



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 16 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

1. JARED OCHIENG OUMA

2. BENARD WESONGA.....ACCUSED

JUDGMENT

1. **Emmanuel Otieno Oteyo** (hereinafter referred to as **'the deceased'**), a seasoned fisherman, went fishing as usual in the company of his three colleagues in Lake Victoria on 01/08/2017. The four fishermen were the two accused persons herein, the deceased and one **Ayecho Ouma**, who is still at large. **Jared Ochieng Ouma**, the first accused person herein, was in-charge of the boat which they used for fishing that day. The boat was owned by one **Raphael Okeyo Obel** who testified as **PW1** in this matter.

2. PW1 went to see the first accused person at his home at around 07:00pm on 01/08/2017 and finalized all preliminary arrangements on the fishing of *omena* (a special type of small fish) in the Lake Victoria. PW1 then accompanied the first accused person to the lake shore to see his boat and the fishermen who accompanied the first accused person. It was required of any owner of a fishing boat to personally see and maintain the records of the fishermen using his/her boat before they set out into the Lake. PW1 was introduced to the three other fishermen by the first accused person and after PW1 confirmed that all was well he left the lake shore as the team prepared to start sailing into the lake.

3. **Judith Akoth** testified as **PW2**. She was the wife of PW1 and dealt in *omena* business. She used to receive the *omena* from the fishermen who used PW1's boat and pay them accordingly for services rendered. PW2 was as usual at the shore of the lake in the morning of 02/08/2017 to receive the fishermen and the *omena*. When the fishermen who used PW1's boat finally arrived they were less by one person. They were three instead of four. PW2 asked the first accused person where the fourth one was and the first accused person kept quiet. PW2 was perturbed by the cold response. PW2 insisted to be told where the other fisherman was before she could pay them. The first accused person then pulled PW2 aside and told her that the other fisherman had instead opted to swim ashore. Since PW2 knew where the other fisherman (who is the deceased herein) lived she asked a lady called **Pili** (not a witness) to rush to the home of the deceased and confirm if the deceased was at home. Pili returned and informed PW2 that the deceased was not at home but the wife. Sensing that all may not be well, PW2 informed her husband, PW1, of the events.

4. PW2 returned home later to learn that the first accused person had been there and PW1 had taken him to the Beach Leader. PW1 confirmed that the first accused person went to see him at around 11:00am on 02/08/2017. By then PW1 was at his cousin's home one **Patrick Obinya** (not a witness) together with the Beach Leader one **James Aira** (not a witness). As PW1 had already shared the information with the two it was Patrick Obinya who asked the first accused person why they returned three fishermen in their boat instead of four and the first accused person responded that the fourth one had opted to swim ashore. The first accused person then left.

5. The beach leader asked PW1 and the other villagers to search for the deceased in the village, but it was all in vain. The leader and PW1 then reported the matter to the police and were advised to continue with the search and to arrest the fishermen who accompanied the deceased. At around 07:00pm PW1 was called and informed by his son that the first accused person was at PW1's home. PW1 informed the police and the Beach Leader of the presence of the first accused person at his home. The villagers who mainly comprised of the fishermen hurriedly gathered at the home of PW1 and arrested the first accused person. They descended on him and assaulted him. The first accused person was injured. PW1 rescued him and locked him inside one of his houses until when the police turned up. The police picked the first accused person and took him to the station as the investigations were on-going. The police also arrested the second accused person later.

6. PW4 took over the conduct of the case which had initially been reported as a case of a missing person at Muhuru Bay Police Post. By the time PW4 took over the matter, the deceased's body had been found near the Tanzanian waters and had been retrieved on 04/08/2017. He recorded statements from various witnesses and organized for a post mortem examination which was conducted on 07/08/2017 by **Dr. Sylvester Olango** at the Migori County Referral Hospital Mortuary. A Post Mortem Report was prepared and produced in Court by PW3 on behalf of **Dr. Sylvester Olango**. During the examination it had been found that the deceased's neck bones had been broken and there was petechia around the neck and the body had cyanosis. The lungs had collapsed with no blood therein and there was as well petechia around the heart. The cause of death was opined to have been asphyxia secondary to strangulation. PW3 further explained that petechia was the

presence of many small bleeders from the ruptured small blood vessels onto the space under the skin which usually appeared as small pimples. He further stated that petechia can only occur before death. PW3 therefore ruled out the possibility that the petechia resulted during the retrieval of the body and also emphasized that petechia cannot occur when one is drowning. He confirmed that the petechia around the neck strongly suggested throttling of the neck by strangulation. On the presence of water in the lungs PW3 stated that it was possible for water to find its way into the lungs even after one dies from a cause which is not drowning and is then thrown into water.

7. PW4 then processed the accused persons by escorting them for mental examinations where they were found fit to stand trial. He produced the P3 Forms to that effect as exhibits. PW4 then formally charged the accused persons with the murder of the deceased.

8. At the close of the prosecution's case, the accused persons were placed on their respective defences and elected to give unsworn evidence without calling any witnesses. The accused persons denied committing the offence and reiterated how they were arrested and stated that the deceased told them that he was so tired that he wanted to return home and sleep and since it was around 11:00pm and they were to fish until the following morning, the deceased decided to swim to the shore. That, they were not aware of what happened to the deceased thereafter.

9. At the close of the defence cases, Learned Counsel for the accused persons submitted that the offence was not proved as the cause of death was not proved to be either drowning or strangulation. It was further submitted that PW1 and PW2 testified that the deceased was drunk and as a result he made a decision to instead swim to the shore. The prosecution submitted that the case had been proved and prayed for a conviction.

10. It is now on the basis of the foregoing evidence that this Court is called upon to decide on whether the accused persons are guilty of the offence of murder. As the accused persons are 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.

11. There is no doubt that the deceased died. All the witnesses so confirmed. As to the cause of death, PW3 took this Court through the Post Mortem Report which was prepared by his colleague and stated that the cause of death was opined to be asphyxia secondary to strangulation. PW3 explained that it was possible for water to find its way to the lungs of a dead person. In this case PW3 ruled out drowning as the cause of death due to the presence of petechia both around the neck and the heart which is never evident in cases of drowning. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence and finds that the deceased was strangled.

12. As to who strangled the deceased, there is cogent evidence that the deceased went fishing into Lake Victoria with the accused persons and another who is still at large. The accused persons indeed so confirmed. However, there is no eye-witness account on how the deceased died. In such a case reliance is on circumstantial evidence. The Court is hence called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

13. The foregoing principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (supra)** and have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo vs. Republic (2014) eKLR** among many others.

14. The Court of Appeal in the case of **Musii Tulo (supra)** in expounding the above principles expressed itself as follows:-

“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus:

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

15. The accused persons contended that the deceased decided to swim back to the shore because he was too tired and wanted to sleep. It is possible that the deceased decided to swim back to the shore, but such a decision can only be taken very sparingly in view of the dangers of the lake especially in the night including the extreme cold. However, such an inference must be gauged against all the prevailing circumstances. **First**, the accused persons were not ready to disclose the whereabouts of the deceased until they were compelled by PW2 and threatened with non-payment. It is only when the first accused person pulled PW1 aside and told her that the deceased had decided to

swim back to the shore. In this case the first accused person who was in-charge of the boat and knowing that the deceased made a decision which was dangerous to his own life ought to have brought the matter to the attention of the Beach Leader, PW1, PW2 or the police immediately on landing at the shore if he was not able to have called any or all of them the moment the deceased made that decision in the night. **Second**, the accused persons were not intent to know whether their colleague, the deceased, had reached home well when they returned in the morning of the following day. They took no step to so ascertain. They were only intent on getting paid. Infact, it was PW2 who dispatched someone to look for the deceased in his house. They also did not take part in fiinding where the deceased was with their fellow villagers. **Three**, the deceased did not drown. He was strangled. He was also found in the lake. **Four**, the fourth fisherman disappeared when they returned to the shore and he is still at large. One cannot resist the question as to why he so did and has never turned up. **Five**, the contention by the defence that the deceased was intoxicated as the four fishermen set off for the fishing was not proved since PW1 stated that the Rules at the Lake did not allow drunk persons to go fishing and also the owner of a boat is always personally responsible to ensure that the fishermen are not drunk at any point in time when in the lake. I therefore find that the deceased was not drunk as he set off for fishing with his three colleqgues.

16. The defences are therefore incapable of convincing this Court. The explanations given are not in consonance with a decision of a fisherman of sound mind who is alive to the perils of the lake. The defences did not outweigh the prosecution's evidence. Therefore, the logical inference this Court can make is that the accused persons were the last persons to be with the deceased in whose hands the deceased met his death. The events in this case taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the deceased was strangled the accused persons and thrown into the lake and no one else. I equally find that there are no other co-existing circumstances which would weaken or destroy that inference. The second ingredient of the offence of murder was therefore proved.

17. As to whether there was malice aforethought in the accused person 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:

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(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.

18. 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).

19. 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 gracious 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.

20. In this case there was no evidence of what exactly happened leading to the strangulation. There was also no evidence that the fishermen had differed before they set off into the lake. The fishermen were also not drunk. In those circumstances I find no evidence of any motive on the part of the accused persons and the third ingredient fails.

21. 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.

22. 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 each of the accused persons guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and each of them is hereby convicted accordingly.

23. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 16th day of May, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Mwita Kerario, Counsel for the Accused persons.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.