



**REPUBLIC OF KENYA**

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

**HCCRC NO. 24 OF 2018**

**PROSECUTOR.....REPUBLIC**

**VERSUS**

**PETER ONYANGO OTIENO.....ACCUSED**

**JUDGMENT**

The accused, **PETER ONYANGO OTIENO**, was charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

1. The particulars of the offence were that on the 19<sup>th</sup> of September 2018, at about 9.30a.m, at the G.K.Kodiaga, Ochola Farm, he murdered **RONALD MOMANYI GEKONGE**.
2. At the trial the prosecution called six (6) witnesses.
3. **PW1, JAMES ODHIAMBO OTIENO**, was an inmate at the Kodiaga Medium Prison at the material time.
4. On 19<sup>th</sup> September 2018, he was at the Prison Shamba called Ochola Farm. He was together with other prisoners, weeding the vegetable farm.
5. **PW1** was in one line, together with four (4) other prisoners. He said that the deceased was to his right hand, whilst the accused was to his left hand.
6. Whilst they were working, the accused cut some of the vegetables, prompting the deceased to ask him why he had done so.
7. The accused asked the deceased if the vegetables were his.
8. In response, the deceased sought forgiveness from the accused, if the accused was offended by the question which the deceased had asked.
9. **PW1** testified that the deceased carried on with the task of weeding.
10. Shortly, thereafter, the accused stood behind the deceased, and then used a jembe to hit him on the head, shoulder and neck.
11. Upon being hit, the deceased screamed and then fell down. He was bleeding from the injury on his head.
12. **PW1** later assisted in carrying the deceased to the hospital which is within the Kodiaga Prison.
13. During cross-examination, **PW1** said that on that day, there were about 10 people at the Ochola Farm.
14. He explained that the said people were in 2 lines, of 5 people each. He was in the frontal line.
15. **PW1** said he saw the accused hit the deceased, using a jembe.
16. **PW2, SGT. WILSON KENNETH OKOLA**, was an Officer based at the Kisumu Medium Prison.
17. On 19<sup>th</sup> September 2018, he was one of the officers assigned to escort prisoners to the Ochola Farm, where the prisoners were to work.

18. **PW2** testified that there were a total of 25 prisoners at that farm, on that day.
19. The prisoners were arranged in columns of 5 persons each.
20. **PW2** was about 20 metres behind the prisoners, when he heard someone asking why vegetables were being cut. At that stage, **PW2** did not identify the person who had asked the question. He wanted to inquire about what was happening. However, before he could make the inquiry, the accused hit the deceased using a jembe.
21. **PW2** testified that he saw the incident when it took place. He witnessed the accused hitting the deceased, using a jembe.
22. During cross-examination, **PW2** said that the incident happened in the first (frontal) column.
23. Although he was about 20 metres away, **PW2** said that that was very close, and was within eye-sight.
24. **PW3, FREDRICK MUSYOKI MUTUA**, was an Officer who was working at the Kisumu Medium Prison at the material time.
25. He was at the Ochola Farm on the morning of 19<sup>th</sup> September 2018, where prisoners were weeding.
26. At about 9.00am **PW3** saw prisoners running around. However, he did not go to the spot immediately. He went there after about 3 to 4 minutes.
27. **PW3** found one prisoner on the ground. The said prisoner was bleeding from his neck and head.
28. Another prisoner was seated between Major Okola and Cpl. Segem. **PW3** identified the accused herein as the prisoner who was seated between those 2 officers.
29. **PW3** gathered the other prisoners and returned them to the prison. Meanwhile, the injured prisoner was taken to the Prison hospital, where he later died.
30. During cross-examination, **PW3** said that he did not see the deceased being hit by the accused.
31. **PW4, SOLOMON SAVA**, is a Medical Practitioner who also doubled-up as a Pathologist. He was based at the Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH), Kisumu.
32. He conducted the post-mortem examination on the body of the deceased, Ronald Momanyi.
33. The doctor noted that the deceased had;
- (a) *a laceration at the back of the head; with*
  - (b) *an underlying skull fracture; and*
  - (c) *internally, he had brain haemorrhage.*
34. Having undertaken the examination, the doctor concluded that the cause of death was traumatic brain injury, occasioned by blunt trauma to the head.
35. **PW4** signed the Post-Mortem Report, and produced it in court, as an exhibit.
36. **PW5, POLYCARP LUTTA KWEYI**, was a Senior Chemist, working at the Government Chemist Department, Kisumu.
37. On 24<sup>th</sup> September 2018 he received the following 4 items;
- (a) *Jembe;*
  - (b) *soil;*
  - (c) *sugar-cane plant leaf; and*
  - (d) *finger-nails of Ronald Momanyi (Deceased)*
38. **PW5** was requested to analyze the samples, so as to establish whether or not there was any generic relationships between them.
39. He established that the jembe and the sugar-cane leaf were heavily stained with human blood, whilst the soil was moderately stained with human blood.

40. The doctor then generated **DNA** profiles from all the samples, and thereafter analyzed the said **DNA** profiles.
41. Having conducted the physical, chemical and instrumental examinations, the doctor concluded that the **DNA** profile from the samples on the jembe, on the soil and on the sugar-cane leaf all matched the profile of the blood of Ronald Momanyi (Deceased).
42. **PW5** produced his Report as an exhibit at the trial.
43. **PW6, PC MASIKA PAUL**, was a Detective Investigator.
44. On 19<sup>th</sup> September 2018 he received a report about the death of a convict at the Kodiaga Prsion.
45. He visited the Ochola Farm, where he collected soil samples which were stained with blood; some slashed “*sukuma-wiki*” and a sugar-cane leaf.
46. Through his investigations, **PW6** ascertained that the accused was in a group of 5 prisoners, working at the Ochola Farm.
47. The investigations revealed that the accused had accidentally cut some ‘*sukuma-wiki*’ stoke; which prompted the deceased to ask why he had done that.
48. The exchange degenerated into an argument. However, the 2 were calmed-down.
49. About 3 minutes later, the accused stepped back, and then used his jembe to hit the deceased, causing him to fall down.
50. The deceased was accorded first-aid attention, and then taken to the hospital, where he died.
51. During cross-examination, **PW6** emphasized that although there were more than one farm within Kodiaga Prison, there was no possibility that the accused was not at the Ochola Farm where the deceased was fatally assaulted.
52. **PW6** reiterated that the accused was at the Ochola Farm and that **PW1** was present when the accused assaulted the deceased.
53. **PW6** further testified that **PW2, PW3** and Cpl Richard Segem, who were at the Ochola Farm, also confirmed that the accused was at the farm during the incident.
54. **PW6** interviewed the following inmates, who confirmed the presence of the accused at the Ochola Farm;
  - (a) *Edward Otieno Okelo;*
  - (b) *James Odhiambo Otieno;*
  - (c) *Geoffrey Ateka Nyang’au.*
55. After **PW6** testified, the prosecution closed its case.
56. When the accused was put to his defence, he gave sworn testimony.
57. He said that the deceased was a prisoner at Kodiaga Prison; but he clarified that the first time when he saw the deceased, the latter was already lying on the ground, bleeding.
58. The accused testified that at the time when the deceased was injured, he (the accused) was at the Korando Farm, which was 50 to 70 metres away from the Ochola Farm.
59. The accused said that there was a fight between some prisoners at Ochola Farm.
60. The fight attracted the attention of the prisoners at Korando Farm, who then ran towards the Ochola Farm.
61. He said that although all prisoners were forced to lie down, at Ochola Farm, he refused to lie down. Instead, he questioned the Prison Officers for failing to provide adequate security to the prisoners.
62. The accused said that the prosecution witnesses who testified that he had been at Ochola Farm and that it is he who had assaulted the deceased, were all telling lies.
63. After the accused testified, the defence case was closed.
64. Having given due consideration to all the evidence on record, I make the following findings.

65. The deceased, **RONALD MOMANYI GEKONGE**, died due to traumatic brain injury, which had been occasioned by a blunt force trauma to the back of his head. The said injury, as the doctor stated, was consistent with assault.
66. The deceased was an inmate at the Kodiaga Prison, and on the material day, he was at the Ochola Farm together with other inmates. They were weeding the vegetable farm.
67. The fatal injury was inflicted by a blunt force exerted to the head of the deceased.
68. **PW2** was working in the shamba, together with both the deceased and the accused.
69. When he testified in that respect, the accused did not cross-examine him about the line of defence which the accused mounted later.
70. **PW1** expressly said that he was only one metre away from the accused.
71. If the accused wanted to dispute that evidence, he should have cross-examined **PW2** about it: but he did not.
72. Although there is a discrepancy in the evidence about the total number of prisoners who were at the farm, at the material time, I find that the said discrepancy was not material in the circumstances.
73. **PW1** said that there were 10 people, whilst **PW2** talked about 25 people. However, both of them said that each column was made up of 5 inmates, and also that the deceased and the accused were in the front column.
74. Having been in front of the other inmates, it is possible that **PW1** did not have the opportunity or reason to conduct an actual count of the inmates who were in the columns behind them.
75. I find that the accused was not at the Korando Farm, as he asserted. He was at the Ochola Farm.
76. I further find that **PW1** was an eye-witness to the incident, when the accused hit the deceased with a jembe.
77. The evidence tendered by the eye-witness was corroborated by both **PW2** and the doctor who conducted the post-mortem examination on the body of the deceased.
78. Accordingly, I find that the evidence established beyond any reasonable doubt that it is the accused who inflicted the fatal injuries on the deceased.
79. The evidence did not reveal the existence of any grudge between the deceased and the accused, prior to the incident.
80. However, I do find that the degree of injury was testament to the amount of the force which the accused used when he assaulted the deceased. The assault caused, inter alia, a fracture of the occipital parietal skull bone.
81. By assaulting the deceased with such force, the accused is deemed to have had an intention either to cause death or to do grievous harm to the deceased.
82. The use of such force as caused a fracture of the skull must have been intended to, at least, cause grievous harm to the deceased. But even if the accused was indifferent whether death or grievous harm would result from his actions, or even if he had a wish that his actions may not lead to death or grievous harm, the accused is deemed to have had malice aforethought, as defined at **Section 206** of the **Penal Code**.
83. In the event, the prosecution has proved beyond any reasonable doubt that the accused assaulted the deceased, leading to the death of the said deceased, and that the accused had malice aforethought.
84. Accordingly, I find the accused guilty of the offence of Murder, and I convict him for committing the said offence.

**DATED, SIGNED and DELIVERED at KISUMU This 29<sup>th</sup> day of April 2020**

**FRED A. OCHIENG**

**JUDGE**