Case Number:	Criminal Appeal 25 of 1994
Date Delivered:	23 Jun 1994
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Johnson Evan Gicheru, Riaga Samuel Cornelius Omolo, John Mwangi Gachuhi
Citation:	Nebart Ekaita v Republic [1994] eKLR
Advocates:	Mr Wesa for the Appellant Mr Karanja for the State/Respondent
Case Summary:	**Ekaita *v* Republic** Court of Appeal, at Kisumu June 23, 1994 Gachuhi, Gicheru & Omolo JJ A Criminal Appeal No 25 of 1994 (Appeal from a judgment of the High Court of Kenya at Kisumu (Mr Justice JA Mango) dated 14th January, 1994 in HCCR No 9 of 1992) ***Criminal law*** *– murder – malice aforethought – meaning of - accused assaulting the deceased for more than half an hour with a walking stick – no evidence led on the size of the stick – whether malice aforethought was established.* ***Criminal law*** *- murder – assessors – summing up to the assessors – trial judge to record notes of the summing up.* The appellant was tried and convicted of murder and sentenced to death as authorized by law. The evidence in support of his conviction was that

he assaulted the deceased using a walking stick called “Kakamega stick” for more than half an hour. The deceased was arrested and put in his custody at the chief’s camp on suspicion of stock theft.

At the hearing of the appeal it was submitted on behalf of the appellant that before the alleged assault the deceased had been beaten by members of the public. It was therefore not clear whose assault was responsible for the deceased’s death.

The appellant further complained that failure by the trial judge to record notes of his summing up to the assessors amounted to miscarriage of justice.

The appellate court while dismissing the appellants’ contention over who was responsible for the fatal assault noted that no evidence was available or led as to the size of the so called “Kakamega stick” with some witnesses calling it a club while others, a walking stick.

Held:

1. Where an accused knows that there is a serious risk that death or grievious bodily harm will ensue from his acts, and he proceeds to

commit those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as a result of those acts constitutes malice aforethought.

2. From the evidence available before him, the beating had lasted over thirty minutes. The only snag was the absence of positive evidence as to the size of the appellant’s “Kakamega stick”.

3. In the absence of such evidence and finding, it remained a matter of guess whether or not the appellant knew that there was a serious risk that death or grievious bodily harm would ensue from his sustained assault on the deceased.

4. The possibility therefore that the appellant killed the deceased by a sustained unlawful assault but without the intent necessary to constitute malice requisite to the proof of the offence of murder

	contrary to section 204 of the Penal Code cannot be excluded. 5. It is desirable that the trial judge should sum upto the assessors and that when he does so, notes of the summing up should appear on the record of the proceedings. *Appeal allowed manslaughter substituted for murder.* **Cases** 1. *Mukono v Uganda* [1965] EA 491 2. *Upar v Uganda* [1971] EA 98 **Statutes** Penal Code (cap 63) sections 204; 205; 206(b) **Advocates** *Mr Wesa* for the Appellant *Mr Karanja* for the State/Respondent
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	HCCR 9 of 1992
Case Outcome:	Appeal Allowed manslaughter substituted for murder.
History County:	Kisumu
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(Coram: Gachuhi, Gicheru & Omolo JJ A)

CRIMINAL APPEAL NO. 25 OF 1994

BETWEEN

NEBART EKAITA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mr Justice JA Mango) dated 14th January, 1994

in

HCCR No 9 of 1992)

****

JUDGMENT

On 1st February, 1990 at about 2.00 am, Augustino Omungini Omwindi (PW2) found his two heads of cattle missing from where he had tied them at his home. He raised an alarm and in response thereto his neighbours came to his home. Together with his neighbours, PW2 started tracking the hoofmarks of his missing two heads of cattle. At Matayo's Trading Centre, they rested until day-break when they again continued to follow the hoofmarks to the missing cattle up to Ekululo village from where they began searching for these cattle in the nearby bush. In that bush, they found a cow tied on its mouth with a rope. That cow did not belong to PW2. They, however, untied it and took it to the home of Afumbwa Anyulo, the deceased, which was close to where it was found.

Meanwhile, as the deceased's son, Fredrick Makokha Afumbwa (PW1), was returning home from Rakite Market, he was accosted by PW2 and his group which now numbered about 50 people, PW1 was carrying three legs of a cow on a bicycle carrier which he said were from a cow which his now deceased father had sent him to supervise its slaughter at Rakite Market. With the assistance of the local village elder, PW1 was arrested and escorted to Matayo's Chief's Centre by this group of people. They arrived at this Centre between 4.00 pm and 5.00 pm. PW1 was handed over to the administration police constables who were at the Centre. Soon thereafter, three of the administration police constables together with the local Assistant Chief, Michael Ouma Siamo (PW13), went to Rakite Market to collect the skin and the meat of the cow whose slaughter PW1 had supervised. They returned to the Chief's Centre with the skin and some meat together with the person who had slaughtered the cow in question. They arrived at about 6.00 pm.

At about 5.30 pm on the same day, the deceased had arrived at the Chief's Centre with a mission to find out why his son - PW1 - had been arrested. He therefore asked the administration police constables

at this centre why his son had been arrested. He was told that his son was alleged to have stolen a cow. He was then asked to sit next to his son - PW1. When PW13 returned from Rakite Market, he interrogated the deceased over the alleged stolen cow. The deceased's response was that he had bought that cow at Sigalame Market.

When the deceased arrived at the Chief's Centre he had no injuries whatsoever. However, from the police statements of PW2; Namenge Ngalu Orinda (PW3); and Peter Makokha Wandera (PW4) which were tendered in evidence in the superior court and marked exhibits Nos D1.2; D1.3; and D1.4 respectively, the deceased was drunk when he arrived at the Chief's Centre and demanded to know why his son - PW1- had been arrested. According to Administration Police Constable Julius Omwanda (PW7), however, the deceased looked normal and not drunk when he arrived at the Chief's Centre. It would appear from exhibit D1.4 that in asserting his claim over the alleged stolen cow, PW2 also contended that the said cow belonged to him. In the ensuing argument as to whom the alleged stolen cow belonged, the deceased jumped upon PW2 who had a *panga*. He got hold of that *panga* and PW2 pulled it away from him. In the process one of the deceased's fingers on his left hand was cut. The administration police constables present intervened and appeased the deceased who then sat down next to his son - PW1. PW13 then instructed the administration police constables at the Chief's Centre to take the suspects to Busia Police Station. He then went away.

At about 9.00 pm the appellant who was the corporal-in-charge of the ten administration police constables at the Chief's Centre arrived at the said Centre. On being briefed about the suspects, he straight away proceeded to where they were seated. He immediately started interrogating them after saying that "these are the thieves who disturb us daily. We do not sleep." The appellant asked the deceased why he taught his son to steal but the deceased answered that he had bought the alleged stolen cow from Sigalame. The appellant disagreed with the deceased and thereupon he started beating him with his hands and kicking him with his legs. Realising that this was not yielding any results, the appellant went to his house at this Centre, took a lantern and a walking stick and then returned to where the deceased was seated. Declaring that the deceased was the real thief, the appellant started beating him on his ribs, back and forehead with the walking stick which he nicknamed "Kakamega stick." The duration of the beatings that the appellant unleashed upon the deceased was in excess of thirty minutes. The deceased became unconscious and on being taken to Busia District Hospital he was pronounced dead on arrival.

The beatings to which the deceased was subjected to had resulted in the fractures of his right tibia, neck, 7th and 9th right ribs, and 2nd and 6th left ribs. His right lung was lacerated and had collapsed. His chest cavity was full of blood and his spinal column was discontinued at the neck region. His cause of death was cardio-pulmonary arrest following internal haemorrhage due to multiple chest injuries. These injuries were consistent with the manner in which the deceased was assaulted by the appellant with what he called his "Kakamega stick": for whether or not the deceased had been assaulted before the arrival of the appellant at the Chief's Centre, from the evidence available before the trial court, such an assault was of a relatively minor nature and his cut on one finger of his left hand if it resulted from any such assault was equally trivial in relation to the injuries that resulted in his death. Indeed, apart from the injury on one of his left hand fingers, the deceased appeared physically normal before the sustained assault on him by the appellant.

On 6th February, 1990 the appellant was arrested and charged with the offence of murder contrary to section 204 (f) of the Penal Code. His defence at his trial in the superior court was that when he returned to the Chief's Centre at about 8.30 pm he found the deceased having been beaten by the people who had gathered there and alleged that the deceased, his son and another had stolen their two heads of cattle. According to the appellant, the deceased was breathing with difficulties and was bleeding from a

finger on his left hand. The appellant therefore looked for a

vehicle to take the deceased and the other two suspects to Busia Police Station. After obtaining a vehicle for this purpose, the appellant asked the administration police constables under him to escort the suspects to Busia Police Station, but they refused because, according to him, they had known what had happened to the deceased before his arrival at the Chief's Centre as is outlined above. Besides, these administration police constables had a grudge against him after one of them had broken his firearm one month before and wanted to put him in trouble although he had not reported the breaking of the firearm to his superior officer. The appellant swore that he did not assault the deceased.

From the evidence of PW1; PW2; PW3; PW4; and that of the appellant's work-mates - Administration Police Constable Jimmy Okwakao Omuse (PW6) and PW7 - the learned trial judge found that these witnesses substantially spoke the truth on what happened to the deceased after the arrival of the appellant at Matayo's Chief's Centre on the evening of 1st February, 1990. The learned trial judge also found that whatever scuffle there may have been between the deceased and members of the public at the Chief's Centre, that scuffle was not responsible for the deceased's fractured ribs, fractured neck and discontinued spinal column at the neck region. Save therefore for the injury on one finger of the deceased's left hand, the learned trial judge attributed all the serious injuries sustained by the deceased to the assault on him by the appellant. His conclusion therefore was that this assault was unlawful and relying on section 206(b) of the Penal Code he held that the said assault was carried out by the appellant with malice aforethought, the result of which was the death of the deceased. Consequently, the learned trial judge found the appellant guilty of murder and accordingly convicted him and sentenced him to suffer death in the manner authorized by law. This was notwithstanding the unanimous opinion of the three assessors who sat with the learned judge at the trial of the appellant that the latter was guilty of manslaughter.

At this juncture, it is worth noting that although the record of the proceedings before the trial judge indicate that the summing-up to the assessors was done on 15th December, 1993 by the trial judge, the latter made no notes of such summing-up. Nevertheless, aggrieved by his conviction and sentence of death the appellant has appealed to this Court against that conviction and sentence and puts forward three grounds of appeal the essence of which is that there being some evidence on record that the deceased was assaulted by members of the public at Matayo's Chief's Centre coupled with the appellant's defence which the learned trial judge erroneously dismissed out of hand, his conviction on the charge of murder was not only against the weight of evidence but it also amounted

to a miscarriage of justice.

At the hearing of this appeal on 15th June, 1994, Mr Wesa for the appellant submitted that before the appellant assaulted the deceased the latter had already been beaten by the members of the public assembled at Matayo's Chief's Centre. It was therefore not clear whose assault on the deceased caused his death. Besides, the learned trial judge's dismissal of the appellant's defence out of hand led to a miscarriage of justice considering that he found the appellant guilty of murder despite the unanimous opinion of the assessors that he was only guilty of manslaughter.

Responding to the appellant's appeal, Mr Karanja for the respondent submitted that the assault on the deceased by the appellant must have led to his death. The injuries sustained by the deceased consequent to that assault could only have been so inflicted with malice aforethought. The scuffle between the deceased and the members of the public at Matayo's Chief's Centre was of such a nature that the deceased had only sustained a cut on one finger of his left hand. That injury had no bearing on the death of the deceased. Whatever therefore was the assessors' opinion, the learned trial judge's

finding was correct and in particular when he arrived at such finding after considering the appellant's defence together with the evidence available before him and rejected the same. To counsel therefore, the learned trial judge's rejection of the appellant's defence was proper and his conviction on a charge of murder was sound.

Concerning the failure of the learned judge to make notices of his summing-up to the assessors, Mr Karanja submitted that such omission did not occasion a failure of justice considering the evidence available before the learned trial judge.

From the totality of the evidence available before the learned trial judge, it does not appear to us that the scuffle that the deceased had with the members of the public at Matayo's Chief's Centre was responsible for the injuries that led to his death. It was the injuries inflicted on him by the appellant when the latter assaulted him with what he called his "Kakamega stick" that led to his death. The core issue to this appeal therefore is whether the assault on the deceased by the appellant was with malice aforethought.

For the purposes of this appeal, where an accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and he proceeds to commit those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as a result

of those acts constitutes malice aforethought. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

In holding that the appellant assaulted the deceased with malice aforethought, the learned trial judge was influenced by the sustained beating of the deceased by the appellant with what he called his "Kakamega stick". From the evidence available before him, that beating had lasted over thirty minutes. The only snag was the absence of positive evidence as to the size of the appellant's "Kakamega stick". Some of the prosecution witnesses who testified before the learned trial judge referred to it as a club while others called it a walking stick. The learned trial judge made no reference to its size in his judgment. In the absence of such evidence and finding, it remained a matter of guessing whether or not the appellant knew that there was a serious risk that death or grievous bodily harm would ensue from his sustained assault on the deceased. The possibility therefore that the appellant killed the deceased by a sustained unlawful assault but without the intent necessary to constitute legal malice requisite to the proof of the offence of murder contrary to section 204 of the Penal Code cannot be excluded. In the circumstances, we are unable to uphold the appellant's conviction for murder.

Regarding the absence of summing-up notes on the record of the proceedings before the learned trial judge, we would only echo the words of the Court of Appeal for Eastern Africa in the case of *Samusoni Mukono and another v Uganda* [1965] EA 491 at pages 495 and 496 that it is desirable that the trial judge should sum up to the assessors and that when he does so, notes of the summing-up should appear on the record of the proceedings. "The importance of the notes of the summing-up, both to the appeal court and to the appellant, cannot be over-emphasized ..... Submissions are made frequently on the ground of misdirection that the summing-up did not contain some important issues for consideration. It is only when the notes appear on the record that the submissions can be maintained or answered." Indeed, as was observed in the case of *Upar v Uganda* [1971] EA 98 summing-up notes assist the appeal court to decide whether or not in a trial with assessors there had been a failure of justice.

From what we have endeavoured to outline above, we think that the killing of the deceased by the

appellant only amounted to manslaughter. In the result, we allow the appellant's appeal, quash his conviction of murder contrary to section 204 of the Penal Code and set aside his sentence of

death and substitute therefor a conviction for the offence of manslaughter contrary to section 205 of the Penal Code and taking into account the severity with which the appellant assaulted the deceased as a result of which the latter sustained serious injuries that led to his death, we sentence the appellant to ten (10) years imprisonment with effect from the date of his original sentence by the superior court - 14th January, 1994.

Dated and Delivered at Kisumu this 23rd day of June 1994.

J.M.GACHUHI

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JUDGE OF APPEAL

J.E.GICHERU

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR