



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: MAJANJA J.)

CRIMINAL CASE NO. 01 OF 2016

BETWEEN

REPUBLIC.....PROSECUTOR

AND

DOMINIC OMONDI ONYANGO.....ACCUSED

JUDGMENT

1. The accused, **DOMINIC OMONDI ONYANGO**, was charged on 13th January 2016 with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on 10th January 2016 at Kuoyo Kaila village, Seme Sub-County within Kisumu County the accused murdered one **SAMWEL ODHIAMBO ONDEGO**.

2. After he denied the charge, the prosecution marshalled nine witnesses who testified as follows. Irene Okoth Onyango (PW 2) testified that on the material day at around 5:00pm she was at her home which to a path in the village. The deceased came with his friend and on reaching the entrance to PW 2's homestead, he called her and told her that he was tired and wanted to rest. His friend went on his way and they left him resting. After a short while she heard the accused calling her but she ignored. She then heard the deceased screaming and shouting, "*Why are you killing me*". She rushed outside and she saw the accused cutting the deceased with a panga. PW 2 testified that she raised alarm but the accused threatened to kill her and she ran away. PW 2 recalled that the accused was a bhang smoker and a habitual drunkard and when he was under the influence of alcohol or bhang he would act irrationally.

3. At about the same time, PW 2's neighbour, Millicent Akinyi Owino (PW 1), was at home from where she could see deceased resting at the entrance to PW2's home. She recalled that the accused, whom she knew as *Generali*, came and began cutting the deceased with a panga. The deceased began screaming, "*Generali why are you killing me*". She began screaming for help. A lorry that was passing by stopped and the accused ran away.

4. Sergeant Rodgers Lumidi (PW 5) recalled that on the material date, the Deputy Commanding Officer of Kombewa Police Station requested him to proceed to Kuoyo Kayila to investigate a case of assault. He rushed to the scene with his colleague and found the deceased laying on the ground in a pool of blood. PW 5 testified that the deceased had cuts all over his body and was bleeding heavily. They rushed him to Kombewa District Hospital where he was admitted. On 11th January 2016, the deceased's mother, Janffer Makungu Makomere (PW3), informed him that the deceased had been transferred Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) where he died while undergoing treatment. PW 5 told the court that thereafter he re-visited the scene and interrogated witnesses and recorded witness statements.

5. Dr Joy Kalondu Olong'a (PW4) produced a post mortem report of the autopsy carried out by Dr Mboya at JOOTRH on 12th January 2016 after the body was identified by PW 3. According to the report, the deceased had multiple cut wounds on his body and face. Dr Mboya formed the opinion that the cause of the deceased's death was excessive haemorrhage caused by multiple cut wounds secondary to sharp force trauma.

6. In his sworn testimony, the accused denied any involvement in the deceased's murder. He testified that on the material day he spent his day in the field's grazing his cows and only returned home in the evening. On the following day, the area chief went to his home and informed him that he was required at the police station on suspicion of assaulting the deceased who was his friend. He told the court that PW 1 and PW 2 were his neighbours and that they testified against him because there existed a land dispute between their families and their husbands were the main suspects in the murder of the deceased but were released.

7. It is now the duty of this court to analyse the evidence on record and reach its determination on whether the charge of murder has been proved to the standard required in law. The offence of murder is defined by **section 203** of the *Penal Code* follows, "*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*" The prosecution must prove beyond

reasonable doubt the following three ingredients; first, it must prove the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

8. As to the fact and cause of death, PW 5 testified that when he went to the scene he found the deceased lying in a pool of blood with several wounds all over his body. The post mortem report indicated that the cause of death was excessive bleeding following multiple cut wounds caused by a sharp object. PW 1 and PW 2 testified that the deceased was cut with a panga. I therefore find and hold that the deceased died and he died as result of severe bleeding as a result of being assaulted by a panga.

9. The next question is whether it was the accused unlawfully attacked and fatally wounded the deceased. There were two eye witnesses who testified that the accused used a panga to slash the deceased who was resting on the foot path. The incident took place at daytime and the witnesses knew the accused they lived in the same neighbourhood. In light of the clear and credible direct testimony, I reject the accused defence that he did not assault the deceased and that he was away grazing his cattle. I also reject the suggestion that PW 1 and PW 2 testified against him because of a grudge due to an existing land dispute between their families. Nothing of the sort was put to PW 1, PW 2 and PW 5 in cross-examination hence I find that suggestion an afterthought. The testimony of PW 1 and PW 2 is corroborated by medical evidence tendered which indicated that the wounds on the deceased body were caused by a sharp object. There is no doubt that the accused unlawfully caused the death of the deceased and I so find.

10. The final question is whether the accused killed the deceased with malice aforethought. PW 2 testified that the accused was a habitual drunkard and a bhang smoker and when he was intoxicated he would do irrational things. It could be that on the fateful day he was intoxicated. When the accused was brought to plead, he was diagnosed with a mental illness for which he was treated and the trial proceeded without incident. The apparent lack of a motive would also point to either the fact that he was drunk or insane. The accused, in his defence, did not raise any of these issues although I have a duty to consider these matters even if they arise tangentially in the evidence and determine whether in fact that prosecution had proved beyond reasonable doubt the accused's state of mind to support a charge of murder.

11. The totality of the evidence is the accused went to where the deceased was resting with a panga. He cut the deceased multiple times causing him to bleed to death. He threatened PW 2 when she came close to where he was and then proceeded to run away. In addition, the cutting of a person with a panga multiple times betrays an intention not only to cause grievous harm but also death. I am therefore satisfied that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

12. I therefore find the accused, **DOMINIC OMONDO ONYANGO** guilty of the murder of **SAMWEL ODHIAMBO ONDEGO** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 18th day of April 2018.

D.S. MAJANJA

JUDGE

Mr K'ouko, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.