



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 37 OF 2011**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**ERICK OCHIENG OMONDI .....ACCUSED**

**JUDGMENT**

1. **ERICK OCHIENG OMONDI** (“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 27<sup>th</sup> May 2011 at Yenga Sub-location, Ugenya District within the former Nyanza Province, he murdered **SAMUEL OMONDI STER** (hereinafter “the deceased”). The prosecution marshalled 6 witnesses while the accused gave sworn testimony. The case was initially heard by Ali-Aroni J. and I completed it after complying with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

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 came home on the night of 27<sup>th</sup> May 2011 and attacked his father with a jembe. The key prosecution witness was the accused’s mother, Joyce Akong’o Omondi (PW 1) who testified that on that night, the deceased, her husband, arrived home at about 9.30pm and called her to open the door. When she opened the door, someone came from behind, hit him and he fell. She told the court that at the time the assailant pushed the door and entered the house, he hit the chairs causing the tin lamp to go off. She further stated that she ran away and went to look for help and found the Chief. When she came back, she found that her husband had died.

4. At this point in the proceedings, the court noted as follows:

*COURT: The witness is obviously lying to the court. Effort to get her to say the truth have now failed. She began by refusing to take an oath on the bible saying that she is born again. She is evasive and has lied.*

*ACCUSED: I am telling the truth.*

*WITNESS: I saw him child (sic). I looked like the accused here. He was armed. He had a jembe.*

*This is the jembe (shown a jembe) marked as MF 1.*

5. When cross-examined by counsel for the accused, she told the court that she saw the attacker as he came in and it was the accused person. She stated that there was a tin lamp on the table not far from the door and it went off when the accused hit the chair.

6. The deceased's brother, John Michael Polo (PW 2), recalled that on that night at about 9.00 pm, as he was about to sleep he heard the deceased pass by the house singing. As he was going to sleep, he heard PW 1 screaming that his brother was dying. She came into his house and told him that accused was killing his father. They both went to the deceased's house and found the deceased in a pool of blood. He called the Assistant Chief of Yenga Sub-location, Richard Ooko Oswago (PW 3) who came to the scene.

7. PW 3 told the court that PW 2 called him and told him that the accused had killed his father. He proceeded to PW 2's house and together they went to the deceased's house where he found PW 1 and her daughter in law, Mourine Omondi. When he inquired from PW 1 what happened, PW 1 told him that it was the accused who had killed the deceased. He called the police from Ukwala who arrived.

8. One of the officers who arrived at the scene was Chief Inspector Alice Cherotich Kimeli (PW 4), the Commanding Officer of Ukwala Police Station. She confirmed that PW 3 had called her and informed her of the incident. When she arrived at the scene with other police officers including the Investigating Officer, PC Ambrose Nyaberi (PW 5), she found PW 1 and her daughter in law at the deceased's home. PW 1 told her that accused had killed the deceased. She noted that the deceased had a fracture on the left side of the leg and bruises on the left ear. She started looking for the accused in his house and in the nearby maize plantation but he was nowhere to be found. She collected took custody of the jembe and took the deceased's body to Siaya District Hospital Mortuary.

9. PW 5 testified that on 30<sup>th</sup> May 2011, they received information that the accused was spotted at River Nzoia. When the accused saw them, he ran away. He was arrested on 4<sup>th</sup> June 2011 by members of the public and handed over to the police.

10. The post-mortem on the deceased's body was done by Dr Nginya at the Siaya District Hospital Mortuary on 2<sup>nd</sup> June 2011. The post-mortem form was produced by Dr Collins Odinga (PW 6). Dr Nginya observed that the deceased's body had several bruises on both shoulders, abdomen and a fractured left humerus and left radioulnar. Internal examination revealed fractured ribs, a ruptured spleen with bleeding in the abdomen and a ruptured left kidney. Dr Nginya concluded that the cause of death was internal bleeding secondary to blunt injury.

11. The accused elected to make give sworn testimony in his defence. He denied killing the deceased and told that court that he was enjoyed a good relationship with his father. He told the court that he was a mason and that he left home on 23<sup>rd</sup> May 2011 to go and work in Marachi which is in Busia and that he was arrested on 4<sup>th</sup> June 2011 at Yenga when he was returning from work.

12. There is no doubt that the deceased died and that he died from internal bleeding as a result of blunt injuries inflicted on his body resulting broken ribs, a ruptured spleen and left kidney. The main point in contention in this case whether the accused is the person who assaulted the deceased. In this respect, counsel for the accused, submitted that the circumstances of the incident were not conducive to positive identification and in any case the key witness admitted that she did not see the accused. He submitted that the other witnesses did not add any value to the evidence of identification.

13. It not in dispute that the incident took place at night in circumstances that call for careful examination of the evidence to exclude the possibility of mistaken identity. Such evidence must be watertight before a court can return a conviction (see *Abdalla Bin Wendo & Another v R* [1953] 20 EACA166, *Wamunga v Republic* [1989] KLR 42 and *Maitanyi v Republic* [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the

accused so as to be able to identify him (See **R v Turnbull [1967] 3 ALL ER 549**). This requirement is, however, relaxed when dealing with the case of recognition because, “*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.*” (see **Anjononi & Others v Republic [1980] KLR 59**). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

14. In addition, where the assailant is a person known to the witness it is expected that the witness will report the accused at the first available opportunity. In **Simiyu & Another v Republic [2005] 1 KLR 192**, it was stated there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises. If the name is not given to the police at the first opportunity then giving the name subsequently is either an afterthought or the evidence given is not reliable and tends to weaken the evidence. (see **Morris Gikunda Kamunde v Republic NYR CA Criminal Appeal No. 332 of 2012 [2015]eKLR**). It is against these legal precepts that the evidence of identification must be examined to determine the quality of evidence and see whether it meets the standard necessary to support a conviction.

15. The judge, who took the testimony of PW 1 found her testimony evasive and concluded that she was lying. She warned the accused and the accused proceeded to state that she saw the accused come in the house and assault the deceased. When cross-examined, PW 1 clearly stated that it is the accused who came into the house and assaulted the deceased. This was not a case of identification of stranger, it was one of a mother recognising her son. At the point, he came in there was a tin lamp on the table which was a distance from the door and in the confined space of the room, I am satisfied that she was able to see the accused attack the deceased. In my view, her reluctance to testify was out of the fact that she was testifying against her own son and her initial reluctance to tell the truth is understandable but does not detract from her testimony after she was warned by the court.

16. In addition to the fact that PW 1 recognised the accused, she immediately went and reported that it was the accused who killed the deceased to her brother in law, PW 2. She gave the same statements to PW 3, PW 4 and PW 5 as persons in authority that the accused who killed the deceased. Why would she report her son to her closest relatives, the chief and the police so soon after the incident if what she was saying wasn't true? The fact that she made the report to various people so soon after the incident and to the police, knowing the consequences of such an accusation, gives me the assurance that her testimony that she saw the accused attack the deceased was truthful.

17. The accused gave an alibi defence. The law has been settled that an accused person who raises the defence of alibi does not thereby assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime (see **Kiarie v Republic [1984] KLR 739**). This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial. I am also guided by the decision of the Court of Appeal in **Wangombe v Republic [1976 – 80] KLR 1683** where the Court held that when alibi evidence is proffered, the prosecution is obliged to investigate it but where the appellant had not given any notice that he would raise it and it was being set up well after the close of the prosecution's case, it was open to the trial court to weigh it against the evidence already tendered.

18. In this case, the issue of where the accused was immediately after the incident was very much at issue as the witnesses were clear that the accused was not at home and his house was locked. Nothing was suggested to them in cross-examination that the accused had left days earlier to go and work in Marachi, Busia. When the accused testimony is considered alongside the prosecution witness, it wilts under the weight of its own falsity and I therefore reject it.

19. In addition to the direct evidence, there was evidence of motive. The Court of Appeal dealt with the issue of motive in **Choge v Republic [1985] KLR 1** as follows:

***Under section 9(3) of the Penal Code, the prosecution is not required to prove motive unless the***

*provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1<sup>st</sup> appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.*

20. Although there was direct evidence of the accused's complicity, when cross-examined PW 1 told the court that there was bad blood between the accused and his father as his father was abusive to his wife. In addition, the deceased would wake him up when he was drunk and abuse him.

21. The entirety of the prosecution evidence is that the accused followed his father on the material night and when he entered the house, he attacked him with a jembe causing severe injuries which led to his death. Although there is evidence that he used to drink and abuse the accused, there is no evidence that he said or did anything to the deceased that night that would cause him to act in the manner he did. The accused's disappearance from home only to be arrested after a little over a week, is inconsistent with his innocence particularly if he was in a good relationship with his father.

22. 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. The blow was so vicious that it caused rupture of internal organs and fracture of multiple bones. 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.

23. I therefore find **ERICK OCHIENG OMONDI** guilty of the murder of **SAMUEL OMONDI STER** and I convict him accordingly.

**DATED and DELIVERED at KISUMU this 23<sup>rd</sup> day of May 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Ojuro, Advocate for the accused.

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