



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL CASE NO. 13 OF 2016**

**(MURDER)**

**(CORAM: J. A. MAKAU – J.)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ALFRED ODIPO OGOLLA.....ACCUSED**

**JUDGMENT**

1. **ALFRED ODIPO OGOLLA**, faces a charge of **Murder Contrary to Section 203 as read with Section 204 of the Penal Code (Chapter 63) Laws of Kenya**. The particulars of the offence are that on the 11<sup>th</sup> day of July 2016, at Got Nanga village, Ligala Sub-Location, North East Ugenya Location, in Ugenya District within Siaya County, together with another not before Court murdered one **WILFRED OMONDI OTIENO**.
2. That upon the charge being read and explained to the Accused in Dholuo Language, which the Accused understands he denied the charge, and plea of not guilty was accordingly entered.
3. The Prosecution called Five (5) witnesses in Support of the charge, whereas the Accused gave sworn defence and called no witness.
4. The Prosecution's case is that, on 11.7.2016 at around 6 p.m. George Otieno Odhiambo, and the deceased proceeded to a club to take Busaa, where they found Fredrick Odipo Ogolla and others taking Busaa. The deceased ordered Busaa for himself and PW1. That the Accused asked the deceased to buy him Busaa, who asked him why they should buy him Busaa when they found him at the club and he asked him whether it was not proper for him to welcome them by buying them Busaa. The Accused told the deceased to buy him Busaa because he is his friend. He then bought the Accused 500 mls jar of Busaa, which the Accused finished and asked for more to which the deceased told the Accused as they had not finished theirs, he cannot have him added more. The Accused then started abusing the deceased telling him he thought he has more money and that the Accused can even buy him Busaa, telling him to keep his money. The Accused got annoyed and left at around 8.00 p.m.
5. That at around 11.00 p.m. PW1 and the deceased left the club for their homes and on their way home they found the Accused at his home preparing charcoal as the road passes near the Accused's home. The Accused was making charcoal behind the house fence near the road, when the deceased called the Accused telling him not to be annoyed, as tomorrow is a day and as he had run short of money he shall get more and buy him Busaa. The Accused, started making noises, asking the deceased what he was telling him, that the charcoal he was making is also money and the next day he would be taking Busaa, who told the Accused he sees that it is also money and tomorrow they will take Busaa. The Accused then picked a panga from where he was standing, started cutting trees as he was telling the deceased to get away as he had a lot of words and that he did not want to see him near him. He told the deceased that there are women of his brother, with whom he commits prostitution with, at which time, the Accused's brother Charles Otieno Ogolla, joined them from his house armed with rungu and started beating the deceased. PW1 intervened enquiring from Charles Otieno Ogolla, why he was beating the deceased, he was also beaten and he saw the Accused cut the deceased on the forehead with a panga, which had a black handle and a curve towards the end with the aid of moonlight. PW1 identified the panga (marked MFI – P1). That after cutting the deceased, the Accused went and informed his brother he had cut the deceased. They each left for their respective houses as the Accused left with the panga.
6. PW1 then took the deceased to his uncle's place one Dominic Odipo, whereby he was given first aid. PW1 called the deceased's mother, they got Dominic's car, took the deceased to Ambira Hospital, where he was treated and left for his house, however, the vehicle developed a mechanical problem at 3.00 a.m. That at 6.00 a.m. the deceased died. The body was taken to Siaya Mission Hospital. PW1 identified the Accused by his name of Fredrick Odipo Ogolla, stating he has known him since his childhood (pointing him at the dock).
7. PW5 received report of the assault of the deceased, commenced investigation, proceeded to Accused's home, recovered the panga, went to the mortuary and saw the deceased's body which was identified to him by PW1 and the deceased's relatives. Postmortem was carried out on

12.7.2016, he arrested the Accused, who he pointed in the dock and charged him with this offence. He produced the panga (MF1 – P1) as exhibit P1 while the postmortem report was produced by PW4 as exhibit P2.

8. The Accused on being put on his defence he gave a sworn statement. He stated that on 11.7.2016 he was at home from the morning to the evening. That at night he went to sleep at around 8.30 p.m. That at 11.30 p.m. he heard voices of 3 people asking him to open the door. He asked them to identify themselves and they told him if he does not open they would forcefully enter and as he was pleading with them, the door was kicked open falling on the Accused. He screamed, pleading for forgiveness for failing to open the door. He named two of the people as the PW1 George Otieno and the deceased, Wilfred Omondi Otieno. He did not name the 3<sup>rd</sup> person. That PW1 started slapping him, head budded him and boxed him, as the deceased held him by his shirt collar telling him, to lie down, asking him to surrender the proceedings of sale of his land of KShs.250,000 to which he told them he did not have cash as the three continued beating him forcing him to go and open the door of his daughter-in-law, Judith Achieng to which he declined as they wanted to take her away and do whatever they wanted with her. They dragged him to the gate of his daughter-in-law as PW1 who was armed with a panga and a rungu continued beating him on the head as the deceased held his shirt by collar.

9. The Accused testified that PW1 slapped him with a panga more than 10 times and as he blocked the panga, it hit the deceased's head. PW1 on seeing the deceased was hurt he ran away with the panga. The deceased also ran away when he noted he was bleeding. The Accused then returned to his house. He claimed on the way he went to report to a certain lady, Nyar-Alego so that she could report to the Assistant Chief of North East Ligala Sub-Location. That at around 8.30 a.m. his sister-in-law told him she heard Wilfred Omondi Otieno had died and he told her that PW1 and the deceased had attacked him last night. He told her that he caused the panga to cut the deceased by blocking the panga aimed at him by PW1, claiming he is the one who cut the deceased because he blocked the panga with his arm as he was defending himself and he told the Court he was asking for forgiveness as regards what had happened. He denied that he was with the deceased at the club. He stated he did not see PW1 and the deceased at 6.00 p.m. and that his brother Charles Otieno Ogolla came after the commotion was over. He said he was able to see the weapon as at the material time there was bright moonlight which enabled him to see the weapon.

10. On cross-examination, the Accused, DW1, stated he was attacked by PW1 and the deceased because he had KShs.250,000/=, but on further cross-examination he stated he had no money. He admitted PW1 who gave evidence was not cross-examined on the issue of his defence, though he had told his Advocate about it. He claimed he suffered injuries. He stated when the incident occurred there were many people. He denied that he said the deceased was killed because he used to seduce other men's women.

11. Upon close of the defence case, M/s. C. Kagoya, Learned Advocate, appearing for the Accused filed written submissions dated 29<sup>th</sup> November, 2017, whereas the State Counsel did not file any written submissions. Mr. Ombati, Learned State Counsel, relied on the evidence

12. The Accused is facing a charge of murder. The Prosecution in a murder case has to adduce evidence to prove that the Accused caused the death of the deceased with malice aforethought. The Prosecution must show that the Accused had formed the necessary malice aforethought to either cause death or do grievous harm to the deceased. Malice aforethought is also proved if it is shown; that the person charged knew that his actions causing death would probably cause death or do grievous harm. 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 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.***

13. For the Prosecution to prove a charge of murder, it has to prove the following ingredients:-

***(a) Death of the deceased and cause of death.***

***(b) That the Accused caused the death through an Unlawful act or omission.***

***(c) That the Accused possessed an intention to cause harm, Kill or had malice aforethought***

**(a) Whether the Prosecution proved the death of the deceased and its cause?**

14. The Accused denied the commission of the offence opting to give the defence of alibi, however, he testified that his sister-in-law on 12.7.2016 informed him of the death of the deceased. PW1, testified that after he had taken the deceased to the Ambira Hospital in company of PW2 and PW3, and was treated and referred to take him either to Busia or Siaya Hospital he died in their presence at his home at around 6.00 to 4.00 a.m., that they took the body to Segla Mission Hospital Mortuary. PW5 received the report of the death of the deceased, proceeded to the scene and found the body had been taken to the mortuary where he proceeded and found the deceased's body. PW4, the doctor who carried out the postmortem corroborated the evidence of PW1, PW2, PW3 and PW5. He testified the deceased's body was

identified by PW2 and PW3 for postmortem purposes. His report on the injuries as per postmortem Report exhibit P2 is as follows:- External appearance of the body:- Head - cut wound of the left forehead (frontal) 6 cm already stitched, expositor and Depth 3 c.m. and reaching the skull, sharp object used. Bruise on the left elbow. No other injuries were noted. Nervous system: blunt trauma brain tissue under increased pressure leading to the increased intra-cranial pressure.

The Doctor's findings corroborates injuries which PW1 witnessed being inflicted by the Accused and his brother, (who is not charged and is at large). The Doctor opined cause of death to be due to Hypovolemic shock/head injury both resulting into cardio respiratory failure.

15. In view of the above, the Prosecution proved the death of the deceased and its cause to the required standard of proof.

**(b) Who caused the deceased's death?**

16. The Accused gave a defence of Alibi and denied having caused the death of the deceased. In his defence he denied having gone out of his home on 11<sup>th</sup> July 2016, from the morning hours to the evening. He denied having met PW1 and the deceased at the club and having been with them upto 10.00 p.m.

17. According to the Accused on the material day at around 11.00 p.m. his door was kicked open by the deceased together with PW1 and PW1 started slapping and beating him jointly with the deceased demanding the proceedings he had got of KShs.250,000/= after selling a piece of his land which he did not have. That the deceased was holding his shirt by collar as PW1 was slapping him with a panga, which he blocked with his hand as PW1 intended to cut him, unfortunately it cut the deceased on the head forcing the two to run away. The Accused asked for forgiveness stating he accidentally caused the deceased's death by blocking the panga aimed at him by PW1.

18. The Accused's defence was not raised early enough, through cross-examination. The Accused did not put his defence to PW1 and other witnesses, that PW1 and the deceased had gone to attack him at his home. He did put it to PW1, that he was not at the club with them and that he did not leave annoyed when deceased refused to buy him Busaa. He did not even put it to PW1 that they did not find him marking charcoal near the road. I find that the Accused's defence of Alibi, not sustainable but a mere afterthought and reject the same. PW1 placed the Accused at the scene of crime. He stated how they met the Accused and deceased bought the Accused Busaa, before he left annoyed as the deceased refused to buy the Accused more Busaa.

19. I find the version as regards what happened as given by PW1 credible. That if what the Accused said is correct he could have sustained injuries and reported to Police or Hospital. That when he appeared before this Court one day after the incident the Court enquired from him whether he had anything to tell the Court or whether he had complaints and he told Court he had none. I am alive to the fact that an Accused person who sets up an alibi defence does not assume any burden to prove the same (see **Karanja v Republic (1983) KLR 501**). In that case however, the two courts below reject the appellant's alibi defence on the basis first; that it had not been raised at the earliest opportunity in the proceedings and secondly, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it.

20. In **Moses Nato Raphael v Republic CRA 169 of 20 [2015] eKLR** the Court of Appeal dealing with Appellant's defence of alibi, reiterated that the burden of disproving the alibi is always on the shoulders of the Prosecution, referring with approval from **Ssentale v Uganda [1968] E.A. 365**, and quoting with approval **Victor Mbatha Mulinge VR (2014) eKLR** where the Court of Appeal had stated the following 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.”***

21. In view of the above, I find that the Accused defence of alibi had not been put forward as his defence at the earliest stage in the case so that it could be tested by those responsible for investigation, nor was there any hint through cross-examination, the Accused intended to offer a defence of alibi. That failure leads to no other conclusion, other than the defence of alibi offered at the last stage in his defence was an afterthought and the same I find is unsustainable. The same is rejected.

22. That from PW1's evidence the deceased made a dying declaration to his mother PW3 and PW2, who took him to the hospital, to the effect that he had been cut with a panga by Alfred Odipo and PW1 who was present confirmed that was the position. The deceased died after few hours after making a dying declaration. A dying declaration is admissible in evidence under **Section 33 of the Evidence Act** which provides:-

***“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—***

***(a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, .....***

23. In **David Ngugi Gichuru vs. Republic (2011) eKLR (Cr. App. 134/2007)** the Court in considering evidence of a dying declaration

considered the case of **Pius Jasanga s/o Akumu Vs. R (1954) 21 EACA 331**, where that court said:-

*“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7<sup>th</sup> Edition of Field on Evidence has repeatedly been cited with approval ....*

*It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (Rv. Eligu s/o Odel and another (193) 10 EACA 9, Re Curuswani (1940) Mad 158, and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused.*

*..... But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration.”*

24. In **Choge v R [1985] KLR** the Court said:-

*“5. The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.*

*6. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.*

*7. The first statement of the deceased was admissible as a dying declaration under section 33(a) of the Evidence Act (cap 80). However, the evidential weight of this declaration was lessened by the fact that the deceased's expectation of death was not severely imminent at the time it was made, the fact that the deceased had not said to anyone else other than the two police officers at the crime scene that the 1<sup>st</sup> appellant was responsible for his death and further by the fact that the dying declaration was not mentioned by a witnesses who had been at the scene of the crime.”*

*From the above cited authorities it is clear that evidence of a dying declaration need not be corroborated but the court has to exercise caution that the deceased could not have been mistaken in his identification of the accused. I am satisfied that PW2 and PW4 heard the deceased say that he was injured by the accused.”*

25. In view of the above authorities, it is clear that it is unsafe to base a conviction on the dying declaration of the deceased person, made in absence of the Accused and not subject of cross-examination. It is clear that there is no need of corroboration of a dying declaration but what the Court is required to do is to exercise caution that the deceased could not have been mistaken in his identification of the Accused.

26. PW2 and PW3 heard the deceased tell them he was cut with a panga by Alfred Odipo, in presence of PW1, they were with the deceased for several hours before he died. PW1 had in his evidence stated that from 6.00 p.m. upto around 10.00 p.m., he was with the deceased and the Accused taking Busaa. That the Accused left them for his home. That after 11.00 p.m. on their way home, they found the Accused burning charcoal and had an exchange with the deceased after his failure to buy the Accused more Busaa. The Accused and his brother attacked PW1 and the deceased. He stated there was a very bright moonlight, a fact the Accused also admitted in his defence. I therefore find that the deceased and PW1 were not mistaken to the identity of the Accused as to the person who cut the deceased with a panga. That PW1 and the deceased were known to the Accused and Accused was a friend of the deceased. That PW5 when he went to search for the murder weapon, he got a panga from the Accused's house which was produced as exhibit P1. The evidence of PW5 corroborates the evidence of the deceased and PW1, PW2 and PW3 that the deceased named the Accused as the person who caused injuries to him by use of a panga.

27. From the evidence of PW1, PW2, PW3 and PW5, I find that the Prosecution has adduced sufficient evidence connecting the deceased with death of the deceased and no the other person. The Accused even in his defence pleaded for forgiveness stating he accidentally caused the deceased death. He stated as follows. “I am the one who caused the panga to cut him by blocking the panga aimed at me by PW1. I am the one who cut the deceased because I blocked it. I never got wounded from the panga. What happened was an accident. I was defending myself and I ask for forgiveness for what happened.”

28. I therefore find and hold the Prosecution's evidence proved to the required standard of proof that the deceased death was caused by the Accused.

### **(c) Whether the Prosecution has proved Malice aforethought?**

29. The Accused did not admit having deliberately caused the deceased's death in his defence, but attributed the same to acting in self-defence as he blocked the panga aimed at him by PW1. I did not in analysis of his evidence find his versions as to how the incident occurred truthful as compared with the version given by PW1. I find the version given by PW1 to be more credible and accepted the same as reflecting what truly transpired at the material time. PW1 testified that when the Accused left him with the deceased, he was annoyed as the deceased had refused to buy him more Busaa, he abused the deceased and left them.

30. That PW1 and the deceased on their way home, they found the Accused at his home preparing charcoal, that the deceased called the Accused telling him not to be annoyed as he had exhausted all his money and he would buy him Busaa the following day, which words provoked the Accused, who started making noises, asking Omondi, the deceased what it is that he was telling him and the charcoal he was

making was money and tomorrow he would be able to buy himself Busaa, as he was picking a panga from where he was standing, started cutting trees and telling the deceased to get away as he had a lot of words and at the same time telling him he does not want to see him near him, but instead of leaving the deceased engaged the Accused in further words, asking him what was the problem. The Accused then, accused the deceased of having been seducing, the Accused's sister-in-law and having been committing prostitution with her, that the Accused's brother came and started beating the deceased and PW1. That the Accused then got involved and cut the deceased on the forehead and ran away.

31. During cross-examination PW1 testified that the deceased was the one who started provocation of the Accused and that if the deceased had not provoked the Accused there would have been no problem. He also stated the Accused was drunk.

32. M/s. Kagoya, learned Advocate, for the Accused fronted a defence of self-defence and cited authorities in support thereof. In **Republic vs. Joseph Macharia Waweru HCCR Case No. 58 of 2010 (NRB)** Hon. Lady Justice Lesiit quoted with approval from **Republic v David Kinyua [2014] eKLR** in which the same Court had cited **Mungai v Republic [1984] KLR 85** thus:

*“No doubt this element of self-defence may, and, in most cases will in practice, merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.”*

33. In the instant case, there is evidence from PW1 that at the material time, the Accused was drunk though not to the extent that he was unable to understand his actions and that it was the deceased who provoked the Accused, by many words and the Accused also felt provoked as he alleged the deceased was seducing the Accused brother's wife. I find that it is not reasonable for man like the Accused to pick a panga and cut the deceased over many words and over seduction of his brother's wife. However, for a person drunk and acting under stress of provocation, reasonableness of an action is not first thing that may come to his mind. The Accused might have felt demeaned by the deceased words and the alleged seduction of his sister-in-law by the Accused. This Court is not indeed excusing the accused's acts which resulted in the death of the deceased. I have taken into Account of the altercation at the club followed by provocative acts at the accused's home which was accompanied as the Accused put it by many words, did work on the Accused's mind causing him to take the action he did swiftly without reasoning and planning by cutting the deceased on the head.

34. I find from the evidence of PW1, the defence of provocation and fortified by accused being drunk, though not to the extent of insanity, even though not pleaded, is available to the Accused in this case. I find there was excessive use of force in self-defence. The fatal cut was executed under stress of provocation and self-defence of Accused's sister-in-law. The fatal cut was given in the heat of passion on a sudden attack which is near enough and serious enough to cause loss of control. This was in the instant case, no intention to cause the deceased's death. The Accused had not planned to kill the deceased. The inference of malice in this case is therefore not proved and is rebutted as it cannot be taken that the Accused had formed the necessary Malice aforethought to commit murder.

35. In view of the above the offence committed by the Accused is Manslaughter and not Murder. I accordingly substitute the charge against the Accused from **Murder contrary to Section 203 of the Penal code to manslaughter contrary to Section 202 of the Penal Code**. I find the Accused guilty of the substituted charge of **Manslaughter contrary to Section 202 of the Penal Code** and convict him accordingly.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 20<sup>TH</sup> DAY OF APRIL, 2018.**

**J. A. MAKAU**

**JUDGE**

**Delivered in the open Court this 20<sup>th</sup> day of April, 2018.**

**In the presence of:**

**M/s Kagoya for Accused**

**M/s Mourine for the State**

**Court Assistants:**

**1. Laban Odhiambo**

**2. Brenda Ochien**

**J. A. MAKAU**

**JUDGE**