



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 22 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

SAMSON OKUL OPIYO.....ACCUSED

JUDGMENT

1. **Joshua Kelvins Ochieng** (hereinafter referred to as '**the deceased**') hailed from Olando village in Kameji Sub-Location in Rongo Sub-County. He was a Clan Chairman charged with *inter alia* the welfare of the members. Sometimes in September 2016 the Clan lost one its members (Charles Odwar) and the deceased led the burial preparations which involved raising funds from members. As the burial date approached amid funds deficit, the members in their characteristic manner of raising funds from all members, led by the deceased, visited the home of the accused herein, **Samson Okul Opiyo**, who was yet to pay a balance of Kshs. 300/=. The accused was married to one **Pamela Okulo** (hereinafter referred to as '**Pamela**').

2. The accused and his wife were both at home when the other clan members arrived. Pamela was taking a bath within the homestead but could hear all what went on. The deceased explained the purpose of the visit and the accused pledged to pay the balance by that evening. The members then demanded a security thereto and opted to catch a hen. Pamela vehemently protested and threatened to storm out of the bathroom naked if the chicken was not released. As the members were not keen to release the chicken Pamela truly stormed out of the bathroom naked. The members ran helter skelter since to them, that was the greatest curse.

3. Due to the gravity of the matter, the clan had to discuss the way forward. A Clan meeting was scheduled for 10/10/2016 after the burial of Charles Odwar. The meeting was to *inter alia* receive a report on the members' contributions towards the burial and also to discuss the conduct of Pamela. The deceased chaired the meeting as scheduled. The report on the burial was well received by the members. When the agenda on Pamela was introduced by the deceased Pamela protested that the same should not be discussed. She stood her ground and made a lot of noise. The wife to the deceased who was also at the meeting stood and asked Pamela to stop shouting and sit down. The accused approached the wife to the deceased and asked her to stop talking to his wife Pamela. It was at that time when the deceased also went to where the accused and his wife were and told the accused that he should tame her wife since she has consistently shown disrespect to the other members. The words of the deceased must have angered the accused. In return the accused slapped the deceased and the two started fighting. It was a serious fight which lasted around 30 minutes.

4. The accused pelted stones to the deceased and also used a stool to hit him on the head. The deceased had a piece of wood. As the fight broke most of the members fled and just a few remained. Their efforts to separate the two were unsuccessful. Those who were at the meeting and witnessed the fight included **Samuel Obonyo Opiyo** (who testified as **PW1**), **James Odhiambo Opiyo** (who testified as **PW2**), **Jacob Otieno** (who testified as **PW3**), **Pamela Atieno Owuor** (who was the Secretary and testified as **PW5**) and **Gordon Okongo Obongo** (who testified as **PW7**).

5. The deceased then began walking towards his home and fell down about 30 metres from the venue. As the accused wanted to stone the deceased as he was lying on the ground the members managed to restrain him and rushed the deceased to the nearby Luala Dispensary where he was pronounced dead on arrival. The body was preserved at Tabaka Hospital Mortuary.

6. **Christine Sunday Odhiambo** was the Assistant Chief of Kameji Sub-Location. She testified as **PW4**. At around 07:00pm she received a call from one of his elders at Olando village on the death of the deceased. PW4 rushed to the home of the deceased and was informed what had happened. She called the Area Chief and informed him of the events and also called the police.

7. **No. 87086 PC Thomas Mutegi Ngore** from the DCI Rongo was the investigating officer and testified as **PW10**. He visited the scene on 11/10/2016 in the company of PW4 and his other colleagues. He interviewed several potential witnesses and recorded their statements. He also recovered a stone and a stick which were both blood stained from the scene. He organized for and a post mortem examination on the body of the deceased which was conducted by **Dr. David Kemboy** who confirmed that the deceased had died as a result of fracture of the skull having been caused by a sheering force on assault. The Doctor testified as **PW8** and produced the Post Mortem Form as an exhibit.

8. PW10 also sought for further scientific analysis from the Government Chemist. He forwarded the stone and stick he had collected at the

scene alongside blood samples for the deceased collected during the autopsy and blood samples from the accused. The Government Analyst testified as **PW9**. He was **Richard Kimutai Langat** and produced a Report of the findings as an exhibit. PW9 confirmed that the stone and the stick contained blood from the deceased and not the accused. Upon forming the opinion to charge the accused, PW10 escorted him for mental examination where the accused was certified fit to stand trial. The accused was then arraigned before Court and was charged with murdering the deceased.

9. It is the forgone chronology of events that led this Court to find that the accused had a case to answer at the closure of the prosecution's case. Placed on his defence, the accused person elected to and gave sworn evidence and called one witness **Dr. Sammy Ruwa Mwatela (DW1)**. The accused denied committing the offence. Whereas he admitted attending the Clan meeting on 10/10/2016 and having engaged in a verbal confrontation with the deceased he stated that it was the deceased who slapped him on the head and he fell down. That, he was unconscious until later where he realized that he was in hospital and that he was stitched. DW1 confirmed that the accused was treated at the Rongo Sub-County Hospital on 10/10/2016.

10. At the close of the defence case, Learned Counsel for the accused **Mr. Gembe** filed written submissions in urging this Court to acquit the accused as the information was not proved.

11. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether or not the accused is guilty as charged.

12. As the accused person is charged with an information 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.

13. There is no doubt that the deceased died. All the witnesses save PW9 confirmed as such. As to the cause of death, PW8 took this Court through the Post Mortem Form which he prepared after conducting the examination and opined that the cause of death was fracture of the skull caused by a sheering force on assault. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence. The first ingredient is answered in the affirmative.

14. On the second ingredient as to whether the accused unlawfully caused the death of the deceased, several witnesses were at the clan meeting and witnessed what happened. The accused as well admitted having attended the meeting and that a confrontation arose. To him, the confrontation was only verbal and that he was slapped by the deceased and fell unconscious. He only regained his consciousness later in hospital. PW1, PW2, PW3, PW5 and PW7 were also at the meeting and witnessed what happened. Their combined evidence is that there was a physical fight at the meeting which was began by the accused by slapping the deceased. They saw the accused pelting stones to the deceased and also hitting him with a stool until it shattered. That evidence was corroborated by the Government Analyst who confirmed that the stone and the stick he recovered at the scene had the deceased's blood. The fight was intense and it lasted around 30 minutes. That, even after the deceased had collapsed as he walked home the accused wanted to stone him, but was restrained.

15. I have carefully considered the evidence before Court. On placing the prosecution's evidence and the defence on a balanced scale, the result is that the scale tilts in favour of the prosecution. The prosecution evidence was well corroborated, congruent and water-tight. The witnesses testified before Court and were quite forthright and answered all questions put forth. I formed the opinion that they were truthful and hence believable. Since the accused took part in the fight there is no doubt he sustained some injuries which were confirmed by DW1. That, however, does not form any iota of any shadow of doubt on the prosecution's case. I therefore find that it was the accused who unlawfully caused the death of the deceased. The second ingredient is also answered in the affirmative.

16. As to whether there was malice aforethought in the accused causing the death of the deceased, 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.

17. The Court of Appeal has also dealt with this aspect on several occasions. In the case of 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". (emphasis added).

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

19. In this case there was evidence that the fight was spontaneous. It all began with the exchanges between the wives of the accused and the deceased. The accused and the deceased only intervened to protect their respective wives. In those circumstances I find no evidence of malice aforethought and the third ingredient fails.

20. A fortiori, the foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

21. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analyzed hereinabove, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

22. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 7th day of February, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of

Mr. Gembe, 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.