



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL CASE NO. E021 OF 2020**

**EVANS MARK OONGO.....ACCUSED**

**Versus**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Evans Mark Oongo** the accused, faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 3<sup>rd</sup> April, 2020 at Kuwesi Village, Bongu Sub location in Nyatike Sub County within Migori County, murdered Kennedy Angawa alias Kennedy Otieno Angawa (the deceased).

He pleaded not guilty to the charge and in support of their case, the prosecution called a total of eight (8) witnesses.

**PW1 Dr. Evans Omondi Oyoo** of Kehancha Sub County hospital recalled having conducted the post mortem on the deceased on 4<sup>th</sup> April, 2020 after the body was identified to him. He found that the deceased had three (3) stitched areas on the scalp, a depressed upper jaw; smashed nasal bridge; smashed lower jaw; smashed chin, missing frontal teeth; the fractured and displaced portions of the jaw were in the mouth; right eye was hanging out though still attached; left eye was smashed inwards; bleeding from the ears; injuries on the right shoulder; head had multiple deep cut wounds on the scalp; skull fracture both frontal and temporal as a result there was bleeding on the brain. He formed the opinion that the cause of death was severe head injury secondary to assault with a blunt object.

**Tony Okoth Odek (PW2)**, told the court that both the accused and deceased were known to him; that on 3/4/2020 about 1:50 p.m, he was sent to get a panga from his uncle, Steve Ogutu and when on the road, he saw the accused beating Baba Baftene whose actual name he did not know; that the accused was hitting the deceased with stones on the forehead. He identified three stones which were used to assault the deceased, the big and two (2) small PEX 1 a, 2b and 2c. He ran to call Rose to go and witness the incident.

**PW3 Eliver Akinyi** who said she is also known as Rose, knew both the accused and deceased. She recalled that on 3/4/2020 about midday, Tony, PW2 went to her home running and asked for her mother but her mother was not at home. PW2 inferred her that Mark (Accused) was beating the deceased with a stone. She went to the scene, called the accused by name but the accused warned her to keep away or she would die. Ongoing closer to where the deceased and accused were, she noticed that the deceased's one eye had been removed, the head was split into two and she started screaming and people came. PW3 said that on arrival at the scene, the deceased was still breathing but by the time people arrived he was no longer breathing.

**PW4 Walter Oduk Oguta**, an uncle to the deceased, a brother to the father, recalled that on 6/4/2020 about 3:00p.m, he identified the body of the deceased to the Doctor before post mortem was done. He noticed an injury to the forehead.

**PW5 PC Silas Lusweti** of Panyako Police Post recalled that accused was taken to the police station by members of the Public on 3/4/2020; that just before that the Assistant Chief of Bongu had gone to the police station to report a murder. PW5 rearrested the accused from the members of Public and he went to the scene, found the deceased in a pool of blood; that near the deceased were blood-stained stones. He noted serious injuries to the deceased's face, mouth and hands. He produced the blood stained stones PEX 2.

**PW6 Samuel Kassam**, Assistant Chief of Rage Sub location knew both accused and deceased. He received a call from the area Chief, Isaac informing him of a murder incident at Kowasi village and that Mark Oongo had killed Kennedy. PW6 proceeded to the scene, found the deceased with injuries to the face, head and noticed blood stained stones near the body. On making enquires, he learnt that Mark caused the death and was walking towards Sori. Together with some motor cyclist, they pursued the accused towards Sori but decided to report at Karungu Police Station and it is then that members of Public arrived with the accused. He denied that accused smelt of alcohol on that day but knew that accused used to take alcohol and smoke bhang.

**PW7 Benedict Onyango** of Bongu area knew both accused and the deceased. On 3/4/2020 he heard screams when at his home and heard people say that Mark had killed Osiyu also known as Kennedy Otieno. He went to the scene, saw the deceased with injuries on the face with one eye protruding. He also saw some blood stained stones near the lady, and he heard that the accused was heading to Sori and they decided to pursue him. They found that accused had entered a home and had sat down and arrested him. He took accused to the police station on his motor cycle. PW7 also denied that accused was smelling of alcohol at the time of arrest.

**PW8 CPL Jonathan Katingu** of DCI Nyatike investigated this case. After getting evidence from the witnesses and taking possession of the stones recovered at the scene, he found accused at Karungu police post, took him to Maclader police station where he was charged with the offence of manslaughter in CMCR 663 of 2020. Later on 2/6/2020, he was advised that the accused be charged with murder. He took accused for mental assessment and he was certified fit to stand trial. PW8 produced the stones recovered at the scene as exhibits.

When called upon to defend himself, accused testified on oath that he is a fisherman; that on 3/4/2020 after finishing his work, he went to take alcohol and smoke. When going home, through a short cut, he met the deceased who told him that since he had him alone, he had to explain why he had called him a thief; that the deceased started to hit him with fists on the face, made him fall and when he got up the deceased threatened him. Because the deceased was tall and bigger, he took a stone which was near so that he would frighten the deceased but the deceased continued to chase him; that he threw the stone at the deceased, it hit him on the face. The deceased fell and he ran away; that though deceased used to drink and smoke, that day he was no drunk; that he went and slept and went to the beach at 3:30p.m and they went to get petrol, he saw the deceased's brother who told him he was wanted and he obliged and was arrested.

Accused said that he had called the deceased a thief earlier on when they were drinking alcohol and that he uttered those words when they were drunk; that the deceased was his friend and he never planned to kill him. He denied hitting the deceased several times nor did he take the deceased to hospital or report to the police station.

The State was represented by **Mr. Kimanthi, Senior Assistant Director** of the ODPP while the accused was represented by **Ms Apondi Advocate**. At the close of the defence case both of them filed written submissions.

**Ms. Apondi** submitted that the death of the deceased is not disputed and that indeed an unlawful act was committed by the accused but that he committed it in self defence when he was drunk; that nobody saw the incident leading to the fight between the accused and deceased and hence there is no proof of malice aforethought. Counsel relied on the decision of **Republic vs Ismail Hassein Ibrahim (2018)eKLR** on circumstances when malice aforethought can be inferred; that the prosecution evidence corroborated accused's defence that he was drunk as they confirmed that he is an alcoholic and therefore the accused should be acquitted of the offence of murder.

On his part Mr. Kimanthi, submitted that the defence of intoxication and self defence raised by the accused cannot hold. Relying on Section 13 (1) of the Penal Code on when a defence of intoxication can be raised, counsel submitted that after attacking the deceased, the accused claimed to have left the scene, went to his house meaning he knew exactly what he had done and his state of drunkenness was not such that he did not know what he was doing and that it was wrong and Section 13 (2) cannot assist him.

On the defence of self defence, counsel urged the same is not available to the Accused because he knew that hitting the deceased who was unharmed and helpless with a stone severally would cause grievous harm or death and he cannot hide under the defence of intoxication. Counsel relied on the decision of **Kupele Ole Kitaiga vs Republic Criminal Appeal No. 27 of 2007** where the court warned that one cannot benefit from the defence of self defence where he deliberately induces intoxication.

I have now considered all the evidence on record and the rival submissions.

The death of the deceased is undisputed, PW2 and PW3 witnessed the deceased being assaulted and PW1, the doctor confirmed that the deceased sustained multiple deep cut wounds on the scalp with a fractured skull both frontal and temporal; injuries to the thigh, the face was smashed and the jaws smashed, eye hanging out amongst others injuries. PW1 formed the opinion that, the cause of death was severe head injury subject to assault with a blunt object.

#### **Whether accused caused the unlawful act:**

In his defence, the accused raised self defence and intoxication as his defences. He told the court that he met accused who started to hit him with fists because accused had called him a thief; that he took a stone near where he fell and hit the deceased with it on the face and he fell. In essence the accused claimed to have hit the deceased once but the injuries found on the deceased tell a totally different story. I do not believe that somebody else came and inflicted the injuries on the deceased. PW2 and PW3 saw the accused hit the deceased with the stone on the head while the deceased was already lying on the ground helpless. The injuries found on the deceased speak for themselves. The accused must have repeatedly hit the deceased, not with the bare hands but using stones, one which was very big (PEX2). The head was nearly smashed and injuries were not only on the head but other parts of the body too like the thigh. For emphasis, I think I need to enumerate the injuries that the deceased sustained; incision to maxillary on upper jaw was depressed inwards; nasal bridge was smashed, lower jaw (mandible was depressed inwards; frontal teeth were absent; fractured and deformed portion of the jaw found in the mouth; right eye hanging out, left eye smashed inwards, bruising of the right shoulder; head was found with multiple deep cut wounds; skull was fractured bilaterally and on frontal temporal region, trauma to the brain. All these injuries cannot have been inflicted by one throw of a stone. As the doctor explained, it must have been inflicted by repeated trauma. The accused's defence was totally untrue. I find that it is the accused who caused the unlawful act on the deceased.

#### **Did accused possess malice aforethought?**

Accused raised the defence of intoxication and self defence. As regards self defence, section 17 of the Penal Code provides as follows:-

**“ 17 subject to any express provides in the 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.”

At common law, the defence of self defence is available to one who proves that he used reasonable force;-

1. To defend himself
2. To prevent attack on other person
3. To defend his property

The Court of Appeal in **Ahmed Mohamed Omar and 5 Others =vs= Republic (2014) e KLR** recognized the common law principles in a defence of self defence and held as follows;-

*“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ....Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. .... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”*

In **Victor Nthiga Kiruthu and Another =vs= Republic (2017) e KLR** the court in dismissing self defence started;-

*“The principles that have emerged from these and other authorities are as follows:-*

- (i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one’s family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.*
- (ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.*
- (iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.*
- (iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.*
- (v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case. [Emphasis added]*

In **Ahmed Mohamed Omar (supra)** the court further said

*“If self defence was raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful”*

In **Palmer =vs= Republic (1971) ALL ER 1079** the court said;-

*“ Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self defence.”*

In the instant case, the court appreciates that nobody witnessed whether indeed the deceased attacked accused first as alleged by the accused. We only have the word of accused as to how it all began. However, from the injuries inflicted on the deceased it is obvious that the accused was not acting in self defence. If he hit the deceased once as he claims to have done, then he should not have continued to assault him with stones when the deceased had fallen was helpless and subdued and was no longer a threat. When PW2 arrived at the scene, the deceased was already lying on the ground as the accused hit him with stones and the deceased was crying. By the time PW3 came to the scene, the deceased was still lying on the ground. PW3 whom I believe was truthful even called on the accused to stop hitting the deceased with the stone but he threatened her and that is when she raised alarm. By then though the deceased was breathing, he was not even moving. It means that even if the accused had been threatened by the deceased in the beginning, by the time PW2 arrived at the scene, the deceased was already subdued, on the ground and the accused did not need to hit him anymore but he did. Accused was no longer acting in self defence

and he can not avail himself of that defence. In dismissing the appellant's defence of self defence, the Court of Appeal in **Lucy Mueni Mutava case (supra)** observed paragraph 13.

**“...Besides the multiple cut injuries she inflicted on the deceased at the back of his neck which led to the spinal cord being severed in our view, was way excessive and negated any defence of self defence”.**

I adopt the above finding which is very much similar to the position in this case. The injuries that the Accused inflicted on the deceased were excessive and negated any defence of self defence.

#### **On the defence of intoxication;**

Section 13 of the Penal Code does provide for the defence of intoxication, it reads as follows :-

- 1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**
- 2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-**
  - a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**
  - b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**
- 3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.**
- 4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence .**
- 5) For the purpose of this section, “intoxication’ includes a state produced by narcotics or drugs.”**

The defence of intoxication is however narrow in its application. The defence of intoxication is only available in circumstances set out in Section 13. So that a person who commits an offence when intoxicated is not automatically excused from the consequences of his act. The first instance where the defence will be availed to an accused is where there involuntary intoxication, that is, where intoxication is caused without one's consent or through a malicious or negligent of another. Secondly, the defence is available where, by reason of intoxication one is temporarily insane so that he does not know what he is doing or that it is wrong and lastly under section 13(4) of the Penal Code where accused by reason of intoxication is incapable of forming a specific intent.

In this case, accused claims to have been drunk. Indeed, there is evidence that he used to take alcohol. However, the accused did not tell the court what he had drunk that day or how much he took or when. He has not told the court that as a result of the alcohol he had taken, he was temporarily insane, did not know what he was doing or that it was wrong. It seems he was generally saying that due to the alcohol he had taken his reason or judgment was impaired.

In **Juliana Obare Angeso -vs- Republic CRA 271 of 2008** , the Court of Appeal quoted **David Mugo Maina –v Republic CRA 212 of 2005** where the court observed;-

**“ ..... a party who says he had taken some liquor is not necessarily raising the defence of insanity. Such a person may only be asking the court to take into account the fact of him having consumed liquor and whether that state has deprived him of the ability to form the specific intent to kill.**

**The court is under a duty to consider such a defence where it is raised”**

In this case, the accused explained in detail how the deceased started to hit him with fists because the accused had earlier on called him a thief. He then detailed how he picked a stone and hit the deceased once. From the evidence PW1, PW2 and PW3, it is clear that he did not hit the deceased once but continued to forcibly and repeatedly hit the deceased on the head totally smashing it and inflicting using serious injuries. Accused then claims to have left the scene, went to his home, rested and later left to go and buy petrol. This narration of the events of the day clearly show that his mind was so clear that it cannot have been impaired by alcohol. The accused can not avail himself of the defence of intoxication. If he was drunk he may have hit the deceased once but he repeatedly went on to assault the deceased till he was very dead. Calls by PW3 to have the accused to stop hitting the deceased resulted in him threatening PW3 with and to her life. I will echo the decision of **Kupele Ole Kitaiga =vs= Republic (2009) e KLR CR 27 OF 2007**, where the court said:-

**“A clear message must also go on out to those of the appellant's ilk who deliberately induce drunkenness as a cover up for criminal acts. Unless a plea of intoxication accords with provision of section 13 of the Penal Code, It will not avail the accused and does not avail the appellants in this particular case.**

From the circumstances of this case, the exceptions under section 13 of the Penal Code have not been met. There is no evidence to show that

either the accused was intoxicated or was accidentally intoxicated, or that if he was intoxicated he did not know what he was doing or that it was wrong. I therefore reject both the defences of intoxication and self defence.

The accused had malice afterthought which clearly flows from the nature of injuries that he inflicted on the deceased. He was untruthful when he claimed to have hit the deceased once when the medical evidence and those who saw the deceased tell a different story. I find that the prosecution has proved its case beyond reasonable doubt. The accused person is guilty of the offence of murder as charged and is convicted accordingly.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021**

**R. WENDOH**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Kimanthi. State Counsel**

**Mr. Adawo holding brief for Ms. Apondi for Accused**

**Accused present**

**Ms. Nyauke Court Assistant**