



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. 31 OF 2011

REPUBLIC PROSECUTOR

VERSUS

ABDINEGO ODERA TIEMA ACCUSED

JUDGMENT

Introduction:

1. On 22/06/2011, **ABDINEGO ODERA TIEMA** was arraigned before this Court and faced the charge of murder as follows:-

“CHARGE: MURDER CONTRARY TO SECTION 203 AS READ WITH SECTION 204 OF THE PENAL CODE.

PARTICULARS: ABDINEGO ODERA TIEMA:- On 11th day of April, 2011 at [particulars withheld] within the County of Vihiga murdered J O E.

2. The Accused person denied the charges and the case was set for hearing thereafter. The prosecution availed 7 witnesses and when the Accused person was placed on his defence, he gave sworn testimony without calling any witnesses.

The trial:-

The Prosecution’s case.

3. **MARY OMONDI AGWAMBA** testified as **PW1**. She stated that on 11/04/2011 at about 5.30 p.m. she was selling vegetables by the roadside in Emakoya village when she was called by one of her customers and a neighbour to take some tomatoes to her house which was about 70 metres away. She obliged and went to her neighbour’s home who was known as JANET. On her way back she found J O E (hereinafter referred to as ‘**the deceased**’) who was elderly bleeding profusely from the head and nostrils whom she assisted and eventually, in the company of other members of public, took him to hospital. She then sent a word to the deceased’s family. She learnt of the deceased’s death on the following day.
4. On cross-examination, she confirmed that she was not at the scene when the deceased was assaulted but she saw the Accused person run away from the scene with a piece of stick in his hands. She found a stick and a stone at the scene just next to the deceased. She identified the stick and the stone in Court while admitting that there were several stones on the road. To her the stick was recovered after the Accused person was arrested. She also confirmed that the Accused person

and the deceased were neighbours.

5. **PW2** was one **B B O**. He was aged 16 years old and in Standard 7 at [particulars] Primary School. He stated that on 11/07/2011 at around 6.00 p.m. on his way home from School he saw the Accused person picking stones and hitting the deceased. This happened as the deceased was following the Accused person. He knew the deceased as his grandfather and the Accused person as his neighbour. He witnessed one stone hit the deceased on the chest as well as the Accused person hitting the deceased on the head with a piece of stick. The Accused person then ran away with the said wood. He was just about 10 metres as he witnessed the foregone. He further witnessed many people gathering at the scene including PW1 who was selling firewood from where the piece of wood used to hit the deceased on the head came from. PW1 asked him to go call his grandmother which he obliged. He later recorded his statement with the police.
6. During the cross-examination, he confirmed that he was born in 1996 and though he did not avail any documentary evidence in proof thereof, the Court observed that he was not a child of tender years as he obviously appeared to have been over 14 years old. He confirmed the assault by the Accused person on the deceased and that he knew the Accused person very well given that it was not yet dark as it was around 6.00 p.m. and he was on his way home from school. He further stated that although the deceased was elderly he used to walk in a normal gait and on that day he was not drunk though he knew that he used to occasionally drink. He denied the allegation that the deceased fell down on the stones as a result of drunkenness as he saw the Accused person hitting him on the chest and the head. He was though not sure if the stone and the stick in Court were the same ones used by the Accused person in hitting the deceased. He further confirmed that PW1 was not at the scene during the assault and only arrived thereat after the attack. He however was not aware if the deceased and the Accused person had quarrelled prior to the incident.
7. **J J A** testified as **PW3**. She was the deceased's wife who confirmed that the deceased, who worked as a watchman, took early dinner in April, 2011 on a date she could not recall, and left for work. That was around 6.00 p.m. and the deceased was not drunk. She recalled being told by PW2 that the Accused person had assaulted her husband by the road and when she reached there, the deceased had already been taken to the hospital. She managed to go to the hospital the following day only to see her husband dead. She then recorded her statement with the police.
8. **SIMON OGAYI OMUFUKO** was **PW4**. He had just arrived home from work on 11/04/2011 at around 6.00 p.m. when he heard noise by the road and upon rushing there he found the deceased lying down bleeding with injuries on the head and face. He organised for him to be taken to Equator Hospital using a motor cycle after he raised Ksh. 50/= from those who had gathered there. He only went to the hospital the following day to learn that the deceased had passed on. He then went to the Sub-chief and reported the matter and later on recorded his statement with the police.
9. **PW5** was **CHRISTOPHER OGAYI** who identified the deceased's body at Dolphine Nursing Home for purposes of carrying out the autopsy.
10. **DR. AWINO ROB OTIENO**, **PW6**, carried out the autopsy on 16/04/2011 and filled in the Post Mortem report which he produced in Court as an exhibit. He stated that the deceased had multiple bruises on the forehead and an external fracture on the right clervicle which had pierced the right lung leading to its collapse whereas the left lung was intact. This affected the respiratory system. He concluded that the cause of death was due to haemorrhage into the right lung due to assault.
11. **PC. ISAYA JILLO NO. 58675** testified as **PW7** and was the investigating officer. He stated to have accompanied the OCS Luanda Police Station on receiving a report about murder at Emayokhe village. On reaching at the scene, the deceased had already been rushed to hospital but managed to recover a stone and a piece of wood which the members of the public informed him had been used to assault the deceased. That was on 11/04/2011 at about 2.30 p.m. He identified the members of public as PW1 and PW4. He then proceeded to Dolphine Nursing Home where the deceased had been taken for treatment and found out that the deceased had died. He collected the body to Rabour Hospital Mortuary for preservation at which the autopsy was conducted on

16/04/2011. During his investigations, he found out that there existed a land dispute between the Accused person and the deceased. He confirmed that the Accused person was arrested on 12/04/2011 and taken to the AP camp then to the Lwanda Police Station. He then charged the Accused person with the murder of the deceased. He further confirmed that when he visited the scene, there was only one stone.

12. The prosecution closed its case on 06/03/2014 and a ruling on a case to answer delivered on 16/09/2014 where the Accused person was placed on his defence.

The defence case.

13. The Accused person elected to give sworn testimony. He admitted having had an encounter with the deceased on 11/04/2011 but denied having killed him as alleged. He stated that the deceased was his neighbour and elderly who worked as a watchman in Luanda Town despite having been advised by doctors not to so engage in such work due to his age. He met him on the road to Luanda town as he was also heading thereto after his daily chores. The deceased called him and asked him why he had told his father (the Accused person's father) that he had picked some scrap metal and left with it. He denied it. The deceased who had a rungu (stick) then raised it with intent to hit the Accused person who in self-defence, pushed him as he went away. He was not sure whether the deceased fell down but he recalled the road was being repaired and had a lot of stones. To him, there was no any other person near the scene and only saw the evidence of PW1, PW2, PW3 and PW4 as only made-up for purposes of fixing him.

14. He was truly surprised by the testimony of PW7 who alleged that there was a land dispute between his family and that of the deceased. He further stated that he never ran away from his home and co-operated with the police during the investigations and even went to see the OCS on 12/04/2011 at around 2.00 p.m. and then returned home. He was arrested by officers from the Luanda police station at 4.00 p.m. and not by AP officers. He reiterated the fact that he had no intentions of killing the deceased.

The Parties' submissions:-

15. At the close of the defence case, the defence filed its written submissions urging the Court to forthwith acquit the Accused person due to lack of sufficient evidence to convict him. For that position, he relied on the persuasive authorities of **Republic vs. Kenneth Kipagat Cheboi (2006) eKLR**, **Republic vs. Wilfred Okwalo (2009) eKLR** and **Republic vs. Jotham Bulimo Alusa (2007) eKLR**.

16. The prosecution relied on the evidence on record arguing that the same remains watertight to sustain a conviction as the same was well and rightly corroborated.

Analysis and Determination:

17. From the above evidence, this Court is now to find out if the ingredients of the offence of murder have been proved in this case. The offence of murder carry three ingredients for determinations which are as follows: -

(a) ***Proof of the fact and the cause of death of the deceased;***

(b) ***Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;***

(c) ***Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.***

I will consider each of the issues independently.

Proof of the fact and cause of death of the deceased.

18. From the evidence tendered by the prosecution witnesses and by the Accused person herein, it is not in dispute that the deceased herein, J O E died on 11/04/2011. This Court therefore so finds.

PW6, DR. AWINO BOB OTIENO carried out the autopsy on the deceased, filled in the Post Mortem report and also issued a Death Certificate No. [particulars withheld]. PW6 detailed the injuries on the deceased in the Report aforesaid as well as before Court and he formed the opinion that the cause of death was:-

“Haemorrhage into right lung due to assault.”

19. The said evidence is in consonance with the testimony of PW2 who witnessed the assault. There being no any other medical evidence suggesting another possible cause of the deceased's death, this Court finds and so holds that the deceased died as a result of the collapse of the right lung having been pieced by a fractured right cervical due to an assault. The opinion of the pathologist is therefore upheld.

Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused person:-

20. This issue is aimed at establishing whether it was the Accused person herein who actually caused the death of the deceased and if so, whether by an unlawful act or omission.

21. It was the prosecution's evidence that the deceased was hit on the head with a wooden stick and on the chest using stones. This was around 6.00 p.m. on 11/04/2011. The Accused person does not deny having an encounter with the deceased on the said day, time and instance. He however denies having assaulted the deceased as alleged, but admits only pushing him away when the deceased attempted to hit him with a rungu.

22. Whereas the Accused person contends that there was no other person at the scene except the deceased and himself, PW2 is of the contrary view. He stated that he was just about 10 metres from where the two were and actually saw the Accused person pick stones and hit the deceased with the same. This was when the deceased was following the Accused person. He also witnessed one stone hit the deceased on the chest though he could not ascertain which part of the chest was hit. He further saw the Accused person hit the deceased on the head using a piece of wood. PW2 was very forthright in his evidence. He never contradicted himself and unlike PW3 (the deceased's wife) who said she was not aware if the deceased used to drink, PW2 said the deceased truly used to drink but not too much and that on that day he could not tell whether he was drunk or not. He further truthfully said that he was not aware if the Accused person and the deceased had quarrelled prior to the incident and further that he could not ascertain if the stone and the wood which were produced in Court were the same ones used by the Accused person in assaulting the deceased. It is also worth-nothing that whereas PW1 attempted to allege that she saw the Accused person beat the deceased, PW2 was very categorical and stated that PW1 was not at the scene during the incident. PW2 was also categorical that the deceased did not fall on stones and hurt himself due to being drunk, but it was the Accused person who hit him. The defence did not in anyway manage to create any doubt as to whether or not PW2 was at the scene. The evidence is so clear that PW2 was at the scene and witnessed what he told the Court. This Court therefore wholly believes his evidence and rejects the attempt by the Accused person to allege that the deceased fell on the stones as a result of drunkenness. Likewise the Accused person's allegation that he only pushed the deceased and left not knowing if he fell down or not is not plausible and is rejected accordingly.

23. But, PW2 was the only identifying witness! Whereas this Court is enjoined in law to carefully and with a lot of caution treat such evidence of identification by a single witness, that burden in this case is lessened by the Accused person's admission that he was at the scene of crime and actually had an encounter with the deceased though he denies having not caused his death.

This Court remains alive to the calling in Wasonga vs. Republic (1989) KLR 426, Nzaro vs. Republic (1991) KAR 212, Kiarie vs. Republic (1984) KLR 739, R. vs. Turnbull & Others (1973) 3 ALL ER 549, among others. Be that as it may, I have carefully cautioned myself in believing the evidence of PW2.

24. Having established that the Accused person actually assaulted the deceased person, it goes without say that the actions of the Accused person in inflicting harm and injury to the deceased remained contrary to law hence unlawful. The Penal Code, Chapter 63 of the Laws of Kenya creates the offence of assault. In sum therefore there is ample evidence before the Court that the Accused person assaulted the deceased who eventually succumbed to the injuries he sustained as a result of the said assault. The deceased therefore died as a result of the Accused person's unlawful act on him.

Proof that the said unlawful act was committed with malice aforethought.

25. Section 206 of the Penal Code defines 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.*

The Court of Appeal has on several occasions dealt with this aspect. In the case of Joseph Kimani Njau vs R (2014) eKLR in concurring with an earlier finding of the Court, but differently constituted in the case of Nzuki vs R (1993) KLR 171 held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

- i. *The intention to cause death;*
- ii. *The intention to cause grievous bodily harm;*
- iii. *Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.*

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed”.

The Court in the above case went on to say that: -

“In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...”

26. The investigating officer (PW7) informed the Court that in the cause of his investigations, he established the Accused person and the deceased were engaged in a land dispute. The deceased's wife (PW3) clearly stated that there was no grudge between the two and to her knowledge. The Accused person equally stated that there had been no grudge or land dispute between the deceased and himself. What is disturbing to this Court is that even after PW7 having established the alleged issue of a land dispute, if he so did, he never brought that evidence to Court. He did not avail any of the witnesses to so testify before Court. This Court therefore considers that allegation as mere hearsay and is hereby rejected as an afterthought.
27. Further, PW7 testified that when he eventually reached Dolphin Nursing Home, the deceased had already passed on and he took the body to Rabour Hospital Mortuary for preservation where the autopsy was conducted. But that evidence is at variance with that of other witnesses. PW6 who is the Doctor who conducted the autopsy confirms to have so conducted the same at Dolphin Nursing Home. This is further confirmed by the Post Mortem Report which is clear on the same. Further PW5 who identified the deceased's body for the autopsy to be conducted clearly confirmed that it was so at Dolphin Nursing Home.
28. Again PW7 alleged that the Accused person was arrested on 12/04/2011 and taken to the A.P. Camp and then to Luanda Police Station. The Accused person testified that he fully co-operated with the police and even went to see the OCS when called to do so and that he was arrested by officers from Luanda Police Station instead. PW7 did not endeavour to avail any witnesses to show how the Accused person was arrested and as such this Court finds his evidence doubtful. I am of the firm opinion that PW7 either was not prepared to give evidence when he so testified in Court or he just did not want to do so. It is highly doubtful if he even refreshed his memory prior to his testimony. This is because his evidence did not at all support the previously adduced evidence by the other witnesses.
29. PW2 told the Court that he only saw the Accused person assaulting the deceased but was not aware if they had quarrelled before. There is also no evidence of any grudge between the deceased and the Accused person. The record is therefore not furnished with the genesis of the assault save what the Accused person informed the Court. But PW2 stated in his evidence-in-chief as follows:-

***“While on the road I saw Odera the accused (identified) picking stones and beating JOSHUA OMILO the deceased with the same. The deceased followed the accused*”**

This piece of evidence by PW2 therefore corroborates the Accused person's testimony that it was the deceased who charged at him after the Accused person denied having told his father that he had seen the deceased take away some scrap metal.

30. In view of the foregone coupled with guidance by the Court of Appeal hereinabove, this Court is not able to find that the prosecution established malice aforethought on the part of the Accused person. The Court hence finds that there was no malice aforethought in the circumstances of this case.

Disposition:

31. The foregone analysis does not therefore support a conviction in respect of the charge of murder. However, it is clear that the deceased lost his life as a result of the actions of the Accused person,

but of course without any malice aforethought. The Accused person is therefore not guilty of murder as charged and is forthwith acquitted on that charge.

32. In view of the provisions of **Section 179(2) of the Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court however finds the Accused person guilty of the offence of Manslaughter contrary to Section 202 of the Penal Code and he is accordingly convicted.

DELIVERED, DATED and SIGNED this 16th day of July, 2015

A. C. MRIMA

JUDGE