



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 21 OF 2014
(FORMERLY KISII HCCR CASE NO. 79 OF 2011)

BETWEEN

REPUBLICPROSECUTION

AND

KENNEDY OCHIENG OLOOACCUSED

JUDGMENT

1. On the night of 11th August 2011, the people of Midida Village, Kajulu II Sub-location were mourning the death of Otieno Nyong'iro. Members of the family and friends had gathered at his homestead that night to make funeral arrangements when a further tragedy struck the village. **BRIAN OCHIENG OKELLO** ("the deceased") was killed in the early hours of 12th August 2011. On 15th August 2011, this court was informed that **KENNEDY OCHIENG OLOO** ("the accused") had murdered him contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.

2. The prosecution case was that on the material night, the deceased was in the company of the accused and three others when a quarrel ensued between the accused and the deceased. The prosecution sought to prove that the accused hit the deceased with a rungu causing the serious injuries which resulted in death. It was the prosecution's case that this act constituted malice aforethought. The prosecution called 8 witnesses while the accused gave a sworn statement.

3. The accused, in his sworn defence, recalled that on that night he was attending the funeral meeting and thereafter, he and others who were his age mates and relatives, were asked to go and collect pledges to cater for Nyong'iro's funeral. After the meeting, he left with the deceased, Nicholas Odhiambo Ochieng (PW 1), Benard Otieno Nyong'iro (PW 5) and Kennedy Ochieng. On the way to their respective homes they were discussing how to collect the pledges. The accused testified that as they were talking, the deceased raised the issue of their uncle called Dickens Okoth Atonga. The deceased stated that they should first start collecting money from Dickens which the accused resisted because Dickens was known to be very poor, "wifeless" and could not raise any money. The accused told the deceased that if this was how the fundraising was to be conducted, he did not want to be part of it. It is at this point that the deceased pushed him and hit him with a rungu. The accused stepped away and raised his hand to block the deceased from hitting him again. When the deceased came back at him, the accused took the rungu from him and hit him with it.

4. After the deceased was hit, PW 1 rushed ahead to go and alert the deceased's mother, Monica Akinyi Okello (PW 3) while PW 5 carried the deceased to his mother's homestead. PW 3 was woken up and

informed what had happened whereupon she immediately ran to the Nyong'iro homestead where the mourners were still gathered and told them had happened to her son. Among those present was Johannes Obonyo Nyong'iro (PW 6) who went back with her to her homestead and found the deceased lying outside her house. PW 3 also went to wake up Michael Oloo Atunga (PW 3), the deceased's uncle, who also went to the PW 3's compound. The people who responded to PW 3's alarm decided to call a taxi to take the deceased to hospital but by the time the taxi arrived, the deceased had died. The taxi ended up taking the deceased's body to Ombio Hospital. The incident was reported to Awendo Police Station.

5. The post-mortem on the deceased's body was performed by Dr Okoth on 13th August 2011 but the report was produced by Dr Jared Ndege under the provisions of **section 77** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. According to the report, he observed that there were two dark liner marks extending to the rib cage on the chest, there was bruising on the stomach and a fracture on the vault of the skull. He concluded that the deceased died as a result of internal haemorrhage due to the skull fracture.

6. It is not in dispute that the deceased died and from an injury inflicted on his head by the accused. As the accused admitted to hitting the deceased, the only issue for consideration is whether the accused inflicted the injuries with malice aforethought. On this issue the evidence of the witnesses who were with the accused and the deceased on that early morning is decisive. PW 1, the son of Otieno Nyong'iro, testified that they had just left the homestead when the deceased told the accused that they taking collection from the accused's home. The accused told him they could not do so. PW 1 left the accused and the deceased but after a few paces he heard the deceased telling the accused to stop holding him. He turned back and found the accused had beaten the deceased with a rungu and the deceased had fallen down. He stated that the accused ran away after the incident.

7. As he was feeling sleepy, PW 5 recalled that after the meeting, he proceeded ahead of the others but PW 1 called him and asked him to come back. He found the deceased groaning in pain. When he asked what happened PW 1 stated that the accused and deceased were fighting and that he tried to separate them but that the deceased fell down. By the time he arrived the accused was not there and he did not detect any injuries on the deceased.

8. Inspector Richard Mutiso (PW 7), the investigating officer, received information of the death at about 10.00 am on 10th August 2010. He proceeded to Midida Village with other officers and proceeded to interview various witnesses. He testified that from the statement he took, the deceased tried to hit the accused with a rungu and the accused managed to snatch it from him and hit him on the head whereupon he fell unconscious. He stated that the rungu belonged to the deceased and that the accused ran away after the incident but was brought to Migori Police Station by his father, Michael Oloo Atunga (PW 3).

9. In light of the facts I have outlined, was malice aforethought proved? Malice aforethought constitutes the mental element of the offence of murder, that is, *mens rea* or the *intention* to kill another person. **Section 206** of the **Penal Code** defines it 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.

10. Malice aforethought may be express, implied or constructive. It is express if there is a clear intention to cause death while it is implied if the accused had an intention to cause *grievous bodily harm* or if it is shown that the accused knew that there was a *serious risk* that death or grievous bodily harm could result from his conduct but he proceeds to do so without any lawful excuse. Where the homicide is committed in furtherance of a felony or when resisting or preventing lawful arrest, notwithstanding the absence of an intention to kill or to cause grievous bodily harm, the accused is deemed to have constructive malice aforethought. (See generally **Raphael Mbuvi Kimasi v Republic Nyeri CA, Criminal Appeal No. 61 of 2013 [2014]eKLR, Nzuki v Republic, [1993]KLR 171**)

11. What emerges from the evidence is that there was a fight between the accused and the deceased. The accused's version of events was augmented by the testimony of PW 7 who interviewed several witnesses. PW 1 recalled that there was an argument between the two while he was about 20 metres away and returned when the deceased had already been beaten with the rungu while PW 5 came to the scene in response to the call by PW 1 and found when the deceased already fallen. Furthermore, PW 5 told the court that PW 1 told him that the accused and deceased were fighting and he tried to separate them. PW 7 stated that the rungu belonged to the deceased while none of the witnesses testified as to the size of the rungu or whether it is the kind of weapon that would have inflicted the kind of injuries that a person would clearly have known the risks involved in assaulting one with it.

12. The totality of evidence leads me to conclude that the malice aforethought necessary to support a conviction for murder was not proved by the prosecution. I however hold that the accused caused the unlawful act which led to the death of **BRIAN OCHIENG OKELLO**. I therefore convict him of the offence of manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code**.

DATED and DELIVERED at MIGORI this 3rd day of September 2015.

D.S. MAJANJA

JUDGE

Mr Kisia, Advocate for the accused.

Ms Owenga, Principal Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.