



**REPUBLIC OF KENYA**

**High Court at Kisii**

**Criminal Case 36 of 2008**

**REPUBLIC ..... PROSECUTOR**

**V**

**BENARD OTIENO OCHIENG' alias MZEE ..... ACCUSED**

**JUDGMENT**

1. The accused in this case, Bernard Otieno Ochieng alias Mzee was arraigned before this court on one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It was alleged that on the 31<sup>st</sup> day of July 2008 at Arujo sub location in Homa Bay Township in Homa Bay District within Nyanza Province, he murdered George Otieno Ochieng. He pleaded not guilty to the charge and his trial ensued.

2. The prosecution's case is that at about 9.00 p.m. on 31<sup>st</sup> July 2008 around the Pedo area in Homa Bay township of Homa Bay District, the deceased George Otieno Ochieng was called by the accused who was at the material time standing outside the deceased's house. The accused was hurling insults at the deceased's whole family on allegations that the deceased's family had left their cows to destroy the accused's maize

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plantation.

3. The deceased went out of his house and sought to know why the accused had not reported the matter to relevant authorities instead of hurling insults at the deceased's family. In the course of the altercation, the accused took a piece of metal with which he hit the deceased on the head causing the deceased to fall down unconscious. Blood gushed out from the deceased's forehead. The attack was witnessed by Paul Ogembo Ochieng who alerted neighbours on what was going on. The deceased was rushed to Homa Bay District Hospital where he was admitted in critical condition. Later the deceased was transferred to a

private Hospital in Kisii and finally to Tenwek Mission Hospital. The deceased succumbed to the injuries on 9<sup>th</sup> August 2008.

4. Following the incident, the accused was arrested and charged with the offence. It was the prosecution's case that by moving to the deceased's home and calling him out before brutally assaulting him, the accused harboured the requisite malice aforethought.

5. The prosecution called three (3) witnesses as it sought to prove the factors alluded to in the opening speech. PW1 Daniel Richard Ochieng (the father to the deceased) told the court that on 31<sup>st</sup> July 2008 at about

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9 p.m. he was in his house when he heard a voice from his neighbourhood. The voice was that of the accused who was abusing the deceased. The deceased was still in his house which was about 50 metres away from PW1's house though in the same compound.

6. PW1 stated that the accused was abusing the deceased in Luo language alleging that the deceased's family looks down upon other people. PW1 went outside and stood at his front door from where he saw the accused standing outside PW1's compound near the fence; he saw the deceased go to where accused was though on the inside of the fence and asked him why he had not gone to report the matter to the authorities.

7. At that moment, PW1 said he heard a metal bang, with one Paul Ogembo Ochieng stating that the accused had killed the deceased. PW1 rushed to where they were and found the deceased lying down on the ground unconscious with a fractured skull. He saw blood and part of the brain oozing out.

8. On raising alarm, other people came, and took the deceased to Homa Bay District Hospital and later returned home to pick up the metal bar used to hit the deceased and then proceeded to the police station. On

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returning to hospital, the deceased had regained consciousness and told PW1 that prior to the attack, at about 4.00 p.m. same day of attack, one Paul Ogembo Ochieng had gone to the accused's wife and sought to know why she had abused him. That the quarrel was about Ochieng's cows having strayed to accused's

grandmother's shamba and destroyed her plants.

9. In addition, PW1 reiterated that when he left his house on hearing the exchanges between the accused and the deceased, he did not have any torch with him but added that there was bright moonlight. That when the deceased left his house he personally saw him do so and that the deceased was not armed with anything in his hands.

10. In concluding his evidence, PW1 told the court that he had known the accused since the accused's birth and that the two families had had normal interactions on day to day basis and that on the material night he heard the accused's abusive voice.

11. On examination by the court, PW1 testified that by the time he got to where the deceased was lying down the accused had run away.

12. On cross examination by Mr. Minda, counsel for the accused, PW1 maintained that the attack took place at was 9.00 p.m. at night; the

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voice came from the residential place where accused's family was living; the place was owned by a Mluhya; the accused was speaking from outside the fence and deceased went to the fence where accused was (the fence is between PW1's home and the accused's residential place).

13. PW1 also told the court that from his side of the fence, one could see the other side of the fence, which was about 6ft high; that he could see through the spaces in the fence but the residential house was visible from end to end. He further stated that the commotion seemed like it was from one person; he did not see the accused hit the deceased; there were other people around so he could not tell who actually hit the deceased.

14. PW2 was NO.63459 Corporal Henry Momanyi (the arresting officer) attached to Homa Bay police station in the crime section. He told the court that on 7<sup>th</sup> September 2008 at about 11.00 a.m. he was instructed to proceed to Kamagambo police station to collect a prisoner who was being held there.

15. At Kamagambo police station he was shown 2 prisoners who were in the cells and whose cases were pending in Homa Bay. He

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testified that the suspects had committed offences in Homa Bay town but were arrested at Kamagambo. He was shown the accused and another prisoner by the name Charles Ochieng who were wanted for murder and for assault respectively.

16. At Homa Bay police station, he booked the accused for murder, but before he booked him, he knew the accused as having committed the offence in Homa Bay but had fled to Kamagambo. He confirmed that he had 3-4 hours with the suspect during which he was able to familiarize himself with the accused; the accused is the person he arrested as he had also stayed with them for two weeks while the file was being prepared.

17. On cross-examination by Mr. Minda for the accused, PW2 confirmed that the accused was held at Kamagambo police station initially over a changaa offence.

18. PW3 was No.66380 Corporal Jabali Ramadhani (the investigating officer). He told the court that on 2<sup>nd</sup> August 2008 he received a report from PW1 confirming PW1's testimony on the assault occasioned to his son, the deceased.

19. After booking the report, PW3 went to hospital but could not talk

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to the deceased because the deceased was in a coma. He was then taken to the scene by PW1 and from the scene, PW3 recovered a metal rod. He drew a rough sketch which showed the residential houses of the homestead and some maize plantation. According to the sketch, the assault took place along a footpath. He produced the sketch plan as **P. Exhibit 1**.

20. PW3 also stated that the blood-stained metal rod was recovered from outside the house of the accused. He produced the same as **P. Exhibit 2**. On 11<sup>th</sup> August 2011 PW1 came back to the station and informed him of the deceased's death. On 16<sup>th</sup> August 2008, he filled a postmortem form and gave it to PC Ndolo who accompanied PW1 and deceased's younger brother to Homa Bay District mortuary for purposes of a post mortem examination by one Dr. Wanjala. The post mortem was filled and brought back to him. The report was produced and marked **PMF1- 3**.

21. On 1<sup>st</sup> September 2008 PW3 got information that accused was being held at Kamagambo police station on a different charge. He went to Kamagambo and interrogated the accused regarding the assault and **P. Exhibit 2**. The accused denied he had anything to do with the

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**Exhibit 2;** and with the alleged offence of murder.

22. Later, PW3 arranged for accused's mental assessment which was done on 12<sup>th</sup> September 2008 by Dr. Okumu who found accused mentally fit to stand trial. He produced findings by Dr. Okumu as **P. Exhibit 4**. Subsequently, and on the recommendation by PW3, the accused was charged with murder.

23. On cross examination by Mr. Minda, PW3 stated that the first report by PW1 was received by himself, and from the report it was alleged 5 people were involved in the assault; the assault weapon was a motor vehicle beaming rod; he did not take the metal rod for chemical analysis nor did he take the rod for finger printing for the reason that the rod was not a smooth surface. He also said that it was the area assistant chief who informed him of the accused's presence at Kamagambo police station on a charge of selling changaa and he did not interrogate the deceased's neighbours.

24. For one reason or another, the prosecution was unable to call Dr. Wanjala who performed the post mortem on the body of the deceased to testify. The prosecution did not also call Paul Ogembo Ochieng and the area Assistant Chief. The court denied the prosecution an

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adjournment to call these witnesses after the prosecution failed to comply with a last adjournment order granted to it after many other previous adjournments.

25. At the close of the prosecution's case and after hearing arguments, the court placed the accused on his defence. The accused gave an unsworn statement in which he stated that on 28<sup>th</sup> June 2008, he was in his house and then he was arrested and taken to the police station. At the police station, he was booked in for a case of changaa. He was kept in cells for 3 days before he was taken to court on the present charge of murder of which he knew nothing about and still denied it. The accused also stated that he was kept in police cells for 21 days before being taken to court. The accused did not call any witnesses.

26. In his final submissions, counsel for the accused contended that there is no evidence whatsoever to

connect the accused person herein to the offence of which he stands accused before this court. Counsel also reiterated the submissions made on behalf of the accused when he urged the court not to put the accused on his defence for failure by the prosecution to establish a *prima facie* case against the accused.

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27. Firstly, counsel submitted that PW1 did not witness the accused person in any way assault the deceased and the same witness on cross examination did not tell the court what distinguished accused persons voice from the voices of the accused persons' brothers, for example a special feature and as a consequence of which PW1 could confirm that the voice he heard on that evening was the accused person's voice and not that of one of his brothers or of the other more than 5 people who were present on the other side of the fence.

28. Secondly, counsel submitted that the incident having taken place at 9.00 p.m., it was not possible for PW1 to see the persons who attacked the deceased. That though PW1 mentioned that one Paul Ogembo Ochieng said he had seen the accused killing deceased, the said Paul Ogembo Ochieng was not called as a witness. That it was only this Paul Ogembo Ochieng who could have told the court who infact killed the deceased.

29. Thirdly, counsel submitted that the police arraigned the wrong person in court as the OCS of Homa Bay police station went with his officers to Kamagambo police station to pick a suspect being held on allegations of possessing changaa, and that the court was not informed

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how the OCS Homa Bay police station got to know that the suspect at Kamagambo was the one who killed the deceased.

30. Fourthly, Mr. Minda submitted that the metal bar recovered from the scene was capable of being dusted for finger prints and yet no finger printing was done to establish whether the accused person's finger prints appeared on the said weapon. Counsel urged the court to acquit the accused for lack of sufficient evidence.

31. After a careful scrutiny of all the evidence that has been placed before me, the issue for determination in this case is whether the deceased was murdered and if so whether he was murdered by the accused.

32. For the offence of murder to be committed, a person with malice aforethought must cause the death of another by an unlawful act or omission. From the foregoing definition of murder, the prosecution has the onerous duty of proving that the accused killed the deceased; that he did so with malice aforethought and that the killing was by unlawful act or omission.

33. From the evidence on record, much as George Otieno Ochieng passed on, it is difficult to tell who killed him and what the cause of his

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death was. PW1 (the main prosecution witness) on cross examination stated that he did not see the accused hit the deceased; that there were other people around so he could not tell who among those people hit the deceased, though PW1 stated that he could tell the accused's voice because he had known him for many years since the accused person was born.

34. The court in **Choge –vs- R. [1985] KLR 1** held on evidence of voice identification that:-

**“In receiving such evidence care is necessary to ensure that the voice**

**sought to be recognized was the accused person's, that the witness purporting to recognize the same was familiar with it and recognized it above all it must be shown that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.**

35. From his testimony in examination in chief, PW1 stated that the voice he heard from across the fence at the material time was that of the accused. However, from his evidence in cross examination which was also corroborated by the evidence of PW3, the accused was not the only one outside the deceased house that night. Therefore it is safe to conclude that it is likely the voice PW1 heard was not that of the accused, since the conditions obtaining of having other persons at the same place with the accused, did not lend themselves to an error – free

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recognition of the accused's voice by PW1.

36. Secondly, PW1 also testified in examination in chief that one Paul Ogembo Ochieng was the one who actually announced “**Mzee has killed Otieno**” meaning that it was the accused who killed the deceased. However, the said Paul Ogembo Ochieng did not testify in court. Therefore, it was never established who actually attacked and fatally wounded the deceased.

37. Thirdly, the circumstances under which the accused was arrested and charged for this crime were not clearly established in the arresting officer’s testimony (PW2). During cross examination, he stated that he was sent by the OCS of Homa Bay following communication between the OCS of Homa Bay and the one of Kamagambo police station. PW2 in his testimony revealed that the accused had initially been arrested over a changaa charge at Kamagambo police station.

38. For this court to understand the circumstances that led PW2 to arrest the accused, it was mandatory for the prosecution to summon the OCS Homa Bay in order to shed light on the circumstances which made them arrest the accused who was in cells over a changaa offence and end up charging him with murder. May be as counsel for the

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accused submitted, this could have been a case of mistaken identity.

39. Fourthly, the prosecution never established the cause of the deceased’s death. PW1 and PW3 only established the fact that the deceased was in hospital and he later succumbed to his illness, died and a postmortem examination was carried out on his body. The failure by the prosecution to adduce medical evidence would not necessarily have been fatal to their case against the accused if there had been other evidence from which the guilt of the accused could be inferred. In the instant case, there was no such evidence. The prosecution case must therefore fail.

40. In a report entitled “**Arrest, Investigation and Prosecution by the Police in Kenya**”, prepared by the **Oscar Foundation [2007]**, it has been suggested that a case may be lost in court for many reasons such as:-

1. *Poor case management by the prosecution;*
2. *Insufficient evidence (not orchestrated by the victim);*
3. *Shoddy investigations by the police;*

4. *Corruption;*

5. *The un availability of witness.*

41. In the instant case, I think that the prosecution case against the accused person herein has failed due to poor investigations as well as the unavailability of witnesses. The unavailability of witnesses meant

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that the evidence placed before the court fell below the threshold of proving the prosecution's case beyond any reasonable doubt, though the prosecutor tried his best as stated by the court in the case of **Juma and Others –vs- AG – Nairobi High Court Misc. Application NO. 345 of 2001**(unreported) where Msagha and Kuloba JJ said:-

**“Always remember that the purpose of a criminal prosecution is not to obtain a conviction. It is to lay before the court what the state considers to be credible evidence relevant to what is alleged to be a crime. The prosecutor has a duty to see that all available legal proof of the fact is presented and this should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing. His function is a matter of public duty which in civil life there can be none charged greater personal responsibility. It should be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings.”**

42. In the final analysis, the prosecution has to bear in mind that the duty to prove the case beyond any reasonable doubt lies squarely with it. The accused had no obligation to fill the gaps in the prosecution case. Whereas PW1 and the investigating officer had the right to suspect the accused, this court cannot use suspicion however strong – as a basis to convict the accused. Accordingly, the accused herein, Bernard Otieno Ochieng alias Mzee is acquitted of the offence of murder in accordance to **section 322** of the **Criminal Procedure Code**. Unless he is otherwise lawfully held, he is to be released from prison

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custody forthwith.

**Dated and delivered at Kisii this 14<sup>th</sup> day of May, 2013**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Majale for the State

Mr. Bosire Gichana for Minda for the Accused persons

Mr. Bibu - Court Clerk

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