



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 39 OF 2008

BETWEEN

REPUBLICPROSECUTOR

AND

JACK OOKO OWUOR..... ACCUSED

JUDGMENT

1. On 29th September 2008, this court was informed that on the night of 13th and 14th September 2008 at Ndeda Island Bondo District, Jack Ooko Owuor (“the accused”) murdered Stephen Onyango Ogenga (“the deceased”) contrary to **section 203** as read together with **section 204** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. After pleading not guilty, the state marshalled 4 prosecution witnesses while the accused gave sworn testimony.

2. The deceased's father, Maurice Ogenga Adhiambo (PW 1), recalled that on the night of 13th September 2008, he was awoken by someone who told him that his son had died. He got out of the house and followed the screaming until he got to the place where he found the deceased's body in a pool of blood with a knife nearby. The people nearby were saying that it is the accused who killed the deceased. He testified that he saw a stab wound on the deceased's body when the police arrived and took deceased's body to the mortuary.

3. The Chairman of the beach at Ndeda Island, Silas Owiti Silwa (PW 2) recalled that at about midnight, George Obiero (PW 3) came to see him and told him that the accused had killed the deceased. He immediately went to the scene where he found the deceased lying on his back with blood on his chest. He took possession of the knife at the scene and handed it over to the police when they arrived.

4. PW 3 recalled that as he was going home to sleep at about midnight, he met many people going to the scene where they were saying that someone had been killed. At the scene, he found the deceased lying on the ground. The accused, who was present, told him that he had killed the deceased and that the police should come and arrest him. He went to inform PW 2 what the accused had done and returned to the scene together but did not find the accused.

5. The final witness was Doctor Belinda Akinyi (PW 4). She produced the post mortem form prepared by Doctor Tanui who conducted the post mortem on the deceased's body on 14th September 2008. Dr Tanui observed three chest stab wounds on his chest which penetrated the pleural cavity and led to collapse of the lungs. He concluded that it is this penetrating injury that led to the deceased's death.

6. When put on his defence, the accused told the court on oath that he was a resident of Ndeda Island

where he was working as a fisherman. He recalled that on the night of 13th and 14th September 2008, he went home to sleep after work and was only arrested later. He denied that he knew the deceased.

7. To prove murder the prosecution must establish three key ingredients beyond reasonable doubt: first, the prosecution 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. The testimony of PW 1, PW 2 and PW 3 confirms that the deceased was found dead on Ndeda Island on the night of 13th - 14th September 2008. They all observed that he had been injured on his chest while PW 4 confirmed that the deceased had been stabbed. I therefore find and held that the deceased died and that he died stab wounds inflicted on his chest leading to collapse of his lung.

9. The main issue for consideration is whether the accused stabbed the deceased. The only witness who puts him at the scene is PW 3 who told the court that the accused told him that he had killed the deceased and that the police should come and arrest him. As a matter of law, there is no impediment in the court convicting an accused on the basis of an admission made to a third party. Apart from being satisfied that what the accused stated is in fact a confession or admission of the offence, the court must also be satisfied beyond reasonable doubt that these statements were made voluntarily and that the admission has the ring of truth (see ***Sango Mohamed Sango & Another v Republic MLD CA Criminal Appeal No. 1 of 2013 [2015] eKLR***).

10. PW 3 met the accused at the *locus in quo*. He further testified that the accused was well known to him as they were acquaintances at work. On cross-examination PW 3 stated that he would not have reported the incident to PW 2 if the accused had not told him that he had killed the deceased. PW 3's evidence is also corroborated by the testimony of PW 1 who stated that when he arrived at the scene, he found the crowd shouting and asking why the accused had killed the deceased.

11. The accused testified on oath that he was not present at the scene and did not meet PW 3. He also denied that he knew the deceased. It is the duty of the prosecution to disprove this alibi beyond reasonable doubt. PW 3 was categorical that on that night he was with the accused who told him what he had done. PW 3's testimony was not shaken on cross examination and there was no suggestion that there was any bad blood between him and the accused thus no reason for him to accuse him falsely. In fact, from the testimony of PW 3 they were acquaintances and that is why the accused freely admitted to him that he had killed the deceased. Finally, PW 3 admitted in cross-examination that the incident may have been borne out of some rivalry arising out of competition between fishermen. I am therefore satisfied that PW 3 was a truthful witness. I therefore find and hold that the accused admitted that he killed the deceased.

12. In determining its presence of malice aforethought the court is entitled to consider factors such as the part of the body targeted, the type of weapon used, if any, and the type of injuries inflicted upon the deceased (see ***Rex v Tubere s/o Ochen [1945] 12 EACA 63***). The post mortem report produced by PW 4 indicated that the deceased suffered stab wounds on his chest which perforated the lungs. Such a vicious assault could only be inflicted by a person who knew that his act would cause grievous harm or death within the meaning of **section 206(a)** of the ***Penal Code***.

13. Having considered all the evidence, I am satisfied that the prosecution has proved its case beyond reasonable doubt. I therefore convict **JACK OOKO OWUOR** for the murder of **STEPHEN ONYANGO OGENGA**.

DATED and DELIVERED at KISUMU this 28th day of March 2017.

D.S. MAJANJA

JUDGE

Mr Odeny, Advocate for the accused.

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