



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 22 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH EMOYO ETYANG.....ACCUSED

JUDGMENT

1. **Joseph Emoyo Etyang** 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 night of 21st day of August 2017, at **MACHAKUS** Sub-location, of **CHAKOL** Division, in **BUSIA** County, murdered **Peter Oporodi Odiye**.
3. Briefly, the prosecution case was that when the accused and the deceased were returning home at about 9 p.m., the deceased raised an alarm that he had been injured. Peter Odeke found them holding each other by the collar. He separated them and each went to his home. When the deceased arrived home, he cried and said that the accused had injured him. He succumbed to the injuries sustained.
4. The accused in his defence denied to have been with the deceased on the material day.
5. The issues for determination are:
 - a) Whether the accused was with the deceased on the material day;
 - b) Whether the accused inflicted the injury that led to the death of the deceased; and
 - c) Whether the offence of murder was established.
6. Margaret Isereen (PW2) and Peter Odeke (PW3) testified that on 19th August 2017 when they went out after they were attracted by some noise, they found the accused and the deceased holding each other. Peter Odeke (PW3) separated the two and thereafter each went his way. Though the accused contended that he was not with the deceased on the material day, the evidence by these two witnesses established the contrary. The two testified that there was moonlight that enabled them to recognize the accused and deceased. They were their neighbours and relatives. I therefore make a finding that the accused and the deceased were together on the material day at about 9 p.m.
7. The evidence of Margaret Isereen (PW2) is that she was attracted outside by a person who cried that he had been injured. When she went outside, she found the accused and the deceased holding each other. Peter Odeke (PW3) on the other hand, testified that he heard Peter Oporodi, the deceased say:

“you have injured me”.

He separated the duo and each went his way.
8. When the deceased arrived at his door at about 9 p.m., Francis Odie Oporodi (PW1) who is his father heard him crying. He was saying that Emoyo had killed him. The deceased told him that the accused had kicked him. I am therefore satisfied beyond any doubt that the accused inflicted the fatal injury to the deceased.
9. For an offence of murder to be established, the prosecution must prove the following three ingredients beyond any reasonable doubts:

- (a) the death of the deceased;
- (b) that the accused committed the unlawful act or omission which caused the death of the deceased; and
- (c) that the accused had the malice aforethought.

In the case of **Republic vs. Andrew Mueche Omwenga [2009] eKLR**, D. K. Maraga J, as he then was, spelled out the ingredients as follows:

There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.

10. What is malice aforethought? In Black's Law Dictionary, 10th Edition it has been defined as follows:

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 indifference to the value of human life, (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

11. Section 206 of the Penal Code gives instances when malice aforethought may be deemed to be established. It states:

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.

12. The evidence on record does not suggest that any weapon was used nor does it show that the accused used excessive force whatever the reason that may have prompted him to batter the deceased. According to the evidence of Francis Odie Opurodi (PW1), the father of the deceased, the deceased informed him that the accused kicked him. I find that malice aforethought has not been established. This therefore means that the charge of murder has not been proved. The prosecution has however proved the offence of manslaughter contrary to section 202 of the Penal Code. I therefore find the accused guilty of this lesser offence and convict him accordingly.

DELIVERED and SIGNED at BUSIA this 18th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE