

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL CASE NO 33 OF 2021

REPUBLIC

VERSUS

**WYCLIFFE MASINDE KUYA ALIAS THOMAS
OTANGA.....ACCUSED**

JUDGMENT

INTRODUCTION

1. The Accused person herein was 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 were that:-
“On the 11th day of October 2018 at Esbwali Village, Emuhaya Sub-county within Vihiga County jointly with others not before the court murdered Joram Otakwa Ambuka.”
2. The Prosecution’s case was heard on diverse dates between 22nd October 2019 and 9th July 2024 when it closed its case. On 26th September 2024, this court found that the Prosecution had established a *prima facie* case against the Accused person and thereby put him on his defence. The defence case was heard on 5th February 2025.
3. This matter was partly heard by Musyoka J. He took the evidence of Marion Owendo (hereinafter referred to as “PW 1”), Zadock Omukuba Otakwa (hereinafter referred to as “PW 2”) and Edward Khasakhala Masinda (hereinafter referred to as “PW 3”) and Sylvanos Kuya Mbuga (hereinafter referred to as “PW 4”).

4. This court became seized of this matter on 8th March 2023 on which day the Accused person and the State indicated that they wished to proceed with the matter from where it had reached. This court therefore took the evidence of Samson Ambuka Otakwa (hereinafter referred to as "PW 5"), Dr Ombok Lucy (hereinafter referred to as "PW 6"), No 62952 Corporal Gilbert Cheruiyot (hereinafter referred to as "PW 7"), the Accused person who testified as "DW 1", Flora Amos (hereinafter referred to as "DW 2") and Fredrick Aura Andayi (hereinafter referred to as "DW 3").
5. The Prosecution's Written Submissions were dated and filed on 5th March 2025 while those of the Accused person were dated and filed on 4th April 2025. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

LEGAL ANALYSIS

6. The issues that were put before this court for consideration were as follows:-
- a. Whether or not Joram Otakwa Ambuka (hereinafter referred to as the "deceased") died?**
 - b. If so, was his death caused by an unlawful action(s) and/or omissions?**
 - c. If so, who caused the unlawful action(s) and/or omissions?**
 - d. Was there malice aforethought in the causation of the deceased's death?**

7. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. PROOF OF DEATH OF THE DECEASED

8. Both the Accused person and the Prosecution submitted that there was no doubt as to the death of the deceased as confirmed by the witnesses.

9. As both the Prosecution and Defence witnesses alluded to the deceased's death, it was not necessary to seek further proof. This court found and held that the deceased's death was proved without an iota of doubt.

II. PROOF OF CAUSE OF THE DECEASED'S DEATH

10. Both the Accused person and the Prosecution agreed on the cause of death as was proven by the autopsy that was produced by PW 6.

11. The cause of the deceased's death was a pertinent issue. PW 6 tendered a Post-mortem Report dated 15th October 2018 in respect of the deceased herein as an exhibit in this matter. After conducting the post-mortem examination, he formed an opinion that the cause of death was severe head injury due to massive left subdural hematoma following blunt force trauma to the head.

12. It was, therefore, clear from his evidence that the deceased's death was not as a result of natural causes. It was therefore crucial

to establish how the deceased sustained the injuries that caused his death.

III. IDENTIFICATION OF PERPETRATOR OF DECEASED'S

DEATH

13. The Accused person did not deny having been with the deceased on the material date of 12th October 2018 or beating him. However, he denied having hit him on the head as was corroborated by PW 3 who testified that he saw him hit the deceased on the legs. He asserted that PW 7 stated that the deceased was beaten with a pipe which electricity passed through. He added that on cross-examination, PW 7 said that the pipe was a small one that could not cause severe head injury.
14. He contended that the evidence of PW 3 and PW 7 was further corroborated by that of DW 2, DW 3 and his evidence that he beat the deceased on the leg with a small pipe to bring him to order. He added that PW 6 also confirmed that a fall could cause a subdural hematoma as shown in the post-mortem.
15. He pointed out that it was PW 1's evidence that the deceased fell several times since he was drunk. He asserted that he first fell on chairs hitting his head and that PW 1 stated that while in the house, he fell on his left side and started bleeding. He was emphatic that the fall was corroborated by the evidence of PW 7, DW 2 and DW 3. He was categorical that the Prosecution did not prove its case as far as him causing the deceased's death was concerned.

16. On its part, the Prosecution submitted that from the evidence of its witnesses, it was clear that it was the Accused person who inflicted the injuries on the deceased. It added that PW 1 stated that he was at the scene and saw the Accused person hit the deceased on the head twice leading to a head injury which PW 6 stated was the cause of his death.
17. The Accused person testified that on the material day of 12th October 2018, he was in a funeral at the village and the deceased was present but drunk at the time. He stated that the deceased jumped on him as he was trying to cut an electric wire and that they fell down. He added that there was an electric wire extension from a neighbour's house and he was stopping him from cutting the same.
18. He further testified that when the deceased fell down, he hit him twice on his legs with a pipe. The deceased's mother and wife took him to his uncle's house. He added that he was falling on chairs and, therefore, they had to carry him as he was not walking at the time. He said that there was nothing in the house that the deceased was placed in and that they locked him inside.
19. His further testimony was that he saw the deceased falling several times and calling his mother while outside before being taken into the house. He said that it was the night of 11th October 2018 at around 11.00 pm going to midnight. He stated that from the time the deceased was locked in he did not see him again and that he only learned on the next day evening that he had died.

20. DW 2 testified that she was at the scene of crime on the material night of 11th October 2018 at around midnight when she saw young people running after the deceased. The deceased jumped on the electrical wires and the sparks started coming out. He fell down on the chair and stood up and held on the wire again. People started screaming saying, “fire is going to burn us” and started asking for the village elder, the Accused person.
21. It was her further evidence that the Accused person heard them and came with a thin stick. She further said that it was a small green pipe, that people used to pass electrical wires. She said that the Accused person came and asked, “You mean it was my uncle who was disturbing people?” The deceased started pushing the Accused person and they fell down. The Accused person asked the deceased, “you have come to bring a fight here?” (**sic**) and then started beating him. He hit him twice on the legs. The deceased mother came and asked him, “why are you calling me to create chaos?” and together with the deceased’s wife they took him to his uncle’s home which was not far from the home with the funeral.
22. She further said that at the time, the deceased was well and was walking. She added that from where they were, they could hear the deceased screaming and calling his mother and wife to open the door for him. She said that he continued to make noise until morning. The next morning, she went to work and her daughter called her informing her that the deceased had died.

23. DW 3's evidence corroborated that of DW 2. However, he added that the pipe that the Accused person had was one that people used to put water or pass electrical wires. He said that the Accused person hit the deceased twice but did not say where he was hit. He further testified that later after the deceased had been locked a few of the people including him went to see whether he had sobered up so they could open the door for him. He said that when he saw him, he was bleeding from the mouth and nose and was incoherent and bad in shape. He was walking by himself and was not assisted.
24. It was his further evidence that the deceased was not bleeding from anywhere. He pointed out that the seats were scattered in the room and it was like someone was fighting with the seats. He added that the previous night the seats were properly arranged. He said that the deceased was taken to hospital and he later learned that he died.
25. Notably, PW 1 who was the deceased's mother testified that on the material day of 11th October 2018, she was at a funeral with the deceased and that the deceased's uncles took him to a drinking den and he came back drunk. She said that the Accused person who was the deceased's uncle asked him to buy him cigarette and that they went and bought and came back to the funeral. The deceased went aside to smoke but he was also making noise.
26. It was her further evidence that the Accused person told the deceased to stop making noise and he stopped. He tried to stand up

but he fell. The Accused person removed him from touching the electrical wire. As they carried him away, the Accused person came and hit him with a club. She described it as a mkunju **(sic)** broken. She added that the Accused person hit the deceased twice on the head.

27. She further told the court that they locked the deceased inside the house and went back for the funeral matters. She noted that since he was bleeding, they went back shouting that he had been beaten. At 4.00a.m, she heard the deceased shouting when she went to check on him, she found that he was very weak and was no longer speaking and/or talking. She added that the next day the deceased did not go to work as he was bleeding. They decided to bring him clothes and took him to hospital where he passed on. She blamed the Accused person for beating the deceased in the name of disciplining him.

28. PW 2 was the deceased's father. He testified that he identified the deceased's body during post-mortem.

29. PW 3 corroborated that of PW 1. However, he said that he saw the Accused person hit the deceased on the legs.

30. PW 4 was the deceased's uncle, the brother to PW 1. The deceased was locked in his son's house. It was his testimony that when the deceased was brought in, he did not examine him well. He left for the funeral only to come back when the deceased was being taken to hospital. He was later informed that the deceased died.

31. PW 5 was the deceased's brother. He testified that on the material day of 12th October 2018, he was called by his brother's wife who informed him that the deceased had been beaten in a funeral by the Accused person among other persons. He was called to go and take him to hospital. When he arrived where the deceased was, he noted that he was bleeding from the left ear. They escorted the deceased to hospital where he later died.
32. PW 7 was the Investigating Officer. His evidence corroborated that of PW 1, PW 2, PW 3, PW 4, PW 5 and PW 6.
33. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 1 and PW 3 saw the Accused person beat the deceased on the material date. PW 1 stated that he saw him hit the deceased twice on the head while PW 3 said that he saw him hit the deceased on the legs. PW 1, PW 5 and DW 3 were able to see the deceased bleeding from the mouth and ears before he was taken to hospital in the morning.
34. PW 1 and PW 3 all placed the Accused person at the scene of crime. The incident happened during night but there was sufficient light for identification. Additionally, the Accused person was a Village elder and even the witnesses referred to him as such. There was, therefore, no probability of a mistaken identity in the case herein.
35. In his defence, the Accused person admitted to have beaten the deceased but denied hitting him on the head. This court noted that the evidence of his witnesses was not cogent as they kept

contradicting themselves and thus, failed to corroborate his evidence. Whereas the Accused person testified that the house that the deceased was locked in had nothing inside, DW 3 said that there were seats inside and that in the morning they were scattered in a manner that insinuated that someone had been fighting inside. Further, DW 3 kept contradicting himself as to whether or not he saw the deceased bleeding. He did not seem to have been a truthful witness.

36. The Accused person did not demonstrate that there was any motive for PW 1 and PW 3 to have colluded to frame him as the person who unlawfully caused the deceased's death on that material date.

37. His assertions that he did not hit the deceased on the head and/or that the pipe he used to hit the deceased could not have caused his death were therefore rendered moot because the Post-mortem was clear that the deceased died as a result of a blunt injury to the head.

38. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Accused person's evidence to have been watertight enough to have weakened the inference of guilt on his part. His defence was a mere denial and did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 3, PW 5, PW 6 and PW 7.

39. This court was thus persuaded to find and hold that the Accused person was positively identified by PW 1 and PW 3 as

aforesaid. They each spent sufficient time with the Accused person and the deceased at the funeral at the material time. They were all relatives and neighbours and they knew each other. This could not have been a case of mistaken identity. Identification was by way of recognition.

IV. MALICE AFORETHOUGHT

40. Having found and held that the Accused person's defence was not sustainable as he was positively identified as the perpetrator of the deceased's death, the next pertinent question that arose was whether or not he had malice aforethought in causing his death.

41. He invoked Section 206 of the Penal Code and placed reliance on the case of **R vs Juma Mwarabu Chai & Another[2022]eKLR** where it was held that the test of malice aforethought was to be properly understood in so far as the evidence by the prosecution manifests the nature of the weapon used, how it was used, the manner used to inflict the injuries, the part of the body injured and the conduct of the assailants before, during and immediately after the injuries inflicted.

42. He asserted that he had no intention at all to cause the death or do grievous harm to the deceased and that he was merely trying to maintain order and stopping the deceased from causing danger at the funeral. He pointed out that he had no problem with the deceased, therefore, he had no intent at all to kill the deceased.

43. The Prosecution cited Section 206 of the Penal Code and relied on the case of **Republic vs Tubere s/o Ochen[1945] 12**

EACA 63 where it was held that an inference of malice aforethought could be established by considering the nature of weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

44. It contended that the evidence on record showed that the aim of the Accused person herein was to kill as was seen in the nature of the injury inflicted on the deceased. It added that the actions of the Accused person were clear and had an outcome of death and that the attack on the deceased head was an attack on his life. It was emphatic that it relied on direct evidence which established malice aforethought on the part of the Accused person.

45. Having analysed the evidence that was adduced by both the Prosecution and the Accused person and their respective Written Submissions, this court came to the firm conclusion that the Prosecution established to the required standard, which in criminal cases, was proof beyond reasonable doubt that the act of unlawful killing of the deceased herein was by the Accused person herein but that there was no malice aforethought.

46. This court noted that the circumstances of the case pointed towards a case of manslaughter. While there was *actus rea* on the part of the Accused person, there does not appear to have been *mens rea* to kill the deceased. It was a case of discipline that went haywire and lead to the deceased's death. This court, therefore,

found and held that what the Accused person committed was manslaughter and not murder as it was not pre-planned.

DISPOSITION

47. For the foregoing reasons, the upshot of this court's decision was that the Accused person herein be and is hereby convicted of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code Cap 63 (Laws of Kenya) having been reduced from the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

48. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **26th** day of **November**
2025

J. KAMAU
JUDGE