution proved that the act which was caused the death of the deceased was committed with malice aforethought as defined in **section 206** of the *Penal Code*. Under **section 206**, provides as follows;

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- 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;*
- c. *an intent to commit a felony;*
- d. *an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

12. Mr Osoro, learned counsel for the accused, submitted that the accused admitted having slashed a person in the company of several other who wanted to kill him. He did not intend to kill anyone as he was being attacked and that he acted in self-defence therefore malice aforethought was not proved.

13. Ms Ongeti, learned counsel for the prosecution, submitted that the prosecution proved malice aforethought. She submitted that the evidence is to be found in the testimony of PW 7 which revealed that the deceased had a deep cut wound caused by a sharp object and that the area of the body was cut was the head hence he intended to kill the person in terms of **section 206** of the **Penal Code** and that cutting someone's head is inconsistent with manslaughter. She relied on the case of **Abdi Kinyua Ngeera v Republic** NYR CA Criminal Appeal No. 312 of 2012 [2014]eKLR.

14. Mr Osoro submitted that the accused acted in self defence. The law regarding self defence is to be found at **section 17** of the **Penal Code** which states as follows;

17. 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.

15. The Court of Appeal in **Ahmed Mohammed Omar & 5 others v Republic** NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014]eKLR stated as follows;

*The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in **DPP v Morgan** [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in **DPP v Morgan (Supra)** it was held that:*

.....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.

16. The Court continued; **Section 17 of the Penal Code** subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test. The learned Judge's attention was not drawn to the current position of the English Common Law as regards the defence of self-defence. We believe that had the Judge's attention been drawn to the case of **DPP v Morgan (Supra)** his decision would have been different.

17. Accordingly, the issue for determination is whether under the circumstances, the accused believed that his life was in danger to the extent that he was entitled to use force to protect himself. In his sworn defence the appellant stated that while he was coming from the disco *matanga* at 2.00 pm

he met two people and when they started beating him, he slashed one of them with a panga and ran away thereafter. The autopsy report and testimony of PW 7 confirms that the deceased suffered only blow that led to his death consistent with the testimony of the accused.

18. In my view there is sufficient evidence that show that the incident occurred at night and that the accused met two people and a confrontation ensued. The accused's defence is in my view plausible. I therefore find that the deceased acted under the belief that he was being attacked and he used force to repel the said attack which resulted in death. There is no evidence that the accused deliberately set out to attack the deceased.

19. I therefore find the accused **JULIUS OUMA NYAMBERE** guilty of manslaughter contrary to **section 202** as read with **section 205** of the *Penal Code* and convict him accordingly.

DATED and DELIVERED at HOMA BAY this 18th day of November 2014

D.S. MAJANJA

JUDGE

Mr Osoro instructed by Osoro and Company Advocates for the accused.

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