



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)**

**CRIMINAL APPEAL NO. 17 OF 2014 (R)**

**BETWEEN**

**GORDON OKUMU OLUOCH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An Appeal from a Judgment of the High Court of Kenya at Kisumu (A. O. Muchelule, J.) dated 16<sup>th</sup> December, 2013***

**in**

**HCCRA. NO. 31 OF 2008)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. The appellant, Gordon Okumu Oluoch, was charged and tried before the High Court of Kenya at Kisumu for the offence of murder. He was subsequently convicted for that offence in a judgment delivered on 16<sup>th</sup> December 2013 and sentenced to death. The particulars of the offence were that on 11<sup>th</sup> July 2008 at Otonglo village in the then Kisumu West District of the then Nyanza Province, he murdered one Michael Owino Okumu.

2. He has appealed to this Court against the conviction and sentence on grounds that the charge of murder was not supported by evidence; that malice aforethought, a necessary ingredient of the offence, was not established; that the evidence that the appellant acted out of frustration, anger and provocation was ignored; that the trial court relied on the evidence of single eye witness; that the alleged murder weapon, namely the slasher that was produced in court had no blood stains and the nexus between that slasher and the injuries sustained by the deceased was not established.

3. Our task, on a first appeal, is to review and evaluate the evidence afresh with a view to drawing our own independent conclusions, bearing in mind that a trial court has the unique advantage, which we do not have, of hearing and observing the witnesses.

## The evidence

4. Eight witnesses testified for the prosecution. Bernard Otieno Obondo (PW1) was at his home in Otonglo village, Kisumu, on 9<sup>th</sup> July 2008 at about 10.00 pm. He was with his wife. Gordon Okumu Oluoch, the appellant, went to PW1's house to seek his help "*as he had been assaulted by one Odhiambo and one Peter*" apparently on account of having stolen their rabbit. PW 1 declined to assist upon which the appellant indicated that he would seek help from Michael Owino Okumu, the deceased. Thereafter PW1 saw the appellant as he was leaving the homestead of the deceased. The appellant then picked up a stone and threw it at the roof of PW1's house. On flashing his torch at him, the appellant ran away.

5. Thereafter PW1 went to the deceased's house to tell him what he had witnessed. He found the deceased at his house with his girlfriend, Jackline Adhiambo (PW2). Accompanied by the deceased, PW 1 proceeded to the appellant's homestead where the deceased called out the appellant's name. The appellant emerged from his house and upon enquiry as to what his '*problem*' was, the appellant told PW1 and the deceased to leave his compound. As PW 1 and the deceased were preparing to leave the appellant's compound, the appellant rushed into his mother's house and emerged with a slasher and remarked to PW1 and the deceased, "*you people are still here?*" As the deceased turned around to face the appellant, the appellant cut him with the slasher in his stomach. When the deceased raised his hand, it was also cut.

6. The deceased cried out for help. PW1's mother and PW 2 responded and arrived at the scene where they found the deceased vomiting. PW 1 fetched a bicycle and took the deceased to Kodiaga Dispensary where the deceased was attended to and referred to New Nyanza General Hospital. Being late in the night, PW 1 took the deceased to his home with a view to taking him to New Nyanza General Hospital the following day.

7. At 7.00 am the following day, PW 2 called PW 1 and informed him that the deceased wished to see him. PW 1 went to the deceased's home where he found him sitting on a chair and made arrangements to take him to hospital where the deceased was admitted and later died.

8. After the news of the death of the deceased reached the village, PW 1 went on to say, members of the public apprehended the appellant.

9. According to PW1, he is related to both the appellant and the deceased; their homesteads are near each other and that when they went to the appellant's homestead with the deceased, they were not armed.

10. PW 2 stated in her evidence that she was with the deceased at his home in Otonglo village on 9<sup>th</sup> July 2008 when PW 1 reported that the appellant had thrown stones at his house; that the deceased then accompanied PW 1 to go to the appellant's homestead; that she later heard shouts and on checking she found the deceased holding his abdomen "*saying that he had been killed by Gordon*" the appellant; that alongside others they took the deceased to Kodiaga Dispensary where he was referred to the General Hospital; that since they did not get transport to the General Hospital, they instead took him to his house before taking him to the General Hospital the following morning where he died while undergoing treatment.

11. Helida Akinyi Obondi (PW3), who is PW1's mother, was at her home in Otonglo village, Kisumu on 9<sup>th</sup> July 2008 at about 10.00 pm when she heard PW 2 shouting; she left her home and found PW 2 and her boyfriend, the deceased; the deceased was lying down and holding his stomach; he had injuries on his abdomen and on his hand. Her son, PW 1, looked for a bicycle and they took the deceased to hospital near Kodiaga Prison where he received first aid before being referred to New Nyanza General Hospital where he was taken the following day. Later that day at about 6.00 pm, she learnt from PW 2 that the deceased had died. She later saw the deceased's body had a deep stab wound on the abdomen.

12. Michael Ochieng (PW4), a resident of Otonglo village in Kisumu and a cousin to the deceased, was one of the members of the public who, on hearing that the appellant was implicated in the death of the deceased, assisted in the apprehension of the appellant before handing him over to the area chief and subsequently to the police.

13. Agneta Aluoch Okumu (PW5), a sister to the deceased, alongside Samson Odanga Ochuka (PW6) a resident of Otonglo village, identified the deceased's body at the mortuary at New Nyanza General Hospital for purposes of post mortem on 27<sup>th</sup> July 2008.

14. Police constable Jeremiah Kiemr (PW7) from the investigating department at Kisumu Central Police Station was assigned to take over the file relating to the matter following the death of the investigating officer Police Constable Paul Ingila. He produced the slasher, the weapon of crime, as an exhibit before the trial court and stated that it did not have bloodstains and could not tell where the slasher was found.

15. Dr. Ochola Okal Ephraim (PW8), produced the post mortem report dated 17<sup>th</sup> July 2008 in respect of the deceased that indicated that the cause of death was a penetrating abdominal stab.

16. In his defence, the appellant, in his sworn statement stated that on 11<sup>th</sup> July 2008 at about 5.00 pm, he was conversing with his stepmother when PW 4 informed him that he (the appellant) was required by the chief; that he reported to the chief who interrogated him about the death of the deceased; that he told the chief that he was in Migori between 4<sup>th</sup> July 2008 and 2.00pm on 11<sup>th</sup> July 2008 when he got home from Migori; that the chief ordered his release; that he embarked on his way home but before reaching his home, "PW4 and his gang appeared" and they had pangas and escorted him to Central Police Station where he was locked up and subsequently charged with the murder of the deceased, something he "knew nothing about". According to the appellant, he was framed, saying that in his youth the deceased and PW4 had a land boundary dispute with his father.

17. Upon considering the evidence, the learned trial Judge was satisfied that the prosecution had established the appellant's guilt. The Judge concluded his judgment thus:

***"I have considered the evidence of PW1 and PW2 and that of the accused. I accept that on this night the accused was at his home at Otonglo, and find that the claim that he was away in Migori was not true. I accept that on this night he attacked the deceased with a slasher and cut him with it and that subsequently the deceased died from the injury inflicted. I find that the attack was unprovoked and was intentional. The accused is consequently guilty of murder c/s 203 and 204 of the Penal Code and is hereby convicted."***

18. Against that background, the appellant has lodged the present appeal.

### **Submissions by counsel**

19. At the hearing of the appeal before us, the appellant was represented by learned counsel Mr. Moses J. A. Orenge who referred us to the memorandum of appeal and submitted that having regard to the testimony of PW7 who produced the slasher, the murder weapon, as an exhibit and stated that the same did not have blood stains, the prosecution failed to establish any connection between the alleged murder weapon and the injuries sustained by the deceased; that assuming the slasher was the murder weapon, one would have expected it to have blood stains; that malice aforethought, which is a necessary ingredient of the offence of murder, was not proved and that the learned Judge erred in concluding that "the attack was unprovoked and was intentional."

20. According to Mr. Orenge, if the learned Judge had considered the totality of circumstances, namely that the appellant was frustrated having sought, to no avail the assistance of PW 1 and that of the deceased, the Judge should have found that the appellant was not in the right frame of mind when the incident took place; that the fact that the deceased and PW1 followed the appellant to his homestead was not only provocative, but also intimidating with the result that the appellant was not in a state of mind to have malice aforethought.

21. In support of his submission, counsel referred us to the decision of this Court in **Jenes Bikeri Ondieki Mocha vs. Republic, Criminal Appeal No. 179 of 2012** and urged us to allow the appeal. Counsel concluded by urging that if the appellant was guilty of any offence, it could only be

manslaughter for which he has been sufficiently punished having been in custody since July, 2008. With that, counsel urged us to allow the appeal and to quash the conviction and set aside the sentence.

22. Opposing the appeal, learned counsel for the respondent, Mr. Evans Ketoo, submitted that the prosecution discharged its burden and proved the offence of murder; that both PW 2 and PW3 placed the slasher at the scene of crime; that the post mortem report produced by PW8 confirmed that the deceased died from a penetrating abdominal stab; that having regard to section 206(b) of the Penal Code the ingredient of malice aforethought was established as the appellant knew or should have known that by inflicting the stab he would cause death or grievous harm; that the fact that the appellant in a premeditated fashion retreated into the house before emerging with a slasher which he then employed to stab the deceased is evidence of malice aforethought.

23 Counsel went on to say that there was further evidence in the nature of a dying declaration; that according to the evidence of PW2, the deceased said that the appellant had killed him, as he held his abdomen. In the totality of circumstances, counsel submitted, the offence was proved to the required standard.

### **Determination**

24. We have considered the appeal and the submissions by learned counsel. This is a first appeal. As already mentioned, our task, as this Court has stated on many occasions referring back to the case of **Okeno vs. Republic [1972] EA 32**, is to re-evaluate the evidence on record and to draw our own conclusions bearing in mind that the trial court was in the unique position of having heard the witnesses. We will do that in the context of the complaint by the appellant that the offence for which he was convicted was not proved so that we may draw our own conclusion whether the conviction was based on evidence and is legally sound.

25. Based on the grounds of appeal and submissions by counsel, the main issue that we have to determine is whether the ingredients of the offence of murder were proved. In particular, whether *mens rea* was established.

26. The thrust of the arguments by counsel for the appellant in that regard were that, quite apart from the fact that the appellant was provoked by PW1 and the deceased who pursued him to his house, the circumstances under which the deceased died were such that the appellant was not in a mental condition capable of making a rational decision. He leaned heavily on the authority of the decision of this Court in **Jenes Bikeri Ondieki Mocha Vs. Republic** (supra).

27. Based on the record however, there is uncontroverted evidence, as submitted by counsel for the respondent, that when the deceased and PW1 went to the appellant's homestead to enquire from him why he threw a stone at the roof of PW1's house, the appellant asked the deceased and PW1 to leave his compound; that as they were preparing to leave, the appellant retreated into the house and armed himself with a slasher, and then emerged and remarked to the deceased and PW1 "*you people are still here?*" before cutting the deceased with the slasher in his abdomen. In our view, those actions by the appellant manifested an intention to, at the very least, cause grievous harm to the deceased. Section 206 (a) and (b) of the Penal Code provides that:-

*"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;*

28. Expounding on that provision, this Court in **Dickson Mwangi Munene and Anor vs. Republic [2014] eKLR** stated that:

**“the definition of malice aforethought in Section 206 of the Penal Code comprises of not only the intentional but also of reckless acts causing grievous harm committed with indifference of their consequences. “**

29. In **Paul Muigai Ndungi v R [2011] eKLR** this Court held that:

**“malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person.”**

30. In the present case there was clearly evidence that the appellant intended, at the very least, to cause grievous harm by equipping himself and using a slasher to stab the deceased. We conclude therefore, that malice aforethought was established.

31. The argument that the appellant was provoked and that he was not in a mental condition capable of making a rational decision is, in our view, devoid of merit. The evidence by the prosecution that PW1 and the deceased were not armed when they went to the appellant’s homestead was not shaken. Neither are the circumstances in this case comparable to those in **Jenes Bikeri Ondieki Mocha vs. Republic** (supra). There the appellant had differed with her husband; she sought solace from her father who in turn chased her away; she then became suicidal and decided to poison herself and her children. There was evidence, in that case, which is absent in the present case that the appellant was not in control of her faculties.

32. We think we have said enough to show that the appellant’s appeal is devoid of merit. It is accordingly dismissed in its entirety.

**Dated at Kisumu this 6<sup>th</sup> day of November, 2015.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

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**DEPUTY REGISTRAR**