



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
MURDER CASE NO.32 OF 2008

REPUBLICPROSECUTOR

VERSUS

MOSES BAVON OTIENOACCUSED

J U D G E M E N T

On the 31st of July, 2008 the accused herein **Moses Bavon Otieno** was arraigned in court where he faced the charge of Murder contrary to Sections 203 as read with 204 of the Penal Code. The particulars of the offence were that; on the 23rd of July, 2008 at Simur Kondiek Sub-Location, Ukwala Location in Siaya District within Nyanza Province he murdered one **Kennedy Ouma Opondo**. The accused pleaded not guilty to the charge. On the 20th of May 2009 a plea of not guilty was entered and the matter proceeded to trial. The prosecution called a total of 10 witnesses. The accused gave a sworn statement and did not call any other witnesses.

The brief facts of the case as laid out by the prosecution is that on the material day, the 23rd day of July, 2008 at about 6.30 p.m. the deceased and the accused were involved in a fight where the accused fatally knifed the deceased. That the accused ran to a friend's house from where he was arrested about 10 p.m. the same night. He was later charged with this offence.

The salient features of the prosecution evidence are as follows:

PW1 ANTONY ODUOR ;

- **on the material day in July, 2008 at about 6 p.m. as he swept outside his house he heard people shouting and arguing;**
- **he called an old lady to assist;**
- **although he did not know the people fighting he saw their faces;**
- **he saw one fall after working for about 10 meters;**
- **the other had a knife. The one with a knife was beating the one who fell;**
- **(He pointed at the accused as the one who had a knife;**
- **He also identified the knife in court;**
- **The accused brandished the knife;**
- **He however does not know whether he stabbed the other;**
- **In cross-examination he stated he saw that the 2 fighting;**
- **He did not know where the knife came from;**

PW2 ALLAN KENNEDY OKUMU :

- He is a pharmacist;
- on the 23rd July, 2008 he received news of the deceased injury from the deceased father;
- he got to the scene and found the deceased lying down;
- deceased died after 30 minutes;
- he saw knife stabs, behind the head, on the chin, 2 stabs on the chest and on the palm of the hand;
- he witnessed the post-mortem examination.

PW3 FREDRICK OTIENO OPONDO :

- a brother to the deceased;
- on the material day at about 7 p.m. he received a call from an unknown person that his younger brother Kennedy had been stabbed;
- he went to Ukwala health centre and on arrival he found his brother had died;
- he saw injuries on the chest, head, chin and right hand. The deceased was bleeding;
- the deceased body was taken to Busia;
- on 25/7/2008 he witnessed the post-mortem on the deceased at Busia hospital;
- he identified the body;
- the doctor told them that the cause of death was a stab on the heart.

PW4 COLLINS KENNETH OKUYO:

- he recalls that on the 23rd of July, 2008 at about 9.50 p.m. while in the company of his 2 brothers Eric Onyango and Ian Okwasa, Eric received a call through their father's cell phone;
- Eric left and came back with a friend. The accused;
- The accused told them he had had a disagreement with his uncle and requested for a place to sleep;
- As they talked 4 police officers in the company of some youth arrived;
- Eric and the accused were arrested;
- He heard the police say they had murdered;
- The police searched the house and found a knife under the bed;
- He suspected the knife belonged to the accused. He described the knife as a pen knife. He could not identify it in court;
- The knife had blood stains.

PW5 ONESMUS BRIAN WAMBUGU

- A police officer stationed at Ukwala Police Station;
- On 23rd July 2008 at about 9 p.m. he received a call from Sergeant Amakobe, a colleague about a boy who had been attacked and was pronounced dead at the Ukwala health centre;
- In the company of P.C. Shem and P.C. Mbugua they proceeded to Kisoma area;
- They looked for the accused at his grandfather's where they did not find him. They got him at his friend's home at around 11.30 p.m.;
- They searched the house and got a knife where the suspect (accused) was seated;
- described it as a pen knife with a black handle;
- They arrested PW7 and the accused as they were key suspects;
- Later on 25th July, 2008 he witnessed the post-mortem;
- He formed the opinion that the accused was a suspect after talking to key witnesses;
- He spoke to a key witness who saw accused stab the deceased.

PW6 INSPECTOR JAMES CHIPTIONI

- deputy officer in-charge Ukwala Police Station.
- he received the report of the incident and sent P.C. Amakobe and P.C. Wambugu to investigate;
- the officers recovered the murder weapon, a knife and clothes;
- he was the investigating officer;

- he visited the scene;
- he interrogated the suspect and those at the scene;
- accused had no injuries at the time of interrogation on 23/7/2008;
- from the statement of Euphemia (PW9) the deceased started beating the accused.

PW7 ERICK ODUOR ONYANGO :

- He was known to both deceased and the accused;
- was with the accused on 23rd July, 2008 initially at about 5 p.m.;
- they later met and joined the company of PW9 and another lady;
- he later branched off and left the 3;
- later at 6.30 p.m. they bumped into each other with the accused;
- accused informed him that he met a boy who questioned him about PW9 and a fight ensued;
- the accused informed him that the deceased wanted to knife him but the accused instead knifed him on the jaw;
- the accused then received a call from PW9 they parted;
- later he received a call from the accused on his father's phone informing him that the accused would be going to their home;
- the accused arrived at 7.30 p.m.;
- later the police and villagers arrested the accused;
- accused had a pen knife.

PW8 EDWIN OMONDI OTIENO

- he is known to both the deceased and the accused;
- at about 6.30 p.m. on the material day he learnt from one Hesbond that a person had been stabbed;
- he went to PW9's home and she told him Kennedy (the deceased) had been stabbed;
- he found the deceased still alive but breathing with difficulty;
- he took deceased to Ukwala hospital on a bicycle;
- he left PW2 and others entering the hospital with the deceased and in the company of PW9 they followed the accused;
- they found the accused at a shop. He asked the accused to accompany them but the accused refused and walked away;
- he reported the matter to Ukwala Police Station;
- later he accompanied the police who arrested the accused and recovered a knife from him;

PW9 EUPHEMIA ADHIAMBO ODHIAMBO

- A student;
- Known to both the deceased and the accused;
- Accused was her boyfriend when she was in class 6;
- On 23/7/2008 she received a call from the accused ;
- they met after 10 minutes;
- the accused was with PW7;
- She was in the company of a friend (Patricia)
- The 4 walked together up to Kanyawegi when PW7 left;
- They reached her friend's home (Patricia) and her friend branched off;
- She walked on with the accused a bit and they met the deceased coming from the opposite direction cycling;
- The deceased stopped and asked the accused what relationship the accused had with the her , and before he could answer the deceased slapped the accused;
- The deceased was her boyfriend;
- She gave the time of the incident as 6.30 p.m.;
- After the slap a fight ensued;
- She tried to stop them in vain. They fought for 10 minutes

- they were using their fists;
 - She saw the deceased fall and the accused running away;
 - She looked at the deceased and he looked okay;
 - She then sought for help from their worker Kennedy Omondi;
 - A friend of their worker Edwin came and informed them Kennedy had died;
 - The deceased was taken to Ukwala hospital;
 - In the company of Edwin she looked for the accused;
- she called him and agreed to meet him at the post office they did not find him;
later he agreed to meet at lake bar;
- PW8 attempted to arrest the accused but the accused ran off;
 - Later she wrote her statement;
 - At the time of the fight they were only 3 people;
- She did not see any other person;
- The deceased attacked the accused before the accused reacted;

PW10 DR. JOSEPH KISULU of Busia District Hospital

- on the 5th of July, 2008 he carried out a post-mortem examination on the body of Kennedy Ouma Opondo;
- his general observations were:-
- clothes had blood stains and stab holes;
- deceased was an African male of 23 years;
- of average nutrition;
- 5ft 8” tall
 - external observations:
- stab wound on the left side of the chest around the 5th rib 5 cm in length;
- penetrating stab wound right side of chest rear 7th rib – 2cm long;
- stab wound on right knee 2 cm long;
- stab wound on the occipital area 10 cm length and 1 cm deep;
- no fracture of the scalp;
- left mandibular region had stab wound 2cmx1cm,deep;
- Internal observations:
- no fracture but stab wound had gone through the chest to the heart muscle 2cm in length;
- pericardial cavity had blood;
- no fracture on the head;
- He formed the opinion that death was caused by cardio-pulmonary arrest and shock;
- he produced the post-mortem report as an exhibit P1.

The court found the accused had a case to answer after close of the prosecution case. He was a sole witness and gave a sworn statement as follows:-

- He lived in Eldoret and had traveled to Ukwala on the 23rd July, 2007 to see his grandfather over his inheritance as he had lost both his parents.
- On the said day he met with PW9, whom he had last seen in 2001;
- He asked to see PW9’s brothers;
- They were to meet later they then exchanged numbers;
- In the company of PW7 he met PW9 and a friend at about 6 p.m.
- They walked 4 of them up to Kanyawegi when PW7 branched off to see his sister;
- After a short distance PW9’s friend reached her home and left;
- They reached PW9’s home he met her brothers and at about 6.30 p.m. he left in the company of PW9 and after a short distance they the deceased who was cycling he did not know him prior;
- The deceased came down the bicycle, did not greet him but asked what relationship he had with PW9;
- Before he could answer the deceased slapped him, hit him 3 times and told him he would finish him;
- The deceased got a knife from his pocket and knife him on the head.
- The accused then held the deceased hand and the knife faced the deceased, they then

rolled severally;

- The deceased let go the knife which he took and ran off;
- All the while PW9 told the deceased to leave him;
- He later met Erick PW7 whom he told of the attack and injury on his head and finger;
- He did not tell PW7 that he had stabbed the deceased;
- He went home had supper and left for PW7's home as he feared he may be attacked again;
- He called and informed PW7 he would go to his place through PW7's father's cell phone;
- He found PW7 with Ian and Collins his two brothers;
- At about 10 p.m. he heard noise outside people asking him to surrender as he had killed;
- He was shocked to hear that he had killed as at no time did he stab the deceased;
- The police took a pen knife that he had;
- The deceased may have received the stab wound during the struggle when they rolled;
- In cross-examination he stated that when they rolled they were fighting;
- The deceased was angered;
- He was shocked by the attack not angered;
- He was not examined or treated for the alleged injuries he sustained;
- He is 23 years of age.

Having considered the evidence on record from both the prosecution and the accused. I am minded that in criminal cases the onus of proving the case to the required standard which is **"beyond any reasonable doubt"** squarely lies on the prosecution. In the case of **Kioko versus Republic (1983)** at 289 the Court of Appeal had this to say of the burden of proof:

".....

5. In a murder or manslaughter charge the burden never shifts from the prosecution, it is not for the accused to establish his innocent."

The issue for determination herein is whether or not the accused person fatally injured the deceased, and if so whether the ingredients of murder been sufficiently been proved as against the accused

In both the prosecution and defence evidence two things emerge; One, that the deceased and the accused had an altercation on the 23rd of July, 2008. Secondly a knife featured in a fight that ensued.

PW1 in his evidence states that he saw the accused brandishing a knife; although he did not see the accused stab the deceased. **PW2** and **PW3** noted the injuries on the deceased when they first saw the body at the scene and at the Ukwala Health Centre respectively. **PW9** stated that she did not see any knife. That she saw the 2 fought with their fists. on the other The accused on the other hand states that the deceased removed a knife and attempted to stab him. **PW9** stated that she checked the deceased after the accused ran off and found him okay. I do not believe the version of the accused in this regard and I shall treat the evidence of **PW9** cautiously. She was an eye witness but was mean with her evidence she was not truthful as relates to the injuries, her evidence being weighed as against the evidence of **PW1, PW2 PW3 & PW7**. **PW1, PW2 & PW7** saw stab wounds. The post-mortem report refers to several stab wounds and as such I am inclined to find that the deceased sustained stab wounds during the cause of the fight between him and the accused.

PW1 states that he did not see the accused stab the deceased. **PW9** never saw either. From the post-mortem report gives details of stab wounds that the deceased sustained. **PW1, PW2, PW3** and **PW8** stated:

PW1 "the old lady tied the neck with a lessa."

PW2 "I saw the injuries. I saw knife stabs behind the head, on the chin, 2 stabs on the chest and one on the palm of his right hand."

PW3 " I saw injuries on the chest, head, chin and the right hand"

PW8 “we found Kennedy still breathing with difficulties. He had a cut under the jaw.”

The accused denies having stabbed the deceased. He says that he simply defended himself and any injuries sustained may have been at the time of struggle when they rolled and the knife faced the deceased.

There is no direct evidence of how the deceased sustained the injuries from any of the witnesses. **PW9** an eye witness does not allude to a knife. **PW1** who saw the accused with the knife, did not see the accused stabbing. However, on record including the postmortem report show that the deceased received serious stab wounds from a sharp object in various areas of his body inconsistent with injuries that may have been sustained while rolling or struggling with his wrist held and the knife facing him as alluded by the accused.

- wounds sustained were observed in exhibit P1 (the post-mortem) as follows:

- **left chest, around 5th rib 5cm long -penetrated to the heard muscle;**
- **right chest around 7th of 2 cm;**
- **right knee 2cm in length;**
- **left occipital region 10cmx1cm;**
- **left mandibular region 2cmx1cm.**

This is a case where the court must refer to circumstantial evidence as there is no direct evidence of how the stab wounds were sustained. In my view, evidence on record irresistibly point a finger at the accused as the person as the one who inflicted the stab wounds on the deceased. In **R V Kipkering Arap Koske & Another 16 EACA 135**, It was held that:

“In order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

The deceased was found with the stab wounds immediately after, the fight with the accused.

The seriousness of the same cannot be merely washed away as mere defence. The stabs were severe and vicious. The conduct of the accused in running away, hiding at his friends place and keeping away the knife is not the conduct of an innocent person. I therefore find that in the circumstances of this case the accused inflicted the fatal stab wounds on the deceased.

However the court must establish the second ingredient of murder that is malice aforethought.. Did the accused have the intention to kill?

PW9 says that the deceased attacked the accused. Slapped him and did not give him time to answer. The accused evidence agrees with this. The accused says the knife was produced by the deceased. This was not negated by the prosecution. The accused further stated in his evidence that he had just arrived from Eldoret, was not known to the deceased and did not know the relationship between the deceased and **PW9**. I find that the prosecution failed to establish malice aforethought an ingredient of the offence of murder.

Having found that malice aforethought was not established it will therefore be unsafe to sustain a conviction of murder against the accused. Nevertheless the accused inflicted such severe injuries upon the deceased that the justification of self defence cannot hold.

Having taken possession of the knife during the struggle, the accused ought not to have fatally injured the deceased by the very many stabs all over the deceased body. The accused did not just defend himself, he turned vicious and beastly against the deceased.

Having established that the accused did indeed fatally wound the deceased and having found that the

prosecution failed to establish malice aforethought, I find that the action by the accused was brutal and he must be punished for taking away the life of another person. He must face the wrath of the law for the consequences of his vicious action against the deceased I accordingly find him guilty of the lesser offence of manslaughter contrary to section 205 of the Penal Code and convict him accordingly.

Dated and delivered this 27th day of October, 2011

ALI-ARONI
J U D G E

In the presence of:

.....**counsel for State**

.....**counsel for accused**