



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 3 OF 2016**

**BETWEEN**

**REPUBLIC .....**

**PROSECUTION**

**AND**

**JOANES GUYA RIJE .....**

**ACCUSED**

**JUDGMENT**

1. On 19<sup>th</sup> January 2016, this court was informed that the accused, **JOANES GUYA RIJE** had murdered **KEVIN ODHIAMBO OGONJI** (“the deceased”) on 3<sup>rd</sup> January 2016 at Kogony area, Bandani, Kisumu East Sub-County within Kisumu County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The prosecution marshalled 7 witnesses while the accused elected to give sworn testimony.

2. The facts giving rise to this case are really not in dispute. The accused and deceased were neighbours sharing a common boundary. On 3<sup>rd</sup> January 2016 at around 6.00am, the accused and deceased quarrelled over the fact that the accused had planted some kei-apple trees beyond his boundary. The accused picked a piece of timber and hit the accused on the head. The deceased was taken to Jaramogi Odinga Oginga Teaching and Referral Hospital (“JOOTRH”) where he was admitted. He finally succumbed to the injuries on 9<sup>th</sup> January 2016 whereupon the accused was charged with murder. The post mortem was conducted by Dr Rukia Aksan (PW 1) observed that there were no visible injuries but internal examination of the head revealed a massive bleeding between the skull and brain with a non-depressed skull fracture. She concluded that the cause of death was a severe head injury leading to massive bleeding following blunt force trauma on the head.

3. On the prosecution side, the deceased’s brother, John Onyango Ogonji (PW 2) told the court that before he left for Church that morning, he heard and saw the accused and deceased quarrelling over the boundary. The deceased asked the accused to uproot the trees he had planted beyond his boundary. He left for Church and was later informed that his brother had been assaulted and was in hospital. Another brother of the deceased, Kennedy Omondi Ogonji (PW 7), told the court that on that morning when the accused and deceased were quarrelling, the accused went back to his house and came with a piece of timber. He pushed the deceased on the chest and when the deceased moved back, he hit the deceased on the head whereupon he collapsed.

4. The deceased sister, Lucy Adoyo (PW 3) was awoken by the accused and deceased quarrelling and when she went outside she heard them talking about the trees. She told the court that she saw the accused take piece of timber and hit the deceased who fell down. She started screaming thereby attracting people. Among the neighbours who came to assist was Philip Nyariki Andika (PW 5) who assisted in taking the

deceased to hospital. Elijah Ochieng Ogonji (PW 4) told the court that when he learnt that his brother had been assaulted and was in hospital, he went to see him at JOOTRH where he was admitted.

5. The investigating officer, PC Gerald Njuguna (PW 6) confirmed that PW 3 reported the incident of assault on 3<sup>rd</sup> January 2016. After he received the report he went to the scene of the incident and confirmed that it took place at common boundary where the accused had planted trees. He was informed that the boundary dispute between the two families had been longstanding.

6. In his sworn testimony, the accused did not deny that the incident took place. He testified that the deceased asked him why the trees he planted were not well spaced. He responded that he could not uproot them unless the village elders were brought. Following the deceased's insistence, they started abusing each other and when the accused started fighting him he fell on a piece of timber that was on the ground and he fell on the deceased. The accused explained that they both stood up and they both left and as the deceased was walking, he collapsed. The accused stated that he is the one who carried the accused to hospital and that he assisted caring for him until his death. The accused denied hitting the deceased with a piece of wood. He told the court that he did not see any external injuries on the deceased.

7. There no doubt that there was a quarrel over the common boundary which, according to PW 6, had been a long-standing. What happened next is a matter of dispute between the accused and defence. The defence version is that the deceased fell on a piece of timber after during the fight. In considering this matter I am guided by the case of **R v Joseph Kamande Mau & 3 Others NBI HCCR No. 249 of 2003[2005] eKLR** where Ombija, J. observed as follows:

*In this regard, I was referred to the case of Palmer v Region [1971] 1 All ER 1077 an authority for the proposition that where the evidence is sufficient to raise the issue of self-defence that defence will only fail if the prosecution show beyond reasonable doubt that what the accused did was not by way of self-defence. If the prosecution succeeds in this then the issue is eliminated from the cases. Other possible issues will remain; in particular the circumstances may be such as to raise an issue whether there was provocation which would justify a verdict of manslaughter or whether the intent necessary to constitute the crime of murder was lacking. That going by the actions of the accused even if the court is not persuaded by the defence of self-defence then the court should entertain the defences of provocation which now reduces the offences to manslaughter...*

*That the issue of provocation and self-defence merged and it matters little if the circumstances are regarded as acts done in excess of the right of self-defence or done under the stress of provocation. That the essence of the offence of murder is malice-afore thought and if the circumstances show that the fatal blow was given in the heat of a passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control then the inference of malice is rebutted and the offence will be manslaughter.*

8. I agree with the aforesaid observations. PW 7 testified that the accused were back to the house, picked a piece of wood and came back to hit the deceased with it. On the other hand, PW 3, who was close by, and who watched the accused and deceased quarrel for some time, did not see the accused go back to the house. Likewise, I also reject the accused's version of events nothing was suggested to PW 3 and PW 7 that the accused fell and hit his head. The likely scenario is that in the course of the quarrel, the deceased, in the heat of the passion picked up a piece of wood and struck the deceased once as confirmed by the post-mortem report. While the prosecution established the fact of killing, it failed to prove the necessary intent to support a case of murder.

9. I therefore find the accused, **JOANES GUYA RIJE** guilty of manslaughter for the unlawful killing of **KEVIN ODHIAMBO OGONJI** contrary to section 202 of the **Penal Code** and I convict him accordingly.

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

**D.S. MAJANJA**

**JUDGE**

Mr Ngala Awino, Advocate for the accused.

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