



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 47 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

SAMSON OTIENO OLUOCH.....ACCUSED

JUDGMENT

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The information states that on 30th July 2011 at Kisumu Port, Kisumu District within Nyanza Province the accused murdered **Boniface Okiya Ekwenye**.

The Prosecution called 9 witnesses and briefly the facts of the case are that on the material day the accused was a night watchman employed by Bedrock Security Services and attached to the Railway harbour in Kisumu town. At about 4AM that night Terer Charles Kibet (PW2) and Calvin Otieno Juma (PW3) who were the accused's colleagues also stationed in a different area of the harbour heard the accused blow a whistle and went to check what was happening. They found the accused holding an iron rod and a man lying on the ground. Upon enquiring the accused told them that he had seen the man crawling along the fence outside the canteen where there was no security light and that the man attacked him resulting in his striking the man with the iron rod. Since the man appeared to be dead they advised the accused to report the matter to their supervisor and went back to their stations. The accused then proceeded to report the matter to his supervisor Joseph Ooko Ogwati (PW3) who went to the scene before calling the duty officer Francis Wambila (PW5) who after going to the scene reported the matter to the police. Police officers among them PC Benjamin Yator (PW6) and Corporal Robert Kibet (PW7) visited the scene. According to Corporal Kibet (PW7) the accused told him that upon seeing the deceased crawling along the fence he asked who he was but instead he (the deceased) sprinted off but upon telling him to stop he did not prompting him (the accused) to hit him with the metal rod twice. They arrested the accused and removed the body to the mortuary but before that they summoned PW1 also a night watchman in the area who identified the dead man as the deceased in this case. PW1 testified that the deceased was his colleague but that he had not reported to work on that night. A Postmortem conducted thereafter revealed the cause of death to be cardiorespiratory arrest secondary to severe head injury.

The accused gave sworn testimony. He conceded that at the material time he was a guard working with Bedrock and that he was stationed at the canteen section of the harbour in Kisumu. He stated that on the material day he was on night duty and that there were guards from other companies guarding different sections of the port. While admitting that he killed the deceased he asserted that he acted in self defence. He narrated how lights went on and off intermittently from 11.30PM and since hippos would come out to graze at night he became apprehensive when he heard a sound and then saw a movement that did not seem to be a hippo. He went to investigate and saw something going towards him in the grass that was about one (1) meter. He went somewhere to watch what it was only to see a man spring to his feet.

When he asked who it was the man did not respond but instead charged towards him and attacked him with an iron bar. He warded off the blow with his left hand but the man struck him again. This time he got hold of the metal bar and when the man let go of it he hit him with it. The man fell down and that is when he blew the whistle. His colleague went to the scene and he told him what had transpired. He then left to report the matter to the supervisor who soon brought police officers one of who identified the deceased as a fellow officer who was stationed at the harbour to guard a ship. He contended that he himself did not know the man prior to that and that he did not know where he struck him. He emphasized that he hit the man only once. He further stated that the deceased must have come through the fence and that he himself only had a rubber baton and a torch. He explained that the reason he did not flash the torch was that he did not know what he was up against. Although the deceased hit him he had nothing to show he went to hospital. He denied that he used excessive force.

Mr. Olel, Advocate who represented the accused throughout the trial urged this Court to find that the offence of murder had not been proved. He submitted that as stated by the accused he acted in self defence while under attack by an intruder at 2AM and that it was not the intention of the accused to kill the man and he only fought to save his life. He urged this Court to review the evidence in light of Section 17 of the Penal Code and the following cases:-

- **Ahmed Mohamed Omar & 5 Others V. Republic [2014] eKLR**
- **Republic v. Deana, 2 CR APP 75 (CCA)**
- **Republic V. Peter Mwangi Murigi [2012] eKLR**
- **Robert Kinuthia Mungai V. Republic (1982 – 88) 1 KAR 611**
- **Republic V. Joseph Macharia Waweru [2015] eKLR**

He submitted that in this case the prosecution has not discharged the onus of showing that the accused had time for reflection and that he could have counted and aimed the blows that he inflicted. He submitted that in the circumstances of this case it cannot be said that the accused had enough time to reflect and act differently. That with the accused's adrenalin up, deep into the night, next to the lake with all creatures the only option open to him was to defend himself from a vicious attack launched on him by an intruder who was up to no good. He urged the Court to find that the accused acted in self defence and acquit him.

There were no submissions from the prosecution.

The offence of Murder is committed when as set out in Section 203 of the Penal Code any person who of malice aforethought causes death of another person by an unlawful act or omission. Section 206 provides that malice aforethought is established by evidence proving any of the following :-

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

(a) an intention to cause death of or to do grievous harm to any person , whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

To succeed therefore the prosecution must prove and this beyond reasonable doubt that not only did the accused cause the death of the deceased by an unlawful act or omission but that he did so with malice aforethought.

In this case the accused admits that he struck the deceased with an iron rod. Although he asserts he does not know where he struck him the cause of death was confirmed to be cardiorespiratory arrest secondary to severe head injury. We can therefore safely conclude that the accused caused the death of the deceased. Indeed all the witnesses did confirm that when they went to the scene they found the man lying on the ground dead. The actus reus has therefore been established. What of the mens rea?

At the time the accused struck the deceased there were no eye witnesses and therefore we only have the accused's account of what happened. Granted there was a contradiction between what the witnesses allege he told them which is that he saw someone crawling near the fence and thinking he was going to attack him he hit him on the shoulder and what he told this Court which included that the man, in fact charged towards him and would not stop even upon being told to do so. He also told this Court that he did not know on what part of the body he struck the man. He stated that he did not initially know it was a man; That it could have been a wild animal as hippos do come out of the lake to graze at such time. In the absence of evidence to contradict the accused's account this Court believes his account that he challenged the man to stop but that he continued moving towards him.

The Court was told that the deceased was also a watchman/guard in the same harbour and according to the accused that was his eighth month working there and the question one would then ask is why he did not recognize the deceased who was so to speak a fellow guard? It was his evidence that he did not know the deceased before and that at the time this incident occurred the lights had gone off. None of these two issues; whether the accused and the deceased were known to each other and whether there was light at the time the incident occurred were put to the prosecution witnesses. There could have been light when the witnesses went to the scene but did the lights go off immediately prior to PW2, 3 and 4 going to the scene? These were crucial questions that should have been put to those witnesses as firstly we have it on record that the area was well lit and secondly the accused is on record as stating that he reacted as he did because he did not exactly know what he was up against and further that he did not see where he hit the deceased. Were the lights on he would have seen that what was advancing towards him was a man and that the man was unarmed and hence he would certainly have had no good cause to have hit him on the head as he did. However in the absence of that evidence this Court must believe the accused and as such find that there is no evidence to suggest that the accused had formed an intention to kill the deceased.

Be that as it may even in the absence of malice aforethought the unlawful killing of another may amount to manslaughter under Section 202 of the Penal Code. In this case however, the accused stated that he acted in self defence and hence did not act unlawfully. This Court must therefore determine whether he acted unlawfully.

Section 17 of the Penal Code states:-

“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.”

In **Ahmed Mohammed Omar & 5 Others V. Republic [2014] eKLR** the Court of Appeal after discussing several cases among them **Palmer V. Republic [1971] AC 814**, **Robert Kinuthia Mungai V. Republic (1982-88) 1 KAR 611**, **Beckford V. R [1987] 3 ALL ER 425**, **DPP V. Morgan [1975] 2 ALL ER 347**, **R V. Williams [1987] 3 ALL ER** came to the following conclusion in regard to the aforesaid principles:-

“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 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.....

Just as the Privy Council did in BECKFORD V. R (Supra), we must also dispel the fear that 'the abandonment of the objective standard demanded by the existence of reasonable grounds for belief will result in the success of too many spurious claims of self-defence'. Each case will

have to be determined on its own merit and peculiar circumstances”

The question in the present case therefore is whether the striking of the deceased by the accused amounted to an unlawful act or whether applying the test above he acted in self-defence. In **DPP V. Morgan (Supra)** it was held:-

“If the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellant's belief was material to the question, whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

As it turned out the deceased in this case was unarmed and he too was a guard at the harbour. One may therefore conclude that the accused acted on a mistaken belief that the deceased wanted to attack him. That test is however objective and as was held by the Court of Appeal is the wrong test. According to him he believed that the deceased was going to attack him. He told the Court that the deceased dashed towards him when he challenged him to stop and emphasized that he hit him only once. In **Ahmed Mohammed Omar & 5 Others V. Republic [2014] (Supra)** the Court of Appeal placing reliance on **Beckford V. R (Supra)** held that ***“where self defence is raised in a criminal trial the prosecution is enjoined to prove that the violence used by the accused was unlawful and to thereby disprove the defence.”*** The accused testified that his tool of trade was a rubber baton and a torch. It was his evidence that he took the metal rod he used to hit the deceased from the deceased himself. Where this may not have been rebutted it is nevertheless my finding that by the medical evidence tendered the prosecution has proved that the violence used by the accused was unlawful. The injuries defy what he alleges was one strike. The deceased had a fracture of the left humerus bone, facial bruises and a fractured occipital bone which the Doctor described as a severe head injury reminiscent of injuries that could not have been inflicted by one blow alone. For a person whose only tool of trade was a rubber baton intended merely to disable suspects before getting reinforcement, which in this case the accused got as soon as he blew the whistle, the force he meted out on the deceased was unlawful. Yes he may have acted upon the mistaken belief that he was being attacked but he could have used reasonable force to disable the suspect while he sought help which, as is evident, was readily available. Accordingly I find him guilty of manslaughter contrary to section 205 of the Penal Code and convict him accordingly.

Signed, dated and delivered at Kisumu this 18th day of January, 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Muia for the State

Mr. Oyuko for Mr. Olel for accused

C/A: Serah Sidera