



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL CASE NO. 37 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENARD OGALO MIRUKA.....1<sup>ST</sup> ACCUSED**

**LABORIUS OMONDI OTIENO.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Benard Ogalo Miruka and Laborius Omondi Otieno are charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 15<sup>th</sup> day of December, 2014, at Ligotho village, Ndihiwa Sub County of Homa Bay County, jointly with others not before court murdered Brian Otieno Ogotu.
3. The prosecution case is that the accused were part of family members who had been summoned by the father of the deceased to discipline him for alleged theft. The team beat the deceased to death.
4. The first accused pleaded an alibi while the second accused contended that though he was present in the home of the accused, he did not take part in beating him.
5. The issues for determination are:
  - a) Whether the alibi defence is available to the first accused or not;
  - b) What was the motive of the alleged beating;
  - c) Whether either or both accused were involved in beating the deceased ; and
  - d) Whether the offence of murder was established.
6. When an accused person pleads an alibi the onus is on the prosecution to disprove the same. This is even when this defence is raised for the first time while the accused is giving his defence. In the case of **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal rendered itself thus on the issue of alibi:

**It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.**

7. In the instant case, the first accused contended that on the material day he was at home and knew nothing concerning the death of the deceased herein. Felix Okinyi Obura (PW1) the brother of the deceased placed him at the scene. He was also placed at the scene of the incident at the time of the beating that subsequently led to the death of the deceased by the evidence of Everlyne Aoko Ombwaro (PW3). In spite of the contention by the first accused that he was not at the scene, I find that the prosecution has adduced evidence that displaced his alibi defence.

8. The evidence on record suggest that the deceased had stolen from his parents' grains and a machete. Members of his extended family were called upon to discipline him. We gather this from the evidence of PW1 who testified that the deceased was beaten while being asked where he took beans and a machete. Everlyne Aoko Ombwaro (PW3) in her testimony said she was asked to tell her son, Mzee to return the machete the deceased had given to him. Laborius Omondi Otieno (accused 2) testified that the deceased's father had summoned them and wanted the deceased to inform them who had beaten him and where he had taken some beans before he had disappeared from home.

9. I therefore find that the people who were in the home of the deceased had been summoned by his (deceased's) father in order to "discipline" the deceased.

10. The purported disciplinary action took place in broad daylight and in the home of the deceased's parents. There were two eye witnesses who testified. These were Felix Okinyi Obura (PW1) and Everlyne Aoko Ombwaro (PW3).

11. PW1 testified that he witnessed the two accused persons and others beating the deceased while asking him about some beans as well as a machete he had stolen from his parents. He graphically narrated how the beatings occurred. Some beans were recovered from some sugar cane.

12. Everlyne Aoko Ombwaro (PW3) was a hostile witness though she was not declared so. The prosecutor in court cross examined the witness on her earlier recorded statement. in **Batala vs. Uganda [1974] E.A. 402** the court at page 405 said:

**The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight.**

In the instant case I endeavour to establish whether the prosecution adduced evidence that would displace the repudiated evidence of this witness.

13. Everlyne Aoko Ombwaro (PW3) testified that she was attracted out by some people who were talking outside. These included the two accused persons, the deceased and one deceased's brother whose name she did not know. When she greeted them, they asked her where her son Mzee was. They asked her to tell him to return a machete Brian (the deceased) had given him.

14. Her repudiated statement indicated that Brian appeared to have been beaten and had a rope tied to his right hand. She was told to tell her son to return the machete for the two had stolen beans as well.

15. The details in her repudiated statement appear in the evidence of were Felix Okinyi Obura (PW1). At the time of the incident he was 14 years old. He testified that he was attracted by some cry of his late brother who was at the time aged 16 years. He was looking after cattle. This was about 2 p.m. When he went home, he found the deceased being beaten by the accused and others while their step mother Lilian Anyango Ogutu watched. Benard Ogalo (accused 1) was sent for a rope and the deceased was tied. The deceased was then matched out of the compound while leashed.

16. As he was led from the compound, he was being beaten and questioned about beans and a machete.

17. I therefore find that the repudiated statement of PW3 to be the true state of what she had witnessed.

18. The deceased was aged 16 years at the time of his death. The beatings he received from the two accused and others were brutal and cannot be described as chastisement. PW1 testified that Laborius (accused 2) ordered the deceased to walk on thorns. When he requested for water, Laborius ordered him to open his mouth and poured some water that choked him. He further said that Bernard (accused) took a stick and beat the deceased on the knees, elbows while the rest joined in beating him like a snake.

19. The post mortem report contained the details of the injuries as follows:

- a) A single abrasion line around the neck suggestive of strangulation, supported by conjutival congestion.
- b) Bruises on the both wrists caused by some form of rope suggesting that wrists were tied.
- c) Several bruises and cuts on the chest, back, thighs and legs likely caused by a cane or whip that caused cuts on the skin.
- d) Several areas of broken skin and petechial on the back.
- e) Blood found on the left pleural cavity due to bleeding intra thoracic suggestive of blunt injury to the left side of the chest.
- f) Significant amount of blood in the sub-arachnoid and subdural space. Significant intracranial haemorrhage due to blunt trauma to the head.

The pathologist was of the opinion that the cause of death was due to significant internal bleeding to the head (intracranial) and chest (heamothorax) due to blunt trauma.

20. The medical evidence supported the evidence of Felix Okinyi Obura (PW1) on the brutality meted on the deceased in the name of discipline.

21. In order to found conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10<sup>th</sup> Edition** malice aforethought is defined as:

**The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).**

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

**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.**

22. In the instant case, the initial intention was legitimate but the execution went overboard. I therefore, find that the prosecution has not proved the offence of murder against the accused persons. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit each accused of the charge of murder. I however find each guilty and convict each one of them of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED AND SIGNED AT HOMA BAY THIS 14TH DAY OF DECEMBER, 2021.**

**KIARIE WAWERU KIARIE**

**JUDGE**



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