



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 21 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WASHINGTON NICHOLAS OCHIENG.....ACCUSED**

**JUDGMENT**

1. **Washington Nicholas Ochieng**, the accused person herein, was charged with the murder of **Joseph Ondiek** (hereinafter referred to as '**the deceased**') on the 11/08/2016 at Centre-Inn Bar in Rongo Township in Migori County within the Republic of Kenya.

2. The accused person denied committing the offence and the case was set for hearing. A total of ten witnesses testified in support of the information. **PW1** was **Patrick Ouma Odero**, one of the revellers in the bar on the fateful day. **PW1** was drinking with **George Otieno Osodo** who testified as **PW2**. The Counterman at the said bar one **Wycliffe Mungah Okoth** testified as **PW3** and a Waitress one **Emily Anyango Juma** testified as **PW4** whereas the owner of the bar one **Elisha Ochieng Ochola** testified as **PW5**. The arresting officers **No. 86364 Corp. Sylvester Kikwe** and **No. 59061 PC Eliphaz Marete** testified as **PW6** and **PW9** respectively. The wife of the deceased testified as **PW7**. She was one **Jael Atieno Ondiek. Dr. Juma Stephen** of Homa Bay County Referral Hospital and who conducted the post mortem examination on the body of the deceased testified as **PW8. PW10** was **No. 87086 PC. Thomas Mutegi** attached at DCI Rongo. He was the investigating officer. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was based on circumstantial evidence for the reason that there was no eye-witness. **PW1** and **PW2** were in the bar with the deceased in the evening of 11/08/2016. As time passed by the deceased was restless and moved from one end of the bar to the other disturbing other customers. At one point he went towards the rear of the bar and confronted two customers who were smoking cigarettes near the toilets and demanded to know why they were smoking inside the bar which was a public place.

4. **PW1** intervened and asked the deceased not to disturb other customers as the issue of the cigarettes had been sorted out. The deceased however insisted on his demand. **PW1** left them and went to the toilets. Shortly **PW1** saw the deceased running very fast towards him while crying and holding the left side of his stomach. On asking him whether there was anything amiss the deceased continued crying and fell right in front of **PW1**. The deceased was bleeding profusely and **PW1**'s efforts to take the deceased to hospital were futile as he did not get any transport. The deceased then passed on where he fell. **PW1** identified the accused person as one of the two people who argued with the deceased.

5. **PW2** had just stepped out of the bar to speak to his Aunt who had called him over his phone as **PW1** and the deceased went towards the toilets. On return **PW2** did not find his companions at their table. Suddenly, **PW2** saw the accused person holding a blood stained knife and running very fast towards the outside of the bar followed by another person he did not recognize. People in the bar rushed to the direction where the accused person came from. **PW2** also went to find out if there was any problem. He found the deceased lying on the floor while bleeding profusely. He had four stab wounds. **PW3** and **PW4** only saw the commotion at the rear of the bar and on rushing there they found the deceased bleeding while lying on the floor. **PW4** however saw **PW1** holding some one slender, short and who had a *rasta* hairstyle. **PW4** also saw a knife cover near the door. **PW4** knew the accused person well and readily recognized him at an identification parade as one of those people who were at the rear of the bar.

6. PW3 called and informed the Bar Manager, **Fredrick Kwanya** (not a witness) of the events who later went to the bar and proceeded to lodge a complaint with the police in the company of PW3.

7. PW10 conducted the investigations. He visited the scene in company of other officers and interrogated several people. He called the Scenes of Crime personnel who photographed the deceased before removing the body to Homa Bay County Referral Hospital Mortuary. While at the scene PW10 recovered a bag which was allegedly left behind by the accused person and his companion as they fled. The bag had assorted items used in mining.

8. PW10 later recorded statements from witnesses. He then learnt the day after that some *boda boda* riders had attacked a house in Rongo town believed to be that of the accused person. PW10 rushed there in the company of his fellow officers and found everything in the house scattered. He recovered a photo album with several photographs of the accused person. He also organized for an identification parade upon the arrest of the accused person where the accused person was identified by PW1, PW2 and PW4. PW10 also escorted the accused person for mental assessment at Rongo Sub-County Hospital where he was certified fit to stand trial.

9. PW10 produced the photographs, the Identification Parade Forms, a Cap, a Black knife cover, a blue mining torch, a spanner and some sweets as exhibits. PW6 and PW9 arrested the accused person in a house in Migori town on a tip-off.

10. The autopsy was conducted by PW8 at Homa Bay County Referral Hospital Mortuary on 12/08/2016. PW8 confirmed two deep penetrating wounds on the left side of the chest. The 5th and 6th ribs were broken and the left lung was perforated while the left ventricle was cut into two pieces. He formed an opinion that the cause of death was cardiopulmonary arrest due to hemopericardium secondary to penetrating chest injury. PW8 filled and signed a Post Mortem Report which he produced as an exhibit.

11. With the foregone evidence the prosecution closed its case and the accused person was placed on his defence. The accused person opted to and gave a sworn testimony. He explained that on 11/08/2016 he was at the bar and took drinks with **Elvis Onditi** (hereinafter referred to as '**Elvis**') and **Elijah Odhiambo Oganga** (hereinafter referred to as '**Elijah**'). That while seated at the rear of the bar a disagreement ensued between the deceased and Elvis over cigarette smoking. That, the two went towards the toilets leaving him and Elijah behind. The accused person then saw Elvis running away holding a knife and they followed him to find out what was happening before Elvis disappeared outside the bar. He learnt that the deceased had been stabbed. He denied any knowledge of the bag used in mining since according to him the bag belonged to Elijah. He then left the bar and rode on his motor cycle to Migori town where he stayed. He denied smoking and ever having a *rasta* hair style. To him, it must have been Elvis who stabbed the deceased since Elvis was killed in a revenge mission. That, he fully co-operated with the police, did not flee neither was he lynched like Elvis. The accused person prayed that the information be dismissed as he did not commit the offence. The accused person did not call any witness.

12. At the close of the defence case, Counsel for the accused person filed written submissions and the matter was set for this judgment.

13. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

*(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.*

14. There is no doubt that the deceased died. PW1, PW2, PW3, PW4, PW7, PW8 and PW10 so confirmed. As to the cause of death, PW8 took this Court through the Post Mortem Report which he prepared and opined that the cause of death was cardiopulmonary arrest due to hemopericardium secondary to penetrating chest injury. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

15. On the second ingredient as to whether the accused person caused the death of the deceased, since there is no eye-witness

account on how the deceased died, reliance is now on the circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) *The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;*

(ii) *The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

(iii) *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*

16. The foregone principles were set out in the *locus classicus* case of *R -vs- Kipkering arap Koske & Another* (*supra*) and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI -vs- Republic (2013) eKLR*, *Musii Tulo vs. Republic (2014) eKLR* among many others.

17. The Court of Appeal in the case of *Musii Tulo* (*supra*) in expounding the above principles expressed itself as follows:-

*“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v. R (1958) EA 715* citing with approval *Teper v. R (1952) AL 480* thus: -*

*'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'*

18. The chain of events leading to the arrest and arraignment of the accused person before this Court came from PW1, PW2, PW4 and PW10. The accused person vehemently denied the information.

19. PW1, PW2 and PW4 were all in the bar when the incident that led to the death of the deceased occurred. The accused person as well did not deny that he was in the bar in the company of Elvis and Elijah. The accused person's position is that he never took part in the assault on the deceased but Elvis. PW1 stated that he met the deceased with two people arguing over cigarette smoking just next to the toilets and that it was indeed the accused person who was exchanging words with the deceased. That although it was his first time to see the accused person PW1 was able to identify him in an identification parade due to his appearance. PW2 knew the accused person well and that the accused person used to work at the gold mines and was also known as 'Dogo'. That, he saw the accused person holding a knife which was blood-stained as he ran outside the bar followed by another person. PW2 also testified that the accused person ran from the rear of the bar where there were toilets as he fled through the main door. PW4 confirmed that she knew the accused person very well as her regular customer and that the accused person sat at the rear of the bar with others as they took drinks.

20. The accused person however stated that it was instead Elvis who stabbed the deceased with a knife. PW10 who investigated the case heard that the *boda boda* riders had raided one of the homes of those who had stabbed the deceased. That was a day after the death of the deceased. PW10 rushed to the house and found that all the items had been scattered. He recovered a photo album which had several photographs for the accused person. Whereas the accused person contended that he stayed in Migori PW10 was of the firm position that the accused person stayed at the house in Rongo where he recovered the photo album and that he escaped to Migori town to avoid arrest.

21. It is not in doubt that Elvis was caught up by mob and killed in a revenge mission. Likewise, a like thing would have happened had the mob caught up with the accused person in the house. There is further evidence that Elijah is still on the run and that the police are pursuing him. Therefore, the fact that Elvis was killed by the mob and not the accused person is not sufficient proof of the accused person's innocence. There is hence a very high likelihood that the accused person stayed in Rongo and only disappeared to Migori town after the incident which led to the death of the deceased.

22. It is further not in doubt that PW2 knew the accused person well. He even knew him by his *alias* name 'Dogo'. The incident happened at around 08:00pm and from the evidence of the witnesses who were inside the bar, the bar was well lit as they could

easily narrate the events within the bar with ease and clarity. I have as well seen the photographs which were taken at the scene and they are so clear. That is further evidence on how the bar was lit. There was nothing which came up at the trial to suggest that anyone's visibility could have been hampered in one way or the other. I also observed the demeanor of the witnesses as they testified and I was satisfied that they were truthful. I hence find the defence not sound enough to create any reasonable doubt in the prosecution's case. The defence fails and is for rejection.

23. The cumulative effect of the evidence of PW1, PW2, PW4 and PW10 can only be that the accused person was at the rear of the bar and engaged in an exchange of words with the deceased shortly before he ran out of the bar holding a blood-stained knife. I must say that in this case the legal standard required for a Court to act on circumstantial evidence has been attained. There is no any other reasonable and logical explanation that can explain the death of the deceased save the inference that the death was caused by the accused person. There are likewise no other co-existing circumstances which would weaken or destroy that inference. I therefore find and hold that the second ingredient has also been proved in the affirmative.

24. As to whether the accused person acted with malice aforethought, the starting point is the law. **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.***

25. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that 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 mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55”.*** (emphasis added).

26. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally

wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the conviction of murder with manslaughter observed: -

*“There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”*

27. In this case there is evidence that the deceased was disturbing other customers in the bar and had previously been restrained from doing so. The accused and his companion had left their table when the deceased roughed them up and went towards the toilet as the accused person followed them. Such prevailing circumstances cannot be a basis for inferring malice. That being the case, I find no evidence of malice aforethought in this case and the third ingredient of murder fails.

28. Afortiori, the foregoing analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

29. 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 analyzed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is convicted accordingly.

30. These are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 10<sup>th</sup> day of December 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Jura**, Counsel for the Accused person.

**Mr. Kimanthi**, Senior Principal prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant



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