



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CRIMINAL CASE NO. 16 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SANTALINO ONGIRO OBORE.....ACCUSED**

**JUDGEMENT**

The accused, **Santalino Ongiro Obore** was indicted with the charged of murder contrary to section 203 as read with section 204 of the Penal Code cap 67 of the Laws of Kenya. It is alleged by the state that on 7/8/2016 at Kware area in Ongata Rongai the accused unlawfully murdered **John Omusugu**. The accused was arraigned pleaded not guilty to the charge. The state lined up eight (8) witnesses to proof the charge in a prosecution conducted by Mr. Alex Akula, the Senior Prosecution Counsel. The accused person was represented in the trial by Ms. Gikonyo Advocate.

**Evidence at the trial court**

The prosecution evidence from the eight witnesses can be summarized as follows: the state opened its case with the testimony of **Francis Kaloki** herein referred as PW1. In his evidence PW1 gave evidence as a Finger Print Expert attached to the National Registration of Persons Bureau. According to PW1 he came to the scene of this matter by virtue of his employment where the Investigating Officer required of him to positively identify the deceased through finger print impressions and details held as per National Identity Card forms. In his evidence PW1 further stated the examination of various forms and the samples of finger prints taken of the deceased he came to the conclusion that the deceased's body is that of Omusugu John. In support of his analysis PW1 produced before court the finger print samples, the identification report as exhibit (1) and (2).

**PW2 - Lydia Mokera** testified as one of the tenant at Kware area where this incident of murder allegedly took place on 7/8/2016. In her evidence PW1 stated to have heard some commotion within the compound. She decided to go out and check the cause and that is when she heard a voice saying *umeniua*. At the same time PW2 also explained that she came across some people who were walking within the same property but she decided to telephone the police station. PW2 further told the court that the occupant of the house where the murder took place belonged to a lady by the name Nancy. As for the deceased and the accused person PW2 testified that she did not know anyone of them besides seeing them on the material day.

**PW3 – Sgt. Richard Ekwom** and **PW6 – PC Ndunda** testified as Police Officers attached to Ongata Rongai Police Station. Their evidence was to the effect that they responded to a distress telephone call from a member of the public in regard to this murder incident which had occurred at Kware Slums. On arrival at the scene PW3 and PW6 testified that they found the accused having been arrested by members of the public and the deceased was lying within the compound. According to PW3 and PW6 evidence the accused was re-arrested with the deceased body being escorted to the city mortuary. The deceased was later to be positively identified and a post-mortem examination carried out to establish the cause of death.

**PW4 – Chief Inspector Henry Cheruiyot** evidence was mainly on the interrogation of the accused to shed light on the circumstances of the alleged offence. He was however not doing this as an officer recording a confession or charge and cautionary statement. This statement as stated by PW4 indicated that a fight between the accused and the deceased was over a lady he identified as Margaret. PW4 further told the court that the whereabouts of the said Margaret remains unknown to this day.

**PW5 – Joseph Gitau**, testified as the caretaker of the plot where the incident took place on the night of 7/8/2016. PW5 gave evidence that the house in question was rented by a lady by the name Margaret and not the deceased nor the accused person.

**PW7 – PC Bernard Kiplagat** a gazetted scene of crime officer testified with regard to the evidence on documenting the scene by way of photographs taken at various points. The photographs taken and accompanying certificate were both admitted in evidence in support of the charge as exhibit 8 (a) and (b) respectively.

**PW8 – Sgt. Martin Mbae** the Investigating Officer who was assigned the case recorded respective statements from the witnesses to the murder. PW8 further compiled the file together with the post mortem report and forwarded it to the Director of Public Prosecution with a recommendation for a preferred charge of murder. He identified the P3 form filled in favour of the accused and a post-mortem form indicative of the cause of death. The two documentary exhibits were also admitted in evidence as exhibit 9 and 10 respectively.

At the close of the prosecution case, the accused was placed on his defence. He elected to give unsworn testimony where he stated as follows: That on the 7/8/2016 on or about midnight he was in the house sleeping in company of his wife Margaret. Further, the accused stated that he heard his wife scream thief, thief and in response he was attacked by that same thief. He denied any acts of violence against the deceased.

Ms. Gikonyo counsel for the accused made submissions and asked the court to find that the prosecution has not discharged the burden of proof of beyond reasonable doubt against the accused. Ms Gikonyo further contended that the case against the accused was based purely on circumstantial evidence. The manner in which the assault and the death of the deceased took place has not been proved to the required standard of proof to warrant the accused person's conviction. Ms Gikonyo argued and submitted that this was a case based on suspicion which by itself is not proof as to the offence of murder contrary to section 203 of the Penal code. Learned counsel in buttressing her submission relied on the following authorities: **Republic Versus Geoffrey Cheruiyot Alias Frank Kirui HCC No. 2 of 2015. Republic Versus Solomon Kiremi Mirukiarair CR. Appeal No. 46 of 2011, Republic Versus Daniel Olich Ochieng HCC No. 3 of 2016, Republic Versus Erick Okumu Criminal Appeal No. 84 of 2014.** On the basis of these decisions learned counsel submitted that the benefit of doubt should be resolved in favour of the accused person.

On the other hand, Mr. Akula, Senior Prosecution Counsel for the state stressed during his submissions that the court should look at the circumstantial evidence in totality as presented by the prosecution. According to Mr. Akula, the exculpatory facts placing the accused at the scene have not been challenged by the unsworn testimony given by him in answer to the offence. He referred to the statement under inquiry recorded by PW4 –Chief Inspector Henry Chepkore alluding to the version of the murder. Mr. Akula contended that in the whole the evidence by the prosecution has discharged the burden of proof of beyond reasonable doubt against the accused person.

### **Analysis and Decision**

I have considered all these matters as urged by the accused and prosecution counsel. On the face of it the test to be applied on the evidence to determine the accused guilt is whether the prosecution has proved the elements of the offence beyond reasonable doubt. The onus rests on the prosecution as expressly provided for under section 107(1) of the Evidence act and the principles succinctly stated in the cases of: **Woolmington Versus DPP 1935 AC 462 and Miller Versus Minister of Pensions 1947 2 ALLER 372-373.** The essentials of these two authorities on the doctrine of proof beyond reasonable doubt is that each ingredient necessary to constitute the charge with what the accused is facing must be proved by the prosecution.

The task of the court has always been to answer the threshold question for an offence of this nature which always rest with the prosecution. It is trite law that the duty of proving the guilty of an accused person lies with the prosecution at all times. The valuable passage from the above cases states interalia:

**“that proof beyond reasonable doubt does not mean proof beyond the shadow of doubt nor as Lord Sanky puts it in the Woolmington case is not proof to the hilt.”**

Therefore, in the instant case we shall be testing the prosecution evidence on the basis of this standard of proof based on the evidence of the eight witnesses.

As already observed the evidence on the allegations how the deceased met his death is purely circumstantial. The relevant material evidence to be applied to the facts of this case must meet the principles issue as stated in the case of **Abang Alias Onyango V Republic CR Appeal No. 32 of 1990** where the court of appeal held that:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those 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.”**

According to the charge of murder contrary to section 203 of the Penal Code. The prosecution must prove the following ingredients in order to sustain a conviction. (1) The death of Omusugu John (2) That his death was unlawfully caused (3) That in causing death the deceased had malice aforethought (4) Finally, that it was the accused person who participated in causing the death of the deceased

In the light of the above elements, I will move on to consider each of the elements and the evidence as availed by the prosecution

#### **a. The death of the deceased (Omusugu John)**

The death of the deceased is not disputed in this case. This is because PW1 – Francis Kaloki from the National Bureau of Registration of persons forensically identified the impression finger prints to be that of John Omusungu. Further the testimony of PW3 and PW6 confirmed that the deceased person collected from the scene at Kware Slums – at Ongata Rongai – was the same one which samples of finger prints were taken and forwarded to PW1 Department of fingerprints for analysis and identification. The post mortem report dated 23/8/2016 signed by Dr. Oboly and Dr. Ndungu further confirmed that the body they examined was duly identified by PC Ndunda PW6. The post mortem report findings indicated that the deceased suffered multiple injuries and the cause of death being intracranial pressure, secondary to subdural

haematoma. in the case of **Benson Ngunyi Nundu Versus Republic CR Appeal No. 171 of 1984** proof of death of another human being is usually by medical evidence by a pathologist who examined the deceased body and stated to the court as to his or her report on the cause of death. Apart from the post mortem report death may equally be proved through cogent and credible circumstantial evidence as to the cause of death of the deceased. The prosecution therefore has discharged the burden of proof that indeed the human being John Omusungu is dead.

#### **b. Unlawful death of the deceased**

Under section 203 of the penal code. The prosecution is under a duty to prove that the death of the deceased was unlawful. The right to life is protected in our constitution under Article 26. In sub-section (3) the same Article states:

***“A person shall not be deprived of life intentionally except to the extent authorized by this constitution or any other written law.”***

It is important to note that the killing of another being is prohibited in law unless excusable or justifiable by the same law.

In the case of **Republic Versus Guzambizi S/O Wesonga 1948 15 EACA**. It was held that in homicide cases death is only excusable if it occurs in circumstances like self-defence, in defence of a third party or property. Invariably in such situations there is imminent danger to that life and property.

In the present case in the night of 7/8/2016 at a place called Kware Slums PW2 testified that that was a creating disturbance in the house occupied by one Margaret. According to PW1 the first screams she heard were directed to a person alleged to be a thief. The prosecution case was further stated by PW3 and PW6 – being police officers called in through a telephone call made by members of the public who included PW2. While PW3 and PW6 arrived at the scene they found the body of the deceased bearing multiple injuries to the upper limbs, the chest, with more pronounced injury to the head. According to PW3 and PW6, the public had also arrested a suspect later identified as the accused with no physical injuries.

The accused in answer to the charge denied the killing of the deceased simply stating that the victim was a thief who broke into their house and was ready to commit a felony. To this extent I agree with the submissions by Mr. Akula for the prosecution that there is overwhelming evidence that the deceased death was due to the injuries inflicted on the fateful night. From the evidence there is a direct correlation between the injuries inflicted upon the deceased and the cause of his death.

It does not matter nor is it a defence under section 213 of the Penal code that the deceased injury could not have caused death if he had the opportunity to submit himself to a proper medical treatment. The law as explained in the case of **Republic v Tabula Myenka s/o Kinya and three others 1943 10 EACA** does not exonerate the accused of his involvement having set upon the deceased under the pretext that he was a suspected thief. The prosecution evidence does negative any claim of self-defence which may be alluded to by the accused for reason that there was use of excessive force. I therefore hold the view that the deceased death was unlawfully caused through acts of unlawful assault. The prosecution has discharged the burden of proof beyond reasonable doubt on this ingredient.

#### **(c) The element on malice aforethought**

Section 203 of the Penal Code defines murder and clearly identifies the ingredient of malice aforethought as one of the central elements to be proved for an offender to be found guilty of the offence. The law goes further to define instances when malice aforethought is deemed to be established under section 206 of the Penal Code as follows:

**i. An intention to cause death of any person or grievous harm**

**ii. Knowledge that the act or mission will cause death**

**iii. Intent to commit a felony**

**iv. Intention to facilitate the escape from custody of a person who has committed a felony**

The principles governing the weight to be given to such circumstances set out in section 206 of the Penal Code is well stated in the case of **Republic Versus Tubere 1945 12 EACA 63 where the Eastern court of Appeal** held as follows:

***“Malice aforethought in murder may be established by ascertaining the nature of the weapon used, the manner in which it is used, the part of body injured by it, the nature of the injuries inflicted, the conduct of the accused before, during and after the incident”.***

The requirements to prove malice aforethought in both direct and indirect malice has been considered. In the recent decisions by the court of appeal in the cases of **Ogeto Versus Republic CA CRA No. 89 of 1999**. It was held that where the appellant in possession of a knife stabbed the deceased on the chest causing fatal injuries intention to cause the death of another is deemed to be established. In the second authority of **Guyo Fora Duba v Republic Criminal Appeal No. 89 of 1999** the circumstances were that the appellant armed with a rifle shot his colleague and fatally causing his death in cold blood the court held it was murder.

Further in the case of **Ernest Asami where Abanga alias Onyango Versus Republic CR. App No. 32 of 1990 and James Masomo Mbatha Versus Republic 2015 ECLR**. The court held inter alia that malice aforethought is deemed to be established by the sheer force and gravity of the nature of multiple injuries inflicted and the parts of the body targeted against the deceased by the offender. In applying the above principles to the facts of this case one can easily say that the killing of the deceased was with malice aforethought.

### **What were the circumstances in the present case?**

They were vividly described by PW1, PW2, PW3, PW4, PW6, PW7 and PW8. There was no eye witness to the murder. The only person who could tell the story graphically was Margaret the tenant to house No. 5 where the murder took place. However, in circumstances which remain unclear the police never managed to trace her during the pendency of the trial. All the above witnesses came to the scene after the murder. It is also not clear how the accused and the victim found themselves in the house of Margaret. The accused in his defence identified Margaret as a wife but could not tell the court of her whereabouts. In addition, it appears that the deceased was a stranger to the estate. This is supported by the testimony of PW2 one of the tenants to the premises and PW5 the Caretaker who denied any knowledge of the two persons.

The point of law raised in this trial is whether under section 206 of the Penal Code proof of malice aforethought has been established to the satisfaction of the court. From the evidence availed by the post-mortem admitted as exhibit 9 there was sustained assault of the deceased. Further, there was recovery of the murder weapons being three metal bars from the immediate response and visit to the scene by PW3 and PW6.

What the prosecution witnesses failed to testify as to is whether the sustained unlawful assault by the accused was with an intention to cause death or grievous harm to prove malice aforethought. Secondly, it was desirable for the prosecution to firmly ground their evidence as to whether the deceased was actually a suspected thief to the property or one who had an affair with Margaret. That issue was left hanging without being settled at the close of the prosecution case. Regarding the absence of the above piece of evidence enables this court to deal with the narrative introduced by the accused on the doctrine of self-defence.

### **Was the accused action in defence of self or another?**

The law of self-defence is expressly stated in section 17 of the Penal Code. While giving directions as to the role of a person who acts in self-defence the jurisprudence on this issue has been substantially interpreted construing the English Law principles. In the Landmark case of **Palmer Versus Republic 1971 AC 814**. The court held interalia:

*“A person being attacked should not be expected to weigh to a nicety the exact measure of his necessary defensive action and went further to say that if a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most positive evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self- defence, where the evidence makes its raising possible will only fail if prosecution shows beyond reasonable doubt that what the accused did was not by way of self-defence”*

Indeed, as was observed by the **Court of Appeal, in this case of David Lentiyo Versus Republic 2006 EKLR** stated that:

*“It is to be emphasised that in a case of self-defence if an accused finds he is in imminent danger from his opponent, he must retreat from the danger but if he finds that he cannot retreat further, then he can use force to defend himself.”*

The primary factors to consider in determination of whether force used was necessary was stated in the case of **Uganda v Mubuli (1975) HCB 225 (Ssekandi Ag J)**, stated:

*“The law relating to self-defence as consisting of four major elements. One, that there must be an attack on the accused. two, that the accused must, as a result of the attack, have believed on reasonable grounds that he was in imminent danger of death or serious bodily harm. Three, that the accused must have believed it necessary to use force to repel the attack upon him. Four, that the force used by the accused must be such force as the accused believed, on reasonable grounds, to have been necessary to prevent or resist the attack.”*

From the evidence the circumstances of the deceased's assault show acts of a violent nature during the attack. It is also not disputed that the attack occurred in the night and the deceased was not a tenant nor a visitor to any of the houses at Kware Slums. There is therefore a possibility that shows that he may have been a thief or intruder into the house where the accused was an occupant or an aggressor visiting a woman who also had an affair with the accused. In this trial the evidence of PW2 shows that the deceased was either a thief whose presence at the property was to steal from any of the houses or a was friend to Margaret the occupant where the fight allegedly took place and the deceased succumbed to the injuries.

What I do find from the evidence was the use of excessive and disproportionate force to attack the deceased. We have no evidence that the deceased was in any way armed with any lethal weapon to necessitate the sustained assault by the accused. In the result though the injuries in my view were consistent with malice aforethought I think in the circumstances of this offence the killing of the deceased only amounted to manslaughter. Having said so am satisfied that the present case falls short of proving malice aforethought as defined under section 206 of the Penal Code beyond reasonable doubt.

I have evaluated the evidence with due regard to the answer given by the accused. I find the statement by the accused could not be relied by this court. Undoubtedly the accused was positively identified in the sequence of evidence that point at him as the assailant. The circumstances from which an inference of guilt is sought to be drawn by this court has been established by PW2, PW3, PW4, PW5 PW7 and PW8. The force of circumstantial evidence presented by the prosecution is such that the accused was positively identified and placed at the scene of crime. See also the case of **Kipkering Arap Kosgei & Another 16 EACA 131 (Abang v Republic (Supra))**.

If this court admits the defence of provocation as defined in section 207 and as read with section 208 of the Penal Code, the accused may be said to have been deprived of the power of self-control. That is to say the presence of the deceased in their house was to commit a wrongful act to a person who stands in conjugal, filial or fraternal relation with the accused. Again if I take this approach fundamentally it does mitigate the element of malice aforethought to the murder of the deceased.

In my opinion the accused may have been under the impression that he was under attack from the deceased. In response to this apprehension in order to defend himself he exceeded the proportionality test of using force beyond what the occasion could have demanded. I say so when I appraise the nature of multiple injuries suffered by the deceased as demonstrated in the post-mortem report. Such a killing was unlawful as the accused never even made attempts to scream or call for help to arrest the purported thief. Let's think for a moment the deceased was a trespasser and thief to the property as alleged by the accused. It could be argued that in the same Estate there were other tenants whom he could have incorporated to arrest the deceased and in order for him to face the law. Even if one employs the test of a reasonable man it is correct to conclude that the accused unreasonably failed to appreciate the risk of harm while using the metal bars to assault the deceased. I therefore reject the defence by the accused person.

For these reasons I find that the prosecution case overwhelmingly supports the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. Accordingly, I enter a verdict of guilty and subsequent conviction for the offence as proven against the accused person. It is so ordered. With regard to sentence the accused is committed to serve three years' probation.

**Dated, Delivered and Signed in open court at Kajiado this 11<sup>th</sup> day of July 2018.**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

- Ms. Gikonyo for the accused
- Mr. Akula for the State

**Sentencing Remarks and Order**

The accused person was initially charged with the offence of murder contrary to section 203 of the Penal Code. During the final determination this court made a finding that the evidence by the prosecution discharged the burden of proof beyond reasonable doubt for a lesser offence of manslaughter contrary to section 202 as punishable in section 205 of the Penal Code.

At the sentencing hearing the accused was stated to be a first offender from the records submitted by the state. This court called for the presentence report which the probation officer Leah Kidali provided the personal circumstances and views of the community about the accused. In her report the accused has strong community ties and as a family man could benefit from non-custodial sentence. The defence counsel Ms. Gikonyo presented mitigation factors urging this court to pass an un-custodial sentence in favour of the accused.

In view of the unique circumstances of this case there was no victim impact statement. Having made the observations, I need to consider the appropriate sentence for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code. I take judicial notice the definition of what constitutes life imprisonment in Kenya is yet to be defined. Without necessary delving into details of reaching an attempt to define the concepts referred to as life imprisonment my view would be to have a determinate term of imprisonment for the offence of manslaughter and all other offences where life imprisonment is prescribed by parliament.

In the instant case there is no doubt that the facts presented a serious crime where the life of human being was brought to an abrupt end without any justification. I have therefore to take into account that the deceased died as a consequence of an unlawful acts of assault by the accused.

I have borne in mind both the aggravating and mitigating factors derived from the facts of this case and submissions by the defence counsel and the probation officer's report. The relevant factors in this decision on sentence against the accused would be: First, for whatever reason the fact is that there was prima facie evidence of a fight between the deceased and the accused person. The deceased sustained injuries and for that reason he succumbed to death. Secondly, the incident occurred at night at Kware Slums where the fact is that the deceased was not a tenant to any of the houses within the Estate. How he found himself in the property and the nature of his visit never came out clearly save for the scanty testimony from the accused. However, the fact remains that this was truly a killing of another human being outlawed by the constitution under Article 26 which expressly protects right to life. It is difficult to deduce from the evidence why the accused had to use excessive force against the deceased. The conduct of the accused not to retreat or deal with the situation in any other way than use of force has also been taken into account.

In this case it is however proper and plausible to note that despite the aggravating features of this offence the mitigating factors are matters of credit to the accused. It is not in dispute also that the accused has been in remand custody since 5/9/2016. That period has to be factored in making the final order on sentence. Weighing one factor after another I conclude that the appropriate sentence in reference of the charge of manslaughter against the accused is that of a non-custodial sentence. It is not lost to the court that the accused prior to his incarceration was remanded but from the pre-sentence report the wife deserted the home abandoning their two children aged 2 and 3 years respectively. He therefore remains the ultimate parent to provide maintenance and their overall upkeep.

In the premises I sentence the accused to non-custodial sentence of 3 years' probation, in the interim period the probation officer should organize for a psychotherapy counselling lessons aimed at rehabilitating the accused person.

**Dated, Signed and Delivered in open court at Kajiado this 11<sup>th</sup> day of July 2018.**

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**R. NYAKUNDI**

**JUDGE**

**Representation**

Ms. Gikonyo for the Accused – present

Mr. Akula for the State - present