



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL CASE NO. 29 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSES**

**PHILIP OMONDI OBIJA.....ACCUSED**

**JUDGEMENT**

1. The accused was charged with the **offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge was that **on the 19<sup>th</sup> day of December, 2017 at Matisi location Trans Nzoia County murdered Samuel Otieno Odongo**.
2. The accused denied the charge and the prosecution called 4 witnesses to prove its case. At the close of the prosecution's case the accused was placed on his defence where he gave unsworn evidence and he did not call any witnesses. Before looking at the merits or otherwise of the case and the written submissions by the counsels on record it is worthwhile to summarise the evidence as presented during trial.
3. **PW1 Dr Blustus Kagundi** produced the post mortem report on behalf of Dr. Alex Barasa undertaken on the deceased body on 27<sup>th</sup> December, 2017 which concluded that the cause of death was aspiration. He also found that there was traditional brew of about 3 litres inside the stomach.
4. **PW2 Rosaline Nasambu Mabonga** testified that on the material day the accused together with the deceased and others were taking changaa at her place. There was also a lady who were friends with the accused. The deceased used to sell eggs. A woman came and sat next to the accused and he wanted to buy her alcohol but the deceased refused and they began to quarrel. The lady wanted to fight with the deceased and she separated them. The accused then hit the deceased one blow and he felled down. He lost consciousness.
5. They attempted to take him to the hospital but he had already died. The police came and arrested the accused and took the body away.
6. **PW3 John Oyiego** the husband to PW2 stated that he was in the house resting when his wife came and told him of what had transpired. He found the deceased already down and they tried to rush him to the hospital but he had already died. He then called the Chief and the police who came and arrested the accused and took away the body. He said that he did not know how the deceased met his death.
7. As indicated earlier the accused gave unsworn evidence in which he said that they were together drinking with the deceased who had called him earlier to have a drink. Both of them were friends. He said that they were together with the deceased girlfriend called Sarah.
8. Sarah and the deceased were quarrelling and he separated them. The deceased then gave him kshs. 100 to buy a cigarette and a matchbox at a nearby shop. She learned from the daughter of PW2 called Rodah that his friend had collapsed. They attempted to take him to the hospital but he had unfortunately died.
9. Having heard the parties and read the submissions on record which I do not see any reason to reproduce them, the question at hand is whether based on the evidence on record the prosecution has laid a strong case to convict the accused with the offence.
10. The central evidence is that of PW2 who stated that he was at the scene selling beer to the accused person among others. She said on cross examination that it appears the accused and the deceased had already taken alcohol elsewhere and were already drunk.
11. There was a lady called Sarah who was a girlfriend to the deceased. She was not called to testify and from the evidence of the witnesses she seemed to have been the cause of disagreement between the accused and the deceased. The Investigating Officer was not called to testify and perhaps he would have been the right person to confirm this.
12. Be it as it may, it appears that the deceased and the accused were friends and that it was the deceased who was buying alcohol. There was no evidence of a fight before the accused hit the deceased with one blow. Save that the said Sarah differed with the accused there was

nothing to suggest any other serious aggression.

13. There was no murder weapon produced or used by the accused. Although he contents in his defence that he had gone to buy a match box and cigarette, I do not find the said unsworn evidence of much probative value. The evidence by PW2 to my mind was more credible.

14. The result of the blow on the head led to the deceased being choked by food as found by the pathologist.

15. In the light of the above evidence can it be said that there was malice aforethought on the part of the accused? Can mens rea be established against him?

16. Although the learned state counsel thinks that there was proven evidence of malice aforethought I do not think so. The whole incident appears reactionary. There was no preparation on the side of the accused. Both, it was established, were friends. They were on a drinking spree and it appears even before coming to PW2 house they were already drunk.

17. This line of conclusion is further buttressed by the fact that the accused went ahead after the incident to help the deceased be taken to the hospital but he had already died. There was no sufficient evidence that there was serious disagreement even over the lady called Sarah.

18. In the premises the proper charge in my view should have been Manslaughter as opposed to murder. For that reason I shall reduce the charge from Murder to Manslaughter under the provisions of Section 202 of the Penal Code.

19. Orders accordingly.

**Dated, signed and delivered at Kitale this 6th day of June, 2019.**

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**H. K. CHEMITEI**

**JUDGE**

**6/6/19**

**In the presence of:**

**Mr. Omoria for State**

**None appearance for the Accused**

**Court Assistant – Emily**

**Judgment read in open court.**