



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 13 OF 2015**

**BETWEEN**

**REPUBLIC .....PROSECUTOR**

**AND**

**DAVID OCHIENG YOGO..... ACCUSED**

**JUDGMENT**

1. **DAVID OCHIENG YOGO** (“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 8<sup>th</sup> March 2015 at Kodhiambo Sub-Location, Kisumu East Sub-County within Kisumu County he murdered **AGNES ADHIAMBO YOGO** (hereinafter “the deceased”). The prosecution called 5 witnesses while the accused gave sworn testimony.

2. To prove murder the prosecution must establish three key ingredients beyond reasonable doubt: first, the fact of *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 assaulted his mother, the deceased, on her head with a jembe whereupon she died. The fact and cause of death was not disputed as the Post mortem form prepared by Dr Grace Mugure on 17<sup>th</sup> March 2015 was produced by consent of the parties. According to the report the deceased had multiple depressed and displaced fractures on the frontal, biparietal, bitemporal and occipital skull regions. She also had multiple contusions and lacerations with subsequent collapse of the frontal, occipital, parietal and temporal lobes bilaterally. Dr Mugure concluded that the deceased died as a result of a severe head injury secondary to blunt force trauma.

4. The next issue for consideration is whether the accused assaulted the deceased. The prosecution case was that on the evening of 8<sup>th</sup> March 2015 at about 8.00pm, the deceased was at home preparing supper. The deceased’s granddaughter, Rosemary Akinyi Odhiambo (PW 2), in her unsworn testimony, told the court that while the deceased was cooking, she and her younger sister, Ashline Atieno Odhiambo (PW 4) were playing outside. After some time the accused, who lived in the compound, arrived and asked the deceased whether she had cooked but she hadn’t. He left and came back later after they had eaten. PW 2 further testified that the accused came back and asked for and left after being given food. He came back with a panga and a jembe and waited at the door. In the meantime, a lady came to buy firewood and when the deceased went to assist her, the accused went behind her and assaulted her with a jembe. PW 2 stated that she was at the main house when she saw the accused going away after the act. The deceased let out a scream. PW 2 testified that she became afraid and went to call a neighbour.

5. Word of the incident spread in the village and one of the people who arrived at the homestead was the Assistant Chief of Kadhiambo Sub-location, Michael Civilian Buodho (PW 3), who had been informed about the incident. He found the deceased's body lying in a pool of blood near some firewood. He also recovered a blood stained jembe at the scene. The accused's brother, Samuel Otieno Yogo (PW 1) also arrived at the scene at around 9.00pm and found people gathered at the homestead. He found the deceased, who had head injuries, lying outside the kitchen. There was a jembe next to the body which he was able to identify in court. At that time the accused had been beaten by the villagers and restrained on suspicion of killing the deceased.

6. At about 10.30pm, police officers, among them the investigating officer, Inspector Isaiah Bisengi (PW 5), arrived at the deceased's homestead at about 10.30pm. He observed that the deceased was lying outside her house with a head injury. He took possession of the jembe that was said to have the weapon used to assault the deceased. PW 5 re-arrested the accused. He arranged for the deceased's body to be taken to the mortuary and organised for the post-mortem to be conducted.

7. The accused elected to give sworn testimony. He denied that he killed the deceased. He told the court that he left home at about 4.00pm to go for a fundraising function. Thereafter he went for a funeral meeting until 9.00pm. While he was there, he heard that someone had died. He left the place and followed the alarm which came from his homestead. As he was entering the homestead, three men came and confronted him demanding to know what happened. He was beaten and later arrested.

8. The case against the accused is founded on the direct unsworn testimony of children. The law on this issue is that the court can only convict the accused based on unsworn testimony of a child if it is corroborated in material particulars. **Section 124** of the **Evidence Act** states:

*Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

The court in **Johnson Muiruri v Republic [1983] KLR 445** held that:

*Where, in any proceedings before any Court, a child of tender years is called as a witness, the Court is required to form an opinion, on a voire dire examination, Whether the child understands the nature of an oath in which event unsworn evidence may be received. If the Court is not so satisfied, his unsworn evidence may be received if in the opinion of the Court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convinced on such evidence unless it is corroborated by material evidence in support thereof implicating him. [Emphasis mine]*

9. Likewise, in **Bernard Kungu Kariuki v Republic [2014] eKLR** the Court observed as follows regarding the unsworn testimony of children:

*The fact that the evidence of the three children was unsworn does not in our mind render it valueless. The said evidence was admissible and credible....it is a settled principle of law that where a child of tender years gives unsworn testimony then that evidence ought to be corroborated before the trial court can rely on it to sustain a conviction.*

10. In addition, the incident took place at night in circumstances that are ordinarily difficult for identification. In **Cleopas Otieno Wamunga v Republic [1989] KLR 424**, the Court of Appeal sounded a word of caution in matters of identification of suspects at night so as to avoid possible miscarriage of justice through mistaken identity. The Court urged careful examination of evidence in order to minimize risk of error which is possible even in the case of relatives or friends. The Court of Appeal has also noted that the evidence of recognition of a suspect is more assuring and reliable than the identification of a stranger but it nevertheless must be examined because mistakes can also be made (see **Anjononi &**

***Others v Republic [1980] KLR 59***). At all events, such evidence and recognition must be watertight to justify conviction.

11. The testimony of PW 2 placed the accused at the deceased's homestead. The accused came to ask the deceased for food twice before he returned with a jembe with which he assaulted the deceased. Although it was at night, there were electric lights outside as stated by PW 2 but also confirmed by PW 5 and the accused himself. PW 2 told the court that she was not too far and that she could clearly see the accused. The accused was not a stranger to her and he had come earlier and asked for food from the deceased. I heard and observed PW 2 testify and I am satisfied that she was telling the truth and had no reason to lie or implicate the deceased in such a dastardly act. On the whole I am satisfied the conditions existing were favourable for positive recognition of the accused. In the circumstances, I also reject the accused's defence that he was not at home at the material time.

12. I now turn to corroborative evidence. First, PW 2 testified that that the deceased was assaulted with a jembe. She identified the jembe which was produced in evidence as an exhibit. The jembe was found next to the deceased body by PW 3 and identified by PW 1 and PW 5. Secondly, the testimony of PW 2 that the deceased was assaulted on the head was corroborated by the post-mortem report which confirmed that the deceased died from a head injury. I find and hold that PW 2's testimony was corroborated by material evidence.

13. One of the deceased's grandchildren, Ashlin Atieno Odhiambo (PW 4) also gave unsworn testimony. She stated that she saw the accused hit the deceased as she was in the house and there was security light. Although her testimony was consistent with that of PW 2, her narration of events was somewhat exaggerated hence I have disregarded it. I am however satisfied that the evidence of PW 2 was sufficient, it was corroborated, and established that the accused assaulted the deceased with a jembe which resulted in her death.

14. The accused assaulted the deceased with a jembe on the head. The blow was so vicious that it caused multiple head fractures which 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 the assault was clearly intended to cause grievous harm or death.

15. I therefore find **DAVID OCHIENG YOGO** guilty of the murder of **AGNES ADHIAMBO YOGO** and I convict him accordingly.

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

**D.S. MAJANJA**

**JUDGE**

Mr Indimuli, Advocate for the accused.

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