



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 1 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

EDGAR OUMA OMUNYINI.....ACCUSED

JUDGMENT

1. Edgar Ouma Omunyini 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 25th day of December 2017, at Border Palace area in Busia Township of Busia County, jointly with others not before court, murdered Collins Echakara Enakoro.
3. The prosecution case was that when the accused found his house broken into and a TV set stolen from therein, he suspected the deceased. He started to beat him. Members of public joined him in the aggression. The deceased, succumbed to the injuries that were inflicted.
4. Edgar Ouma Omunyini, the accused herein, contended that when he left Border Palace, he found a crowd beating the deceased. He tried to intervene but was overwhelmed. When he returned to his house he found his TV set missing. He went to report. He was arrested and implicated in the murder of the deceased.
5. The issues for determination are:
 - a) Whether the accused participated in beating the deceased; and
 - b) Whether the offence of murder was established.
6. P.C Mercy Were (PW2) is a police officer. She testified that on 25th December 2017 at about 4.30 a.m., she was going to her house which is near Quills, a hotel and Restaurant. She was enjoying herself to some live rhumba music at Quills. Quills is opposite Border Palace, another hotel and Restaurant. When she was outside, she saw a person who was being beaten by a mob of about twenty people.
7. She went there and identified herself as a police officer. Some of the people stopped beating the deceased. The accused went to her and informed her that the deceased had stolen his TV set. The accused then pushed and slapped her telling her that she did not know the price of a flat screen TV set. He then set on the deceased with a stone he was holding.
8. The accused in his defense contended that when he went out of Border Palace, he found a mob beating the deceased. On realizing that he was a person he knew, he attempted to intervene but the crowd overwhelmed him. He therefore denied to have been among the people who beat him.
9. P.C Mercy Were (PW2) was a stranger to the accused prior to the incident. This is what she testified to. There is no evidence adduced to suggest that P.C Mercy Were (PW2) falsely implicated the accused. I therefore make a finding that the accused was at the scene and participated in beating the deceased as testified to by this officer.
10. The accused contended that since the deceased was beaten by a mob, it was not easy to apportion with certainty his contribution. Section 21 of the Penal Code provides as follows:

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

In the case of **Rex vs. Tabula Yenka S/o Kirya & 3 others [1943] 10EACA 51** the Court while analyzing the section stated:

To constitute a common intention to prosecute an unlawful purpose...it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault.

This case has been followed severally by the superior courts with approval. In the instant case, the accused participated in beating the deceased. Common intention was, therefore, proved against him.

11. For an offence of murder to be proved, malice aforethought must be shown to have existed. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

12. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

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.

13. In the instant case, I find that the prosecution has not proved the existence of malice aforethought. Therefore, the offence of murder has not been proved. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit him of the charge of murder. I find him guilty and convict him for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED and SIGNED at BUSIA this 3rd day of June, 2020

KIARIE WAWERU KIARIE

JUDGE