



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL MURDER NO.15 OF 2018**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**TOBIAS OTIENO OGUTU .....1<sup>ST</sup> ACCUSED**

**JOEL OGUTU MATINDE.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

[1] **Tobias Otieno Ogutu** and **Joel Ogutu Matinde** (accused one and two respectively), are charged with murder, contrary to **Section 203** as ready with **Section 204** of the **Penal Code**. It is alleged that on the 9<sup>th</sup> March 2018 at Nyandenga village in Kamreri East, Mbita, Homa Bay County, they jointly murdered Justus Opiyo Okeyo.

[2] It was the prosecution case that on that material Date at about 9.30 p.m., the deceased accompanied by a friend proceeded to his mother's house and stored his motor cycle. He was a motor cycle taxi (boda boda) operator. Thereafter, he left with his friend and went away. His mother, **Redempta Akinyi Okeyo (PW1)**, later on the same night found him at his house with an injury on the forehead. He told her that he had been assaulted by the second accused.

[3] His wife, **Lillian Auma Opiyo (PW2)**, confirmed that the deceased arrived home with a bleeding injury on the forehead and in the company of his friends Leonard and Bernard. He told her that he had been assaulted with a stone by the Olman Ogutu (second accused) but was O.K. He requested that he be taken to hospital on the following day.

[4] **Leonard Owino Odhiambo (PW3)**, a boda boda operator was on his way home after closing business at about 8.30 p.m. when he saw the deceased in the company of the first accused. They were intoxicated and holding each other in a manner suggesting that they were wrestling. He made an attempt to separate them and at that juncture the second accused appeared at the scene and was told by his son (first accused) to leave them alone.

[5] He (PW3) succeeded in separating the first accused and the deceased. While the first accused fell down after being separated, the deceased was bleeding from the forehead and made a request that his cousin Leonard, be called to the scene. He (PW3) called the cousin and thereafter left the scene.

[6] The cousin, **Leonard Oduma Odhiambo (PW5)**, later arrived at the scene and found the deceased bleeding. He was told by the deceased that there was a disagreement between him and the first accused over a motor cycle taxi fare and in the process he was assaulted by the first accused and his father, the second accused. He (PW5) took the deceased to his house and handed him over to his wife.

[7] On the following day, the deceased approached a pharmacist, **Okombo John Onyango (PW6)**, who noted a head injury on him. The deceased asked to be given drugs as the personnel at the local district hospital were on strike. He told the pharmacist that he was assaulted after disagreeing with a client over an allegation of theft of money from the client.

[8] The pharmacist applied first aid on the deceased and sold to him the necessary drugs for the head injury complained of. He noted at the time that the deceased was not bleeding. His sickly condition worsened at a later stage such that his mother and wife took him to Homa Bay Referral Hospital where he died while undergoing treatment.

[9] A post mortem examination carried out on the deceased by **Dr. Cardius Owiti (PW7)** and a colleague, **Dr. Kevin Osuri**, revealed that the case of death was peritonitis due to gut perforation due to a blunt physical abdominal trauma. The two doctors completed and signed the necessary post mortem report (**P. Exhibit 1**).

[10] A cousin of the deceased, **Calvince Omondi Onguru (PW4)**, identified the body of the deceased for postmortem purposes and after completion of police investigations by **PC Christopher Ndegwa (PW8)**, the two accused were arrested and charged with the present

offence.

Both denied the offence. Accused one, indicated that he was at a changaa (illicit liquor) drinking den on the material night with colleagues when the deceased joined them as they joked around. Later, the deceased who was a “boda boda” operator and a village mate agreed to take him home.

[11] He (deceased) carried him (accused one) and a colleague on a motor cycle but the colleague alighted on the way. On arrival at his destination, the first accused asked for the balance of the fare he had earlier paid. The deceased declined to give the balance and this resulted in a quarrel. He (accused one) did not remember what happened next.

He only found himself at home on the following day with an injury on his head.

[12] In his defence, the second accused indicated that he was at home in bed when he was awakened by noises next to his home on a public road. He proceeded to the scene and found three people, among them his son (accused one), on the ground. All of them had injuries on their faces. He (accused two) assisted them to wash their faces and while his son staggered into their house, the deceased climbed on his motor cycle and rode away. He could not tell whether the trio had fought as they were on the ground when he arrived there.

[13] **Micheal Omondi Ogutu (DW1)** who is also a son of the second accused and brother to the first accused, was attracted to the scene by his father’s shouts. He was then instructed by the father to fetch water. He did so and returned to the scene and found his father, a motor cycle rider called Owino Odhiambo and the deceased. He noted that the deceased had an injury on the head. His father washed the deceased’s face despite his resistance.

[14] A nurse at Obalunda dispensary in Mbita, **Micheal Mburu Mugo (DW3)**, confirmed that the deceased had sought treatment at the facility on the 20<sup>th</sup> March 2018, after having given a history of having fallen down in a drinking club and suffering a back injury. He was given pain killers and referred to a higher medical facility.

[15] **Dr. Raymond Otieno Simba (DW4)**, indicated that the postmortem report (**P. Exhibit 1**) which was prepared and signed by his colleagues was consistent with the injuries suffered by the deceased.

He opined that if the deceased was hit on the forehead only, abdominal injuries or peritonitis would not occur. He confirmed that an abdominal injury may be caused by a hard fall on one’s abdomen and may cause peritonitis.

[16] The foregoing summary of the case for the prosecution as well as the defence arising from the stated evidential facts does not raise any dispute that the deceased was on the material date injured on the forehead after being involved in a brawl and/or quarrel with the first accused and probably another person. The only person who may have witnessed the brawl as it turned physical was Leonard Owino (**PW3**). He confirmed that the two were intoxicated at the time.

[17] There was no denial from the two accused that such a brawl may have occurred and that it resulted in the deceased being injured on the head. Accused one indicated that he “blacked out” in the process and did not know what happened thereafter. Accused two indicated that he arrived at the scene after the fact and assisted the injured who appeared to have been involved in a fight.

[18] The deceased’s mother (PW1) and wife (PW2) and cousin (PW5) indicated that the deceased informed them that he had been assaulted and injured by the two accused after a disagreement over motor cycle taxi fare. All of them confirmed that the deceased was referred to the injury on his forehead. They talked of the object used in the assault as having been a stone or a club (rungu). However, they never witnessed what was told to them and the cause thereof. Their evidence against the accused persons was at most indirect and essentially based on hearsay. Its contradiction and inconsistency regarding the object used in the assault and what each one of them was separately told by the deceased when they found him injured on the forehead rendered the evidence most unreliable even if it were to be treated as a dying declaration.

[19] Most significantly, the two witnesses, (PW1 and PW2) did not corroborate each other on what was exactly stated by the deceased regarding the incident and the identity of the assailants. Not even the evidence of a third party or independent witness was availed to corroborate and establish the supposed dying declaration, so, even if the evidence of the two witnesses was reliable and treatable as a dying declaration, it remained inadmissible for want of proper and cogent corroboration and cannot form a basis for the conviction of the accused or either of them.

[20] Leonard Owino (PW3) was the only witness who provided what was seemingly direct evidence against the accused and in particular, the first accused. He clearly indicated that the first accused and the deceased were involved in a brawl and in the process, the deceased was injured on the forehead. He found them in the act and succeeded in separating them from each other’s grip. He exonerated the second accused from the incident inasmuch as he stated that he (second accused) was told by his son (accused one) to leave him (the son) and the deceased alone.

[21] At most, the evidence by Leonard (PW3) indicated that if indeed the deceased died as a result of the injury inflicted on him on the forehead, then this was more accidental than intentional as the first accused and the deceased were merely involved in a scuffle while in a drunken state which proved deadly due to the excessive force used against the deceased by the first accused.

Calvince Omondi (**PW4**) identified the body of the deceased for postmortem purposes. That was the only role he played. He could not therefore tell how the deceased was injured and by whom.

[22] Leonard Oduma (**PW5**) arrived at the scene of the incident after the fact. He proceeded there to assist his deceased cousin who had

been injured and was bleeding. He was told by the deceased that the assailants were the two accused and that they had used a stone to cause him injury. Although this was indirect evidence regarded by the prosecution as a dying declaration, it remained inadmissible for want of credible corroboration and proof. It could not therefore form a basis for the conviction of the accused or either of them as the evidence of the mother of the deceased (PW1) and his wife (PdW2) was incapable of offering the desired corroboration, neither could the evidence itself offer adequate and credible corroboration of the two witnesses' respective evidence.

[23] The pharmacist's (PW6) evidence was merely to confirm that he administered first aid upon the deceased a day after the incident and this, after he complained of an injury to the head and nothing else.

P.C. Christopher Ndegwa (PW8) centered his investigations on recording statements from the witnesses and nothing more of significance. He arranged for the postmortem to be conducted by two doctors and implied that the public interest surrounding the matter may have pressurized him to arraign the accused in court for murder.

[24] However, the most vital evidence with regard to the charge was that of Leonard Owino (PW3). It was direct evidence against the accused but only tendered to implicate the first rather than the second accused for the offence of manslaughter rather than murder as it clearly showed that in brawling with the deceased, the first accused did not have the necessary intention to kill or malice aforethought.

[25] But, just like in an offence for murder, the cause of death must also be determined even in an offence of manslaughter. A person would only be criminally responsible for the death of another, if his criminal act was the actual cause of death.

Cause of death is therefore a vital element in a charge of murder as extended to manslaughter. It is therefore imperative that for a charge of murder or manslaughter to stand, the prosecution is obligated to prove the cause of death beyond reasonable doubt.

[26] The burden of proof in all criminal cases remains on the prosecution (See, **Mkendeshwa –vs- Republic [2002] 1 KLR 461**) and as a general rule the accused assumes no legal burden of establishing his innocence except in certain limited cases where the law places a burden on the accused person to explain matters which are peculiarly within his personal knowledge. (See, **Chemagong –vs- Republic [1984] KLR 611** and **Section 111** of the **Evidence Act**). As was held in **Kioko –vs- Republic [1982-88] 1 KAR 157**, the word "murder" denotes causing the death of another with malice aforethought and on a charge of murder both the act causing death and the guilty mind has to be proved.

[27] In this case, the evidence by those who interacted with the deceased immediately after the incident clearly indicated that he suffered to an injury to his forehead or head and that this was the primary condition that he complained of. However, the evidence by **Dr. Cardius Owiti (PW7)**, as confirmed by the necessary postmortem report (P. Exhibit 1) and indeed the testimony of the defence witness, **Dr. Raymond Otieno Simba (DW4)**, indicated that apart from head injury the deceased could have died from pre-existing conditions independent of the injury occasioned to him on the material date.

[28] This was confirmed by Dr. Owiti (PW7) when he categorically testified that the cause of death was peritonitis due to gut perforation due to a blunt physical abdominal trauma. He overruled the head trauma as a contributory factor or cause of death yet the postmortem report indicates that it was among the contributory factors. This simply meant that the good doctor and his colleagues were not certain as regards the actual cause of death of the deceased.

Dr. Otieno Simba (DW4) specifically stated that if the deceased suffered injury to the forehead only, there would be no abdominal injuries or peritonitis.

[29] It would therefore follow that there was uncertainty in the actual cause of the death of the deceased. In the circumstances, this vital ingredient of the offence of murder and indeed manslaughter was not established and proved beyond reasonable doubt by the evidence adduced by the prosecution. It cannot therefore be held that the two accused or any one of them was criminally responsible for the death of the deceased as there was no credible and certain proof that the cause of death was the head injury inflicted on him on the material date.

In sum, the prosecution has failed to discharge its burden of proof with the result that the two accused are hereby found **not guilty** as charged and are now acquitted. Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**12.02.2020**

[Delivered and dated this 12<sup>th</sup> day of February, 2020]