



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J]

CRIMINAL CASE NO. 13 OF 2019

REPUBLIC.....PROSECUTOR

-versus-

WYCLIFFE OKOTH NYAKACH.....ACCUSED

JUDGMENT

Introduction:

1. *Wycliffe Okoth Nyakach*, the accused person herein, was charged with the murder of one *John Osiyo Nyapara* (hereinafter referred to as '**the deceased**').
2. The particulars of the information were that the accused person '*on the 28th day of December 2017 at Kagito village in Uriri Sub-County in Migori County within the Republic of Kenya, murdered John Osiyo Nyapara.*'
3. The accused person denied the information and was tried.

The Prosecution's case:

4. The prosecution called seven witnesses in support of its case. PW1 was *Joash Owino Maranda* (hereinafter referred to as '**Joash**'). Joash was related to both the accused and the deceased. He was a cousin to the accused person and a nephew to the deceased. *Samwel Ouma Nyapara* (hereinafter referred to as '**Samwel**') testified as PW3. He was a step-brother to the deceased and an uncle to the accused person. The wife of the deceased testified as PW4. She was *Monica Atieno Osiyo* (hereinafter referred to as '**Monica**'). *Vitalis Ochieng Nyapara* (hereinafter referred to as '**Vitalis**') testified as PW5. He was an uncle to the accused person. The deceased was his immediate follower. The arresting officer testified as PW6. He was *No. 92559 PC Howard Omwoha* (hereinafter referred to as '**the arresting officer**') attached to Uriri Police Station. PW7 was *No. 232698 C.I. David N. Onsongo* (hereinafter referred to as '**investigating officer**') the then OCS at the Uriri Police Station. *Dr. Awinda Victor Omolloh* (hereinafter referred to as '**the Doctor**') produced a Post Mortem Report on behalf of *Dr. David Keboe* who conducted the post mortem examination on the deceased's body. He testified as PW2.

5. *Catherine Apiyo Nyapara* (hereinafter referred to as '**Catherine**') passed on sometimes in December 2017. Her burial was scheduled for 29/12/2017 at her home in Kagito village in Uriri Sub-County. There was an overnight vigil at the home of Catherine preceding her burial. Family members were among those who gathered as they mourned one of the wives of their patriarch. Catherine was a grandmother to the accused person.

6. Joash testified that he was at the overnight funeral gathering. He recalled seeing the accused person. He spent most of the time that night with the deceased. The night programme went on as scheduled. At around 02:00am most of the people who had gathered had left save for some few. The coffin bearing the remains of Catherine was outside her house.

7. It was Joash's testimony that the accused person was drunk that night. Joash and the deceased were however not drunk. The accused person then became rowdy. He approached the coffin and began pushing and shaking it. He was also making noise. Joash and the deceased went to where the accused person was and asked him to desist from doing so. They told the accused person that his conduct was shameful more so to their in-laws. The accused person ignored them.

8. The accused person then left the home where the body of Catherine was. He went towards the direction of his home. His home was about 35 metres from the home of Catherine. The accused person returned after a short while. It was after around 10 minutes. By then he wore a

jumper and had put his both hands in the pockets. He was still making noise.

9. Joash sat with the deceased and carefully watched the accused person. The accused person went straight to where Joash and the deceased were seated. He swiftly removed his hands from the pockets. Joash saw the accused person holding something which appeared like a knife. In a fraction of a second the accused person stabbed the deceased with the weapon on the chest. The deceased fell and bled profusely. The accused person disappeared.

10. Joash stated that he was seated just next to the deceased. He estimated the distance between them as less than a metre. Joash raised alarm. The people who were then at the funeral gathered. Joash and others rushed the deceased to Migori County Referral and Teaching Hospital (MCRTH). The deceased was pronounced dead on arrival. The body of the deceased was placed in the mortuary for preservation and further police action.

11. The relationship between Joash and the accused person had all along been cordial. The deceased also related well with the accused person and they even used to drink alcohol together at times. Their respective families also related so well. Joash later recorded his statement with the police.

12. Joash clarified that the home of Catherine was well lit by electric bulbs powered by a big generator. To him, visibility was not in issue. Joash further clarified that the accused person disappeared from their home immediately after attacking the deceased.

13. The incident that led to the death of the deceased was only witnessed by Joash. Samwel was in-charge of catering at the funeral. He was mostly in the kitchen which was behind the house of Catherine. He vouched that Joash, the deceased and the accused person were among many other people who were at the funeral that night. He was aware that the accused person was rowdy and that the deceased and Joash had at one time intervened to cool down the accused person.

14. At around 02:00am Samwel was sent to pick some tomatoes from one of his brother's house. He walked. He saw the accused person ahead of him. The accused person walked away from the funeral. The accused person was about 10 metres ahead and walked fast towards his home. Samwel was able to see and recognize the accused person by the aid of some light which was from the funeral venue. The light was sufficient as the venue was well lit by electric bulbs powered by a generator. Samwel walked slowly.

15. After a short while, Samwel saw the accused person walking back towards the funeral. The accused person was very charged. The accused person and Samwel met on the way. The accused person wore a jumper and had tucked his both hands into the pockets. The accused person harshly asked Samwel if he was the deceased. Samwel told him that he was not. Samwel was very afraid of the accused person and he even ran away from him. Samwel stopped at a distance. He wanted to know what the accused person was upto. The accused person was by then heading to the funeral. Samwel followed him from a distance of between 7 to 10 metres.

16. Samwel then heard Joash shouting that the accused person had a knife. He rushed to where Joash was. He found the deceased lying on the ground. He was injured on the chest and was bleeding. The accused person ran away. Samwel talked to the deceased but the deceased could not talk. The deceased was rushed to MCRTH as Samwel followed them. He was about 20 minutes behind them. When Samwel reached the Casualty area at the MCRTH he found the deceased lying on a stretcher. He was pronounced dead.

17. Samwel recorded his statement with the police. He affirmed that he had no grudge with the accused person. Samwel also confirmed that the accused person disappeared from their home immediately after attacking the deceased.

18. When the incident took place Monica was asleep in her mother-in-law's house. Monica's mother-in-law and Catherine were co-wives. Monica was suddenly woken up by screams. She rushed out of the house. She saw his husband, the deceased, lying on the ground. He was injured on the chest and was bleeding. Monica talked to the deceased but the deceased did not respond. Monica confirmed that the venue was well lit and she saw the injury on the chest.

19. The deceased was rushed to hospital. Monica followed him. She found her husband dead at the hospital. She recorded her statement with the police. She also confirmed that the accused person disappeared from their home immediately after attacking the deceased.

20. Vitalis had left the home of Catherine at around 01:00am. He retired to his home. He left the accused person, the deceased, Joash and other people at the funeral. At around 02:00am Vitalis was woken up by family members. He was informed that the deceased had been injured by the accused person and had been rushed to MCRTH.

21. Vitalis rushed to the hospital. He met the deceased already dead. He observed the body of the deceased carefully and saw the injury on the chest.

22. Vitalis also attended the post mortem examination of the deceased. It was on 28/12/2017 at around mid-day. He identified the body of the deceased prior to the autopsy. He also confirmed that the accused person disappeared from their home immediately after attacking the deceased for 2 years.

23. The investigating officer was called by the Chief of Central Kanyamkago on 28/12/2017 at around 03:00am. He was informed of the death of the deceased. He immediately mobilized his team and visited the scene. On arrival he found several mourners. He interrogated them and was informed of how the incident occurred.

24. The investigating officer then proceeded to MCRTH mortuary where he viewed the body of the deceased. He continued with the investigations. He recorded statements from witnesses. On completion of the investigations he made a decision to charge the accused person with the murder of the deceased. However, the deceased had by then long disappeared from his home.

25. The investigating officer organized for the post mortem examination of the body of the deceased. It was conducted on 28/12/2017 by Dr. David Keboe at the MCRTH mortuary. The body of the deceased was identified by Vitalis and one *Nicholas Nyapara* (not a witness).

26. There was only one injury. It was a penetrating wound on the left side of the chest on the 5th rib. The wound was caused by direct stabbing which ruptured the left side of the heart.

27. Dr. David Keboe formed the opinion that the cause of the death of the deceased was hemorrhage caused by direct stabbing to the heart. Dr. David Keboe filled in a Post Mortem Report and signed it. The Doctor (PW2) produced the report on behalf of Dr. David Keboe as an exhibit.

28. As the accused person had disappeared from his home, the investigating officer liaised with the Chief in tracking the accused person. On 30/11/2019 the investigating officer was informed of the return of the accused person to his home. The investigating officer organized with the arresting officer on how the accused person would be arrested.

29. The arresting officer testified that he was accompanied by his 5 other colleagues in the mission to arrest the accused person. That was on 30/11/2019 at around 03:00am. The police managed to arrest the accused person in his house. They escorted him to Uriri Police station.

30. The arresting officer confirmed that there were OB Numbers at the Uriri Police Station on the death of the deceased and the visit to the scene by the investigating officer.

31. The investigating officer then escorted the accused person for mental assessment at the MCRTH on 06/12/2019. The accused person was certified fit to stand trial.

32. The investigating officer arraigned the accused person in Court on 18/12/2019 where he was formally charged. The investigating officer produced the mental assessment report and the Investigating Diary which contained the relevant OB Numbers as exhibits.

33. The prosecution's case was closed on the foregone evidence.

34. By a ruling of this Court the accused person was placed on his defence.

The Defence:

35. The accused person gave an unsworn defence. He called one witness, *Okoth Michael Nyapar* who testified as DW1.

36. The accused person denied killing the deceased. He stated that he was indeed at the funeral of Catherine in the night in issue. He recalled how Catherine used to assist him. He was overcome by grief and left the funeral. By the time he left, the deceased, Joash and other people were at the funeral and the deceased was still alive.

37. The accused person went to take alcohol far away from the home. He drunk until very late into the night. He then went to his home. He never returned to the funeral. He only heard the following morning that the deceased had died.

38. DW1 was an uncle to the accused person. Catherine was DW1's step-mother. DW1 was also at the funeral. He was with Joash and others. According to DW1 the accused person was drunk. At around 01:30am the accused person left the funeral to his home to sleep.

39. DW1 testified that he left the funeral at 01:50am with Joash. It was Joash who carried him on his motor cycle. Joash took DW1 to his home which was around 200 metres from the funeral. Joash then proceeded to his home which was around 2kms away.

40. At around 02:30am DW1 was woken up by his wife. They were screams from the funeral. DW1 did not go to the funeral. He instead called Joash to find out if there was any problem. DW1 stated that Joash told him that he was rushing to the funeral to take the deceased to hospital as the deceased had been stabbed with a knife. Joash later called DW1 and informed him that the deceased was dead. DW1 rushed to MCRTH and so confirmed.

41. According to DW1 the accused person was a very polite boy. He mostly stayed in Nairobi where he worked as a Jua Kali artisan. He rarely went home and would stay in Nairobi even for 2 years before returning home.

42. DW1 also stated that Vitalis and Monica were not at the funeral. He was not sure if the accused person returned to the funeral after he left. DW1 admitted that he was not present when the deceased was stabbed.

43. DW1 was categorical that the accused person did not stab the deceased as he was too drunk to return to the funeral. He did not attend the burial of Catherine. DW1 was also not aware that the police were investigating the cause of the death of the deceased.

44. The accused person closed his case.

The Submissions:

45. The defence Counsel, *Miss. Okota*, filed written submissions. Counsel submitted that the information was not proved in law. It was further submitted that identification of the accused person as the assailant was doubtful. Counsel referred to several decisions. Relying on

some other decisions, Counsel submitted that no malice aforethought was proved.

46. Counsel for the accused person further raised the *defence of intoxication*. She contended that the accused person was too drunk to engage on anything meaningful and left to his house to sleep.

47. The Defence Counsel prayed that the information be dismissed and the accused person be set at liberty.

48. *Mr. Kimanathi* for the Prosecution submitted that the information was firmly proved. Counsel prayed that the accused person be found guilty as charged.

Analysis and Determination:

49. It is on the foregone evidence and submissions that this Court is called upon to render itself on the information. I have carefully considered the evidence on record as well as the exhibits.

50. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(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.

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

51. It is not in dispute that the deceased in this matter died. That position was confirmed by all the prosecution witnesses and the accused person as well. The first limb is hence answered in the affirmative.

52. As to the cause of the death of the deceased, Dr. David Keboe conducted the autopsy and prepared a Post Mortem Report. He opined that the possible cause of death of the deceased was hemorrhage caused by direct stabbing to the heart. As there was no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:

53. The accused person denied killing the deceased. He raised two issues. The first one was that he was not sufficiently identified as the assailant. The second one was the defence of intoxication.

54. **Section 13** of the **Penal Code Chapter 63** of the Laws of Kenya provides the defence of intoxication. The section states that: -

13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(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.

(3)

(4)

(5) For the purposes of this section, “intoxication” includes a state produced by narcotics or drugs.

55. From the wording of the above section an accused person can only take refuge in the issue of intoxication as a defence. That was rationale in the Court of Appeal decision in **Bakari Magangha Juma vs. Republic (2016) eKLR**.

56. It therefore means that an accused person cannot challenge his/her identification on one hand and raise the defence of intoxication on the other hand. One can only take either of the routes, but certainly not both.

57. Having raised the defence of intoxication the accused person in this matter was estopped under **Section 120** of the **Evidence Act** Cap. 80 of the Laws of Kenya, from contending that his identification as the assailant was doubtful. The said provision states that: -

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

58. Returning to the matter, I hence find that the accused person could not rely on his contention that he was not properly identified as the assailant given that he relied on the defence of intoxication. I will henceforth interrogate if the defence of intoxication is available to the accused person.

59. The defence in **Section 13** of the **Penal Code** is very narrow in its application. The defence can be raised in two instances. First, under **sub-section 2(a)**. In that case the burden of proof is on the accused person to satisfy the conditions therein. Second, **under subsection 2(b)**. In the latter case the burden remains on the prosecution.

60. The Court of Appeal for Eastern Africa in *Kangaro s/o Mrisho vs. R (1956) 23 EACA 532* referred to the case of *Cheminingwa vs. R*, in which it was stated: -

It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused.

See: Joshua Matata Ndonge v R, [2001] eKLR, CR No. 122 of 1991 (Kwach, Shah & O’Kubasu JJ. A).

61. Further, the Court of Appeal cases of *Manyara v. R (5) (1955) 22 EACA 502*, *Nyatike s/o Oyugi (1959) EA 322* among others remain very relevant on this issue.

62. The defence of intoxication in this case was raised in context of **Section 13(2)(b)** of the **Penal Code**. In that case the burden was on the prosecution to prove that the accused person although drunk still knew what he was doing.

63. Several witnesses testified that the accused person was drunk. The accused person also testified as such. There is evidence that the accused person was rowdy and disrupted the funeral by pushing and shaking the coffin which contained the body of Catherine.

64. When Joash and the deceased intervened and asked the accused person to maintain his cool, the accused person ignored them. He then went to his home and armed himself with a knife or a sharp object as the case may be.

65. Samwel met the accused person on his way back to the funeral. He was angry and asked him if he was the deceased. The place they met was however dark. When Samwel informed the accused person that he was not the deceased the accused person went back to the funeral. The accused person then went straight to where Joash and the deceased sat. He stood next to them. He removed his weapon and stabbed the deceased on the chest.

66. The accused person testified that he was drunk on that day. He narrated how he left the funeral and went to take alcohol far away until very late. He then went straight to his house and slept. The accused person did not say that when he was at the funeral he was so drunk that he could not comprehend what he was engaged in.

67. DW1 attempted to speak for the accused person. However, DW1 stated that the accused person was at the funeral until 01:30am and that when the accused person left he went straight to his house. That was contrary to what the accused person himself said. According to the accused person he did not drink at the funeral, but left to a far away place. That is where he engaged in drinking. DW1 was therefore not truthful in his testimony.

68. I further find the testimony of DW1 wanting on two other fronts. First, DW1 was aware that, the deceased, who was a family member had been killed. He however stated that he was not aware that the police were investigating the cause of the death of the deceased. Second, there was also the issue of what DW1 did when he was woken up by his wife. DW1 stated that when he was woken up he heard screams at the home of Catherine. He was just next to that home. DW1 did not rush to the funeral to find out what the matter was. Instead, he called Joash who was 2 kms away to find out what was wrong at the funeral. One wonders if it is true that Joash lived 2 kms from the funeral then how come that DW1 called him to find out about the screams at the funeral. Was Joash reasonably expected to hear the screams from a distance of 2 kms? Was DW1 truthful?

69. According to the prosecution witnesses the accused person although drunk was still in command of his actions and that is why he disappeared after stabbing the deceased.

70. Without shifting the burden of proof to the accused person, it is worth noting that whereas DW1 attempted to explain the absence of the accused person from home for the period of 2 years the accused person did not address the issue even after the prosecution had raised it and the accused person placed on his defence.

71. This Court observed the witnesses testify. The prosecution witnesses were candid and straight-forward. They also withstood and were not shaken in cross-examination. The Court formed the opinion that the witnesses were truthful and credible and their evidence reliable.

72. A witness who deliberately causes a Court to see him/her as otherwise not a straight-forward person runs the risk of his/her evidence regarded of no probative value or such little value, if any. That was the case with DW1.

73. Based on the prosecution's evidence I find the accused person's narration of the events not convincing. I did not believe him. The accused person was not truthful in his defence. I find no reason why the prosecution witnesses would stand in unison against the accused person. There was no allegation of bad blood between the witnesses and the accused person.

74. Taking the totality of the foregoing, I now find and hold that although the accused person was drunk, he was not so intoxicated to a point of being insane whether temporarily or otherwise, at the time of stabbing the deceased. The accused person was well within his senses. He knew all what was happening. He was fully alert and took charge of all his actions. His good state of mind is what led him to disappear from home for the period of 2 years.

75. The defence of intoxication does not therefore come to the aid of the accused person in this case. It is hereby dismissed.

76. The second ingredient is also answered in the affirmative.

(c) Whether the unlawful acts were committed with malice afterthought:

77. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.

78. The Court of Appeal has also dealt with this aspect on several occasions. In **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.

79. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of a 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.

80. The Court of Appeal in **Republic vs. Tubere s/o Ochen (1945) 12 EACA 63** set out the parameters for determining the presence of malice aforethought. The elements include: -

(i) The nature of the weapon used;

(ii) The manner in which the weapon was used;

(iii) The part of the body targeted;

(iv) The nature of the injuries inflicted either a single stab/wound or multiple injuries.

(v) The conduct of the accused before, during and after the incident.

81. The events that led to the accused person stabbing the deceased were spontaneous. It all began when the accused person was rowdy and the deceased and Joash attempted to cool him down. The accused person rushed home and armed himself. He then stabbed then deceased. The events were so interlinked such that I find it difficult to infer malice aforethought.

82. I am therefore not convinced that the accused person planned to attack and kill the deceased. Further, I am not certain if the crime would still have been committed had the deceased and Joash not intervened when the accused person was rowdy in mourning her grandmother.

Conclusion:

83. The foregone analysis does not therefore support a conviction in respect of the information of murder against Wycliffe Okoth Nyakech. The accused person is hereby found not guilty of the murder of John Osiyo Nyapara and he is hereby acquitted.

84. However, from the evidence the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

85. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya this Court finds Wycliffe Okoth Nyakech **guilty** of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and each of them is hereby convicted accordingly.

86. These are the orders of this Court.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT MIGORI THIS 15TH DAY OF OCTOBER, 2020.

S. J. CHITEMBWE

JUDGE

Judgment delivered in open Court and in the presence of:

Miss Okota, 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