



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL (MURDER) CASE NO. 19 OF 2016**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**DENNIS OMONDI OGOLA.....ACCUSED**

**JUDGMENT**

1. **DENNIS OMONDI OGOLA**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that:

**On 24th April, 2016 at Kakola Location, Nyando Sub-County within Kisumu County murdered DAVID LUCI ONDITI**

2. The prosecution summoned a total of 3 (Three) witnesses in support of its case while the defence called accused only.

**Prosecution Case**

3. **PW2 Ronald Owino Ochome** recalled that on 24.4.16 at about 7.30 pm, his sister Victoria Ochome made a distress call to his wife and he rushed to her house which was about 100 metres away from his. He stated that before he got to his sister's house, he saw a crowd gathered outside the house of his cousin David who lived nearby and one of the persons in the crowd informed him that his brother David had been attacked for allegedly stealing a motor cycle. He said he went nearby and saw his brother who kneeling down and had injuries on his body surrounded by a crowd and accused was identified as the owner of the allegedly stolen motor cycle and was also said to be allegedly having an affair with David's wife. That in his attempt to rescue his brother, he was attacked by a mob and he ran for dear life and locked himself in the house of sister Victoria. That after a while, he went out and found his brother David had been beaten and was barely alive. He said he took David to hospital where he died the following day. He stated that he saw accused whom he did not know before strangle David (**hereinafter referred to as the deceased**) with a steel pot holder. **PW3 Victoria Adhiambo Ochome**, deceased's cousin stated that the deceased called him to his house at about 7.00 pm on 24.4.16 and identified accused who was standing outside the house with the deceased's wife Sharon as the one that was having an affair with his wife Sharon. She said accused made a call and several boda boda riders arrived at the scene and beat the deceased senseless on allegations that he had stolen accused's motor cycle. That she too was attacked and injured when she tried to rescue the deceased and she ran to her house from where her neighbor Teresa called PW1 who upon going to the scene was also attacked by the mob and he too ran for dear life in her house until the crowd went away. She stated that he and PW1 took the deceased to hospital from where he later died. She identified accused as the one that called the crowd that attacked the deceased and also stated that she saw accused beat the deceased with a steel pot holder.

4. **PW 1 Mary Nanyama**, of *Jaramogi Oginga Odinga Teaching and Referral Hospital* stated that the postmortem on the body **David Luci Onditi**, (**hereinafter referred to as the deceased**) was conducted by her colleague Dr. Mboya with whom she had worked with for 2 years and who had gone for further studies. She stated that the deceased's body had the following injuries:-

1. Contusion on left frontal scalp
2. Edema on upper and lower lips with contusion
3. Cut wound on left lower limb

4. Left frontal subgaleal hematoma
5. Left temporal epidural hematoma
6. Bilateral subdural hematoma on left parietal region
7. Left cerebral edema

5. The witness produced the deceased's postmortem form **PEXH.1** which shows that he died of bilateral subdural hematoma secondary to blunt force to the head.

### **The Defence Case**

6. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put him on her Defence. In his sworn defence, accused denied the offence. He stated that he was a boda boda rider and said he was arrested on 24.4.16 when he went to Ahero police station to report that his motor cycle had been stolen.

### **ANALYSIS AND FINDINGS**

7. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari Vs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

- (a) the death of the deceased occurred;
- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

#### **(a) The death of the deceased**

8. The death of the deceased has been proved by PW2 and PW3 who saw deceased's body and the postmortem form **PEXH. 1** produced by PW1 which confirms that deceased had extensive injuries especially on his head and *had died of bilateral subdural hematoma secondary to blunt trauma force to the head.*

#### **(b) Proof that accused committed the unlawful act which caused the death of the deceased**

9. Evidence was led by PW3 that she found accused and deceased's wife outside the deceased's house. She stated that accused alleged that the deceased had stolen his motor cycle as a result of which accused called other boda boda riders with whom they attacked the deceased as a result of which he died. PW2 similarly saw accused among the crowd that attacked the deceased and caused him injuries from which he later died.

10. I have considered the evidence by PW2 and PW3 *vis a vis* the accused person's defence. I am convinced that accused was at the scene of crime as this is corroborated by PW2 and PW3. There is evidence that it was the accused that called the boda boda riders with whom they attacked the deceased as a result of which he died.

11. The description of the assault by the accused by both **PW2** and **PW3** is more or less consistent in detail. It was a brutal thrashing which entailed assault on PW2 and PW3 when they attempted to rescue the deceased.

12. Upon a careful evaluation of the evidence, the court finds that the prosecution evidence that accused and others assaulted the deceased as a result of which he died is overwhelming and effectively dislodges the defence offered by the accused. Indeed by the time the assault stopped the deceased lay in a heap on the ground, immobile and had to be carried away to hospital.

13. The assault on the deceased, whether or not he had stolen a motor cycle was unlawful act. The Court of Appeal held in the case of **Njoroge v Republic (1983) 197** that:

**“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the cause of his endeavours to effect the common object of the assembly.....”**

14. In **Dracaku s/o Afia -vs- Republic (1963) E.A 363** the court observed that even though **“there was no evidence that any agreement was formed by the appellants prior to the attack made by each, it is not necessary if an intention to act in concert can be inferred from their actions, such as “where a number of persons took part in beating a thief”.** So it is in this case. Several known and unknown people engaged in what has become commonplace: public participation in assaulting suspects of theft, the so called **“mob justice.”**

15. The deceased may have succumbed to injuries inflicted severally by different self-appointed executioners but the accused also assaulted him. He too was a part of the mob, and is equally guilty of committing the unlawful act which caused the death of the deceased which constitutes the *‘actus reus’* of the offence.

**(c) Proof that deceased had malice afterthought**

16. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. The ingredients of murder were explained in the case of **Roba Galma Wario vs Republic [2015] eKLR** where the court held that;

**“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”**

17. Malice aforethought was defined in the following cases;

(a) **Nzuki Vs Republic [1993] KLR 171** where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- **Intention to cause death**

- **Intention to cause grievous bodily harm**

- **Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.**

(b) In the case of **DANIEL MUTHEE VS REPUBLIC CRIMINAL APPEAL NO. 218 OF 2005 (UR)** cited in the case of **REPUBLIC VS LAWRENCE MUKARIA & ANOTHER [2014] eKLR**, Bosire, O’kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

**“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”**

18. Upon a careful evaluation of the evidence, the court finds that the prosecution evidence was overwhelming and effectively dislodged the defence offered by the accused. I am satisfied that accused inflicted considerable injuries that led to the death of the deceased.

19. I am satisfied that accused masterminded the attack on the deceased and that he and others inflicted the injuries that led to the death of the deceased. From the severity of the attack, I have no doubt that it was their intention to cause the deceased grievous harm if not death. I am therefore satisfied that malice aforethought has been established in terms of Section 206(b) of the Penal Code.

**Disposition**

20. Consequently, I have come to the conclusion that the state has proven its case beyond reasonable doubt. Accused is found **GUILTY** of the offence of murder and he is accordingly convicted.

**DATED AND DELIVERED IN KISUMU THIS 13<sup>th</sup> DAY OF December 2018**

**T. W. CHERERE**

**JUDGE**

Read in open court in the presence of-

**Court Assistant - Felix**

**Accused - Present**

**For Accused - N/A**

**For the State - N/A**