REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 71 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

ERICK ODHIAMBO ONYANGO.....ACCUSED

JUDGMENT

Erick Odhiambo Onyango *("the accused")* was charged with the offence of murder contrary to Section 203 as read with Section 205 of the Penal Code, *(Cap. 63, Laws of Kenya).*

2. The State alleged that the accused on the 13th day of July 2007 at Ereteti Village in Narok District within Rift Valley Province murdered Saidimu Leboo *(the deceased).*

Section 203 of the Penal Code provides -

> ***"203.Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."***

3. And Section 205 provides that 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."***

4. The State called 6 witnesses to establish that the accused had malice aforethought when he killed the deceased. The accused testified on oath and denied the offence of murder of the deceased. I have examined and evaluated the evidence of both the prosecution and the accused.

5. The scene was the house of one KENNEDY's mother. The time was about 5.30 p.m. The occupation of both the accused and the deceased was drinking of traditional brew or liquor known as

'BUSAA'. The accused had walked to the scene as he usually did, after the days work, about 5 – 5.30 p.m. but perhaps earlier. He found other patrons, there were about ten (10) of them. He bought 5 litres of the liquor, and had drank about 3 litres by the time the quarrel started.

6. The dispute was about preferred political parties. The accused preferred ODM Kenya, whereas the deceased declared that he was NARC Kenya. Nothing wrong with this kind of debate as it shows social awareness. The discussion however deteriorated into abuse when the deceased also referred to as *"Bernard"* told the accused – *"if you are not circumcised with a panga today you will be circumcised with a knife"*, and that before he had even finished the abuse, one *"MAGADI"* also a reveler at KENNEDY'S separated the deceased and the accused, and asked the two to stop their dispute which was deteriorating to the concern of other patrons. The accused and the deceased were ordered out. The accused went out first and was followed by the deceased who came and hit with a rungu. In apparent defence the accused not knowing who had hit him, sway his panga in self-defence and hit the deceased on the forehead. The said Magadi tried to separate them, but he the accused decided to run away.

7. The accused met the deceased's brothers, Nampaso Leboo and Nampaso Leboo to whom he explained what had happened and they decided to take him back to the scene where they found the deceased on the ground, and bleeding profusely. They tied the accused's hands with ropes took him to the Assistant Chief (PW4), and the Assistant Chief called the Police – who eventually took the accused and detained him until he was charged with the offence of murder.

8. From the evidence, the only person who saw the accused hit the deceased with the panga was PW1, one Dennis Makwero Kiprono *(Dennis).* Dennis testified that he was sitting by the door when he saw the accused hit the deceased with a panga, the deceased fell down and the accused run into a maize plantation where he was eventually brought back by PW2 and PW3, the brothers of the deceased. Dennis does not however say the exact circumstances which led to the cutting of the deceased by the accused. Those circumstances are described by the accused, Dennis Makwaro Kiprono (PW1) *(whose evidence and statement was relied upon by both the prosecution and accused)*, and Topiwuo Ole Neboo, a PW3 *(again whose evidence and statement was relied upon by prosecution and the accused).*

9. The circumstances of the quarrel degenerated from the party politics of ODM Kenya and NARC to cultural practices of the circumcised and the uncircumcised. At that stage, the drinkers ejected the accused and the deceased out where according to the evidence of PW1, the two continued their quarrel for close to 30 minutes. Both the accused were armed. The accused had a panga while the deceased had a club *(rungu).*

10. In the course of that argument tempers, mixed with drunkenness must have risen high and the deceased according to the evidence of the accused hit him with the rungu. In retaliation, he swang his panga and hit the deceased once on the forehead. PW3 a brother of the deceased confirmed so, that *"on checking, I noted that he had only cut once"*. This was confirmed by PW6, Dr. Lemayon who in evidence testified that the deceased had a linear cut about 15 cm on the scalp extending from the vertex to the frontal aspect, with the skull-bone also linearly fractured (about 15cm long, with a perpendicular crack extending from front aspect to the right parietal region about 8 cm long. The doctor then put the cause of death to -

> ***"... raised intracranial pressure due to intracranial haemorrhage due to head injury as a result of being hit with a sharp object."***

11**.** It is clear from the Doctor's evidence that the reaction by the accused in fending off the assault by the deceased was so violent that one blow inflicted serious and fatal injuries to the deceased. The question therefore is whether the reaction of the accused was so disproportionate to the assault by the deceased on him that it constituted malice aforethought on the part of the accused.

12. A strong Court of Appeal was confronted with a similar scenario in the case of **MOKWA VS. REPUBLIC [1976-80] 1KLR 1337.** The situation in that case was not very dis-similar to this case on the use of force. The Appellant in that case was assaulting a girl called Maria Kemunto, and her sister

Kerubo intervened. The Appellant turned against Kerubo and started beating her. Maria ran to seek for help from Kerubo's husband, and 2 other men. The four rushed and found the Appellant still beating Kerubo. In the process of restraining him the Appellant removed a knife from his jacket pocket and stabbed the deceased four times. The Appellant also received an injury on his hand during the fight with the deceased. Reversing the conviction on manslaughter by the trial Judge, the Court of Appeal said -

> ***"where self-defence is successfully raised as a defence to a charge of murder, a verdict of manslaughter on the ground that excessive force was used in self-defence is only open to the court if the prosecution discharged the onus of showing that the accused had time for reflection and that he could have counted and aimed the blows which he inflicted."***

13. The court also observed that the trial judge had correctly directed himself *"that where a person in legitimate self-defence of person or property uses excessive force or more force than was necessary in the circumstances (always providing that all other elements of self defence are present)* he should not be convicted of murder but of manslaughter, as was also held in **MANZI MENGI VS. R. [1964] E.A. 289, 292.**

14. **Section** 17 of the Penal Code provides -

> ***"17. Subject to the provisions of 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."***

Of English Common Law Parke B said -

> ***"Where a man strikes at another, within a distance capable of the latter being struck, nature prompts the party struck to resist it, and he is justified in using such a degree of force as will prevent a repetition – para 1097, The English and Empire Digest, Vol. 15, 1977 reissue."***

15. In the Indian case of **ALINGAL KUNHINAYAN VS. R. (1905) I.L.R. 28 Mad. 454 – IND** the court said -

> ***"The view that a person should not exercise his right of self defence if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than what the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger, but on whether there was reasonable apprehension."***

(op. cit. Commonwealth case).

16. And in the Australian case of **BENNETT VS. DOKE [1973] V. R. 239** the Court said -

> ***"To raise the issue of self-defence or justification there must be evidence to justify the conclusion that there was an occasion for the Defendant to act in defence of himself. This is a matter for the trial judge to determine. If there is sufficient evidence to put the matter in issue, there must also be evidence to justify a conclusion by the jury that the defendant acted in defence of himself."***

(op cit supra).

17. In this case, the accused testified on oath that it was the deceased who first hit with a club *(rungu)*, that he immediately swang his *"panga"* which caught the deceased on his forehead. I have already observed that the force of the swing was such that it inflicted fatal injuries upon the deceased. The injuries

would probably have been less severe if the accused used a similar weapon, a rungu. This is however an area where a panga is a tool not merely for cutting trees, but is an essential tool for cultivating/weeding crops, and is therefore a common incident of life, as much as carrying of a club, and it was not unusual for both the deceased and accused to be found walking and came to the drinking place with a panga or a rungu. It is therefore not unusual that the assault committed by the accused was a likely result of the provocation offered to him by the deceased.

18. I therefore find and hold that the accused acted in self-defence in hitting back at the deceased.

19. Counsel also raised another angle of attack against the prosecution's case. It is that the prosecution failed to record the statements of and call vital witness, and invited the court to infer that the evidence of such witnesses would have been adverse to the Prosecution's case. Counsel relied on the decision of Kiwanuka C.J. in the Ugandan case of **BUKENYA & ANOTHER VS. UGANDA [1972] E.A. 549.**

20. In that case the Appellants were convicted of murder after having beaten the deceased with sticks and a stone. The trial judge found that their intention was to cause death and grievous bodily harm. He also stated that the court would not enquire into the failure of the prosecution to call witnesses. On appeal, the court held *inter alia* that -

i. ***the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent,***

ii. ***the court has the right, and the duty to call witnesses whose evidence appears essential to the just decision of the case,***

iii. ***where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

21. In this case, except for *(Dennis Makworo Kiprono (who also testified as PW1)* and Topiwuo Ole Neboo *(who also testified as PW3)*, on whose statements the accused also relied, there was reference to a person called *"MAGADI"* who PW3 says, informed him and his brother Nampaso Leboo (PW3), that their *"younger brother was hit by somebody else Luo by tribe, namely Odhiambo."*

22. PW5 who was the Investigating Officer made no mention of the person called MAGADI, as he seems to have had knowledge of the circumstances under which the deceased had been *"cut by somebody else Luo by tribe namely Odhiambo"*. He seems to me have been a necessary witness and the fact that no statement was recorded from him would suggest that his evidence if it were adduced may well have been adverse to the prosecution's evidence.

23. It is thus clear to me whether looked at both from the point of view of lack of evidence to prove malice aforethought, or provocation and self defence, there was no evidence upon which to convict the accused for the offence of murder.

24. **Firstly** the evidence clearly shows that the accused and the deceased had been arguing over their political differences until the other patrons of Mama Esther's home where the Busaa was being drunk were upset and politely asked both the accused and the deceased to get out of the hut and settle their differences without forcing their arguments on them. It is the accused who moved out first followed by the deceased. Their arguments continued for 30 or so minutes when PW1 heard noise that the accused had cut the deceased with his panga. MAGADI the only person who may have seen what actually happened did not have his statement taken or recorded. He therefore did not testify. PW1 who testified that he was sitting by the door and purported to have seen the accused cut the deceased on the head did not say how far the accused and the deceased were from the door. His evidence was therefore not helpful. The investigations by PW5, the Investigating Officer were perfunctory, and did not help.

25. **Secondly,** the best evidence was that of the accused himself. He admits he hit the deceased on the forehead, but adds that he did not intend to kill him. Indeed as I have already held, there was no

evidence of malice aforethought. In the Canadian case of **R vs. OGAL [1928] 3 D.L.R. 676,** an appeal from a conviction occasioning actual bodily harm, the court held:

> ***"The force used by the accused in defending himself, as he did against an assailant armed with a hammer was not disproportionate to the nature of the attack made on him, although it caused the fracture of his assailant's skull, and he had brought himself, within, and was justified by Criminal Code S. 23*** *(equivalent to Section 207 of our Penal Code).*

26. The present case is not dissimilar. The deceased attacked the accused first, and in self-defence, the accused without pausing to cool down hit back the deceased fracturing his forehead. To say that the deceased brought injury upon himself is perhaps cruel, but any person who extends a hand in anger may well receive a back-handed compliment which is actually, an attack in self-defence.

27. For those reasons, I find that the accused not guilty of murder and I acquit him accordingly.

28. I direct that unless otherwise lawfully, he be released forthwith.

29. It is so ordered.

Dated, signed and delivered at Nakuru this 12th day of July, 2013

M. J. ANYARA EMUKULE

JUDGE