



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 6 OF 2016

REPUBLIC PROSECUTOR

VERSUS

DAVID OTIENO JAOKOACCUSED

JUDGMENT

1. As betting is steadily gaining ground in the lives of Kenyans as a quick way of earning, it so comes with its setbacks among them disagreements among the parties. This case reveals such a scenario which resulted with the death of one of the parties.

2. The parties to the betting were two good friends who were fishermen at Sori within Nyatike Sub-County in Migori County. In the evening of 27/01/2016 the two friends; **David Otieno Jaoko** the accused person herein and **Nahashon Ouma Otieno** (hereinafter referred to as '**the deceased**') bet on a football match where the deceased pledged his phone. That was at the home of the accused person. It was the accused person who won the bet and truly took possession of the phone belonging to the deceased. The friends parted ways as they retired for the night. The deceased however did not consider the loss of his phone a settled issue; he wanted it back and planned on how to reposses it.

3. The recovery day was the morning of 28/01/2016 at the home of the accused person. The two friends met but this time round all was not cordial since the deceased lost his life and the accused person sustained serious injuries and was admitted in hospital for a couple of weeks. On 22/02/2016 the accused person was arraigned before this Court and was charged with the murder of the deceased. He denied the charge and a trial followed.

4. A total of 6 witnesses testified in support of the prosecution's case. **PW1** was **George Okoth Achieng** the Assistant Chief of Bongo Sub-Location in Central Karungu Location in Nyatike Sub-Location where both the deceased and the accused person were his subjects. The Doctor who conducted the post mortem examination on the body of the deceased one **Dr. Thaddeus Owiti** testified as **PW2**. **Kevin Onyango (PW3)** and **Jerry Nyariga Abongo (PW4)** who were family members of the deceased identified the body of the deceased for the post mortem examination. **PW5** was **Josephine Anyango Otieno**. She was a tenant occupying a different room in the same house with the accused person and was an eye-witness. The Investigating Officer **No. 76630 PC Abdi Sataa** testified as **PW6**. He was attached at Nyatike CID offices. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

5. The prosecution's case is centred on what happened when the deceased went to reposses his phone which he had lost to the accused person in a bet. According to **PW5** who was at home on the said date and at around 11:00am, she saw the deceased come into their house as she was about to prepare lunch. She then heard the accused person who was also at home telling the deceased that he was not welcome at his place and that he did not want to see him there. That, the deceased told the accused person that he had gone to collect his phone, but the accused person insisted that the deceased was not a welcome visitor that day. That, the deceased went and stood at the door of the room the accused person lived in and said that he was ready to die for his phone. That, the accused person also stood at the door to his room. It was the accused person who then told the deceased that if he wanted to die then he was also ready to kill him.

6. According to **PW5** the accused person then entered inside his room and came out wielding two pangas. That, the accused person jumped towards the deceased and aimed one of the pangas on the head of the deceased. That, the deceased then shielded his head using his hand which was badly cut. That, the accused person attempted to cut the deceased again but the deceased evaded and the panga fell down. Since the deceased was bleeding profusely he left while lamenting that he was dying for his phone. The accused person then took the two pangas and kept them inside his room as he was taken to hospital by one of the neighbours as he had been injured when the panga fell on him after missing the deceased.

7. **PW5** learnt later that day that the deceased had died while undergoing treatment.

8. The police commenced investigations upon receipt of information from **PW1**. Later that night the police visited the scene and interrogated **PW5** who informed them that the accused person had locked the pangas in his room and since no one had opened the door since then **PW5** was sure the pangas were still therein. The police in the company of **PW1** broke the padlock used by the accused person in locking the door to his room and truly **PW6** recovered the two pangas which still had fresh blood on them. The said pangas were recovered from under the sofa set.

9. PW6 in the company of his colleagues proceeded to St. Camillus Hospital where they found the accused person admitted with injuries on the knee and collar bone. He made arrangements for the accused person to remain under guard while in the hospital. He then proceeded to the mortuary and confirmed the lifeless body of the deceased. On 09/02/2016 PW6 witnessed the post mortem examination on the body of the deceased which body was identified by PW3 and PW4.

10. PW6 proceeded with the investigations and recorded statements from the witnesses. When the accused person was discharged from the hospital, PW6 accompanied him for mental assessment where he was confirmed fit to stand trial. He then charged him accordingly. PW6 produced the medical documents for the accused person, the two pangas and the Mental Assessment Report as exhibits.

11. The prosecution then closed its case and by a ruling of this Court, the accused person was placed on his defence. He opted to give sworn testimony and called his wife, **Molly Akinyi Atieno (DW1)**, as a witness. The accused person narrated how the deceased while armed with a panga and visibly drunk at the house of the accused person threatened him with death if he did not give him back his phone. As the accused person was not intent on returning the phone which he had won a bet on, the deceased then cut him using the panga on his collar bone and on the knee. That, the panga got stuck on the knee as he fell down. That, the accused person removed the panga from his knee and attacked the deceased by instead cutting him on the hand in self defence. He further recounted how he spent several weeks in hospital as a result of the injuries the deceased inflicted on him.

12. DW1 who confirmed that she witnessed the whole incident corroborated the evidence of the accused person. She however, stated that the deceased was armed with one panga and two knives as he demanded for his phone.

13. At the close of the defence case Counsel for the accused person **Mr. Omonde Kiseru** submitted that the offence of murder was not proved as the accused person acted in pure self-defence upon attack by an aggressor in his own home. Counsel also took issue with the way the investigations were conducted as they were incomplete and selective having not interrogated the central issue of betting. The State called upon the Court to be guided by the evidence on record. It is on the basis of the above background that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder.

14. The offence facing the accused persons is an information of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

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.

I will now consider the above issues as follows: -

(a) Proof of the fact and cause of death of the deceased:

15. As to whether the deceased indeed died, the prosecution availed PW2, PW3, PW4 and PW6 in such proof. All those witnesses saw the lifeless body of the deceased. The Court therefore finds as a fact that indeed the deceased herein died.

16. On the cause of the death of the deceased, PW2 produced a Post Mortem Report which he prepared upon conducting the examination. The said report gave the possible cause of death of the deceased to have been haemorrhagic shock due to massive loss of blood as a result of a cut wound. Since there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person: -

17. There is no doubt that the deceased died out of the injury he sustained in the struggle with the accused person. There were at least four people at the scene on that day. They included the accused person, the deceased, PW5 and DW1. On the part of the prosecution therefore PW5 was the only eye-witness whereas the evidence of accused person was corroborated by DW1.

18. That being so, the starting point is on the legal burden of proof. This is a criminal matter where the burden of proof rests on the prosecution throughout. It is therefore the duty of the prosecution to prove its case beyond any reasonable doubt. Under this head therefore, it must be proved that the accused person acted without any legal justification. Whereas the accused person admits having caused the fatal injury, he in turn contends that he did so in self defence. It is hence imperative to closely examine the events as they unfolded at the scene leading to the injuries and that brings into sharp focus the evidence of PW5, the accused person and DW1.

19. While being examined-in-chief PW5 stated that '*...as David (accused person) had also been injured by the panga when it fell down, he asked one of our neighbors to take him to hospital.....*'. (emphasis added). On cross-examination, PW5 stated that '*I did not see Nahashon (the deceased) cut David on the clavicle bone. I did not see Nahashon cut David on the knee. I did not see any injuries on David. I am truthful, and it is not that I am giving one-sided evidence..... It is Collins who told me that David cut his knee himself when Nahashon evaded the panga which David had aimed at him. That injury was self-inflicted.....*' (emphasis added).

20. I find the evidence of PW5 wanting in several aspects. I will only highlight two of such. **First**, PW5 saw the accused person injured by the panga when the panga fell on the accused person and witnessed the accused person wake up Collins to take him to hospital. Shortly thereafter it is the same PW5 who did not see any injuries on the accused person. The witness comes out as wanting in honesty. It is blatantly unimaginable for one to be able 'to see' and at the same time 'not see' the same occurrence.

21. **Second**, if the injury on the knee of the accused person was self-inflicted, then how did the accused person sustain the injury on the collar bone which resulted into a fracture of the right clavicle? According to the treatment notes produced as exhibits the injury to the collar bone was described as 'a complete displaced right clavicle fracture', and 'a deep cut wound and fracture of right clavicle bone caused by a sharp object.' PW5 knew more than what she chose and informed the Court. I agree with the Defence Counsel that PW5's evidence was not a balanced encounter of the events as they unfolded. I hence must and do hereby find that PW5 was not an honest witness.

22. I will now look at the evidence the accused person and DW1. The accused person stated that the deceased who was drunk and armed with a panga attacked him. He cut him on the collar bone and the knee before the panga got stuck on the knee. As the accused person fell, he removed the panga from his knee and attacked the deceased in turn. DW1 corroborated the evidence of the accused person although this Court is alive to the fact that DW1 was a spouse to the accused person who categorically stated that she can do anything to assist her husband.

23. As the prosecution and the defence deny being armed at the scene and blame it on the other I will attempt, from the evidence on record, to create an impression of the then possible situation. PW6 recovered two pangas which were blood stained. Unfortunately, they were not examined to confirm whose blood was on them. I saw the pangas in Court which were still stained with dry blood. If each of the pangas had blood on it, (hoping that it was human blood) then the only inference I can draw is that both must have been used in the fight between the accused person and the deceased. I am certain that the two engaged in a fight based on the evidence of PW1, PW5 and PW6. PW1 testified that he received a call and was asked whether he was aware that people were fighting and cutting one another with pangas at the plot of one **James Minee alias Willis Otieno Ondiege**. PW5 agreed during cross-examination that the accused person and the deceased fought. PW6 also so confirmed during the investigations. That being the case, I must find that each of them; that is the accused person and the deceased; was armed with a panga in the fight and that the injuries which each of them sustained resulted from the fight.

24. Given that the weapons used in the fight were similar, a consideration of other aspects is crucial. One of such is the nature and the point of injury. The accused person sustained two deep cut wounds on the collar bone and the knee which resulted into fractures. Once the collar bone is severed then the whole hand is affected. The same applies to the knee which cripples the entire leg. Such injuries render one not able to stand or use the hand. There is no doubt that such are very serious injuries. On the other hand, the deceased was cut on the hand. It was a single injury. The cause of death was loss of blood due to the cut on the hand. Looking at the nature of the injuries on the accused person and the deceased there is no doubt that the accused person sustained so grievous injuries compared to the single injury sustained by the deceased. The accused person was under a real life-threatening situation.

25. Another aspect is the scene. The scene was at the home of the accused person. The two lived over one kilometer away. The deceased is the one who set out to the home of the accused person with only a single mission; to get back his phone. He armed himself with a panga. On reaching at the home of the accused person his message was clear; to get the phone or ready to die. According to PW5 the accused person repeatedly told the deceased not to go near his home but the deceased, while armed, went up to the door. The deceased was hence the aggressor who was out to get what he wanted under any circumstances whatsoever.

26. The foregone is the factual scenario which must be subjected to the legal parameters to ascertain whether the defence will be available to the accused person. The starting point is the law and judicial precedents. **Section 17** of the **Penal Code** Chapter 63 of the Laws of Kenya states as follows: -

"17. 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."

27. 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 vs. 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 come 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'S CRIMINAL LAW, 13TH 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.'

28. By applying the subjective test and in taking the particular circumstances of this case into account, this Court is convinced that the accused person acted in self-defence. There is ample evidence that the accused person was under a heavy attack by the deceased such that the accused person luckily escaped death. The threat and fear of death on the accused person was so eminent. There was only one way for the accused person to save his own life and it was to also attack the deceased; which the accused person did with such restraint. The defence therefore comes to the aid of the accused person since the prosecution has failed to show that the accused person acted beyond the parameters of self-defence. In so finding this Court echos the holding in the case of **Palmer v. Regina (1971) All ER 1077** where the Court stated that:

“Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence.”

29. This Court therefore finds that the accused person did not commit any unlawful act that went towards causing the death of the deceased as the accused person acted in self-defense. The second ingredient is hence not successfully demonstrated.

30. Having failed to prove the second ingredient it goes without say that the accused person cannot be said to have acted with malice aforethought. Infact a consideration of the last ingredient will not serve any purpose in this matter.

31. I hence conclude that the information of murder facing the accused person has not been proved. The accused person herein, **DAVID OTIENO JAOKO**, is hereby found **NOT GUILTY** of the murder of **NAHASHON OUMA OTIENO** and is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 4th day of May 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Omonde Kiseru Counsel instructed by Messrs. Omonde Kiseru & Company Advocates for the Accused person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyn Nyauke – Court Assistant