REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 18 OF 2018

REPUBLIC .....PROSECUTOR

VERSUS

GEORGE OWINO ADHOCH.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Ms. Mwania for the accused person

JUDGMENT

The accused was indicted in this court with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The alleged brief facts are that on 10.10.2018 at Mnarani Sub-location accused murdered **Juma Boi Jindwa**. He pleaded not guilty.

At the trial Learned counsel **Ms. Mwania** acted on his behalf to prosecute the defence whilst **Ms. Sombo** prosecution counsel represented the state.

The state called five witnesses to try in disapproving accused's innocence under Article 50 (2) (a) of the Constitution, beyond reasonable doubt.

PW1 – Riziki Charo Gona sells alcoholic drinks in a club which was patronized by one Jackson and the deceased on 10.10.2018. that upon serving them with a bottle of alcoholic drinks each she closed the club and went home. In the morning she received a police officer from Kilifi Police Station requiring her to record a statement in regard to the events of the previous night.

PW2 – Noah Agonya Saiga a boda boda operator testified that on 10.10.2018 while at pub – signature selling palm wine he finalized his shift leaving behind **Jackson** and another customer still having their drinks. While at home he received a telephone call from **Jackson** that a customer has been killed and wanted services of motorcycle to assist take them to the hospital. On arrival at the pub he saw the deceased on the ground but did not bother with him at all.

PW3 – Jackson Said Ali testified as the watchman who used to guard, signature pub at Mnarani. On the fateful day of the 10.10.2018, the accused and the deceased were inside the pub where they were each served with alcoholic drinks. In the course, the deceased went to where the accused was seated and forcibly took away his alcoholic drink. That triggered a fight and even his efforts to separate them did not bear fruits. The witness further said that the fight which proceeded to outside the club became vicious. It did not take long on responding to screams from the deceased. He saw the accused armed with a club beating the deceased on the chest and stomach. That is the time he telephoned **PW2 Noah** to come with his motorcycle to assist and escort them to the hospital. Unfortunately, the deceased succumbed to death almost immediately.

PW4 Changau told the court that on 18.10.2018 he participated in identifying the body of the deceased to the pathologist for purposes of postmortem examination.

PW5 – PC Dominic Omondi gave evidence in court that the incident of murder which occurred on 10.10.2018 was duly investigated by recording witness statements, arranging for the post-mortem and visit to the scene. The recovered murder weapon being a piece of wood was produced as exhibit 1. As he participated in the post-mortem examination and by consent of both counsel, the post-mortem report was produced as an exhibit in support of the charge.

Defence case

On 10.3.2020 the accused offered his sworn statement of defence following the prosecution closure of its case in support of the charge of murder against him. According to the sequence of events of the 10.10.2018, it was explained by the accused that he found himself having a drink at signature pub. While there it happened that the deceased also visited the club though intoxicated he did demand to be served another drink.

In his evidence, the deceased started creating disturbance which ended up in him grabbing with force the beer he had in his possession. Initially accused gave evidence that the fight was between the deceased and one Jackson but on separating them the deceased turned against him in the same manner.

The fight took another turn when the deceased armed himself with stones aimed at inflicting harm. That being the case, accused further explained he took the liberty to push away the deceased to create room for his escape to avoid the stones in the hands of the deceased being thrown towards his side. He was later to be taken to the hospital due to the injuries suffered on that fateful night. Thus, the final picture is that both the accused and the deceased were in the vicinity of the murder scene. In a nutshell he denied using any excessive force with an intention to cause death or to do grievous harm. The evidence now becomes circuitous on one hand the prosecution support of a conviction against the accused in causing the death while on the other hand, the defence narrative is based on non-participation in killing the deceased.

Analysis and Determination

This trial raises the issue whether the charge of murder contrary to Section 203 of the Penal Code has been proved beyond reasonable doubt. The offence of murder as stipulated in the code has the following ingredients to be proven:

(a). The death of the deceased.

(b). That his death was unlawful.

(c). That in causing death, the accused unlawful act was accompanied with malice aforethought.

(d). That on identification there is sufficient evidence to place him at the scene.

The standard of proof

The duty to proof the charge in its entirety rests with the prosecution throughout the trial. In **Festus Mukati Mumwa v R {2013} eKLR** quoted with approval the dictum in **Miller v Ministry of Pensions {1947} 2 ALL 372** in which Lord Denning stated as follows:

> ***"That degree is well settled. It need not reach certainity, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, of course, it is possible but not in the least probable, then the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

There is no burden on the part of the accused to establish that by any reason he committed the offence. Closely related to this is the principle in **Joseph Kimani Njau v R {2014} eKLR** where the Court of Appeal rendered the decision thus:

> ***"In all criminal trials, both the actus reus and the mensrea are required for the offence charged. They must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mensrea have been proved to the required standard."***

Now it is pertinent to consider each of the ingredients at this stage to establish whether the evidence as tendered by the prosecution discharged the burden of proof against the accused.

Death of the deceased

In the case of **M'nyebe v R {2010} E.A. 315:**

> ***"The burden of proof of cause of death lies with the prosecution, and the defence never shoulders the burden of disapproving the cause of death. Its only duty is only to raise reasonable doubt. Thus in Benson Ngunyi Nundu v R CACRA NO. 171 of 1984 the court stated that in cases where the body is available and has been examined, a post-mortem report must be produced and that the normal and straight forward means of seeking to prove cause of death is by producing post-mortem examination report."***

With this guidelines, in the instant case the post-mortem produced as exhibit 2 by PW5 pursuant to the consent of both counsels indicated the cause of death to be severe head injury. Other than tendering the postmortem report as an exhibit, the prosecution witnesses PW1, PW2, PW3 provided the necessary circumstantial evidence on causation that the injuries had been inflicted at signature bar when a fight ensued between the accused and the deceased. The accused does not dispute the fact of death of the deceased. Therefore, the prosecution has discharged the burden of proof on this ingredient.

(b). Whether the accused committed the unlawful act that caused the death of the deceased.

In terms of Section 213 of the Penal Code the crime of death need not be caused by the immediate act of the accused. It would be natural to suppose that there must be intimate connections between the injuries and the death of the deceased. Yet it is possible to claim that the nature and background theory of the death had nothing to do with the injuries inflicted by the accused person. This is of course true in the sense that every defence counsel will carry his own ideas on the cause of death which he works towards, for the better, he undertakes to create a reasonable doubt to the prosecution case.

The connecting thread runs through the dictum in the persuasive case of **United States v Hartsfield 591 F Ed 945 (7th circuit 2010)** where it was held:

> ***"Causation is an important issue in many cases in a variety of Fields of Law and has been so for centuries one finds the following phrases, words on causal terms, proximate cause, actual cause, direct cause, but for causation, significant causation, sole cause, factor in the victims injuries, concurrent cause, meaningful role, possible cause, remoteness, and cause in fact……."***

Notwithstanding the elements under Section 213 of the Penal Code the prosecution is required to lead evidence satisfactorily to differentiate the causal terms and factor or the predominant cause that resulted in the death of the deceased.

Similarly, in this case on the cause of death the evidence on record sufficiently given starts with what PW3 told the court with regard to the conflict which escalated into a fight between the accused and the deceased. The accused version though admitting being involved in a fight with the deceased he denied inflicting harm save, that at the final end he retaliated by pushing the deceased away to avoid being hit with stones. Again **PW5** who produced the post-mortem examination report there is every indication that the deceased died out of sustained severe head injury.

In **Rex v Mutoro s/o Luigo & another {1936} 3 EACA**:

> ***"The actus reus for the offence of murder is the unlawful act or omission causing the death of another person." The dangerous test of the act is as laid down in the case of DPP v New bury and another {1976} 2 ALL ER 365 "It was stated that it is homicide where the death results from an unlawful act directed against the person involving a considerable risk of injury but which no reasonable man would foresee as likely to cause death or grievous harm."***

It should be clear that all unlawful acts are not alike. Just as some are so serious as to give to a conviction of murder others are not sufficiently serious to give rise even to a conviction for manslaughter. In **Longley v R {1962} V. R. 157 at 141** the court held:

> ***"The assault for this purpose, must be of character, such that, the accused must have realized that it involved an appreciable danger of death or serious injury."***

In applying this analysis to the facts of the case before me. It cannot be ruled out that the accused performed an unlawful and dangerous act in the manner of his retaliation that he caused the death of the deceased. The solemn assertion by PW3 relied upon points at the accused assaulting the deceased with a piece of wood exhibit 1. Its against this background that a post-mortem report it was opined existence of a correlation between the assault and the cause of death. The death of the deceased was therefore unlawfully caused.

(c). Whether in causing death of the deceased the accused unlawful conduct was actuated with malice aforethought.

Malice aforethought is one of the central elements in the charge of murder. At its face value, however, it means *'thought of beforehand.'* or to imply the mental process involved where an accused person has pondered over a plan to commit a crime of homicide for a substantial period of time in advance.

Malice aforethought in Kenya is frequently used in Law as defined under Section 206 of the Penal Code to mean a manifestation in specific cases any of the following circumstances:

> ***(a). An intention to cause the death of or to do grievous harm to any person whether such person is the person actually killed or not.***
>
> ***(b). Knowledge that the act or mission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.***
>
> ***(c). An intention to commit a felony.***
>
> ***(d). An intention by the act or omission to facilitate flight or escape from custody of somebody who has committed or attempted to commit a felony.***

It is at this definition we find the notion of express and implied malice being imputed in specific cases by the prosecution to affix intention in committing the offence of murder.

At this juncture putting carefully in perspective important contributions to the Law on this maxim reference to sample cases on the approach taken to manifest malice aforethought, is plausible. By drawing the line at intent to kill or to do grievous bodily harm a clear and satisfactory division is made between murder and manslaughter.

From a persuasive jurisdiction in the landmark case of **Woolmington v DPP {1935} AC 462** the court held:

> ***"Every person who kills another is presumed to have willfully murdered him, unless the circumstances are such as to raise a contrary presumption. The burden of proving circumstances of excuse, justification or extenuation is upon the person who is shown to have killed another."***

The Court of Appeal in **Smith v Re {1961} A.C. 290, 300** held that:

> ***"The Law on this point as it stands today is, …… that, as a man is usually able to foresee, what are the natural consequences of his acts so it is, as a rule, reasonable to infer and intend them. But, while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn yet if on all the facts of the particular case, it is not the correct inference, that it should not be drawn. The final question for the Jury or Judge must always be whether on the facts as a whole an actual intent to do grievous bodily harm was established, remembering, of course, that intent and desire are different things and that once it is proved that an accused man knows that a result is certain, the fact that he does not desire that result is irrelevant."***

However, in our jurisdiction the high profile case of **Tubere s/o Ochen v R {1945} 12 EACA 63** took the view that:

> ***"malice aforethought can be manifested in a trial for murder where evidence clearly shows the nature of the weapon and the manner it was used. This was meant to distinguish between a stick, a spear or a firearm, part of the body targeted, whether vulnerable parts of a human being, i.e. heart, lungs, head, neck or stomach etc, the severity of the injuries inflicted, was it one of injury or multiple. Did they involve skeletal or only soft tissue, the conduct of the accused prior, during, or after the commission of the crime."***

This approach is consistent with what the Court of Appeal said in **Nzuki v R {1993} KLR 171** pointing out that malice aforethought is a term of art and emphasized the following that:

> ***"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: (1). The intention to cause death. (2). The intention to cause grievous bodily harm. (3). Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure 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 these 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 the intention were aimed at a potential victim other than the one who 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"*** **(Hymn v DPP 1935 AC 55).**

By this decision of the Court of Appeal mensrea has been made clear though referring to malice aforethought as a term of art. There is no ambiguity as to the threshold, of the test to draw an inference on malice aforethought.

What is the fundamental feature of malice aforethought in consonant with the predominant principle in **Nzuki case (supra)** is the statement denied in the text.

> ***"Stephen's Digest of Criminal Law, where it can hardly be denied that malice aforethought for the purpose of the offence of murder contrary Section 203 includes the state of mind in which there is "knowledge that the act which causes death will probably cause the death or grievous bodily harm to, some person, whether such 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."*** **(See also Section 206 of the Penal Code).**

For this principles it is imperative to establish whether in the circumstances of this case malice aforethought can be held to exist or not to entitle the prosecution a conviction as postulated in Section 107 (1) of the Evidence Act. The facts of this case are straight forward. The accused and the deceased happened to enjoy a bottle of beer at Signature bar in the presence of PW1, PW2 and PW3. In the course that social event a fight ensued between the two which was triggered when the deceased went to grab a drink from the accused person. All efforts made by PW3 to separate them to disescalate the conflict, fell on deaf ears. PW3 saw the accused having picked up a piece of wood produced in court by PW5 as an exhibit 1 and violently using it to assault the deceased. That PW3 fearing the risk of being beaten by the accused safely left the scene and the fight, raged on between the duo.

Everything must be construed in context that in the same evening on the 10.10.2018 the deceased succumbed to death. It is clear from the post-mortem report that **Dr. Lorraine** opined the cause of death to be severe head injury.

In defence to the charges the fact that there was a fight with the deceased is admitted. However, the accused stated that at the time he pushed the deceased violently to the ground it was only to disempower him from using the stones he had in his possession to inflict harm.

The other import brought into this trial by the accused is the fact that all these was done in self-defence. The defence of self is underpinned in Section 17 of the Penal Code. The distinction which has been made in the following cases to interpret and construe the defence of self is primarily between the element of provocation under Section 207 as read with Section 208 of the Penal Code and the awakening of use of excessive force disproportionate to the provocation. In **Ahmed Mohamed Omar & 5 Others v R {2014} eKLR** the Court of Appeal held:

> ***"In the circumstances is the appellant's intention that they acted in self-defence plausible."***

What are the Common Law principles relating to self-defence? The classic pronouncement on this issue and which has been severally cited by this court is that found in **Palmer v R {1971} AC 814** which set out the basic principle of self-defence and the decision was approved and followed by the Court of Appeal in **R v Mcinnes 55 CR Appeal R 551 –** where **Lord Morris** 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. These Common Law principles have gained judicial notoriety in a number of the superior courts decisions." (See Robert Kinuthia Mungai v R {1982 – 88} 1KAR 611, Roba Guema Wario v R {2015} eKLR whilst in Jane Koitee Jackson v R {2014} CR Appeal No. 146 of 2009 where the court observed interalia that:***

> ***"If the accused's aim was to defend herself she would not have cut the complainant viciously as she did. One cut to immobilize the complainant would have sufficed."***

The collateral questions whether the use of force was necessitated or not are questions which determine the entitlement of self-defence to an accused person to reduce the level of culpability from that of murder to manslaughter. In essence the manifestation of malice aforethought would be wanting in the commission of the offence. If none of the elements in Section 206 of the Penal Code are not established by the prosecution in its case against the accused.

Difficult as this distinction may be to apply in some cases, it is clear in principle and of fundamental importance that discretion be exercised judiciously.

In the case of **Uganda v Mbubahi {1975} HCB 225** in accordance with our Section 17 of the Penal Code the court stated as follows that the Law to self-defence is consisting of four main major elements:

> ***"One, that there must be an attack on the accused. Two, that the accused must as a result of the attack, have believed on reasonable grounds that he was in imminent danger of death or serious bodily harm. Three, that the accused must have believed it necessary to use force to repel the attack made upon him. Four, that the force used by the accused must be such force as the accused believed, on reasonable grounds, to have been necessary to prevent or resist the attack."***

In assessing what is reasonable force in the circumstances of the case, I have taken into account the following characteristics as to time and day the crime was allegedly committed.

The evidence discloses that **PW3** made frantic efforts to separate the two from escalating the fight into a full blown dangerous act likely to occasion death or grievous harm. During that event, **PW3** testimony discloses accused turned violence against him an indication that he wanted to be given an opportunity to assault the deceased.

In **PW3** words, the accused armed himself with a piece of wood which aided him in inflicting the serious injuries suffered by the deceased. Following the infliction of harm, the deceased died shortly thereafter without even making it to a medical facility. The nature of provocation being alluded to by **PW2** and **PW3** was in respect of the deceased who at the time was said to be intoxicated grabbing a beer from the accused. The eligibility and definition of what constitutes acts of provocation under Section 208 of the Penal Code does not entail any such element as grabbing an alcoholic drink from another to constitute provocation.

In the accused own words he used physical force to push the deceased away fearing that he was under imminent danger to be attacked with stones. Unfortunately, in the whole transactions there is no evidence upon which one can demonstrate that the accused was under any reasonable believe of attack or danger from the deceased.

For purposes of this case, the accused has not demonstrated that the wrongful act by the deceased amounted to provocation to deprive him of the power of self-control.

One other outstanding feature on the evidential burden is the piece of evidence by the accused that in the course of the fight he went to answer a call of nature. It was at this second round in time that he alleges to have pushed the deceased fatally to death. There can be no doubt that the accused stepping out of fighting scene had time to cool off the provocation.

In my view, the accused took an active part to inflict harm likely to cause death or to do grievous harm. Whatever defences he may have does not rise to a level to controvert the prosecution evidence on malice aforethought. There is not a vestige of evidence to support the arguments and the defence as canvassed by the accused that it was all done in self-defence.

I agree with the prosecution that imminent or actual armed attack by the deceased was non-existent to call for use of excessive force to cause the death of the deceased.

Consequently, I draw a reasonable inference of the legal burden of beyond reasonable doubt having been satisfied in Law. I find the accused guilt of the offence of murder contrary to Section 203 of the Penal Code which I hereby convict him in accordance with the Law.

Order

The sentence for murder is provided for under Section 204 of the Penal Code. It's the death penalty. This a case in which you committed murder using excessive force against the deceased.

First of all, I am satisfied that when you attacked the deceased you did so with an intention to cause death or to do grievous harm. The approach taken is of picking a club at the scene which you aimed at the vulnerable parts of the deceased body not only represents an aggravating factor but absence of any justification or excuse.

In terms of mitigating factors for this offence there is none. The basis of you being remorse or breadwinner for the family does not lower the degree of culpability. In my Judgment the appropriate punishment befitting the gravity of this offence is twenty-eight (28) years imprisonment.

14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF MAY 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Gekanana for Mwania for the accused person

2. Ms. Sombo for the state