



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL MURDER CASE NO.13 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NOORDIN CHARLES MWITA.....ACCUSED**

**JUDGMENT**

1. The accused, **NOORDIN CHARLES MWITA**, is charged with murder, contrary to **Section 203** as read with **Section 204** of the **Penal Code**, in that on the 29<sup>th</sup> April 2017, at Remba Island, Mfangano North Location in Mbita – Homa Bay County, he murdered **OWINO CHEK**.

2. The case for the prosecution was that at the material time both the accused and the deceased were fisherman based at Remba Island. On the material date in the afternoon hours, they were deep in the lake undertaking their fishing activities using different boats. In the process, their fishing nets were entangled and this resulted in an abusive altercation between themselves.

3. The deceased threw his pair of trousers or shorts from his boat into that of the accused. In return, the accused picked the trousers and made an attempt to throw them back to the deceased. Unfortunately, the trousers fell into the water. The deceased became agitated and made as if to set the accused's boat on fire by pouring fuel on it. His colleagues restrained him and drew their nets. They then proceeded to anchor their boat but the deceased followed the accused and jumped into his boat to demand his trousers while holding a stone.

4. It was at that juncture that the accused picked a knife from his boat and used it to stab the deceased on the neck. Thereafter, he threw the knife into the waters and assisted to carry the injured deceased into his boat to be moved to the mainland. He however, passed away. His body was taken to Mbita hospital and the accused arrested. He (accused) was eventually charged with the present offence.

5. The case for the defence was that on the material date the fishing boat occupied by the deceased and his colleagues approached the boat occupies by the accused and his colleagues due to strong winds engulfing the fishing area. The accused then requested the deceased and his colleagues to move a distance away but was met with abuses from the deceased. The two engaged in jocular abuses with each other before the deceased removed his pair of trousers and threw it into the accused's boat.

6. The deceased then chided the accused to check the trousers for lice but he (accused) threw it back. The trousers fell into the water prompting the deceased to pick a fuel pipe and pour fuel into the accused's boat with an intention of setting it on fire. The accused on noting that the deceased had been restrained by his colleagues decided to move his boat away but was followed by the deceased who then jumped into his boat and threw a stone at him. He (accused) was then confronted by the deceased and the two engaged in a struggle.

7. There was a knife in possession of the deceased. He used it to cut the accused on the hands but the same was wrestled away from him by the accused who swung it around and stabled him. He (accused) threw the knife into the water and went to the rescue of the deceased whom they rushed to the mainland but he died from his injuries. He (accused) was then arrested and charged.

8. The issue arising for determination from the foregoing facts is whether the deceased was unlawfully killed by the accused and if so, whether in doing so, the accused acted with malice aforethought.

The prosecution was thus required to prove not only the commission of the unlawful act but also that it was done with an **“evil”** or guilty mind. So that, any person who of malice aforethought causes the death of another person by any unlawful act or omission is guilty of murder (see **section 203 Penal Code**).

9. In this case, the evidence by **DR. ODHIAMBO BOB FELIX (PW8)**, showed that the deceased died from collapse of the lung and haemothorax due to assault.

There was undisputed evidence from the prosecution through **EDWIN MANYAMA KASONGO (PW1)**, **PAUL OCHIENG ONGENE**

**(PW2), MARTIN OCHIENG OLELO (PW3) and CHEMEL NICODEM JAIRI (PW4)**, that the deceased was assaulted with a knife and injured by the accused.

10. The accused did not deny having fatally injured the deceased but he implied and was indeed supported by the prosecution witnesses that the deceased was the aggressor inasmuch as he provoked the episode leading to his death.

Both the prosecution and the defence indicated that the deceased had threatened to set the accused's boat on fire after his trousers accidentally fell into the waters after being tossed back to him by the accused, shortly afterwards, he jumped into the accused's boat.

11. However, whereas the accused indicated that he was attacked by the deceased with a stone and then a knife, the prosecution indicated that the deceased did not have a chance as he was immediately attacked by the accused with a knife no sooner had he jumped into the accused's boat.

The prosecution also indicated that the person in possession of the knife was not the deceased but the accused.

12. There was a suggestion from the accused that his reaction towards the deceased was an act of self defence. However, this was disproved by the fact that he was not under any danger to his life from the deceased after he (deceased) jumped into his boat as the deceased was never armed with any dangerous weapon but a stone which was apparently not used.

13. In any event, the accused was capable of fending off any danger from the deceased after the two held one another and engaged in a struggle which would have been harmless had he (accused) not drawn a knife from somewhere in his boat. It was him and not the deceased who created a dangerous situation when he introduced the knife into his disagreement and/or struggle with the deceased and the fact that he aimed the knife at the neck of the deceased meant that the fatal single blow knife attack was clearly meant to snuff life away from the deceased.

14. It was no longer a question of defending oneself or accidentally inflicting a fatal injury upon the deceased. The accused's intention was clearly to do grievous harm to the deceased or even to kill him.

Under **Section 206** of the **Penal Code**, malice aforethought is deemed to be established by evidence proving an intention to cause the death or to do grievous harm to any person. This is exactly what happened in this case as shown by the evidence adduced against the accused.

15. Even if the deceased was the aggressor or the person who agitated the unfortunate incident, the accused did not have to overreact by attacking him with a knife with fatal consequences. In so doing, he took the law into his hands and must therefore be held criminally liable for the consequences of his unlawful action even though he demonstrated remorse by rushing to help the deceased after he had inflicted serious injury on him.

16. For all the foregoing reasons it is the finding of this court that the prosecution's burden of proof was fully discharged against the accused.

17. It was thus proved beyond reasonable doubt that the deceased was killed by the accused's unlawful act of fatally stabbing him with a knife or sharp object on the neck and in doing so, the accused acted with malice aforethought. He is therefore found guilty as charged and is convicted accordingly.

**J.R. KARANJAH**

**JUDGE**

**11.10.2018**

[Delivered and signed this **11<sup>th</sup>** day of **October, 2018**].