



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 25 OF 2013

BETWEEN

REPUBLIC..... PROSECUTOR

AND

GEORGE ODHIAMBO ONGORO..... ACCUSED

JUDGMENT

1. The accused, **GEORGE ODHIAMBO ONGORO**, 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 15th May 2013 at Katieno East Sub-Location, Kisumu West Sub-County within Kisumu County he murdered **TOM ODHIAMBO OTURE** (hereinafter “the deceased”). The prosecution called 5 witnesses while the accused gave sworn testimony.

2. On 15th May 2013 at about 5.00pm, Rose Achieng (PW 2), was working on her farm near the road at Japuonje Ongomo market. She saw two men standing by the road whom she recognised as Adadi and Mbuya talking to each other, she suddenly saw Adadi cut Mbuya on the neck with a panga and then he took off. Mbuya held his neck and tried to chase the accused but he took off to the market. She never saw what happened thereafter. She identified the accused as Adadi whom she knew from the time he was a child.

3. On the same day, prior to the incident, Michael Otieno Owol (PW 1) testified that he had met the deceased and when they were together, his cousin, Duncan Otieno Ochieng (PW 3), came by. PW 3 told the court that the accused came and slapped him. PW 3 asked him why he assaulted him while PW 1 told to go away. As they were going away, the accused started throwing stones at them. PW 1 proceeded to the market when he heard people screaming. When he went to see what was happening, he found that the deceased on the ground with blood oozing from the lower part of the ear. He told the court that he saw the accused at the scene. He testified that the deceased was taken to the hospital by a motorbike. In the meantime, PW 3 heard the screams but did not see what happened. PW 3 suspected that he was slapped by the accused because of an incident that took place a few days earlier at Kombewa where he differed with the accused over the manner he was taking photographs.

4. After the incident, the deceased was taken to Kombewa Hospital. Jocinta Adhiambo Otire (PW 4) went to the hospital immediately after being informed. She found him unconscious with a cut wound on the right side of the neck. The deceased was thereafter transferred to Jaramogi Odinga Oginga Teaching and Referral Hospital Kisumu where he died. The post-mortem on the deceased’s body was done by Dr Muturi after the deceased’s body was identified by his brother, Caleb Omondi Osore (PW 5). The post mortem form was produced by Dr Dixon Mchana (PW 8). The significant finding is that the deceased had

a deep cut wound on the left side of the neck that severed major blood vessels and fracturing the 2nd and 3rd neck bones causing dislocation of the neck. Dr Muturi concluded that the cause of death was severe blood loss due to a deep cut wound on the neck.

5. The investigation officer, Inspector Zablon Nyongesa (PW 9), confirmed that he received the report of the deceased death from PW 4. After taking initial statements from witnesses, he turned to locating the accused. He was assisted by Manas Okanda Adipo (PW 7), the Assistant Chief of Upper Kombewa, who received information that the accused was in Kisumu and would be travelling to Nairobi. He called the accused's brother to assist and the accused was arrested in Kisumu on 17th May 2013. PW 6 told the court that the accused was fighting with Duncan and the deceased went to separate them and then the accused turned on the deceased and injured him.

6. In his sworn testimony, the accused denied that he was at the market on 15th May 2013. He told the court that he went to fish at the lake as usual in the morning and returned in the evening without any incident. He further testified that thereafter, he went to Kisumu to buy fishing nets where he was arrested. He denied that he knew the deceased.

7. The fact and cause of death of the deceased is not in dispute. PW 1, PW 2 and PW 5 who saw the deceased after the assault confirmed that he had a deep cut wound on the left side of the neck. This was corroborated by the post-mortem conducted by Dr Muturi whose results were recorded in the post mortem form produced by PW 8.

8. The prosecution relied on the testimony of PW 2 to prove that it is the accused who assaulted the deceased. The incident took place at daytime and PW 2 could clearly see what happened as she was not too far. Moreover, she knew the accused and deceased hence there was no possibility of mistaken identity. It was not even suggested that the witness could be lying or was motivated by some grudge against the accused. Furthermore, the accused was placed in the vicinity by PW 1 and PW 3 who encountered near the market prior to the incident. In light of the clear testimony of PW 1, PW 2 and PW 3, I reject the accused's alibi that he was away fishing. I find and hold that that it is the accused who cut the deceased on the neck causing his to bleed to death.

9. I now turn to the issue of whether the killing was with malice aforethought. In cross-examination, PW 6 alluded to a fight between the accused and PW 2 and the deceased and others went to separate them. When pressed over the matter he told the court that there was a fight between two groups of boys involving the accused and the deceased and that the deceased hit the accused with a rungu. PW 1 and PW 2 made it appear that there was no fight on that day and that they were innocent in the matter. PW 6 further accepted in cross-examination that the accused extricated himself from the group by throwing stones which fact is confirmed by PW 2. PW 6 told the court that the accused went and armed himself and came back to attack group.

10. The facts narrated by PW 6 are not unlike those explained by the Court of Appeal in **Maurice M. Kenyatta v R KSM CA Criminal Appeal No. 144 of 2000 [2001]eKLR** where it observed that:

The case seems to fall within the decision in REX v. BROWN (1 Leach 167) which is used to illustrate the following comment in KENNY CRIMINAL LAW, 119:-

"One of the most common cases of voluntary manslaughter is that of its being committed in the anger provoked by a sudden combat. Thus if, upon a quarrel which was not premeditated on the part of the prisoner, persons fall to fighting and then in the heat of the moment either of them (for the combat affords matter of provocation to each) inflicts some fatal injury upon the other, the slayer will not be guilty of more than manslaughter".

11. From the testimony of the PW 6 it is clear, that PW 1 and PW 3 were being economic with the truth about the circumstances that led to the deceased's death. One thing remains true; it is that the accused is the one who cut the deceased. The prosecution has a duty to prove that the accused committed the unlawful act with malice aforethought beyond reasonable doubt. In this case, there are elements of self-

defence and provocation, which the prosecution did not disprove beyond reasonable doubt. In the circumstances, the benefit of doubt must be given to the accused.

12. I therefore find **GEORGE ODHIAMBO ONGORO** guilty of the unlawful killing of **TOM ODHIAMBO OTURE**. I convict him of manslaughter contrary to **section 202** of the *Penal Code*.

DATED and DELIVERED at KISUMU this 22nd day of May 2017.

D.S. MAJANJA

JUDGE

Mr S.M. Onyango, Advocate for the accused.

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