



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NUMBER 60 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

JOHN OTIENDE ALFAYO.....ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. On the 2nd December, 2013, the accused herein John Otiende Alfayo (The accused) found himself on the wrong side of the law when he was arrested in connection with the death of PATRICK SEMO (The deceased). The allegation against the accused is that on the 2nd day of December, 2013 at Keveye village, Solongo sub-location Chavakali Township, in Vihiga County, he murdered PATRICK SEMO. The charge preferred against the accused is **contrary to section 203 as read with section 204 of the Penal Code**.

2. The accused took plea before Hon. Justice Chitembwe (J) on 16th December, 2013 and denied the charge. Following that plea the prosecution called 10 witnesses in an effort to prove the charge of murder against the accused.

The Prosecution Case

3. The facts of this case, whose beginning was at benign as one could not imagine it, are brief. On 2nd December, 2013 at about 4.30 p.m. Edwin Otieno, PW6 (Edwin) received a telephone call from his conductor, one Ochango, that his (Edwin's) motor vehicle had developed a mechanical problem while at Keveye area and was being repaired. The deceased herein, who was a jua kali mechanic at Chavakali market was one of the people assisting Edwin's crew to fix the vehicle, a Nissan matatu. The vehicle had broken down next to the home of the accused. The accused was not amused that the vehicle was being repaired at his doorstep as it were, and asked the deceased and the other people to remove the vehicle.

4. There was some altercation between the accused and the deceased with the deceased insisting that he vehicle had to be removed immediately from near his home, while the deceased was asking the accused to indulge them for only a little while upon an undertaking that as soon as the vehicle was fixed (by replacing springs) it would be removed.

5. According to Fredrick Mmbohe Ngaira, PW7 (Fredrick), when the deceased did not move away at once, the accused ran to his (accused's) house and came out with a panga and headed straight to the deceased who was bending down repairing the vehicle. Fredrick pleaded with the accused to desist from doing anything harmful with the panga, but the accused turned a deaf ear to the pleas. When the accused got to where the deceased was, another altercation took place with the deceased telling the accused to cut him (deceased) if he wanted to do so. The accused then cut the deceased on the neck. Fredrick was about 6 metres away from where the attack took place.

6. After witnessing the incident, Fredrick ran to the deceased's home and informed the deceased's wife by the name Josephine Adisa, PW5 (Adisa) that the accused had killed the deceased by cutting him (deceased) with a panga. At the time of the incident, Oscar Otiende Mugalizi, PW2 (Oscar) and Arthur Bwuzu Chunza, PW4 (Arthur) were also at Chavakali market and saw what happened. Oscar stated that at about 16.15 hours, he witnessed a slight quarrel between the accused and the deceased over a matatu vehicle that was being repaired near the accused's house. Oscar supported Fredrick's testimony that the accused fetched a panga from his (accused's) house, when the deceased did not stop working on the stalled motor vehicle that had been stopped near the accused's home, and cut the deceased on the neck using the panga.

7. Arthur also testified that he saw the accused attacking the deceased with a panga and cutting him (the deceased) on the neck. After the incident, the Solongo sub-location Assistant Chief, Evans Mudenyio Chogo, PW3 (Evans) was informed of what had befallen the deceased. Evans then informed the police who rushed to the scene and found the accused locked up in his house, with members of the public baying for his blood. Number 62967 Sgt Samuel Kimanga visited the scene after being instructed to do so by the DCIO. There were other police officers from Chavakali Police Station. After rescuing the accused from the house, the police noticed that the accused was injured. He was taken to Vihiga Hospital for treatment while the body of the deceased was taken to the Vihiga District Hospital mortuary.

8. Sgt. Kimanga interrogated the witnesses from John Imbali Kibili, PW1 (John) right through to Fredrick, after which the accused was charged with the offence of murder. On 5th December, 2013, a post mortem examination was conducted on the body of the deceased by Dr. David Akaliche Adori after the body was identified to him by Beatrice Atsiaya Vugutsa, PW8 (Beatrice) who was a sister to the deceased.

9. Dr. David Akaliche Adori testified as PW9. He testified on behalf of Dr. Ouma Oluga who conducted the post mortem examination. From the testimony of Dr. Adovi the deceased had a deep degloving cut on the left side of the neck. The cut exposed all the neurovascular bundle at around C3/C4 vertebrae. The vessels of the neck had deep cut wounds both externally and internally. The nervous system also had a deep cut wound. The spinal column at the level of the neck had fracture of C3 and C4.

10. In the doctor's opinion the cause of death was asphyxia secondary to massive external bleeding. The dully filled, stamped and signed post mortem report was produced as P-exhibit 3.

11. A kitchen knife and the panga suspected to be the murder weapon were produced by Sgt. Kimanga as P-exhibit 1 and P-exhibit 2 respectively.

Defence case

12. At the close of the prosecution case, the accused was put on his defense. He gave sworn evidence. He did not call any witnesses. During his evidence, he testified that the deceased was his next door neighbour. He narrated how on the evening in question, the deceased and some other people had pushed a vehicle to his home and when he sought to know from the deceased why the vehicle had been pushed to his (accused's) home, the deceased retorted by saying that the vehicle was not in the accused's house but on the road. There followed an exchange between the two since according to the accused the deceased and crew had not asked the accused for permission to have their vehicle there. The accused further said

“We quarreled seriously with them. They were abusing me. They started beating me. I decided to enter my house. They followed me into the house. They took me outside. We continued fighting. I was injured. I then entered my house a second time. They followed me into the house and Bahati Semo told me they would not go away and he told me that if I was man enough I should go out and do whatever I wanted. I got angry with them. I started crying because of the pain and the anger I was feeling. My anger got higher. My anger drove me to the point of taking a panga and I cut Bahati Semo. I had no intention of cutting him but because he angered me and provoked me, I did what I did. What I can say is that I did not plan or intend to kill Bahati Semo.”

Submissions

13. At the close of the hearing, M/S Andia, counsel for the accused asked for time to file and serve her final submissions on whether indeed the prosecution had proved the case against the accused beyond any reasonable doubt. On numerous occasions when the matter came up for mention, between 9th May, 2018 and 22nd June, 2018, M/S Andia was not ready with her submissions and finally on 22nd June, 2018, the Court reached the conclusion that it was no longer reasonable nor was it fair to keep the accused in custody long after the defense had closed its case. The court accordingly gave a date for judgment. The absence of final submissions notwithstanding.

Issues for Determination

14. The issues for determination in this case are well defined under sections 203 and 206 of the Penal Code. For clarity, the two sections provide as follows:-

“ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

“ 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 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.”

15. From the above provisions, for the charge of murder to stand against the accused herein, the prosecution must prove:-

a) The fact of death.

b) The cause of death.

c) The fact that the death occurred as a result of an unlawful act or omission on the part of the accused

d) That in committing the act or omission, the accused had malice aforethought, or the mens rea.

16. As regards the fact of death, there is no doubt from the evidence on record that the deceased herein died after his neck was chopped with a panga. In the words of Evans, **“On arrival we found Patrickhaving been cut on the left side of the neck. Very deep cut. There was also a fresh cut on the foot of the left leg. The deceased had bled a lot.”** Oscar also saw the deceased being slaughtered. Adisa, the wife to the deceased ran to the scene after being given the information that her husband had been **“slaughtered”** and confirmed the death of the deceased before running back home to report the death to the deceased’s family. Beatrice also testified about the fact of death of the deceased and later identified the body of the deceased to Dr. Adori for purposes of post mortem examination.

17. Dr. Adori gave a detailed account of the injuries that Dr. Ouma Oluga was able to see on the body of the deceased. Upon examination, Dr. Oluga filled, stamped and signed the post mortem report which was produced as P-exhibit 3. The court is therefore fully satisfied that the fact of death was proved beyond reasonable doubt. Even the accused himself confirmed that fact.

18. This court is also satisfied, after a careful analysis of the evidence on record that the cause of death of the deceased was proved beyond any reasonable doubt. In the opinion of Dr. Oluga, the cause of death was asphyxia secondary to massive external bleeding.

19. The next issue for determination is whether the fact of death of the deceased occurred as a result of an unlawful act or omission on the part of the accused. The evidence is clear that it was the accused who cut the deceased with a panga on the left side of the neck, thereby inflicting fatal injuries. Whatever may have caused the accused anger, no man is allowed to take away the life of another, save for lawful reasons. **Article 26 of the Constitution of Kenya 2010** stipulates that every person has a right to life and that no person shall deprive another of his life except as provided by law.

20. From the evidence on record, both from the prosecution and the defense, there is no doubt that it is the accused who cut short the life of the deceased. It was not lawful for the accused to “slaughter” the deceased. Taking away another person’s life is not a joke. I am therefore fully satisfied that the death of the deceased occurred as a result of the unlawful acts of the accused, namely the act of cutting the deceased on the neck with a panga with the full knowledge that such an act would either kill or cause grievous harm to the deceased.

21. In his defense, the accused pleaded provocation. Before going into the definition or ingredients of the defense of provocation, the evidence shows that at the material time, the Kisumu-Kakamega road, along which lies Keveye village, was undergoing construction, with many diversions some of which went quite close to peoples’ houses. It so happened that the accused’s home was one of the houses affected by diversions. It is also clear that the vehicle which was being fixed was a public service vehicle which had broken down near the accused’s house. The deceased who was a mechanic at Keveye market was assisting the vehicle’s crew to fix the vehicle. Apparently, the accused was not amused by the fact that the vehicle was being repaired at his gate and wanted it removed at once. The deceased told the accused to give them time to work on the vehicle and also gave an undertaking that as soon as the vehicle was fixed it would be driven away. That was the situation as described by the eye witnesses. Would, therefore, one conclude that in such circumstances, (even if the deceased challenged the accused to do whatever he wanted), the defense of provocation was available to the accused?

22. The determining factor for the defense of provocation is whether, in the circumstances of the case, the accused had an opportunity to avoid the situation, such as running away from the scene or finding a moment to cool off. In my considered view, the accused had a chance to run away from the scene and cool off the anger which he said he could not contain. Indeed he ran away but instead of keeping away to let his anger cool, he returned with a panga and cut the deceased on the neck. It is my considered view that the words from the deceased **“you can do what you want”** where such as would make a man chop off that man’s neck. And was this provocation even after the deceased had asked the accused to give them a little time to fix the vehicle? The accused had time to reconsider the matter when he went into his house. He had time to reconsider the matter after Oscar and Fredrick told him not to use his panga to cause harm to anybody. The accused had a chance, after this intervention by Oscar and Fredrick to run away from the danger. It would appear to the court that the accused was determined to kill the deceased for reasons only well known to himself. I therefore reject the accused’s defense that he had been provoked. I also reject the accused’s contention that the deceased and the matatu crew abused him. According to the eye witnesses there was only a quarrel when the vehicle was not removed from the gate at the accused’s demand.

23. The final issue for determination is whether the accused acted with malice aforethought. In my considered view he did so. The gravity of the injury and the location of the injury, namely the neck was a clear indication that the accused knew or ought to have known that by cutting the deceased on the neck, and with so much force, the deceased would either die or suffer grievous harm.

Conclusion

24. In light of all the above findings I am satisfied beyond any reasonable doubt that the prosecution has proved all the requisite ingredients of the offence of murder against the accused person. I therefore find the accused, JOHN OTIENDE ALFAYO **guilty of the murder of PATRICK SEMO** on 2nd December, 2013 and **convict him accordingly under section 322(2) of the Criminal Procedure Code.**

It is so ordered.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega this 28th day of September, 2018.

WILLIAM MUSYOKA

JUDGE

In the Presence of

Mr. Juma for the state

Accused present in person

Erick/Polycarp - Court Assistants