



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 2 OF 2017

REPUBLIC .....PROSECUTOR

VERSUS

DAVID ALEMU ODEKE .....ACCUSED

JUDGMENT

1. **David Alemu Odeke** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 26<sup>th</sup> day of January 2017, at **Awata** village Kakoli sub location, Okuleu location in **Teso North** sub County of **Busia** County, murdered **Moses Okasirim**.
3. The prosecution case was that when the accused returned home and found his children having been sent to fetch water, he became enraged and threatened to kill. He subsequently killed his brother using a machete.
4. In his defence, the accused contended that after quarrelling with his brother, he only pushed him. He claimed that at the time of the incident he was drunk.
5. The issues for determination are:
  - a) Whether the defence of intoxication is available to the accused;
  - b) Whether the accused was provoked into his action; and
  - c) Whether the offence of murder was established against him.
6. The evidence on record establish that the accused and his wife had separated. His children were mostly taken care of by his parents. On the fateful evening, the accused returned home at about 9 p.m. and found the rest of the family eating. This is according to the evidence of his father, Alfred Alimu Imakide (PW1). He (accused) enquired about the whereabouts of his children. When he was told by his mother that they had gone to fetch water, he complained that his children were being sent to work and threatened that he was going to kill somebody.
7. According to this witness, the accused had a confrontation with the deceased in the house and when he got hold of the deceased, he separated the duo and the accused went to his house. He further said that the accused used to claim that he (PW1) favoured the deceased.
8. Andrew Omonya (PW2) testified that the accused found him at the river where he had been sent by his grandmother to check on the children. The accused took his children home and returned after about ten minutes. He was annoyed and accused Moses (the deceased) to be the one giving orders in the home. He removed a machete from his waist and cut the deceased on the head, neck and on the hand.
9. The accused in his defence contended that the deceased asked him why he came from drinking to ask for his children. He said since he had taken alcohol. They pushed each other and the deceased wanted to cut him with a machete he (deceased) had. He pushed the deceased who fell down.
10. Section 13 (2) of the Penal Code provides:

**(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.**

11. In addition, section 13 (4) of the Penal Code provides that the state of intoxication shall be taken into account in determining whether or not an accused person had the necessary mens rea in committing a crime. That section provides that:

**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.**

12. From the evidence on record, it is clear that the defence of intoxication is not available to the accused person.

13. What is provocation? Section 208 (1) of the Penal Code defines the term provocation as follows:

**The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.**

14. In order for the defence of provocation to be available certain conditions must be met. In the case of **Kato vs. Uganda [2002] 1 E A 92** at page **108** stated:

**The former Supreme Court has interpreted two sections thereof meaning that before a charge of murder can be reduced to manslaughter on ground of provocation, the following conditions must be satisfied;**

**a) the death must have been caused in the heat of passion before there is time cool;**

**b) the provocation must be sudden;**

**c) the provocation must be caused by a wrongful act or insult**

**d) The wrongful act or insult must be in such a nature as would likely to deprive an ordinary person of the class to which the Appellant belongs the power of self-control. It is obvious from this that any individual idiosyncrasy, such as for instance as that the accused is a person who is more readily provoked to passion than the ordinary person, is of no avail; and**

**e) Finally, the provocation must be such as to induce the person provoked to assault the person by whom the act or insult was done or offered.**

**This last provision in our opinion means (provided, of course, that all the other conditions referred are present) that if the provocation is such as to be likely to induce an assault of any kind, then the accused should be found guilty of manslaughter and not murder irrespective of whether the assault was carried out with a deadly weapon, or by other means calculated to kill. See Rex v Hussein s/o Mohamed 9 EACA 152; Yovan v Uganda [1970 EA 405; Chacha s/o Wamburu v Republic [1953] 20 EACA 339.**

15. Though we were not given the ages of the children of the accused, the fact that they were sent to fetch water alone at night may have given an impression of discrimination even if that was not the case. In my view, this coupled with the fact that the accused had imbibed some alcohol may have deprived him the capacity to be rational and therefore form the necessary *mens rea*. The defence of intoxication is however, not available to him.

16. The defence of the accused that he only pushed the deceased is not supported by the evidence on record. The medical evidence by Dr. Ombongi (PW5) displaced his defence. The injuries could not have been sustained from a fall.

17. I am persuaded therefore to make a finding that malice aforethought was not proved to the required standards. I acquit the accused of the offence of murder. I however find that the prosecution has proved the lesser offence of manslaughter beyond any reasonable doubt. I find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED and SIGNED at BUSIA this 20<sup>th</sup> day of February, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**