



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO.35 OF 2014

REPUBLIC PROSECUTOR

VERSUS

EVANS ODHIAMBO NYASIKO ACCUSED

JUDGMENT

1. **EVANS ODHIAMBO NYASIKO** (the accused) faces a charge of murder contrary to **Section 203** as read with **Section 204 Penal Code**. The particulars of the charge being that on 2nd August 2014, at Nyamagero village in Ndhiwa he murdered **JOHN ODHIAMBO OKIRI**(deceased).

2. **EVANS OUMA OKIRI** (PW2) testified that on 02/08/2014 while seated alone beside the road at Lwanda Centre at about 5.00 p.m., he saw his step brother (**JOHN ODHIAMBO**) going towards the centre to sell jaggery, while using his motor cycle. The deceased stopped next to the video room entered and immediately came out. The deceased went back where he had parked his motor cycle got on riding at a slow speed. PW2 saw the accused cutting the deceased. The deceased rode slowly until the place where the motor cycle usually parks, then he fell down.

3. Upon seeing the deceased being cut, PW2 rushed to him and deceased requested to be taken to hospital. The deceased told PW2 that the motor cycle was defective and did not have fuel.

4. PW2 ran to where **BERNARD ONYANGO** (another brother) was so as to get another motor cycle but upon returning to the deceased they found that the deceased had already been taken to hospital.

5. PW2 explained that he was seated 15 metres away from where his brother was attacked and he saw the accused cut his brother. He explained –

“The person who cut my brother is Odhiambo Nyasiko. I knew him from the village. I knew him for a long time ... the assailant emerged from the right. I could see him clearly.”

6. Apparently, PW2 had seen the accused about an hour earlier as they had met at the centre and even greeted each other although during the attack he did not see his face well as accused was wearing a cap which he had pulled over his face. He also recognised his clothing, being a jacket and black trouser which PW2 was familiar with. However he was certain the attacker was the accused as he was wearing the very clothes and cap he had seen him earlier in the day.

7. PW2 observed that the deceased had a large cut on the side of the head from the right eye, cutting the ear into half and upto the head at the back. After the attack the accused ran away with the panga.

8. On cross examination, PW2 explained that he had earlier met the accused at about 4.00 p.m., wearing a

black jacket and a light blue shirt with different coloured stripes, and black trousers and the cap was green in colour but at that time he was not armed. He was not aware of any sour relations between the accused and the deceased.

9. FREDRICK ODHIAMBO OPIYO (PW3) a businessman, within Kamdungo village in Ndhiwa was at Luanda centre on 02/08/2014 at about 5.00 p.m. as he had gone to check whether tailor **JOSEPH ACHIENG** had mended his trouser. While at the tailor's shop, he heard loud screams coming from the middle of the trading centre and both he and the tailor rushed out of the shop.

10. He realized the screams came from the stage for boda bodas and as he was going towards the stage he saw **ERIC ODHIAMBO** (whom he knew very well as his fellow villager, running towards his home. He was running away from where the screams were and was just about 4 metres away from PW3. PW3 stated:-

“He was wearing a black T-shirt and a black trouser with a green cap. He was carrying a panga... I did not talk to him.”

11. PW3 got to the scene and found the deceased lying down with a cut on the right side of his head which was bleeding. He had known the deceased since birth. He also found two boys **BILLY** and **KENNEDY** who were trying to assist the deceased by putting him on a motor cycle. He then called the deceaseds brother **BERNARD ONYANGO AKIRI** and informed him about the incident.

On re-examination he stated:-

“I saw the accused running and I saw his face ...”

12. GEORGE OCHIENG ONYANGO (PW4) was playing draughts at Lwanda centre at the date in question and stated the sun had not set, it was still bright.

13. He saw **EVANS ODHIAMBO NYASIKO** with a panga, and he also saw the deceased get on to his motor cycle which was just starting to take off. That is when the accused cut him on the head then fled off. PW4 was then about 5 metres away from the scene. He knew both the accused and the victim as they hail from the same village and said:-

“I can see EVANS NYASIKO in court today seated in the dock. I know him as EVANS ODHIAMBO ... He left with the panga.”

On cross examination he stated:-

“The accused came towards my direction. He was facing me and he had a panga.... He had black jeans and a black top. He also had a shiny cap.”

14. He gave a similar account as PW2 regarding the deceased's movements, saying he had come from the video hall before going to start his motor cycle. Although the deceased was rushed to hospital, he succumbed to his injuries on the same day.

15. DR. DAVID ONYANGO NYAWADE (PW5) who produced the post mortem form in respect to the deceased said the significant findings were that there was a cut on the right side of the face running from the margin of the right eye to the right side of the neck – mid section. The facial bones and skull were fractured and the cause of death was severe bleeding secondary to severe head injury inflicted by a sharp object.

16. The incident was reported to **PC SHADRACK MELI** (PW6) who visited the scene but did not recover any weapon.

17. On 03/08/2015 **PC MELI** received information that the accused had surrendered himself to **PALA**

AP POST, so PW6 proceeded there and re-arrested the accused.

18. PW6's investigations revealed that three months prior to the incident the accused and the deceased had been involved in a physical confrontation where the deceased had cut the accused in the stomach, but the issue was amicably resolved by neighbours and members of the family. However it seemed that as a result of that earlier incident the accused had decided to revenge and in the process the deceased succumbed to his injuries.

19. In his sworn defence the accused confirmed that he knew the deceased as his village mate but says he did not go anywhere on 02/08/2014, but two people approached him at home and told him he would go to prison before night falls. He decided to make a report to the D.O. about the threat but when he got to the gate, he found the two people already there.

20. He stated that a month before the incident he had a quarrel with the deceased who had stabbed him and he was taken to Migori Hospital. When accused was discharged, they sorted out everything, so he had no reason to attack the deceased. He stated that on the date in question he was wearing a red T-shirt, with black and white stripes and he did not have a jacket or a cap. He denied stabbing the deceased saying he did not even see him at the centre.

21. On cross examination he explained that the disagreement with the deceased had been over sugarcane worth Kshs.20,000/= he had supplied but the deceased failed to pay leading to the stabbing incident but the matter had been resolved amicably.

22. MISS ONGETI submitted that the evidence indicated there was malice aforethought as it was an undisputed fact that the deceased and the accused had disagreed about a month before the incident resulting in the deceased inflicting injuries on the accused, so he definitely had set out to commit an unlawful purpose which satisfied the ingredients of malice aforethought.

23. Counsel also argued that there was ample opportunity for identification as there was sufficient light to enable the witnesses see and identify the accused who was in any event well known to them for a long time, so that it was actually identification by recognition.

24. MISS ONGETI also urged the court to consider the conduct of the accused after commission of the offence, saying he was seen running away with the murder weapon after committing the offence and in fact surrendered to the authorities at **PALA AP CAMP** the next day. She submitted that this pointed to a guilty mind and amounts to corroboration.

25. The defence counsel Miss Nyarige submitted that although PW1 (**ERICK OCHIENG**) a brother to the deceased, did not witness the incident, he confirmed that as far as he knew there was no bad blood between the deceased and the accused. She further pointed out that according to PW2 when he had met the accused earlier on in the day he was not armed.

26. She cast doubt on the evidence of PW3 saying that since he claimed not to have seen PW2 at the scene during the attack and vice versa, then it could only mean that one of them was not being truthful or probably both were never at the scene.

27. The defence counsel also poked holes at the testimony of PW4 saying his evidence as to the sequence of the events did not tally with the evidence of any other witness. She suggested that this witness was also most likely not at the scene as he could not clearly describe what the accused was wearing at the time.

28. Miss Nyarige's submission is that there were discrepancies among the prosecution witnesses as to the date and time of the offence.

She maintained that there was no evidence that accused had the panga and urged the court not to be persuaded by the claims that due to the past misunderstandings between the accused and deceased, the

accused was on a revenge mission.

29. It is counsel's contention that the evidence is purely circumstantial yet it does not satisfy the test set out in **TUMUHEIRA –VS- UGANDA (1967) EA 328** which stated that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanations upon any other reasonable hypothesis than that of the guilt of the accused.

30. Miss Nyarige argued that the purported misunderstanding between the accused and the deceased had been resolved amicably and they were living in harmony, and someone else might have killed the deceased and accused was now just a victim because of that past misunderstanding.

31. It is an uncontested fact that the accused and PW1, PW2, PW3 and PW4 hailed from the same area and knew each other very well. It is also not disputed that **JOHN ODHIAMBO OKIRI** was attacked at **LWANDA CENTRE** and sustained fatal injuries on 2nd August 2014.

32. It is also common ground that a month before the incident the accused and the deceased had a physical altercations resulting in the deceased inflicting injuries on the accused.

33. The issue for determination is whether accused is the person who attacked and fatally wounded the deceased and if so why.

34. According to all the prosecution witnesses, the incident took place before darkness engulfed the area – PW2 and PW3 said it was at 5.00 p.m. while PW4 said it was at 6.00 p.m although on cross examination he said it was about 5.30 p.m. Of significance is that in his evidence in chief PW4 clearly stated:-

“The sun had not set. It was still bright.”

35. I think this disparity is not fatal and so simple to resolve – whether it was 5.00 p.m.; 5.30 p.m. or 6.00 p.m. – the conditions were still bright enough to enable the witnesses see and recognise both the deceased and the accused.

36. I am also not clear on the unsynchronized sequence of event referred to by defence counsel. PW2 and PW4 are the eye witnesses and both described how the deceased arrived on his motor cycle to deliver jaggery. Then went into the video shop, but came out almost immediately, got onto his motor cycle and just as he was about to start, the accused struck him on the head with a panga.

37. Certainly PW3 could not have given a blow by blow similar account because he did not see the accused actually inflict the injury – he was in tailor **JOSEPH ACHIENG'S** shop and his attention was only drawn by the loud screams coming from the middle of the centre. When he came out he saw the accused running towards his home carrying a panga.

38. All the prosecution witnesses described the accused as wearing a black upper garment (be it described as a T-shirt, sweater or jacket) and a black trouser, and a cap which two witnesses described as green and one described as shiny.

39. All the three witnesses were consistent that the accused had a panga which he carried with him as he fled the scene.

40. I have no doubt in my mind that the person who inflicted injuries on the deceased was seen by those three witnesses and recognised as the accused.

41. Of course PW3 may not have seen PW2 – after all he was inside the tailor's shop while PW2 was seated by the roadside – that does not mean both of them were not at the centre. It is also significant that after the attack PW2 left the scene to get help and PW3 came to the scene after the attack – only to see the accused fleeing – there is a real possibility that by then PW3 could not have seen PW2 at the scene as the latter had left to get help

42. All witnesses had ample opportunity to see accused and the conditions were favourable. Indeed the evidence of the three witnesses placed the accused at the scene and his claims that he was never anywhere near the centre on the date in question ring hollow.

43. The evidence of PW2 and PW4 was not circumstantial – it was direct, and that of PW3 although circumstantial was corroborated by that of PW2 and PW4 and indeed confirmed the conduct of running away while armed with a panga which demonstrated the conduct of one with a guilty mind and inculpatory pointed to the guilt of the accused and no one else. This satisfied the test set out in **REPUBLIC –VS- KIPKERING ARAP KOSKE AND ANOTHER 1949 16 EACA Pg 135.**

“Such evidence is sometimes compared to a chain with its links as a rope with several strands and must be carefully tested... If it passes the test it is as good as any direct evidence.”

44. Was there a reason for the attack? Section 206 of the Penal Code provides that malice afore thought shall be established by evidence proving –

a. An intention to cause the death or do grievous harm to any person, whether that person is actually killed or not;

b. Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person ...

45. Stabbing any human being with a panga on the head cannot be expected to draw harmless results, and the intention was clear. It was to inflict the greatest degree of injury, as it indeed achieved. It resulted in a cut on the right side of the face running from the margin of the right eye to the right ear to the side of the neck – mid section. And so heavy was the blow that it cracked the facial bones and the skull along the lanes of the facial cut. I cannot infer anything less than an intent to kill or at least cause grievous harm to the victim.

46. As to the explanation that the past disagreement was not what propelled the accused to act thus, I do not believe him, he had never really forgiven the deceased and found a chance to pay back. His defence is rejected and I hold that the evidence on record proves that he murdered the deceased.

47. Consequently I make a finding that **EVANS ODHIAMBO NYASIKO** is guilty of the murder of **JOHN ODHIAMBO OKIRI** and he is convicted as charged.

Delivered and dated this 28th day of March, 2017 at Homa Bay

H.A. OMONDI

JUDGE