



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL CASE NO. 1 OF 2019

REPUBLIC.....PROSECUTOR

-versus-

JOASH OTIENO OKETCH *alias* SINA..... ACCUSED

JUDGMENT

1. The accused person herein, **Joash Otieno Oketch *alias* Sina**, was charged with the murder of **David Odhiambo Okuji** (hereinafter referred to as '**the deceased**'). It was alleged that the accused person murdered the deceased on 04/02/2019 at Wasio village in Suna East Sub-County within Migori County.
2. The accused person denied committing the offence. The case was set for hearing.
3. The trial was comprised of ten prosecution witnesses and one defence witness. The prosecution witnesses were the wife of the deceased who testified as **PW1**. She was **Rose Awino. Dr. Olango Sylvester Ochieng** who conducted the post mortem examination on the deceased's body testified as **PW2**. **PW3** was the Senior Chief of God Joppe Location. He was **Luke Ouma Ochieng**. A cousin to both the accused person and the deceased testified as **PW4**. He was **Caleb Otieno Ogolla**. **PW5** was **Erick Omondi Okuji**, a younger brother to the deceased. **PW6** was **Francis Oduor** who was an elder brother to the deceased. **No. 70665 Corp. John Muithya** attached to that the Migori Police Station Crime Branch testified as **PW7**. **No. 79093 Corp. James Olago** attached to the Scenes of Crime Section at the DCI Migori testified as **PW8**. A Government Analyst testified as **PW9**. He was **Dalmas Kibet Kipsang** attached at the Government Chemist Laboratories in Kisumu. The Investigating Officer **No. 87935 Cpl. Luke Rotich** testified as **PW10**.
4. At the close of the prosecution's case the accused person was placed on his defence. He gave an unsworn statement and called his wife as a witness. The wife was one **Agnes Aoko** who testified as **DW1**. The accused person was a Village Elder.
5. I will henceforth refer to the witnesses in the numerical sequence they testified before Court.
6. The prosecution's case was that at around 10:00pm on 04/02/2019 the deceased and the accused person were engaged in a disagreement outside the house of the deceased. It ended up with the deceased being injured on his neck. The deceased then collapsed and died. **PW1** allegedly witnessed the scuffle.
7. **PW1** raised alarm and several people rushed to the scene. They included **PW3**, **PW4**, **PW5**, **PW6** among many others. **PW3** called the OCS Migori Police Station and informed him of the incident. The police visited the scene the very night. They included **PW7**.
8. **PW7** observed the scene carefully. He saw the lifeless body of the deceased lying on the ground near the house of the deceased. The body had an injury on the neck. **PW7** interrogated the people who were at the scene. He in particular talked to **PW1**. He then photographed the body and placed it in the police vehicle. He was later accompanied and led by some of those at the scene to the house of the accused person.
9. The house of the accused person was about 100 metres from the scene. **PW7** found the accused person inside his house. He interrogated him about the incident. He arrested him and conducted a search in the house. **PW7** recovered a knife which had fresh blood stains under a mattress which was on the bed of the accused person. He also recovered a black jacket which had fresh blood stains. **PW7** escorted the accused person to Migori Police Station. He took the body of the deceased to the Migori County Referral Hospital Mortuary for preservation and further police action.
10. **PW10** was tasked to investigate the matter. He took over the investigations on 05/02/2019 from the Migori Police Station officers. He was also handed over the exhibits which **PW7** had recovered in the house of the accused person.

11. PW10 recorded statements from witnesses and witnessed a post mortem examination conducted by PW2 at Migori County Referral Hospital Mortuary on 06/02/2019.

12. PW2 observed the body of the deceased. He noted that the two major vessels around the neck (carotoid and jugular) were cut through. He opined that the cause of death of the deceased was internal bleeding secondary to trauma to major vessels on the neck. He filled and signed a Post Mortem Report.

13. PW10 prepared the police file on the matter and forwarded it to the Office of the Director of Public Prosecutions for advice. Upon given the greenlight to charge the accused person with the murder PW10 escorted the accused person to Migori County Referral Hospital for mental assessment on 06/02/2019. The accused person was thereafter formally charged.

14. PW2 produced the Post Mortem Report as an exhibit. PW8 produced the photographs in his evidence. PW9 produced the Analyst Report whereas PW10 produced the knife, the black jacket, the Police Exhibit Memo and the Mental Assessment Report as exhibits.

15. At the close of the prosecution's case the accused person was placed on his defence. He opted to give an unsworn statement and called DW1. He denied committing the offence. He stated that in the night of 04/02/2019 he was asleep in his house with his wife (DW1) when police officers visited his home. The accused person was arrested and the police recovered a knife and his jacket. He was led to a waiting police vehicle. He boarded the vehicle on the instructions of the police and saw a dead body therein. The body had a lot of blood on it.

16. The accused person further testified that the police placed the knife and the jacket which they had recovered from the accused person's house on the dead body and that is how the items got stained with human blood.

17. DW1 corroborated the evidence of the accused person.

18. At the close of the defence case the Defence Counsel **Mr. Awino Odondi** tendered oral submissions. He argued that the offence was not proved as identification of the assailant was not properly handled and proved. Counsel also argued that the knife and jacket were placed on the body of the deceased a result whereof they were stained with human blood. Counsel prayed that the accused person be acquitted.

19. Learned Senior Principal Prosecution Counsel **Mr. Kimanthi** submitted that the offence was proved as required in law. He further submitted that the accused person was rightly placed at the scene of crime as the assailant. Counsel prayed that the accused person be found guilty and convicted as charged.

20. It is on the foregone evidence that this Court is called upon to render this judgment. I have carefully considered the evidence on record as well as the exhibits. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients:

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(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will consider each of the ingredients separately.

21. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by PW1, PW2, PW3 PW4, PW5 and PW6. The first limb is hence answered in the affirmative.

22. As to the cause of the death of the deceased, PW2 produced a Post Mortem Report which he prepared upon conducting the post mortem examination. The said report gave the possible cause of death of the deceased to have been internal bleeding secondary to trauma to major vessels on the neck. As there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

23. Turning to the second ingredient; that is to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person, I am aware that the eye-witness account touching on the accused person's involvement in the death of the deceased was by PW1. She was the wife of the deceased. All the other witnesses only came up after the occurrence of the actions complained of. PW1 is hence the sole identifying witness in this case.

24. In such an instance and given that the identification of the assailant is contested this Court is under a legal duty to weigh the evidence of PW1 with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence on recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under: -

It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

It was also held in Nzaro vs Republic (1991) KAR 212 and Kiarie vs Republic (1984) KLR 739 by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

25. In R –vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?..... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

26. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR in upholding the evidence of recognition at night held as follows: -

On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...

27. Again the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night: -

We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.

28. On corroboration, **Section 124 of the Evidence Act, Cap. 80** of the Laws of Kenya calls for a conviction in a criminal trial to be based on corroboration by any other material evidence save in sexual offences. Corroboration is hence not limited to only eye-witnesses accounts. Corroboration can be found in any other material evidence before Court. I am alive to the persuasive decision of the Court of Appeal of Uganda in Obwana & Others vs. Uganda (2009)2 EA 333 where in dealing with the issue of conviction in the absence of corroboration the Court presented itself thus:

.....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence.

29. PW1 gave a candid narration of what transpired on the material day. The incident occurred outside the house where both PW1 and the deceased lived. There was bright moonlight and PW1 stated that visibility was not impaired. PW1 also stated that she used a powerful lamp that night. PW1 posited that she knew the accused person (both physically and by voice recognition) as the accused person was their neighbour. He was also the village elder. PW1 had known the accused person since she was married into the home of the deceased 6 years back.

30. On the fateful night, PW1 was taking a bath outside her house. She was in the dark but could see clearly as there was bright moonlight. She also had a large all-round D-Light which she had placed at the door of her house and illuminated the compound. By that time the deceased was not at home. PW1 then heard the deceased returning home. The deceased seemed to have been in the company of someone whom they engaged in a verbal exchange. They were using the Dholuo language. PW1 heard the deceased ask the person he was with, whom he referred to as ‘Sina’, if he will continue to threaten him even in his homestead. The deceased and Sina were about 80 metres from where PW1 was.

31. The name ‘Sina’ was very familiar to PW1. She readily knew who ‘Sina’ was. To her ‘Sina’ was the accused person. PW1 finished taking bath and went inside her house. She then came out of the house and was just by the door. She could see well within her compound. The deceased and the accused person then reached where PW1 was.

32. PW1 heard the deceased ask the accused person what it was all about. Suddenly PW1 heard the sound of something hitting someone and she ran inside the house. While inside the house she heard the accused person asking the deceased what had happened. The deceased entered the house in a hurry and asked for a panga. PW1 did not have one but gave him a hoe stick. The deceased ran outside the house. PW1

followed the deceased who was bleeding from the neck.

33. PW1 saw the accused person outside the house. She was aided by the bright lamp which was still outside the house and the moonlight. She saw the accused person from a distance of about 10 metres. Although PW1 saw the person from the back she readily recognized him as the accused person. She also confirmed that the voice she had heard was indeed that of the accused person. According to PW1 the accused person was dressed in a black jacket and wore gum boots.

34. The deceased was by then profusely bleeding from the injury on the neck. He told PW1 that it was the accused person who had killed him. The deceased then collapsed as the accused person went towards his house. PW1 raised alarm and many people gathered. PW1 cried and repeatedly mentioned the name of the accused person as the one who had killed her husband. She even told the police when they visited the scene as such.

35. PW1 identified the black jacket in Court. She had previously seen the accused person dressed in the jacket.

36. PW1's evidence was duly corroborated by PW2, PW7, PW9 and PW10. PW2 who conducted the post mortem examination on the body of the deceased found a deep cut wound on the neck. The injury had totally severed the main vessels on the neck. PW9 analyzed the knife against the blood of the deceased. He successfully generated DNA profiles from both the blood of the deceased and the bloodstains on the knife. PW9 found out that both DNA profiles matched. The blood on the knife was hence confirmed to have been that of the deceased.

37. PW7 recovered the blood-stained knife and the jacket from the house of the accused person soon after the deceased was injured. Both had fresh blood stains. He preserved the items well and handed them over to PW10. It was PW10 who forwarded the knife and the blood sample which he collected during the autopsy to PW9 for analysis.

38. The accused person denied the offence. He admitted that PW7 had recovered the knife and the black jacket from his house. He however stated that the knife and the black jacket had been deliberately stained with the blood of the deceased by PW7 who placed the items on the body of the deceased in the police vehicle. The body was at the rear of the police vehicle.

39. PW7 rebutted the proposition that he had intentionally stained the items. He stated that he sat at the front of the police vehicle as the body was at the rear. He clarified that he personally held the items he had recovered from the house of the accused person as they headed back to the police station. PW7 further stated that he did not know any of the parties in the matter including PW1, the deceased and the accused person before the incident.

40. I find the accused person's proposition that his knife and jacket were intentionally stained with the blood of the deceased by PW7 as untenable. PW7 did not know any of the parties prior to the incident. As such, it would not be reasonably foreseeable that PW7 committed as an act. I find it hard to believe that PW7 had an interest in the matter at that point in time to act in such a manner. That line of defence is hereby rejected.

41. This Court observed the demeanor of the witnesses as they testified. The prosecution witnesses were candid and straight-forward. They also withstood and were not shaken in cross-examination. This Court formed the opinion that the witnesses were truthful and credible and their evidence reliable.

42. I have properly cautioned myself on the evidence of PW1 being a sole identifying witness. From the foregone, by placing the prosecution's evidence against that of the defence I find that there was ample and corroborated evidence to the effect that the recognition of the accused person as the assailant was not in doubt. The accused person was rightly placed at the scene. PW1 did not therefore err in contending that it was the accused person who injured the deceased.

43. The second ingredient is hence proved.

44. I will now consider the third limb as to whether there was malice aforethought on the part of the accused in committing the act complained of in this case. As the safest tradition the starting point is the law. **Section 206** of the Penal Code defines 'malice aforethought' as follows:

206. 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.

45. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs**

R (1993) KLR 171, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

i) *The intention to cause death;*

ii) *The intention to cause grievous bodily harm;*

iii) *Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.*

*It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions (1975) AC 55*". (emphasis added).*

46. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the conviction of murder with manslaughter observed: -

There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

47. In this case there is no evidence that the accused person planned to kill the deceased. Infact it is not clear why the two differed. PW1 only witnessed the attack. I hence find no evidence of malice aforethought in this case and the third ingredient of murder fails.

48. Having so found, the foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

49. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analyzed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

50. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 17th day of February, 2020

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Awino, Counsel for the Accused person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant