



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 2 OF 2016**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**DAVID OMBASA OUMO Alias OSAMA .....ACCUSED**

**JUDGMENT**

1. **David Ombasa Oumo** Also known as **Osama**, is accused of murder, contrary to S. 203 read with S. 204 of the Penal Code. It is alleged that he murdered Samson Mwema Gitebe, on the night of 1<sup>st</sup>/2<sup>nd</sup> January 2016, at Donyo Sub-location South Gucha within the County of Kisii.

2. The case for the prosecution was that the deceased was taking alcoholic drinks at a local bar from about 8.00pm on the material date. He was in the company of the accused and others but he returned to his home at about 11.00p.m to demand from his wife, **Alice Kerubo Mwema (PW 1)**, the keys to his shop. He obtained the keys and indicated that he was to sleep at the shop to guard his property.

3. At about midnight, he (deceased) was called back home after it was reported to him by his wife that the accused had gone there and attempted to force himself into the house before taking off to a neighbour's home after alarm was raised and villagers appeared at the scene.

4. On arrival home, the deceased was abused and threatened by the accused who was in possession of a spear which he used to stab the deceased on the abdomen.

The deceased suffered serious injury from which he succumbed while being rushed to hospital.

The accused escaped from the scene and ran into the homestead of his wife.

5. The deceased's sons, **Peter Mwema (PW 2)** and **Isaiya Mwema (PW 3)**, were at the scene during the incident. They both confirmed that the deceased was stabbed on the abdomen with a spear and that the accused was responsible for the act.

6. The said spear (P.Ex 1) was handed over to **Cpl. Antony Musembi (PW 5)**, who investigated the incident and in the process arranged for a post mortem examination on the body of the deceased which was identified for that purpose by **Zebedeyo Mose (PW 4)**.

7. On the 7<sup>th</sup> January 2016, the accused was arrested at the Kenya/Tanzania border while attempting to flee from the country. He was taken for a mental assessment examination and the necessary report (P.Ex 2), revealed that he was mentally stable. He was eventually charged with the present offence.

8. In his defence, the accused denied the charge. He stated that he was at his farm in Kehancha – Migori County on the 7<sup>th</sup> January 2016, when he was informed that he was required at the local police station. He went there only to find police officers from Ogembo Police Station.

9. The police officers took him to Sirare Police Station and eventually to Ogembo Police Station where he found his uncle and aunt who told him that they would take him very far from home. Thereafter, he was charged in court for the murder of his uncle. He contended that he did not commit the offence and was at his home in Kehancha when it occurred. He had no grudge with the deceased and did not know the person who killed him.

10. It is apparent from all the foregoing evidence that no dispute arises with regard to the fact that the deceased was assaulted with a spear and fatally injured.

The post mortem report (P.Ex3) indicated that he died from cardiopulmonary arrest due to massive bleeding into the abdominal cavity due to a penetrating stab wound through the abdominal line.

11. The basic issue for determination was therefore, whether the accused was the person responsible for assaulting and fatally injuring the deceased and if so, whether he acted with the necessary intention (malice aforethought) to cause the death of the deceased.

12. The accused's defence was essentially based on an alibi indicating that he was at his home in Kehancha and not at or anywhere near the scene of the crime as and when it occurred. He thus implied that he was not the person responsible for the death of the deceased under whatever circumstances.

13. In criminal cases, the obligation to prove a charge against an accused person on a standard of proof which is beyond reasonable doubt always lies on the prosecution. The burden never shifts from the prosecution. It is not for the accused to establish his innocence (see, **Kioko Vs. Republic (1983)KLR 289**) and by the same token it is not for him to prove his alibi.

14. In **Kiarie Vs. Republic (1984)KLR 739**, the court held that an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

15. In **Sekitoleko Vs. Uganda (1967)EA 531**, it was held that as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else.

Herein, the question that is crucial is whether the prosecution evidence is cogent and credible enough to dislodge and/or discredit the alibi raised by the accused.

16. In that regard, the deceased's wife (PW 1) and sons (PW 2 and PW 3) contended that the deceased was fatally injured with a spear by the accused. They all indicated that they actually saw him in the act which it would appear happened outside the house of the deceased.

17. There being no dispute that the accused and the witnesses (PW 1, 2 & 3) were no strangers to each other as they were relatives, it is apparent that his alleged identification by the said witnesses was by recognition which is more reliable than ordinary visual identification (see, **Anjononi & Others Vs. Republic (1980)KLR 59**).

18. However, whether the identification is by recognition or otherwise, the prosecution must show or establish existence of favourable conditions for identification so as to overrule the possibility of mistaken identity.

The wife to the deceased, Alice (PW 1) indicated that she identified the accused by recognition and by voice.

19. She also indicated that she identified the accused on two occasions, firstly when he arrived at her house no sooner had her deceased husband been there to collect the keys to the shop at about 11.00 pm. Secondly, when he returned to the scene at about 12.00 midnight to abuse, threaten and eventually attack her husband with the spear.

20. It was the testimony of Alice (PW 1) that on the first occasion she prevented the accused from accessing her house when he attempted to force himself inside. She indicated that she was able to identify him at that point since he was near or at the door to the house which was lighted by electricity. She however, did not indicate how she was able to visually identify him on the second occasion when he assaulted the deceased outside the house.

21. On both occasions it was unclear whether the deceased's wife (PW 1) was able to make a visual identification of the accused since her sons (PW 2 and PW 3) indicated that there was no electricity in the house and she never mentioned moonlight as being the favourable condition which enabled her see and recognize the accused outside her house.

22. However, she (PW 1) mentioned that she was also able to recognize or identify the accused by his voice. This was a possibility as the accused was related to her. She must therefore have been familiar with his voice and she heard it on the material date when he was shouting from a neighbour's homestead and when he uttered abuses and threats directed at the deceased when he was called home at midnight.

23. This court has no hesitation in holding that the deceased's wife (PW 1) identification of the accused at the scene of the offence was by voice while his identification by recognition by the sons of the deceased (PW 2 and PW 3) was positive and reliable due to the presence of sufficient or bright moonlight at the scene of the offence.

24. Consequently, the accused's alibi defence was credibly dislodged and invalidated by the deceased's wife and sons. They all placed him at the scene of the offence when it happened and affirmed that he was the actual offender. This was confirmed circumstantially by the fact that he escaped from the scene after the fact and was arrested at the Kenya/Tanzanian border while trying to flee from the country.

25. As to whether the accused assaulted the deceased with intention to cause his death, the evidence by Peter (PW 2) and Isaiya (PW 3) coupled with that of the investigations officer (PW 5) indicated that the accused and the deceased may have quarreled and disagreed over ownership of land and this could have led to the unfortunate act of assault occasioned to the deceased by the accused.

26. From what the deceased's wife (PW 1) stated, it would appear that prior to the unfortunate act the deceased and the accused were together in a bar taking alcoholic drinks. She left them in the bar when she proceeded home at about 8.30pm on the material date.

The investigations officer (PW 5) said that his investigations revealed that both the accused and the deceased were taking beer at a local trading centre when they quarreled over some land.

27. It is clearly evident that when the accused assaulted and fatally injured the deceased he may not have been in a position or capable of forming an intention to kill the deceased due to his intoxication at the time. This was a possible defence which was not raised by the accused. However, a trial court has a duty to deal with alternative defences which emerge from the evidence and which reduce the charge to manslaughter even though they were not put forward by the defence (see, **Okeyo Kigen Vs. Republic (1965)EA 188** and **Kioko Vs. Republic (Supra)**).

28. It is therefore the ultimate finding of this court that the accused was responsible for assaulting and fatally injuring the deceased but without the intention to kill him.

The prosecution has thus proved as against the accused a charge of manslaughter, contrary to S. 202(1) of the Penal Code for which he is hereby convicted.

**[Delivered and signed this 21<sup>st</sup> day of February 2017]**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

CC Steve Njoroge/Dorothy

State Counsel – Mr. Otieno

Mr. Kaburi holding brief for Mr. Okemwa for accused

Accused

**State Counsel:** Accused may be treated as a first offender.

J.R. Karanjah , Judge

**Mitigation by Mr. Kaburi:** Accused is a first offender. He is aged 48 years old, married with four children. He is the sole breadwinner of his family. He is remorseful of the incident which happened under the influence of alcohol. May the court consider a non-custodial sentence.

J.R. Karanjah , Judge

**Court:** Accused is a first offender. Mitigation noted. Circumstances of the offence show that although the accused may have been drunk he was bent at harming the deceased after they disagreed over matters related to land. He in effect used excessive and unnecessary force against the deceased.

J.R. Karanjah , Judge

**Sentence:** Accused to serve thirty (30) years imprisonment. Right of Appeal.

J.R. Karanjah , Judge

21/2/17