



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL CASE NO. 34 OF 2015**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**SAMWEL MBOYA CONGO *alias* TOM.....ACCUSED**

**JUDGMENT**

1. This is a case which once again brings to the fore the defense of self-defense. **Samwel Mboya Congo *alias* Tom**, the accused person herein, did not deny that his friend **Andrew Dennis Young Ogada** (hereinafter referred to as '**the deceased**') died as a result of a confrontation between the two. He contended that he only acted in self-defense as he was in real danger and had no intention of causing the death of the deceased.

2. The accused person was arraigned before this Court on 16/11/2015 and was charged with the information on the murder of the deceased. The particulars of the information were that: -

***“On the 27<sup>th</sup> day of October 2015 at Manywanda Village, Okayo Sub-Location in Migori County in the Republic of Kenya murdered Andrew Dennis Young Ogada”***

3. The Accused person denied committing the offence and the case was set for hearing. The prosecution availed six witnesses who testified in support of the information. **Gabriel Seko Ajuoga Owuor** who was a brother to the deceased and a neighbor to the accused person testified as **PW1** whereas the father to the deceased one **Cosmas Krisa Ogada** testified as **PW2**. **Eric Okeyo Odera** who was a close relative to the deceased testified as **PW3**. The initial investigating officer **No. 79589 Cpl. James Nzioka** testified as **PW4** while the wife to the accused person testified as **PW5**. She was **Celeza Akinyi Mboya *alias* Akinyi *alias* Celestine**. **PW6** was the subsequent investigating officer **No. 79856 Corp. George Stephen Mutunga**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. The evidence of **PW1**, **PW2** and **PW3** was taken before my sister **Omondi, J.** and upon compliance with **Section 200(3)** as read with **Section 201(2)** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya I recorded the rest of the evidence.

5. The evidence in support of the prosecution's case revealed that **PW2** had contracted the accused person to plough his farm at a cost of Kshs. 800/=. That, in the morning of 27/10/2015 the accused person while accompanied by his wife went to plough the **PW2's** land and were later joined by the deceased who was not only a son to **PW2** but a close friend of the accused person. All the three persons ploughed and completed the work at around 11:00am. **PW5** returned home while the accused person and the deceased went to see **PW2** for payment. After paying the accused person as agreed **PW2** proceeded to Macalder for a meeting and returned to his home in the evening where he found the deceased taking supper and who was lightly drunk. As **PW2's** family members were at home that evening they heard the accused person who ran on the road leading to his home which road passed next to the home of **PW2** mourning and chanting in Dholuo language that one '**Wuod Ombugu**' had died. The deceased then hurriedly decided to go to the shop operated by the wife of the accused person to buy a match box but **PW2** asked him not to do so as he feared a possible confrontation between the accused person and the deceased given that the accused person seemed to be drunk as well. The deceased however insisted and left.

6. **PW2** retired to his house. After a short while **PW2** heard the accused person shouting from his homestead in Dholuo language that he was killing **PW2's** son who was an American. **PW2** asked **PW1** to rush to the homestead of the accused person and find out if there was any issue. **PW1** rushed towards the homestead of the accused person and met one **Bill Clinton (DW1)** on the way who told **PW1** to go and collect the deceased who had been injured by the accused person and was lying at the gate to the homestead of the accused person. On reaching at the scene **PW1** saw many people had gathered and the deceased was lying in a pool of blood crying. **PW1** saw **PW5**, **Eunice Atieno** who was the mother to the accused person, a cousin to the accused person one **Joseph Ogomo** among others.

7. **PW1** called and informed **PW2** of the state of affairs and **PW2** asked **PW1** to get back home and pick a motor vehicle and rush the

deceased to hospital. PW1 obliged and as he was returning to the scene he was accompanied by his wife and the wife of the deceased. PW1 was accompanied by his wife, PW5 and one **Joseph** and rushed the deceased to Lakeside Maternity and Nursing Home in Karungu where the deceased was referred to Homa Bay County Referral Hospital for specialized medical attention. PW1 took the deceased thereto and the deceased was admitted and rushed to theatre as he underwent treatment.

8. PW2 went to see the deceased in hospital the following day and the deceased who was then in great pain could not even talk much. The deceased only told PW2 that the accused person had finished him. The deceased then passed on shortly thereafter. PW2 returned home and proceeded to Luanda Police Post and reported the matter. PW2 was informed by the police officers thereat that the accused person had also reported the matter earlier. PW2 recorded his statement.

9. PW3 narrated that as he went to buy some airtime from the shop operated by the wife to the accused person in the early night on 27/10/2015 he found the shop closed albeit early. He however saw someone walking and shone his phone torch. He saw the accused person whom he knew so well carrying a panga and when he asked him whether there was anything wrong the accused person kept quiet and ran off. PW3 proceeded to the scene and saw the deceased injured and lying in a pool of blood as the gathering of the neighbours increased.

10. The matter was then taken over by the DCI Nyatike Sub-County who instructed PW4 to continue with the investigations. PW4 visited the scene in the company of other officers and were also led to the home of the deceased. He interviewed several potential witnesses and recorded their statements. He later proceeded to Luanda Police Post where he found that the accused person had reported the matter under OB No. 3 of 28/10/2015 as well as PW2 under OB No. 7 of 28/10/2015. PW4 was also informed by the In-Charge of the Post that the accused person was in communication with him and had decided to surrender to the police. PW4 managed to talk to the accused person over the phone and directed him to surrender at the DCI offices in Migori which he readily did and was collected by officers from DCI Nyatike.

11. PW4 eventually met the accused person and interviewed him. The accused person gave PW4 a club fitted with a piece of metal at the front and informed him that he recovered it from the deceased during their confrontation. PW4 accompanied the accused person back to the scene with a view of recovering any other exhibits but in vain. He then accompanied the accused person to his house and PW4 searched it. PW4 recovered the accused person's purple trousers, black jacket and a vest which had blood stains together with his treatment notes. Later the In-Charge of the Luanda Police Post called PW4 and informed him that some members of public had surrendered a panga suspected to have been used in the confrontation between the deceased and the accused person. PW4 recovered the panga.

12. On 04/11/2015 PW4 escorted the accused person to Macalder District Hospital where he was mentally examined and found to be fit to stand trial and also took blood samples from the accused person on the strength of a court order. The accused person was also treated at the said hospital from the injuries sustained during the confrontation and a P3 Form filled. PW4 also prepared a Sketch Plan of the scene and organized for the post mortem examination which was conducted by Dr. Osuri Kevin on 13/11/2015 at the Homa Bay County Referral Hospital Mortuary where a depressed skull fracture with a deep face wound were noted. The cause of death was opined as the head injury. PW4 requested for and obtained some samples from the body of the deceased for further analysis. PW4 then forwarded the exhibits and the samples to the Government Chemist for forensic analysis. He arraigned the accused person in Court on 16/11/2015 and charged him with an information of the murder of the deceased.

13. PW4 confirmed the confrontation between the accused person and the deceased where the deceased sustained fatal injuries and the accused person was as well injured. According to PW4 the accused person used a more lethal weapon in the circumstances even after cooling off from the initial fight on the road since the fatal attack took place later at the accused person's homestead. PW4 produced the copies of the OB extracts, accused person's treatment notes, P3 Form, the mental examination report and the sketch plan as exhibits.

14. PW6 received the Government Analyst Report and the exhibits. The Report confirmed that the trousers were stained with the blood of the accused person and the blood stains on the panga did not generate any DNA profile. The DNA profile generated from the blood stains on the club were for an unknown male. PW6 produced the panga, the club, the trouser, the Government Chemist Report, the Post Mortem Report and the Exhibit Memo as exhibits.

15. 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 a witness, DW1. The accused person narrated how he was engaged by his relative, PW2, on 26/10/2015 to plough PW2's land on 27/10/2015 at an agreed cost of Kshs. 800/=. That, PW2 gave him a down-payment of Kshs. 200/= on the 26/10/2015. In the morning of 27/10/2015 the accused person proceeded to PW2's farm with his wife and their cows and began working. That, the deceased later joined them and they all worked and finished at around 11:00am. Whereas the wife of the accused person returned home the accused person and the deceased went to the home of PW2 where the accused person was given a further Kshs. 300/= by PW2. The accused person and the deceased then parted ways.

16. The accused person then visited his other friend until the evening. He then heard over the radio that his other friend had died and returned to his home at around 09:00pm while mourning loudly on the way and mentioning the name of his late friend. As he approached his homestead the accused person was confronted by someone who emerged from a nearby bush. That person held the accused person by the neck and the accused person realized that he was the deceased who was then demanding the Kshs. 300/= which the father of the deceased (PW2) had given the accused that morning. The deceased hit the accused person with a club on the head and as they struggled DW1 emerged and asked the deceased why he was assaulting the accused person. As the deceased chased away DW1 the accused person got an opportunity and ran into his house. He locked the door and prepared to sleep.

17. A little later there was a bang on the door of the house of the accused person by the deceased demanding the money. The accused person told him that he did not have the money and the deceased threatened him with death together with his wife (PW5) and children. The accused person saw the deceased carrying a club. The accused person opened the door and the deceased entered inside the house. A confrontation ensued as PW5 escaped. There was a panga aside and both struggled over it. The accused person held it on the handle as the deceased held it on the plate. The panga cut the deceased and the deceased ran out of the house. The accused person reported the incident to Luanda Police Post in the morning of the following day and proceeded to hospital where he was treated for the injuries he had sustained in the fight. He was later called and informed by an officer from the Police Post that the deceased had died and he surrendered to the DCI at Migori.

18. DWI corroborated the incident on the road between the accused person and the deceased whereas PW5 confirmed the later incident. The accused person contended that he acted in self-defense as the deceased was determined to kill him.

19. At the close of the defence case Counsel for the accused person **Mr. Kisia** filed written submissions and the State called upon the Court to be guided by the evidence on record. It is on the basis of the above evidence that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder.

20. 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:**

21. The fact that the deceased indeed died was confirmed by PW1 PW2, PW4 and PW5. All those witnesses saw the lifeless body of the deceased. The Court therefore finds as a fact that indeed the deceased herein died.

22. On the cause of the death of the deceased, PW6 produced a Post Mortem Report which was prepared by Dr. Osuri Kevin upon conducting the examination. The said report gave the possible cause of death of the deceased to have been the injury on the head. 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: -**

23. There is no doubt that the deceased died out of the injury he sustained in the struggle with the accused person. The genesis of the twin confrontations between the deceased and the accused person have been visited above. They centered on the demand by the deceased for the Kshs. 300/= which the accused person had been given by PW2. It is as well true that the deceased also worked with the accused person and PW5 at the farm of the father of the deceased. What did not come out clearly was whether the deceased did so as part of his contribution to his family or as part of the workforce employed by his father, PW2.

24. It cannot be denied that the attack on the road was sudden. It appears that when the deceased heard the accused person mourning his friend on his way to his home the deceased got an opportunity and ambushed him. They fought as the deceased hit the accused person with a club. It was DW1 who aided the accused person to escape. The deceased then followed the accused person into his house. While armed with the club fitted with a metal piece at the front the deceased while banging the door demanded for the money and threatened that unless he was given the Kshs. 300/= which the accused person had been given by PW2 he would kill the accused person together with his family.

25. The accused person then opened the door and the deceased entered and a fight ensued. The accused person contended that the deceased was injured by the panga as both struggled to get it from the floor of the house and the deceased instead held the plate and was injured. If that was the case then the likely injuries would have been on the hand. However, according to the Post Mortem Report the deceased sustained a deep cut on the head, another deep cut on the face and on the forearm. The cut on the head fractured the skull. Such serious injuries cannot be alluded to one holding the plate of a panga. I hence find that the injuries were otherwise inflicted. The accused person was inside his house when the deceased went for him. He undoubtedly had an opportunity to prepare himself for another confrontation with the deceased whom he knew had a club. He then armed himself with a panga. The injuries confirm that the accused person used force in the use of the panga. It is those injuries that were fatal.

26. The accused person pleaded self-defense. The question which now begs an answer is whether the accused person indeed acted in self-defense in the unique circumstances of this matter. 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-defense 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-defense 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-defence 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, 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.'

28. By applying the subjective test and in taking the particular circumstances of this case into account, this Court ponders over the question as to what would have happened had the accused person not opened the door to his house. Was the accused person put in a situation where his life was in a real danger such that he had no other choice but to act the way he did? I do not think so. There was no guarantee that the deceased would have gained access into the house had the accused person not opened the door. I therefore do not find that the life of the accused person was put in such a real danger to warrant such a reciprocating and scathing attack. Either way I am not convinced that the accused person used self-defence. I hence echo the finding of the English Court 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 unlawfully caused the death of the deceased. The second ingredient is hence successfully demonstrated.

c) Proof that the said unlawful act or omission was committed with malice afterthought: -

30. Section 206 of the Penal Code defines 'malice aforethought' as well as case law. In the case of Joseph Kimani Njau vs R (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of Nzuki vs R (1993) KLR 171, held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55”. (emphasis added).

31. In the case of Nzuki (supra), the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There

was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed that: -

*“There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”*

32. In this case it was the deceased who was the aggressor. He ambushed the accused person on the road and after the accused person escaped the deceased again followed him into his house and not *vice-versa*. Apart from the finding that the accused person used a more lethal weapon and excessive force on the deceased I am not satisfied that the accused person acted with malice aforethought. If anything it can be said that it was the conduct of the deceased which demonstrated malice. I hence find that the accused person did not act with malice and the third ingredient fails.

33. The foregoing analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, it is clear that the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

34. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

35. These are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 4<sup>th</sup> day of October, 2018.**

**A. C. MRIMA**

**JUDGE**

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

**Mr. Kisia** Counsel for the accused person.

**Joseph Kimanthi**, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Evelyne Nyauke** – Court Assistant