



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 92 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SIMON MANGO OTIENO.....ACCUSED**

**JUDGEMENT**

**BACKGROUND**

1. The Accused **SIMON MANGO OTIENO** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that on 19<sup>th</sup> day of August, 2013 along Tom Mboya Street in Nairobi within Nairobi County jointly with others not before the court murdered **JACKSON OUMA SANDE**.
2. His journey through the corridors of justice are captured in my Ruling dated 20<sup>th</sup> June 2019 which for the purposes of this Judgement I shall summarize as follows:- He first appeared before Lady Justice Korir on 20/11/2013 when the investigator was given seven (7) days to complete/undertake investigations on account that other suspects had not been arrested and on 10/09/2013 he took his plea when a plea of not guilty was entered for him and several directions and mentions undertaken by the Judge.
3. The accused then applied for bail and by a Ruling dated 7<sup>th</sup> March 2014 the court denied him bail on the grounds that he was likely to abscond and not attend trial. He again made an attempt to review the said order which was rejected by a Ruling dated 27<sup>th</sup> May 2014. The accused has therefore been in custody through the period of his trial.
4. After several false start at hearing, on 19/05/2015 his trial commenced before Ombija J. who as stated in the Ruling dated 20<sup>th</sup> June 2019 recorded evidence from four (4) prosecution witnesses – (**PW1 – PW4**) before being transferred to the Civil Division and the file was placed before the Presiding Judge of the Division for directions, when it was ordered that the trial should proceed *de novo*. On 20/09/2016, the matter was placed before me for hearing when the said order was restated for record purposes. For some unknown reasons which is captured in the said Ruling on 17/10/2017 the matter proceeded before me with the prosecution only calling witnesses who had not testified before Justice Ombija at the close of which the accused was placed on his defence.
5. It was only when I retired to write the Judgement when it came to my notice that the matter proceeded against the initial directions given by the Presiding Judge which mistake was cured through the said Ruling, where I found that no prejudice was suffered by either the accused nor the prosecution and hence this Judgement. I have stated the background herein for judicial accountability.
6. For record purposes it must be stated that I did not have the advantage of hearing and seeing four (4) prosecution witnesses who testified before Ombija J. but have read their recorded evidence for the purpose of this Judgement having complied with the legal requirements of **Section 200** as read with **Section 201 (2)** of the **Criminal Procedure Code**.

**PROSECUTION CASE**

7. The case against the accused was that on 19/08/2013 **PW1 PC STANLAUS MWITA** was on patrol at 1.20 a.m. in the company of **BERNARD KIRUI** when they spotted four (4) young men chasing one of their colleagues towards Tom-Mboya Street. They caught up with him and started to assault him. They went to his rescue and managed to arrest the accused person while the rest sped off. It was his evidence that they caught the accused by surprise who continued beating the deceased who was by then unconscious. He confirmed that the accused when arrested was bleeding on the mouth and nose and was found in possession of a mobile phone make HTC and a concrete stone on his hand. In cross-examination he stated that he was 40 – 50 meters from where the accused and his group were.
8. **PW2 DR. JOSEPH MAUNDU** examined the Accused person for purposes of mental assessment, age and injury but did not see any

physical injuries on the same. **PW3 CPL. JOHANA TANUI** a scene of crime officer was called to the scene where he found the body of the deceased in a pool of blood with blood oozing from his head, next to the body was a stone with blood stains. He took photographs which were produced in evidence. **PW4 GEOFFREY ASAMBA LUKANGA** a security guard stated that he was on duty at the entrance of SCRATCH BAR when a fight arose amongst fifteen (15) revelers whom they threw out of the Club when the situation came out of control. He stated that the genesis of the fight was about a phone and could not tell whether the accused was amongst them.

9. **PW5 PC BERNARD KIRUI** corroborated the evidence of **PW1** and stated that they were on patrol when they saw four (4) young men chasing another from Kabro Street towards Tom-Mboya Street. There was adequate street light which enabled them to see. They arrested the accused at the scene who said that the deceased had stolen his mobile phone which was found in his pocket. The accused had injuries on his head which he said had been caused by the deceased who hit him with a beer bottle in the bar.

10. **PW6 DOROTHY NJERU** produced the post-mortem report on behalf of **Dr. Oduor**. The body had bruises on the right side of the head/face, laceration on the right side of face, bruises on forearm, scalp hematoma and acute subdural hematoma. As a result of the said examination he formed an opinion that the cause of death was head injury due to blunt trauma. **PW7 ABDI JIBRIL** who was assigned to investigate the case, collected exhibits and blood samples which he forwarded to the Government Chemist. It was his evidence that the accused told him that the deceased had hit him with a bottle and he had a fresh wound. **PW8 LAWRENCE KINYUA MUTHURI** a Government Analyst produced the report which confirmed that the stone collected from the scene was lightly stained with human blood and the DNA profile generated therefrom matched the profile generated from the blood of the deceased.

## DEFENCE CASE

11. When put on his defence the accused stated that he was at Scratch Bar with his two friends when someone they did not know joined their table and he later on noticed that his mobile phone was missing and saw the deceased walking away. He followed him and asked for his phone, when he turned and hit him with a beer bottle. His friends then followed them and a fight broke out when the friends of the accused joined. They were then thrown out by the bouncers. It was his evidence that someone came and hit the deceased who fell down. He then told the bouncers to take the deceased who had stolen his phone to the police station but he took off with the accused and his friends following in pursuit. They got hold of him before his friends joined and a further fight ensued in which he was thrown down, since he was drunk and was losing consciousness he took a stone which was nearby and hit the deceased on the head so to let him free but he did not, forcing him to hit him twice and he left him. It was his evidence that his mobile phone then fell out of the deceased which he took and placed in his pocket.

12. It was his evidence that when he rose up, there were two people who told him they were police officers. He explained to them what had happened and was taken to Central Police Station where he was booked and later on charged with the offence. In cross-examination he confirmed that he used to see the deceased in the Club and that on the material day he knocked himself on him before hitting him with a beer bottle.

## SUBMISSIONS

13. At the close of the defence case Ms. Ojiambo submitted that there was no evidence of malice aforethought on the part of the deceased. It was submitted that they were in a bar when he lost his phone which was recovered from the deceased. It was submitted that the accused was defending himself when the deceased tried to strangle him. It was her submissions that based on the evidence on record the charge should be reduced to manslaughter. Miss Wegulu for the State relied on their submissions at no case to answer and stated that the accused's defence did not shake the prosecution case.

## ANALYSIS AND DETERMINATION

14. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code**, the prosecution is under legal and evidential burden to prove beyond any reasonable doubt the following elements of the offence:-

a) *The fact and the cause of death.*

b) *That the said death was caused by unlawful act of omission or commission on the part of the accused person.*

c) *That it was committed with malice aforethought - mens rea, on the part of the accused as defined in Section 206 of the Penal Code.*

15. The fact and cause of death of the deceased is not in dispute. **PW5** confirmed that the same was pronounced dead at the scene. This was corroborated by **PW1** who stated that they summoned St. John Ambulance personnel to the scene who upon arrival pronounced the same dead. **PW3 JOHANA TANUI** a scene of crime officer processed the scene and took photographs of the dead body of the deceased. The cause of death was proved by the evidence of **PW6 DOROTHY NJERU** who produced post-mortem report by **Dr. Oduor** which confirmed that the cause of death was head injury due to blunt force trauma. As I have stated before, at the time of the Judgement there was no report of the deceased having done the "*Lazarus act*" of resurrecting either caused by Jesus Christ, the Mighty Prophet of the Lord or some other Apostles who claim to having mighty powers to raise people from the dead and therefore hold that the fact and cause of death was proved beyond reasonable doubt.

16. On whether the said death was caused by the accused person, the prosecution placed him at the scene from where he was arrested by **PW1** and **PW5**. In his defence in chief he confirmed having been at the scene and having hit the deceased on the head with a stone. The evidence of **PW1** and **PW5** confirms that the deceased died at the scene and was pronounced so by the personnel from St. John Ambulance. It therefore follows that the prosecution proved beyond reasonable doubt that the death of the deceased was caused by unlawful act on the part of the accused.

17. The only issue in controversy in this case is whether the same was caused with malice aforethought as defined in **Section 206** of the **Penal Code**. The accused's defence as tendered in his evidence was that the deceased had stolen his mobile phone while they were at the bar. This evidence was corroborated in material particular by that of **PW4 GEOFFREY ASAMBA LUKANGA** who was head of security at Scratch Bar and Restaurant whose evidence was that on the material day there was a commotion thereat over an allegation of lost mobile phone originally involving four (4) people but was later on joined by a total of fifteen (15) people who were thrown out of the Pub.

18. The accused in his defence stated that he hit the deceased with a stone so as to free himself from him and the evidence of the arresting officers confirmed that he was injured. Whereas there were four (4) people, three (3) of whom ran away from the scene, the accused did not manage to run away and was arrested at the place thereby leading credence to his account of being held by the deceased. **PW5** confirmed that the accused had injuries on his head when they arrested him, of which he said he had been hit by the deceased with a beer bottle. His first report to the arresting officers was that the deceased had stolen his mobile phone thereby confirming his account of what happened as corroborated by the evidence of the security guard.

19. The accused has therefore raised the issue of self defence which is provided for under **Section 17** of the **Penal Code** as follows:-

*“Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”*

20. Justice M'rima in **REPUBLIC v SIMION OWUOR OTIENO [2017] eKLR** has summarized the common law position as follows:-

*“The common law position has evolved with time from an objective approach to a subjective one. The Court of Appeal in **AHMED MOHAMMED OMAR & 5 OTHERS v REPUBLIC (2014) eKLR** dealt with the aspect of self-defence in great detail. I fully concur with the analysis in that decision not only because the decision is binding upon this Court but also given that the legal position was rightly and clearly settled. I will herein below reproduce how the Court of Appeal expressed itself in allowing the appeal on the ground that the appellants acted in self-defence thus: -*

*The common law position regarding the defence of self-defense has changed over time. Prior to the decision of the House of Lords in **DPP v MORGAN [1975] 2 ALL ER 347**, the view was that it was an essential element of self-defense not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in **DPP v MORGAN (supra)** it was held that:-*

*“.....if the Appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”*

*In **BECKFORD v R (supra)** it was also held that if self-defense is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.*

*In **R v WILLIAMS [1987] 3 ALL ER 411**, Lord Lane, C.J. held:*

*“In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the Defendant's alleged belief was mistaken and if the mistaken was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury comes to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”*

*It is acknowledged that the case of **DPP v MORGAN (supra)** was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also **SMITH AND HOGAN, CRIMINAL LAW, 13<sup>th</sup> Edition, Page 331**.*

*Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test.”*

21. Having taken into account the accused's defence and the prosecution evidence tendered before me, noting that the accused is only required to raise his defence or account on a balance of probability and there being no any evidence tendered by the prosecution to dislodge his account, I find and hold that in the prevailing circumstances, the defence of self defence was reasonably available to him and it cannot be said that he had malice aforethought. He was protecting his property – mobile phone which was allegedly stolen from him as confirmed by **PW3** and his life as he testified in chief.

22. Whereas the accused had submitted through his Advocate on record that the charge should be reduced to manslaughter, in the case of **MOKWA v REPUBLIC [1976 - 80] 1KLR 1337** the Court of Appeal states that:-

***“Where self defense is successfully raised as a defense to a charge of murder, a verdict of manslaughter on the ground that excessive force was used in self defense is only open to the court if the prosecution discharged the onus of showing that the accused had time for reflection and that he could have counted and aimed the blows which he inflicted.”***

23. Having taken into account the totality of the evidence before the court and in particular that the offence was committed at night, there having been a fight between the accused’s group and the deceased’s group as confirmed through the evidence of the security guard at the Club, which fight proceeded outside the Bar before the accused was arrested. In the prevailing circumstances, it is my finding that the force used by the accused in defence was not unreasonable and further that the same did not have an opportunity to reflect on the blows he inflicted upon the deceased there being evidence on record that he also sustained injuries.

24. It is therefore the finding of the court that the accused did not have the necessary intention to cause the death of the deceased and neither did the same develop in the cause of the fight as per the evidence on record.

25. It was for the prosecution to dislodge the accused’s account on what happened at the material time and at the close of the defence case it was clear that they failed to do so either through direct or circumstantial evidence.

26. It therefore follows and I find that the prosecution failed to prove beyond reasonable doubt the element of malice aforethought to the required degree and therefore find and hold that the offence of murder was not proved by the prosecution against the accused person and consequently find the same not guilty and acquit the same of the charges. The accused shall be set free forthwith unless otherwise lawfully held.

27. The State has a right of appeal and it is so ordered.

**Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of October, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Okeyo for the State*

*Mrs. Ajiambo for the accused*

*Accused present*

*Court assistant- Karwitha*