**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 44 OF 2015**

**REPUBLIC…………….....…………......……………....……PROSECUTOR**

**Versus**

**JOSHUA KOIKAI SITAYA………...……..……............................ACCUSED**

**Counsel Mr. Mokaya for the Accused**

**Mr. Akula, Senior Prosecution Counsel**

**JUDGEMENT**

JOSHUA KOIKAI SITAYA, hereinafter referred as the accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). As per the particulars of the offence the accused on the night of 31/10/2015 in Birika village, in Olooloitikosh Location within Kajiado North County murdered one ORAIS SAPUNYU MUNEI hereinafter referred as the deceased. The accused pleaded not guilty to the charge and particulars hereof.

In order to proof the charge against the accused the prosecution called a total of eleven witnesses who gave evidence as summarized here below:

PW1 JOSHUA KOILEKEN gave evidence that on 31/10/2015 while in his house the deceased visited him. As they had a conversation in about twenty minutes the accused also came knocking the house wanting to talk to the deceased. PW1 further stated that the deceased informed the accused that since it was late in the night they can discuss whatever issue in the following day. In a span of a moment PW1 told this court that he heard a loud bang of something being hit with force. This bang made him to walk to the directions of the bang outside the house only to notice the deceased was on the ground. PW1 further testified that he moved to intervene to restrain the accused from continuing to beat the deceased but due to the slippery wet ground he fell on the ground. PW1 fearing the worst has happened because the deceased was not talking rushed to seeking help from the nearby church. This church where PW1 rushed and did inform some members who were fellow partners in church with the deceased.

On arrival in the church PW1 found one David Nyesuka who testified as PW2. According to the testimony of PW1 and PW2 they both rushed back to where the incident of assault between the accused and deceased had taken place. It was their evidence that on observing the condition of the deceased they made arrangements and took him to Malaika Health Clinic at Birika. In the clinic the deceased was examined by PW3 Samuel Wainaina working as a lab technician. In his testimony PW3 told this court that a physical examination revealed that the deceased had sustained severe injuries to the head. He decided to call the doctor but was not successful due to the time. PW3 further stated that he referred and advised PW1 and PW2 to take the deceased to Kajiado District Hospital for better management that upon consultation amongst themselves PW1, PW2 and PW3 agreed to use PW3’s vehicle to take the deceased

to Kajiado District Hospital. While at the District Hospital a quick x-ray of the head revealed that the nature of injuries suffered required the deceased to be referred to Kenyatta National Hospital for advance treatment.

PW9 DUNCAN TIPAYA testified to the effect that PW1 had telephoned him on 31/10/2015 regarding an incident of assault involving the accused and the deceased. According to PW9 evidence to this court he joined PW1 and PW2 to have the deceased receive treatment at Malaika Clinic. It was at the clinic that PW3 advised them that nature of injuries required to be better managed at Kajiado District Hospital. PW9 further confirmed to the court that when they arrived at Kajiado District Hospital the medical doctor at observing the deceased directed that he be taken to Kenyatta National Hospital. PW1, PW2, PW3 and PW9 collectively took a decision that an ambulance he hired to carry the deceased to Kenyatta National Hospital. It was further testimony by PW1, PW2 and PW9 that while on the way to Kenyatta National Hospital the deceased succumbed to death. The body was returned back to Kitengela Hospital Mortuary and the matter became a police case.

PW4 APC BENSON AMEME attached to Birika Police Post told this court that on 31/10/2015 the accused went to the post and reported that someone whom he suspected having an affair with his wife has died in the house. PW4 stated that in response to the report and in company of the accused he visited the scene. At the scene the wife of the accused informed them that the victim has been taken to the hospital by good Samaritans. The following morning on 1/11/2015 PW4 booked a further report from PW8 that the victim of assault in the previous night has died in the course of being taken to Kenyatta National Hospital for treatment. PW4 armed with these two reports on the matter moved to the accused house and effected arrest. PW8 was in company of PW4 during the arrest of the accused.

PW5 JAMES SAITABAO and PW7 JONATHAN LITEE gave evidence that each participated in identifying the body of the deceased at Saitoti Hospital Mortuary to PW10 Dr. Ndegwa who performed the postmortem. According to the testimony of PW10 on examination of the deceased body revealed injuries noted: subatoneous contusion, left temporal occipital parictal scalp, skeletal fracture of the left temporal occipital skull, subdural haematoma and contusions right lower arm near the wrist joint. In his opinion PW10 stated that the deceased death was due to cranial cerebral injuries due to blunt force consistent with assault. The postmortem report was produced as exhibit 4.

PW6 PC JOSEPHAT MUGO a scenes of crime officer gave evidence to the effect that on 1/11/2015 he was instructed by PW11 Cpl Ochieng to visit a scene of murder at Birika and take necessary photographs. In compliance with the directions PW6 told this court at the scene he took seven photographs. The photographs which he presented before court as exhibits captured the scene generally and various views of the body of the deceased. The certificate accompanying the process and integrity of the film which generated the photographs was admitted in evidence as exhibit 3 (b) and bundle of photograph prints as exhibit 3A.

PW11 MICHAEL OCHIENG the investigating officer based at Kiserian testified that he was among the first officers to visit the scene of the murder at Birika on 1/11/2015. In his testimony PW11 made reference to observations of the scene where the deceased was murdered. He further stated that he recorded statements from the witnesses who took the deceased to the hospital and the one who was present at the time of the assault. PW11 also told this court the arrangements made to have the scene photographed and for a postmortem to be conducted on the body of the deceased. In appraising the material and documentary evidence gathered he recommended the accused be indicted of the offence of murder. PW11 was able to identify the accused person as one who committed the offence against the deceased as per the witnesses’ statements.

At the close of the prosecution case the accused was called upon to answer the charge under section 306 (2) of the Criminal Procedure Code. The accused elected to give a sworn statement. The accused denied any knowledge of the deceased nor participating in causing his death. The accused further testified that on the alleged date of 31/10/2015 he left his house at about 7 pm for Makutano bar at Birika where he stayed upto 9.30 pm. According to the accused when he finished having some beers in that bar he retired for home where he spent the night till the 1/11/2015. The accused further stated that it was on this day the

police officers arrested him as a suspect of murder for the offence he did not commit.

**Submissions by the defence counsel:**

Mr. Mokaya learned counsel for the accused submitted on the issues surrounding the determination of this case against the accused. The learned counsel first line of attack was that in evaluating the eleven witnesses the prosecution failed to discharge the burden of proof beyond reasonable doubt. According to learned counsel the cause of death of the deceased as given by PW10 Dr. Ndegwa was only an opinion with no direct or circumstantial evidence that the accused was involved in inflicting the injuries staled. Learned counsel took issue with the piece of evidence regarding the murder weapon exhibited being a broken piece of wood, a metal bar and another brown wooden stick. His bone of contention as to the manner the prosecution failed to demonstrate how the accused utilized those weapons to occasion injuries. Learned counsel in support of this issue on the cause of death cited the case of ***Sahonki Chema Kbhai Ukabhai v State of Gujarat Air SC 484 [1983] CRL 822*** where the court observed that:

> **"Ordinarily the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more."**

It was further learned counsel submission that on the ingredient of unlawful death of the deceased no evidence was ever presented to prove that the accused person came into contact with the alleged weapons of murder or used them to assault the deceased. On this element learned counsel argued that the testimonies by PW1, PW2, PW5, PW8 and PW9 consisted of contradictions and gaps on how the unlawful acts on the part of the accused caused the death of the deceased. Learned counsel further contended that the scene of the murder as described by the prosecution witnesses consisted of a residential plot with tenants. However the investigations officer PW9 failed to call the occupants of the plot to give credence or corroborate as to any commotion on the material night the death is alleged to have occurred. Learned counsel invited the court to find that the alibi defence dislodged the prosecution evidence of placing him at the scene of the crime. Learned counsel further submitted that despite the evidence by the prosecution that the deceased died there was no proof that whoever killed deceased had malice aforethought as defined under section 206 of the Penal Code. The learned counsel further contended that the prosecution failed to lead evidence that the accused had the intention to cause death or the intention to cause grievious harm. That ingredient of malice aforethought according to learned counsel was never proved. In a nutshell learned counsel argued that the police failed to carry out proper investigations leaving out flaws to the case whose doubts as to his participation in the murder should be resolved in favour of the accused. The learned counsel to buttress his arguments and submissions referred to the following authorities:

***Republic v Derrick Waswa Kuloba [2005] eKLR*** for the proposition that:

> **"The burden of the prosecution is to establish its case beyond reasonable doubt."**

***Republic v David Ruo Nyambura & 4 Others [2000] eKLR*** for the proposition that:

> **"An accused person does not assume any burden to prove his innocence in a criminal case. He is obligated only, if he so wishes to give an explanation or raise a defence to the charge which is probably or possibly true...."**

***Republic v Andrew Mueche Omwenga [2009] eKLR*** where the court held interalia that:

> **"An accused person must be proved to be responsible for conduct or the existence of a state of affairs prohibited by criminal law before conviction can result."**

***Republic v Kipkering Arap Koskei & Another EACA [1949] pg 135*** on the test to be applied on circumstantial evidence before a court of law an place reliance on it to convict the accused.

The learned counsel therefore urged this court to find that the prosecution case fell short of the required

standard of proof to warrant a conviction. It was his contention that the accused be acquitted of the offence of murder as charged.

**The senior prosecution counsel submissions:**

Mr. Akula, the senior prosecution counsel submitted that the evidence from the eleven witnesses proved beyond reasonable doubt that the accused person murdered the deceased. The learned prosecution counsel submitted that the three elements of the charge of murder existed in the information filed against the accused that is the death of the deceased, the unlawful death of the deceased, that the accused in causing the death had malice aforethought and he was positively identified us the perpetrator of the crime. Learned prosecution counsel observed that it is not in dispute that on the 31/10/2015 at Birika village the deceased Orais Munei was murdered and that the same was due to the grevious harm inflicted by the accused person. The learned prosecution counsel further submitted that the accompanying murder weapons were duly produced in court as exhibit 1 and 2. In support of the prosecution case the learned prosecution counsel maintained that PW1 properly saw and identified the accused as the person who assaulted the deceased on the material night. It was learned prosecution counsel contention that a postmortem conducted by PW10 confirmed that the deceased died out of the harm inflicted which fractured the skull and other parts of the body. In his evaluation of the circumstances as to the death of the deceased learned counsel contended that it was coupled with malice aforethought on the part of the accused. He felt that the prosecution evidence proved the key elements of the offence as defined under section 203 of the Penal Code beyond reasonable doubt. Learned prosecution counsel further argued that the going by the direct and circumstantial evidence adduced the defence of alibi will not be available to the accused. Learned prosecution counsel relied on the following cited authorities to support his submissions that a watertight case do exist for this court to enter a verdict of guilty and convict the accused:

> ***(1) Libambula v Republic [2003] 683.***
>
> ***(2) Republic v Jared Otieno Osumba [2015] eKLR***
>
> ***(3) Abunga alias Onyango v Republic Cr. Appeal No. 32 of 1990 UR.***

I have considered the evidence, submissions by both counsels on the matter.  It is now firmly settled that the essential ingredients of the offence of murder under section 203 of the Penal Code. These are the ingredients i endeavour to evaluate alongside the case for the prosecution against the accused:

> **(1) The death of the deceased.**
>
> **(2) Unlawful death of the deceased.**
>
> **(3) Proof of malice aforethought.**
>
> **(4) That the accused person was the one who caused the death of the deceased.**

The burden of proof against the accused is upon the prosecution to discharge beyond reasonable doubt. This was the legal proposition in the case of ***Woolmington v DPP [1935] AC 485*** and in the case of ***Miller v Minister of Pensions [1947] 3 ALL ER 373*** in the case of ***Woolmington*** the court held interalia that proof beyond reasonable doubt is not proof to the hilt or as stated by **Lord Denning J** as he then was in ***Mcinness*** case as follows:

> **"That degree is well settled. It needs not reach certainty; but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."**

It is now my singular duty to go though each of the ingredients of the offence stated above and the evidence to establish whether the burden of proof of beyond reasonable doubt against the accused has been discharged by the prosecution.

**(1) Death of the deceased:**

In this element of the offence the prosecution adduced evidence of PW5 James Senei a cousin to the deceased and PW7 Jonathan Kiusya a pastor with Dream Church where the deceased was a member who identified the body at the mortuary during the postmortem. According to PW10 Dr. Ndegwa who performed the postmortem the deceased identified as male African by the name Orais Sapunyu Munei is dead. There is no dispute therefore that a human being positively identified by PW5 a cousin and PW7 a pastor well known to the deceased confirmed his death. The medical evidence by PW10 also proved beyond reasonable doubt that the deceased is dead.

**(2) Unlawful death of the deceased;**

The law on this ingredient is well settled way back in 1948 by the Court of Appeal in Eastern Africa in the case of ***Guzambizi Wesonga v Republic [1948] 15 EACA 65***. The court stated as follows:

> **"Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property."**

What did the prosecution proof under this ingredient? According to the testimony of PW1 on 31/10/2015 prior to 21.00hrs the deceased was alive in his house. He was called out by the accused to apologize on an earlier insult but there was resistance to that demand from the deceased. In a span of moments PW1 confirmed to this court as having heard a commotion outside the house. In response to establish the nature of the commotion PW1 saw the accused armed with a metal bar and assaulting the deceased. The accused on noticing PW1 ran into his house leaving behind a metal bar and a wood stick. The iron bar used was recovered by PW4. PW11 later produced the metal bar and a wooden stick as exhibits in support of the fact that they were the weapons used to inflict harm against the deceased. PW2 Ole Nteluka and PW9 Duncan Tipanya later received information of an assault against the deceased who was well known to them and did rush to the scene. PW2 and PW9 evidence was to the effect that they took the deceased who was at the time in pain from the physical injuries suffered to Malaika Clinic. The deceased was first attended at the medical centre by PW3 Samuel Wainaina. PW3 found the deceased to have sustained severe injuries to the head and referred him to Kajiado District Hospital. The deceased on arrival at Kajiado Hospital was referred further to Kenyatta National Hospital. According to PW1, PW2, PW9 the deceased succumbed death while on the way to the hospital at Kenyatta. When Dr. Ndegwa performed the postmortem the deceased had sustained severe injuries with a fractured skull which stood out as a major injury together with other minor injuries to the right arm.

On scrutiny of the evidence by the prosecution and defence there are no leads to establish that the death of the deceased was lawful or justifiable. The death of the deceased is traceable to the harm suffered on the night of 31/10/2015. The nature of injuries were not self inflicted nor though an accident or misadventure but though use of force on the part of the accused. The unlawful acts by the accused person to maim and or cause grievious harm by striking the deceased with a metal bar on the head sufficiently proves that the death of the deceased was unlawful. See (section 231 of the Penal Code (Cap 63 of the Laws of Kenya).

**(3) The third ingredient is that of malice aforethought.**

This is the element which deals with the ***mens rea*** of the crime of murder. Under section 203 of the Penal Code malice afore thought is a key element to differentiate the charge of murder from other homicides. Malice aforethought is defined under section 206 of the Penal Code. **"Malice aforethought shall be deemed to be established by evidence providing any one or more of the following circumstances:**

> **(a) An intention to cause the death of or to do grievious 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 death or grievious harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievious injury occurs or not or by a wish that it may not be caused.**

**(c) An intention to commit a felony."**

It can also be inferred from the circumstances of the case. This was discussed in the case of ***Tubere S/O Ochen [1945] 12 EACA 63*** the court held the circumstances to be:

**(1) The nature of the weapon used, the nature of injuries inflicted.**

**(2) The part of the body targeted whether vulnerable**

**(3) The conduct of the accused before, during and after the attack.**

In addition in ***Ogelo v Republic 2KLR 14***, ***"in the case the appellant had chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The court held that dint of section 206 (a) of the Penal Code malice aforethought is deemed to be established by evidence showing an intention to cause death or grievious harm."***

In ***Republic v Ndalamia & 2 Others [2003] KLR 638*** the court held that, ***"there was sufficient proof of malice aforethought as defined in section 206 (b) of the Penal Code where the accused persons beat the deceased violently and persistently and when they were persuaded to stop they could not listen."***

What can be deduced from the above cited authorities is that malice aforethought is a technical term which includes the five distinct state of mind as defined under section 206 of the Penal Code. The prosecution proving any one of the elements and circumstances outlined under section 206 constitutes malice aforethought on the part of the offender.

As far this case is concerned, PW10 Dr. Ndegwa confirmed the death of the deceased. In his postmortem report the deceased suffered a fractured skull and contrisions on the right wrist which he classified as defensive injuries. The prosecution led evidence that the accused and the deceased had a misunderstanding before this confrontation. The accused lured the deceased to come out of the house so that he could apologize. That is when he did inflict the fatal injuries which deceased died while undergoing treatment. The cause of death of the deceased therefore falls under the provisions of section 213 of the Penal Code.

Malice aforethought is an intention to cause the death of or to do grievious harm to any person, whether that person is the person actually killed or not. Knowledge that the act or omissions causing death will probably cause the death or grievious harm to some person whether that person is the person actually killed or not. The Court of Appeal in ***Nzuki v Republic [1993] KLR 171***. This is a case where Nzuki pulled the deceased out of the bar and fatally stabbed him with a knife. There was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the applicant had any one of the intention outlined for malice aforethought when he unlawfully assaulted the deceased with fatal consequences other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause grievious harm. The trial court did not direct itself that the onus of proof of the necessary intent was throughout on the prosecution and the same had been discharged to the satisfaction of the court. In view of the circumstances under which the offence was committed it is uncertain whether malice aforethought was proved beyond reasonable doubt.

Throughout the web of our criminal law one golden principle is always that of the duty upon the prosecution to prove the accused guilt subject to any statutory exceptions beyond reasonable doubt. See section 107 of the Evidence Act, ***Minister of Pensions (Supra), Woolmington Case (Supra)***. In the case

of murder if at the end of the whole case there is a reasonable doubt, created. In analysing and appraising evidence by the trial court as to the existence of malicious intention, then the accused is entitled to an acquittal unless the elements support the charge of manslaughter. See section 202 of the Penal Code.

In a persuasive English Authority in the case of ***Stevens v The Queen [2005] 227 CLR 319, 346*** **Lord Callinan J** stated thus:

> **"The accused is under no obligation to prove any of these matters. Before you can convict, you must be satisfied by the prosecution on whom the onus lies, beyond reasonable doubt, that the death was not an accident, that is not an event which occurred as a result of an unintended and unforeseen act or acts on the part of the accused, and that it would not have been reasonably foreseen by an ordinary person in his position."**

I am bound to test the evidence on record against the principles elucidated herein both in the persuasive authorities and local decisions from the superior courts. In support of the prosecution case there is no evidence that is admissible on the part of the accused that the conversation between his wife and the deceased was of a nature that constituted a qualifying trigger to retaliate with such a force which caused the death of the deceased. An interesting observation arises concerning this case where the accused at the scene of the crime and at the spur of the moment armed himself with a metal bar and used it to commit not just any offence but homicide. The provocation on the part of the accused cannot be said to be of such a level to persuade this court to make a finding that he did not know or understand the consequences of his action.

The real point of this case turns upon whether or not legal provocation as defined in section 207 of the Penal Code was exhibited from the evidence.

Section 207 of the Penal Code provides:

> **"When a person who unlawfully kills another under circumstances which, but for the provision of this section, would constitute murder, does the act which causes the death in the heat of passion caused by a sudden provocation as hereinafter defined and before there is time for his passion to cool, he is guilty of manslaughter only."**

A person is liable for murder where he unlawfully kills another with intent to kill or with intent to cause grievious harm. This is the law in this country for one to be convicted contrary to section 203 of the Penal Code in considering the matter i did not find sufficient evidence that the prosecution established the intention on the part of the accused. The view i take is traceable to the persistence demands made to the deceased by the accused that he intended to speak to him. The deceased from the prosecution case continued to put off the accused with an option that they could discuss whatever issue in the morning. The stage was then set for a major disagreement between the two and what followed was an attack on the deceased.

The inference i draw from the set of circumstances are that the acts of the accused in causing death were precipitated by the exchange of words with the deceased selecting the threshold on malice aforethought and legal provocation. I am more inclined that the merit of this case falls within the provisions of section 207 of the Penal Code.

Thus from the conduct of the deceased the accused seems to have been induced and in rage lost self-control to cause harm to the deceased.

**(d) On identification and placing the accused at the scene:**

On identification i am reminded of the legal principle in the case of ***Roria v Republic [1967] EA 383*** where the court held interalia that, ***"the evidence of a single identifying witness of an accused person is admissible evidence to be legally used to convict so long as the court satisfies itself that favourable conditions favouring correct identification were in existence."***

Applying the above principle to this case the prosecution adduced evidence of PW1 who saw the accused in the night of 31/10/2015. In assessing the testimony of PW1 he was a neighbour to both the accused and the deceased. There were no discrepancies nor inconsistencies in his evidence relating to the circumstances of how the accused inflicted bodily harm upon the deceased.

I therefore accept his evidence as truthful and honest in respect of placing the accused at the scene of the crime. However unlike other cases where one is not able to find any other corroborative evidence in the present case accused on his own surrendered to the police as per PW4 testimony. This gives credibility to identification evidence by PW1. According to PW4 a police officer at Birika Police Post, the accused submitted himself and made a report as having assaulted a man who was having an affair with his wife. That therefore disposes the ingredient on identification as against the accused.

In this case provocation is manifested when the accused in a surprise move ambushed the deceased while armed with a metal bar. There is no evidence on malice that the accused planned the attack against the deceased. It appears to me that this incident was triggered by deceased refusal to the demands made by the accused that he comes out of the house so that they can settle some outstanding dispute between them. The nature of the dispute was however never pursued by the investigator nor did it come out clear from the defence case.

It therefore leaves a doubt whether in the accused hitting the deceased was refusal on the part of the deceased to turn down the demands for both of them to have a meeting. The trigger which deprived the accused his self-control can be infered from the exchange of the words between him and the deceased.

My view therefore is that the circumstances of this case malice aforethought was not proved beyond reasonable doubt.

In the circumstances i find that the offence of murder not proved but that of manslaughter. I therefore substitute the charge of manslaughter as against the accused person under section 202 as read with section 205 of the Penal Code.

As a result i enter a verdict of guilty against the accused and do convict him accordingly.

**Dated, signed and delivered in open court at Kajiado this 3rd day of April, 2017**

**………………………………….**

**R. NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Mokaya for the accused present

Mr. Akula for the state present

Accused present

Mr. Mateli Court Assistant