



**THE REPUBLIC OF KENYA**

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

**HCCRC NO. 50 OF 2015**

**(CORAM: J.A. MAKAU – J.)**

**REPUBLIC.....PROSECUTION**

**VS**

**DOUGLAS MUSA LITUNYA.....ACCUSED**

**JUDGMENT**

1. The accused **DOUGLAS MUSA LITUNYA** is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya**. The particulars of the charge are that on the **21<sup>st</sup> day of June 2011** at Kaindakwa Estate, Siaya Township location, in Siaya Sub-County within Siaya County murdered one **WILLIAM OMUKUNDA ODONGO**.

2. The Prosecution called five (5) witnesses. The facts of the Prosecution's case were that the deceased and others who included PW2 and PW3 were at their rented house by their boss Mr. Wycliffe Ogong'a in Siaya Town near Equator Bar; that PW1 and five others including the deceased William Omukunda Odongo were living in one room. That at around 8.00pm, while they were seated in their room preparing their supper, one Douglas came and knocked the door, entered in the room and called Omukunda, the deceased outside. Omukunda proceeded outside leaving the door open; Douglas and Omukunda started talking for a period of about 5 minutes. PW2 and PW3 could hear the two talking but they did not bother to find out what they were talking about. They heard them struggling as they pushed each other into the room and one of them fell on the mattress on the floor. The lantern lamp was on and it enabled them to see what was happening. They noted someone who entered and fell on the mattress was Omukunda. PW1 noted Omukunda was bleeding and had blood on his head as he was holding his abdomen from which he saw his intestines out. PW1 rushed to call their boss from Equator Bar. On return, they found Omukunda already dead. Police from Siaya Police Station were called and took the deceased to Siaya Referral Hospital Mortuary. That after investigation, the accused was arrested and was charged with the offence.

3. The accused on being put on his defence, he gave unsworn statement denying the commission of the offence. He gave a defence of alibi stating that after close of his business on 21/6/2011, he proceeded to his residential house; prepared a meal, ate and had a shower then he slept. That at 1.00am, he heard his house door being knocked and on opening the door he found police officers at the door, who told him they were looking for him. He was arrested and taken to Siaya Police Station when he was told it was alleged he had killed someone. That he was charged with the offence which he knew nothing about it.

4. The accused faces a charge of murder. **Section 203 of the Penal Code** provides:-

***“(203) Any person who of malice aforethought causes death of another person by an unlawful***

***act or omission is guilty of murder.”***

5. Malice aforethought is a very important ingredient for the offence of murder; the Prosecution has therefore to prove facts which establish malice aforethought. **Section 206 of the Penal Code** sets down the facts which constitute malice aforethought as follows: -

***“(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 the 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.”***

6. For Prosecution to prove a charge of murder, the Prosecution has to establish the following ingredients:-

***(a) the death of the deceased and its cause.***

***(b) that the accused caused the death through an unlawful act or omission.***

***(c) the accused possessed an intention to cause harm/kill or had malice aforethought.***

7. **Whether Prosecution proved death and cause of death of the deceased?** PW2 told court he saw the deceased fall on a mattress on the material night of 21/6/2011, bleeding from the head and with his intestines out, that he went to inform his boss and on return he found the deceased dead. He witnessed police collect the deceased body to the mortuary. PW3 told court when the deceased entered the house, he noted he had injuries. He was bleeding from the head and his intestines were out. They gave him first aid and when police came, they found him dead and took the body to the mortuary. PW1, uncle to the deceased identified the deceased's body to the doctor on 23/6/2011 at Siaya Referral Hospital Mortuary for postmortem purposes. A postmortem was carried out on the body of the deceased by Dr. Metho. PW4, Dr. Biko Opidi gave evidence on behalf of Dr. Metho, who conducted postmortem over the deceased body in presence of PW1 who identified the body in company of Justus Okora. The doctor's evidence corroborated the evidence of PW2 and PW3 who told the court that they witnessed that incident and noted the injuries sustained by the deceased. PW5 testified the police visited the scene, found the deceased dead and took the body to Siaya Referral Hospital Mortuary. In this case, there is no dispute on the death of the deceased. The doctor upon examination of the deceased came to the opinion that the cause of death was due to penetrating abdominal injury with damage to small gut. I am from the evidence of PW1, PW2, PW3, PW4 and PW5 satisfied that the Prosecution has proved the deceased's death and the cause of death.

8. **I now turn to the next ingredient of an offence of murder, thus who caused the death of the deceased?** The accused denied the offence and gave a defence of alibi. The accused statement was unsworn and he could not be subjected to cross-examination. His defence of alibi was introduced in his defence for the first time. In the case of **Charles Anjare Mwamusi V Republic C.A Criminal Appeal No. 226 of 2002**, the **Court of Appeal** stated: -

***“An alibi raises a specific defence and an accused person who puts forward an alibi as an***

*answer to the charge preferred against him 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 Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25.”*

9. I have considered the evidence of PW2 and PW3 which put the appellant at the scene of crime. PW2 stated that the incident took place at 8.00pm and they had lantern lamp in the room, when the accused then, knocked the door and entered the room and called Omukunda who proceeded to the door. That he heard them talking as the door was open. They talked for about 5 minutes, then started struggling, pushing each other into the room. PW2 was observing all what was happening as the deceased fell on the mattress with blood on his head and his intestines outside. PW2 had known the accused as he used to work at Equator Hotel and used to serve PW2 and his co-employees with meal at the hotel for a period of 1½ weeks as they had to take their lunches at the hotel. PW2 identified Douglas in court as the accused person pointing at him, in the dock. He stated he saw him on 21/6/2011 at 8.00pm when he went to the room and had also seen him during the day time. PW3 told court on 21/6/2011 at 8.00pm, someone knocked at their door, he opened and called William Omukunda Odongo outside. That he went out and after a while he heard screams from the deceased. The door was open. When the deceased returned, his face was bleeding and his intestines were outside. PW3 told the court when the person opened the door he was able to see him and he saw that it was **DOUGLAS MUSA LITUNYA** as there was a lantern lamp on and it had bright light. He even saw the accused was dressed in a white shirt. That PW3 had known **DOUGLAS MUSA LITUNYA** for 1 week as he used to see him at Equator Hotel where he was an employee and where PW3 and his co-employees used to take their meals. That on 21/6/2011 he had seen the accused earlier on in the morning on their way to work, as he was coming from the hotel. From the evidence of PW2 and PW3, I am satisfied that at the material night there was sufficient light from the lantern lamp, that enabled PW2 and PW3 to see and recognize the accused. The accused was known to PW2 and PW3 before as an employee of Equator Hotel who used to serve them with meals. They saw him and they recognized him and identified him by his voice. They heard him talking to the deceased for about five minutes though they did not know what the two were talking about. The deceased screamed as the two struggled with each other till the deceased fell. There was no other person who had called the deceased outside but the accused. There is no other explanation how the deceased sustained his injuries other than the deceased sustained injuries from the attack by the accused. The accused raised a defence of alibi in his unsworn defence. That he was not at the scene of crime. The said defence was not raised early enough, through cross-examination to enable the Prosecution to check on it. I find the defence unsustainable and that it is an afterthought. I am therefore satisfied that the Prosecution have proved as required by law that the accused caused the death of the deceased.

10. **I now turn to the remaining ingredient of the offence of murder, thus whether the accused had malice aforethought?** PW2 and PW3 told court they were at their room with the deceased when the accused knocked their door and called the deceased outside. They heard them talking for about 5 minutes, then saw the two struggle and the deceased fell on a mattress bleeding from the head and his intestines outside. The accused raised a defence of alibi which I have held was an afterthought. I find evidence of PW2 and PW3 dislodged the accused's defence and placed him at the scene of the crime, he was well known to PW2 and PW3. The accused did not raise a defence of grudge and I find PW2 and PW3 credible witnesses and I believe that they were telling the court the truth. From evidence of PW2 and PW3 as regards how the accused came to deceased's room, called the deceased out, talked to him for about 5 minutes and they struggled leading to the deceased falling on the mattress having injury to the face and protruding intestines, I find from the evidence, that the accused had planned to commit the offence of murder. The accused had knowledge that his act of stabbing the deceased at the stomach could probably cause death or grievous harm. Exhibit P1, reveal that the deceased had 6cm cut wound on parietal aspect of the head; penetrating abdominal, entry wound on right hypochondrial region wound approximately 4cm diameter with intestine spilling out of the abdominal wound; several wounds mainly in small gut with leakage of intestinal contents into peritoneal cavity. That the several injuries inflicted by the accused intended to cause death or grievous harm to the deceased. I will find that the accused had malice aforethought and that the Prosecution proved malice aforethought. **I find the accused herein is guilty of murder of WILLIAM OMUKUNDA ODONGO. Accordingly, I convict the accused of murder contrary to Section 203 as read with Section 204 of the Penal Code.**

**DATED AT SIAYA THIS 9TH DAY OF FEBRUARY 2017.**

**J.A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 9TH DAY OF FEBRUARY 2017.**

**In the presence of:**

**Mr. Ooro:** for the Accused

**M/S Odumba:** for State

**Accused** - Present

**Court Assistants:**

1. George Nganyo

2. Sarah Ooro

**J.A. MAKAU**

**JUDGE**