



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. E001 OF 2020 [MURDER]

CORAM: HON R.E. ABURILIJ

STATE.....PROSECUTION

VERSUS

GEORGE OMONDI OWAK.....ACCUSED

JUDGMENT

1. The accused person **GEORGE OMONDI OWAK** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). Particulars of the Information dated 21st October 2020 are that on the 5th day of October, 2020 at around 0030hours at Hagera village, Kaugagi Udenda Sub location in Siaya Sub county within Siaya County the accused murdered one **Geoffrey Ochieng Yamo**.

2. The accused pleaded not guilty to the charge on 28th October 2020. The prosecution called five (5) witnesses to establish a prima facie case against the accused person who upon being placed on his defence, he gave unsworn testimony and called no witness.

Evidence

3. **PW1 George Otieno Onyango** a casual labourer from Mwer testified that on the night of 4/10/2020 he was in his house sleeping when at about 11.40 pm, he heard screams from the road from someone saying he had been invaded and wanted help. It was his testimony that the screams were the voice of Geoffrey Ochieng Yamo whom he knew and was thus able to recognize it.

4. PW1 testified that he got out and went to the scene and on arrival, he found Geoffrey and the accused herein quarrelling. He stated that there was a motorcycle for the accused person and that when he arrived, he saw the deceased falling on his back and noticed that he had been stabbed. He stated that he then heard a phone ringing from the accused person's trouser pocket. It was his testimony that he started struggling with the accused person upon realizing that Geoffrey was stabbed, to snatch the knife from the accused but the accused stabbed PW1 on his right hand and back. PW1 showed the court the resultant scars. He testified that two other people arrived with torches and lit the area and the accused's spectacles fell down.

5. PW1 testified that when he arrived and realized the deceased had been stabbed, he asked the accused what had happened and that the accused stated that he was Akala's grandson and that he had been send. PW1 further testified that he wanted to snatch the accused's phone so that he could have evidence of the accused being at the scene and stabbing the deceased. PW1 stated that he knew both accused and deceased prior to the incident. He stated that there was moonlight on that particular night and further that he also saw the accused when another person came and shone a torch on him. It was his testimony that he knew the accused who used to be a farmhand for a certain person and that he had known the accused for about 5 months whereas he, PW1 used to work for the deceased. He further stated that he did not know the person who came and lit the torch at the scene.

6. It was his testimony that when he escaped from the scene, he ran to a neighbour's home but did not find anyone. He stated that the accused started pushing the motorcycle away from the scene as it started raining. He further stated that he returned to the scene with Daniel, another neighbour, where they recovered the key and goggles and found the deceased already dead. It was his testimony that he snatched a black phone model KGtel from the accused.

7. PW1 identified the accused in the Dock as the one who killed the deceased. He further stated that the deceased's brother came to the scene of the murder that night after he was called and that they went and reported to the police station at Mwer which happened to be closed so they called Siaya Police Station who send 4 police officers to the scene and they took them and the deceased to Siaya Hospital and Mortuary respectively.

8. In cross-examination by Mr. Oduol counsel for the accused, PW1 stated that when he arrived at the scene, he only found the accused person and the deceased whom he both recognized. He stated that on his arrival he found that the accused had stabbed the deceased. He

further stated that while at the scene, 2 people came from the upper part, with torches so he escaped because he did not know who they were and so he ran to a neighbour's place as the people who had come to the scene assisted the accused push his motor cycle. It was his testimony that the deceased did not talk to him.

9. In re-examination, PW1 stated that When he heard screams, he ran to the scene, where he found the accused and the deceased and so including himself, they were three people.

10. **PW2 Ruth Adhiambo Ochieng**, the deceased's wife testified that on 4/10/2020 at about midnight, Millicent her co-wife knocked on her door and called PW2 out saying that she had called PW2 but that the latter was not picking the calls. It was her testimony that her co-wife told her that Dan had called her and told her that their husband had been injured.

11. PW2 testified that she opened the door and saw George and Dan and the latter told her that her husband had been injured. She testified that they went to the scene together and that it was bright because of moonlight. She further stated that she saw someone lying on the road and on arrival she saw the deceased who was already dead. It was her testimony that they found goggles and keys at the scene. She stated that George-PW1 was also in pain and that he told her that he was awakened by screams and went out only to find 'Ogula' (whom she identified by pointing at the accused), stabbing the deceased, and they struggled and 'Ogula' stabbed PW1.

12. It was her testimony that she knew 'Ogula' because he used to ride a motorcycle for her in-law. She further stated that they went to the police station, reported and the body was removed to Siaya Mortuary. She further testified that her co-wife attended the postmortem while her son Dancan Onyango- 'Dan' identified the body to the Doctor with her co-wife.

13. **PW3 Dancan Onyango Ochieng**, the deceased's son testified that on 4/10/2020 at about between 10-11 am he received a call from his uncle Daniel Apondi Akal who informed him that PW3's father had been stabbed and injured.

14. It was his testimony that he called his mother and left Nyadorera for home and that Enroute, he met a crowd and on the road he found his father lying dead. He testified that he was informed by his father's assistant, George Otieno, that George Ogula had stabbed his father. He further testified that he was told of how George Otieno heard screams from PW3's father and on getting out to rescue the deceased, he found PW3's father stabbed and the assailant was still at the scene.

15. PW3 testified that they called the police who went to the scene. He further stated that at first they called Mwer police but did not get help so he called Siaya Police who went to the scene and took them and the deceased to Siaya and placed the deceased in the Mortuary. He testified that the following day they went and recorded statements. He further testified that he was present during postmortem and that he identified the body of his father to the doctor. It was his testimony that he was with his step-mother Ruth Ochieng and his uncle Daniel. PW3 testified that he knew Ogula, the accused, for long as he is a neighbour. He identified the accused in the dock as Ogula.

16. **PW4 No. xxxx PC Ali Abdi** based at DCI Siaya performing investigative and general duties testified that on 5/10/2020 at around 2 am, he was called by the orderly officer of the night, Inspector Juma who told him of a distress call of a murder incident at Mwer, Mahola area. It was his testimony that they proceeded to the scene and on arrival they found a middle aged African man lying in a pool of blood in the middle of the road. He testified that it was raining.

17. It was his testimony that he found PW1 and the family of the deceased as well as a large crowd. He testified that PW1 who was first to go to the scene told him that he was a neighbor and heard screams so when he went to the road, he saw the deceased screaming saying he had been stabbed by one 'Ogula' and that he saw the deceased fighting with the accused herein and saw the accused stab the deceased and that he recovered a phone from the accused as well as 3 muddy pieces of motorcycle TBS keys on a wooden holder. It was his testimony that PW1 also recovered goggles from the accused, which items PW1 handed over to PW4.

18. He further testified that PW1 told him that he intervened in the fight but was overpowered so he escaped with the items. It was his testimony that they removed the body of the deceased to Siaya Mortuary for an autopsy. He further testified that the phone had been rained on so they tried to do forensic examination but no information could be retrieved. He produced the KGtel mobile phone as PEx1.

19. PW4 further produced motorcycle keys recovered from PW1 as PEx2 and further stated that they were unable to recover the motorcycle as they did not get its registration number. He testified that PW1 told him that the accused pushed the motorcycle to run away. He further produced goggles that PW1 had snatched from the accused as PEx3. He attended the post-mortem and that the accused surrendered himself to the police and was processed at Siaya Police Station. PW4 identified the accused in court.

20. In cross-examination, PW4 stated that they established from PW1, who was at the scene, that the accused stabbed the deceased. He further stated that he recorded PW1's statement who said that he heard the deceased call him out by name as they were neighbours. PW4 further testified that PW1 got to the scene and saw a scuffle and intervened but the accused stabbed the deceased and PW1 wrestled with the accused and snatched the items he had produced as exhibits. He further stated that the weapon used for stabbing the deceased was never recovered.

21. **PW5 Dr. Gabriel Wekesa Juma** based at Siaya County Referral Hospital testified that he conducted the deceased's autopsy on the 19/10/2020 at Siaya County Referral Hospital morgue at 3.30 pm. It was his testimony that the deceased was an African male, adult man. On examination, externally, the deceased had no clothing, was a male severely pale all over the body (whitish), with a 5 cm stab wound at the sternum-right in the middle of the chest; at the level of the third rib and another 7 cm stab wound at the 4th intercostal space posteriorly to the right and all sites were stitched.

22. PW5 testified that there were no fractures and no other signs of external injury. In the respiratory system, there was massive right lung haemorrhage from a 5 cm sharp cut on the middle lobe. On examining the cardiovascular system he noticed that the deceased had a collapsed heart and a 5cm cut wound on the left ventricular wall. He further stated that there was pericardial haemorrhage and that all other

systems were normal.

23. PW5 testified that as a result of his postmortem he found the cause of death to be hypovolemic shock following sharp right lung and heart sharp injury with massive intrathoracic haemorrhage. He stated that he issued death certificate No. 1557406 and signed the report and stamped it on 19/10/2020. He produced the postmortem report as an PEx4.

Defence Case

24. Placed on his defence, the accused elected to give an unsworn statement and stated that he would not call any witnesses. It was his testimony that on the night of 4/10/2020 at about 11.00 pm he was in a bar and left at about 11.30 pm with one Simon Ken. He further stated that as they were going home, he was carrying Ken on his motorcycle and that en-route, Ken told the accused that he had left his phone in the bar where they had sat so the accused person herein rode back to the bar before closure time. He testified that he called the bartender telling him that Ken had forgotten his phone in the bar and that he was returning for it. He stated that he left Ken at the River and rode fast to the bar where he found the bartender who dialed Ken's phone that was picked up by a lady who said that she was at Mwer where he proceeded to pick the phone. He testified that it was about midnight when he was given the phone by Ogada, whose wife had picked the phone. He testified that he left Ogada's house at Mwer alone and went to pick Ken at the river but on reaching a junction, with his lights on full light, he saw someone waving at him whom he thought was Ken.

25. The accused testified that he stopped, then another person emerged and they started beating him. He testified that he could identify one person by appearance and that the bar owner called him asking whether he had recovered the phone. He testified that when his attackers heard him speak on phone, they took his motorcycle, the key and his phone and went away. He stated that he ran away. He further stated that he had been hit on the knees.

26. The accused further testified that he ran and returned to talk to them and told them that he knew one of them whom he had given a lift at one time but his assailants continued assaulting him. He further testified that a torch and knife which they had fell down and so he picked the knife and started running away but one of them ran after him trying to snatch the knife and in the ensuing scuffle, the knife injured the person.

27. The accused testified that he ran to where his motorcycle was but the person who wanted to ride off with his motorcycle wrestled him so he used the knife to stab him on his hand so he left him and he ran up to Mama Tonny's where he called out and explained to her what had transpired on the material night.

28. It was his testimony that when he went home he found many people gathered so he went to Mwer to report the incident. He further testified that he accepted he was the one who killed the deceased as they were fighting over the knife which the deceased wanted to snatch from the accused after they attacked him.

Analysis & Determination

29. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari v Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

(a) the death of the deceased occurred;

(b) that the accused committed the unlawful act which caused the death of the deceased; and

(c) that the accused had malice aforethought.

30. On the death of the deceased, the same been proved by the PW1, 2, 3, and 4 all who saw the deceased's body at the scene of the crime and subsequently during the post-mortem and by the post-mortem form PEx4 produced by PW5 that confirms that deceased *died of hypovolemic shock following sharp right lung and heart sharp injury with massive intrathoracic haemorrhage*.

31. As to whether the accused committed the unlawful act causing the deceased's death, the accused has conceded that he committed the unlawful act which caused the death of the deceased. From the foregoing; I find that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which constitutes the '*actus reus*' of the offence.

32. On whether the accused had malice aforethought, the court must determine whether the accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. The ingredients of murder were explained in the case of **Roba Galma Wario v Republic [2015] eKLR** where the court held that;

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

33. In the case of **Nzuki v Republic [1993] KLR 171**, the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- *Intention to cause death*

- *Intention to cause grievous bodily harm*

- *Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.*

34. In the case of **Daniel Muthee v Republic Criminal Appeal No. 218 of 2005 (UR)** cited in the case of **Republic v Lawrence Mukaria & Another [2014] eKLR**, Bosire, O'kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

35. The accused raised the issue of self defence saying that one of his assailants was injured in a scuffle he had with the deceased while the deceased's co-assailant was stabbed on the hand as he was escaping with the accused's motorcycle.

36. Section 17 of the Penal Code reads that:-

“Subject to any express provisions in this code or any law in operation in Kenya, Criminal responsibility for the use of force in the defense of person or property shall be determined according to the principles of English Common Law.”

37. At Common Law the defence of *Self-defence* allows a person to use reasonable force to:-

i. Defend himself

ii. Prevent attack of another person

iii. Defend his property

38. The defence of *self-defence* if successful, accords the defendant complete acquittal. However, in *self-defence* only use of reasonable force, given the circumstances is allowed or acceptable.

39. The issue of self defence was discussed by the Court of Appeal in the case of **Ahmed Mohammed Omar & 5 Others v Republic [2014] eKLR** where the court held as follows;

“What are the common law principles relating to self defence” The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in PALMER VS R [1971] AC 818. The decision was approved and followed by the Court of Appeal in R VS McINNES, 55 Lord Morris, delivering the judgment of the Board, said:

“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.”

40. The Court of Appeal further held that;

“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.”

41. From the above decisions, the following evidential issues are relevant which the prosecution has the burden to negate that the accused in using force had no honest and reasonable belief that he was under threat of bodily injury from his attackers. That though the attack was imminent he had an opportunity to retreat. Further, the use of force was disproportionate to the imminent or immediate danger from the assailant. That the use of reasonable force was not for the sole objective to protect self and some other person. What were the threats that operated on the accused's mind before he pulled the trigger? In the case of **Walsh Versus Republic 1991 A Criminal R 423-424** he directed

the jury on what to take into account on this respect to include:

“The surrounding circumstances (place, darkness, relative size of the attackers), the defendant, prior knowledge about the deceased, that he was a man with some military experience, the defendant’s personal experiences, which make him more susceptible to fear the consequences and more likely to perceive a necessity for immediate and drastic action.”

42. The Court of Appeal in the case of **Victor Nthiga Kiruthu & another v R [2017] eKLR** while discussing self defence stated:

“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 one’s 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]

43. In this case, the accused testified that the deceased was stabbed in a scuffle with him after trying to snatch the knife from him and in the ensuing scuffle, the knife injured him. He further stated that the deceased’s co-assailant was stabbed in the hand whilst trying to escape with his motorcycle. The question is whether the accused faced imminent danger to justify using the force that he applied in hitting back.

44. Juxtaposed against this testimony, PW1 testified that he heard screams of the deceased from the road whilst at home. He testified that when he went to the scene, he found the accused and the deceased quarrelling and that he saw the deceased falling on his back and noticed that he had been stabbed. PW5 who performed the deceased’s autopsy and testified that on examining the deceased’s body he noticed a 5 cm stab wound at the sternum-right in the middle of the chest; at the level of the third rib and another 7 cm stab wound at the 4th intercostal space posteriorly to the right all sites were stitched. PW5 further testified that the deceased had a collapsed heart and a 5cm cut wound on the left ventricular wall.

45. In my view this points to the fact that contrary to the accused’s allegation, the deceased was stabbed twice and that the stabbings were so intense and deep to reach his heart. In my view this does not amount to self-defence force given the circumstances that the accused was alleging, that he was trying to escape from the deceased and his co-assailants. I reject that defense of self-defence.

46. I have considered the injuries occasioned to the deceased and I highly doubt that such injuries were inflicted by a person acting in self-defence. I am not persuaded by the evidence that the accused acted in self defence. His action was out of proportion. The attack on the deceased leaves no doubt in my mind that the accused must have known that the act of stabbing the deceased on the chest with a knife would cause him grievous harm or death.

47. I find the prosecution evidence overwhelming and it effectively dislodged the defence offered by the accused. I am therefore satisfied that malice aforethought has been established in terms of Section 206(b) of the Penal Code.

48. Consequently, I find and hold that the prosecution has proved the charge of murder against the accused person beyond reasonable doubt. I find the accused person **George Omondi Owak** guilty of the Information of murder as charged and convict him accordingly. Sentence will be after records and mitigation.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 15TH DAY OF DECEMBER, 2021

R.E. ABURILI

JUDGE