



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 37 OF 2013**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**KEVIN OCHIENG OCHIENG.....ACCUSED**

**JUDGMENT**

1. The accused, **KEVIN OCHIENG OCHIENG**, 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 14<sup>th</sup> August 2013 at Koyango area in Kisumu District within Kisumu County he murdered **GEOFFREY WASONGA OCHUOGA** (hereinafter “the deceased”). The prosecution called 5 witnesses while the accused gave sworn testimony.

2. The key witness for the prosecution, Beatrice Akinyi Obala (PW 2), told the court that she was a resident of Koyango where the accused was her neighbour. On 14<sup>th</sup> August 2013 at about 4.00pm, while she was at home, she heard the accused calling her. She went at the door and asked him why he was calling. He responded that she was talking to him rudely. She told him she did not wish to talk to him. He took a big stick and hit her on the head causing her to start bleeding. In a short while, her brother, the deceased, came and asked the accused why he was assaulting his sister. The accused then started fighting with the deceased. PW 1 testified that the accused removed a knife from his body and when she went to separate them, he stabbed her on her back. She fell but could see what happening before she became unconscious. She stated that she saw the accused stab the deceased on the stomach and whereupon he also fell. She became unconscious and found herself at Jaramogi Odinga Odginga Teaching and Referral Hospital (JOOTRH).

3. Millicent Otieno Atieno (PW 1) recalled that on the same day she was called by a nurse at JOOTRH who told her that her children, PW 1 and the deceased had been stabbed. When she went to the hospital on 15<sup>th</sup> August 2013, she was told that her son had died. PW 1 told her that the accused, who was her neighbour, tried to seduce her. She reported the incident at Kondele Police. She accompanied the police officers to PW 1’s house where they noted that there was blood at the door. She was present when the police recovered a long straight kitchen knife with blood and bent knife, which were both blood stained, and a stick. They also went to the accused’s house where they recovered a blood-stained pair of trousers and T-shirt.

4. The post-mortem on the deceased’s body was done by Dr Olwala on 20<sup>th</sup> August 2013 at JOORTH after the body was identified by PW 1. The doctor observed a sutured laceration on the right lower chest around the 5<sup>th</sup> and 6<sup>th</sup> rib approximately 6 cm in length, laceration on the right forearm, a laceration on

the mid right leg and degloved skin on the right big toe. Internal examination revealed massive bleeding in the right lung, a fractured 5<sup>th</sup> right rib, the lung had a laceration on the right upper and middle lobe. Dr Olwala concluded that the cause of death was respiratory failure due to massive bleeding as a result of right lung trauma. The post mortem form was produced by Dr Dixon Mchana (PW 3).

5. The investigating officer, PC Peter Ooyi (PW 5) confirmed that the following items were collected from the scene which included a blood stained straight kitchen knife, a blood stained bent knife, a yellow blood stained t-shirt and a blue blood stained jeans. The said items together with cotton wool with dry blood stains of the accused blood, cotton wool with blood stain from PW 1's blood and a test tube containing the deceased's blood, were sent to the Government Chemist to ascertain the relationship between the physical items and the blood samples.

6. Richard Langat (PW 4), a Government Analyst, testified that the exhibits and samples were analysed. He presented his report where he concluded that following DNA analysis on the blood of the accused, deceased and PW 1 and the blood on the physical items, he concluded that the DNA profile generated from the bloodstains on the straight knife were a mixture of the DNA profiles generated from the blood samples of the accused and PW 1. Secondly, the DNA profiles generated from the bloodstains on the T-shirt and jeans matched those of the accused. He noted that although the bent knife was lightly stained with blood, attempts to generate a DNA profile was unsuccessful.

7. When put on his defence, the accused elected to give a sworn statement. He told the court that on the material day, PW 1 and the deceased came to his house as he was resting and started beating him. They stabbed him with a knife and as he ran to a nearby pit latrine, they followed him, kicked the door open and removed him causing him to fall. While still holding knives, PW 1 and the deceased told him to kneel as if in prayer. As he was kneeling, some motorbike riders saw what was happening and came to rescue him. He went to the District Hospital for treatment. He later reported the matter to Kondele Police Station on that day at 6.30pm but was told to come back the next morning which he did at about 7.30am. While he was recording his statement, he was arrested.

8. To prove murder the prosecution must establish three key ingredients beyond reasonable doubt: first, 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*.

9. As regards the cause of death, there is no doubt the deceased died as a result of a stab wound inflicted on his chest which penetrated his lung and caused him to have respiratory failure leading to his death. The issue is whether the accused stabbed the deceased and if so, whether it was with malice aforethought.

10. The accused does not deny that he was at the locus in *quo*. The testimony of PW 2 is that the accused stabbed her with a knife and as the deceased intervened she stabbed him. The fact that she was stabbed is corroborated by the DNA profiles confirming the straight kitchen knife contained the accused and PW 1's blood. PW 1 testified that she saw the accused stab the deceased after she had fallen with the bent knife.

11. The key issue in this case is whether the accused acted with malice aforethought when he stabbed the deceased. On this issue the evidence is circumstantial. PW 2 was clear in her testimony that when the deceased came to intervene, the accused and deceased started fighting. Although she saw the accused stab the deceased, she did not see any act that would account for the fact that accused sustained injuries, a fact confirmed by PW 5 and corroborated by the accused's blood stained clothes and the straight kitchen knife with his blood

12. The evidence on whether the stabbing was deliberate or premeditated is also conflicting. It was suggested to PW 2 in cross-examination that in her initial statement to the police she stated that she saw the accused go back to his house after beating her and coming back with the knife. However, in re-examination she told the court that there were utensils by the door from where the accused picked a knife and stabbed her. The fact that there were utensils also suggests that the deceased may also have picked the other bent knife to attack the deceased. This evidence undermines the prosecution case on the issue of malice aforethought.

13. I have weighed the conflicting version of events and I find the likely scenario to be as follows. PW 2 testified that she saw the accused use the bent knife without a handle to stab the deceased. The only inference when the accused came to PW 2's house and there was an exchange of words, he stabbed PW 2 with the straight knife. The deceased came and they started fighting while the accused was still holding the same knife. The deceased injured the accused with the knife he had used to stab PW 1 hence the presence of PW 1's and the accused blood on it. The accused then took the second knife where it was with the other utensils and stabbed the deceased once in the chest.

14. I reject the accused's defence that the deceased may have been killed by the motorbike riders who came to rescue him. Nothing of the sort was suggested to PW 2 in cross-examination. Had the deceased been killed by motorbike riders, the accused would have reported as much on the police, a fact that was not suggested to PW 5. Further, the deceased's cause of death is inconsistent with an attack by many people. The evidence of blood stains at PW 2's house which were confirmed by PW 1 disproves the accused's defence that PW 2 and the deceased chased him outside and continued to assault him until he was rescued. There was no evidence of blood in the accused's house to confirm that he was stabbed and started bleeding there.

15. The totality of the evidence is that on that afternoon, there were only three people at the scene, PW 2, the accused and the deceased. The accused stabbed PW 2 and she became unconscious and he also stabbed the deceased who died as result. He is the only person who could give an explanation as to what happened. I have rejected his explanation. He is the only person who stabbed the deceased and I so find.

16. I find that the prosecution proved beyond reasonable doubt that the accused stabbed the deceased but failed to prove malice aforethought. I therefore find **KEVIN OCHIENG OCHIENG** guilty of the unlawful killing of **GEOFFREY WASONGA OCHUOGA**. I accordingly convict him of manslaughter contrary to **section 202** of the *Penal Code*.

**DATED and DELIVERED at KISUMU this 24<sup>th</sup> day of May 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr K'Owinoh, Advocate for the accused.

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