



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 12 OF 2016**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**EDWIN OTIENO OKELLO.....ACCUSED**

**JUDGMENT**

1. **EDWIN OTIENO OKELLO** (“the accused”) was charged with the offence of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on 5<sup>th</sup> March 2016 at Pap-Onditi Location, Nyakach Sub-County within Kisumu County he murdered **ZACHARIA OKELLO OBUYA** (hereinafter “the deceased”). The prosecution marshalled 7 witnesses while the accused gave unsworn testimony.

2. 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*.

3. The prosecution case is that the accused hit his father, the deceased, on his head with a jembe. The fact and cause of death was not disputed as the Post mortem form prepared by Dr Dixon Mchana on 9<sup>th</sup> March 2016 was produced by consent of the parties. He conducted the post-mortem after the body was identified by Chrispin Otieno (PW 4) and Gilbert Obuya (PW 5). According to the report the deceased died as a result of a penetrating head injury as a result of mixed force trauma following assault.

4. The events of surrounding the assault were narrated by several witnesses. On the 5<sup>th</sup> March 2016 at about 4.00pm, the accused, his mother, Alice Adhiambo Okello (PW 1) and the deceased were at home. PW 1 was shelling maize while the deceased was seated nearby relaxing. PW 1 testified when the deceased got up to go into his house, the accused picked a jembe and followed him. She suddenly heard her husband scream and saw the accused hit him with the jembe on the head. The deceased collapsed and the accused ran away. PW 1 raised alarm which attracted the neighbours. One of the neighbours who responded to the alarm was a neighbour, Goretta Auma Swa (PW 2) as she was coming from Church. She rushed to the scene and found the deceased lying on his verandah bleeding from the head.

5. On the material evening, at about 6.30pm, police officers from Pap Onditi Police Station arrived at the deceased’s homestead. Corporal Enock Ogega (PW 7) recalled finding the deceased’s body was lying in his house. He observed that the body had a cut on the left side of the head. They collected the body and took it to Nyakach County Hospital Mortuary. He told the court that by the time they arrived the accused was nowhere to be found. However, at about 11.00pm he was called by his Commanding Officer and informed that the accused had been arrested by members of the public at Olemba. He proceeded there and re-arrested the accused and brought him the police station. Corporal Mohammed Abullahi (PW 6), the investigating officer, gave an account of the investigation. He recorded the witness statements and organised for the post-mortem.

6. The accused elected to make an unsworn statement in his defence. He denied that he killed the deceased. He told the court that on the material day he was at home with the PW 1 and the deceased. He

explained that he was following the deceased and when the deceased saw him coming from behind, he pushed the door and fell on a jembe that was behind the door. After seeing what happened he ran away.

7. I disagree with the submission by counsel for the accused that the evidence against the accused was contradictory and inconsistent. The only 3 people who were at the deceased's homestead on the material day were PW 1, the accused and deceased. The accused in his unsworn statement admits as much. PW 1 was clear that the accused took a jembe and followed the deceased. She heard the deceased scream and saw the accused hit the deceased with it. This is in stark contrast with the accused's explanation that the deceased fell on the a jembe that was at the door. I reject that line of defence. I find and hold that the accused took the jembe, followed the deceased, when the deceased realised he was being followed and turned, the accused struck him. This is consistent with the fact that the deceased had injuries and lacerations on the mid anterior parietal region which masked the penetrating head injury. I must note at this stage that there was no reason for PW 1 to lie. Her testimony was that of a mother in great pain testifying against her young son and I believed her narration of events.

8. The prosecution buttressed its case by presenting evidence that the accused had issued threats to his parents before. PW 2 told the court that earlier in the year, the accused became violent and had chased them. PW 2 testified that the accused used to chase away the deceased and his wives and at some point, the deceased's wives would come to seek refuge at her place. Although the prosecution is not required to prove motive under **section 9(3)** of the *Penal Code*, it may when taken together with the other circumstances, constitute circumstantial evidence as to furnish some corroboration of culpability (see *Choge v Republic [1985] KLR 1*). The accused's previous conduct, his conduct of running away after assaulting his father and testimony of PW 1 and PW 2 leave no doubt that it is the accused who assaulted the deceased and caused his death.

9. In determining the question of malice aforethought, the court is entitled to consider factors such as the part of the body that was 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 accused assaulted the deceased with a jembe on the head. The blow was so vicious that it caused the deceased to die instantly. This assault and the injury are consistent with the unlawful killing of the deceased actuated by malice aforethought within the meaning of **section 206(a)** of the *Penal Code* as they were clearly intended to cause grievous harm or death.

10. I therefore find **EDWIN OTIENO OKELLO** guilty of the murder of **ZACHARIA OKELLO OBUYA** and I convict him accordingly.

**DATED and DELIVERED at KISUMU this 27<sup>th</sup> day of March 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Lore, Advocate for the accused.

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