



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL CASE NO.46 OF 2013**

**REPUBLIC.....PROSECUTION**

**VS**

**JOSEPH MOKWA ONYIKWA.....ACCUSED**

**JUDGMENT**

1. Joseph Mokwa Onyikwa (hereafter the accused) was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information brought by the state against him was that on the 7<sup>th</sup> day of September 2013, at Chebchabas sub-location in Konoin District within Bomet County, he murdered Robert Arama.

2. The accused had initially been charged in Sotik Senior Principal Magistrate's Court Criminal Case No. 634 of 2013 with the offence of assault causing grievous harm. However, upon the demise of the complainant, he was charged with the offence now before the court. The accused took plea and denied the offence charged, and his trial commenced before Ong'udi J and the accused placed on his defence. The case was completed before me following the transfer of Ong'udi J from this station.

3. The prosecution called 6 witnesses. PW1 was David Ogero Orog, the father of the deceased. His evidence was that he was at home in Kisii on 10<sup>th</sup> September 2013 when he received a report that his son, Robert Arama, had been injured and was in hospital. He was called by one Silvester from Maramara estate in Kericho. His son was staying at Maramara. PW1 testified that he came to Kericho and went to the Kericho District Hospital where his son was admitted. His son had an injury on his head, and died on the 6<sup>th</sup> day. According to PW1, his son was confused during the time he was in hospital, and they could not understand his speech.

4. PW1 further stated that it was one Meshack and Silvester who took the deceased to hospital. They also told him that it was Mzee Onyikwa, whom he had not known prior to the incident, who had injured his son. He had later gone to the prison with the accused's mother and seen the accused. He pointed at the accused in the dock as the person whom he had seen in prison. He had identified his son's body for the doctor who performed the post mortem. In cross-examination, he stated that he had not seen his child being assaulted.

5. PW2 was Cleopas Sang, a security supervisor at Finlays Tenderet tea estate. His evidence was that on 7<sup>th</sup> September 2013, at 8pm, he was notified by phone by one Francis that there were people who had injured each other at Nairobi Chemamuel Camp. He had walked to the camp and arrived there at 8.30pm where he found the deceased, who was bandaged on the head. He was lying on the bed with pain on the left side, and he said that it was the accused who had injured him.

6. PW2 stated that he knew the accused, who worked at the quarry. He went to look for him but did not find him in his house. He went there a second time and found that he had packed his things but was not in the house, and he placed security guards there to keep watch. At 5.00 a.m., the guards called and informed him that the accused had returned home. He went there and ordered the accused to open the house. The accused told him that the deceased had also injured him on his leg. PW2 saw that the accused was limping but did not see any visible injury. He arrested him and took him to Maramara police post.

7. In cross-examination, he stated that the accused and the deceased were both contractors at James Finlays. He had not witnessed the incident but had been informed by one Francis Korir about it. The deceased and the accused had fought at the shop of Samuel Chepkwony. PW2 had gone to the scene, Samuel's shop, and found it locked. He did not find the said Samuel.

8. PW2 reiterated in cross-examination that he had gone to the house of the deceased and found him in bed with his head bandaged. The deceased had told him that he and the accused had fought over change. That the deceased had paid Kshs 1000/= while the accused paid Kshs 100/= at Samuel's shop. The deceased had been given change for his Kshs 1000/= but the accused had disputed this saying it was he who had given Kshs 1000/= to the shopkeeper, and he wanted to take the change from the Kshs 1000 from the deceased by force. PW3 further testified that the distance from the accused's house to the deceased's house is about 300m.

9. The evidence of PW3, Bernard Arap Sang, was that he works as a security officer at Tenderet estate. He was on duty on 7<sup>th</sup> September 2013 when he was informed by his supervisor that there was someone who had been assaulted. His supervisor informed him that the scene was at Ronda – Chemamel estate. He had gone with one Peter Ngeno to patrol the area. That the information they had was that Joseph, the accused, had assaulted someone. He and Ngeno had gone to Ronda where they had found Cleopas (PW2). They had gone together to the accused's house and did not find him.

10. They then left and returned at 5 a.m and on checking, saw the accused lying on the bed. They telephoned PW2 and informed him that the accused was in the house. When PW2 came, they entered the house, where the accused told them that he had been injured on the leg, and he in turn hit the deceased on the head with a stick. They then took the accused to Maramara Police Station.

11. In cross-examination, PW3 confirmed that he did not see the accused injure the deceased. He also confirmed that the accused had told them that he hit the deceased with a stick, and that the deceased stepped on his foot.

12. PW4 was No. 36208 P.C Phillip Kangogo from Maramara police patrol base. His evidence was that on 8<sup>th</sup> September 2013 at around 11. am., he was in the office when security guards from Finlays came with the accused. They reported that he had injured another person the previous night, and that the person had been taken to Kericho District Hospital. He had placed the accused in the cells.

13. PW4 had later gone to the hospital to see the victim of the assault. The speech of the victim was blurred, and he said he had been beaten by an old man with whom he had fought after they went to a shop together. He claimed he had given the shopkeeper Kshs. 1000/= while the accused had given Kshs. 100/=. PW4 stated that the deceased told him that they were arguing about the change given, as a result of which the accused hit the deceased with a hammer. PW4 had issued the deceased with a P3 form and filled it for him.

14. He had then returned to the station and charged the accused with assault, then taken him to Sotik Police Station and then Sotik Law Court. The accused was then remanded at Kericho Prison as the deceased had not recovered. The accused had told PW4 that he and the deceased had fought over change. On 15<sup>th</sup> September 2013, PW4 received a report that the victim had died in the course of the night. The accused was then charged with the offence he currently faces.

15. In cross-examination, PW4 stated that he had arrested the accused for assault. The report on the assault had been made by security guards. He had recorded statements from five witnesses. He had been

informed that the cause of the assault was money that the deceased and accused had fought over. He had received the information from the security guard Cleopas (PW2) and the accused about the dispute over money. PW4 stated that he had confirmed from Chepkwony about the change the accused and deceased had fought over, which had been change from buying cigarettes.

16. PW4 further testified in cross-examination that he had visited the scene of the incident, Chepkwony's shop, at Chemamul village within Maramara estate. He had not recorded a statement from Samuel Chepkwony as he had denied knowing of the incident. He had confirmed that the accused and deceased were at Chepkwony's shop at 8pm, and that the fight had occurred 200 metres from the shop. He had not recorded any statements from any eye witness to the incident. He had visited the accused's house and recovered a hammer from there.

17. In re-examination, he stated that the cause of the assault was change (money), and that the accused had told him that they had fought. The deceased had initially not been able to speak, but later had told him that the accused assaulted him because of money.

18. PW5 was Ezekiel Kibor, a medical officer at Kericho District Hospital. He had been at the hospital for four years at the time he gave his evidence. He produced the post mortem report prepared by Dr. Oyoo, with whom he had worked at the hospital for one year. The post mortem report was prepared on 19<sup>th</sup> September 2013 in respect of the deceased, Robert Arama, at Kericho District Hospital Mortuary. According to the report, the deceased had a fracture of the temporal bone. The cause of death was a severe head injury caused by a blunt object, with bleeding in the head. It was produced as prosecution exhibit 1.

19. PW6 was Meshack Oikwa Mogaka, a farmer from Kisii. He had gone to the Kericho District Hospital Mortuary on 19<sup>th</sup> September 2013 where he had identified the body of the deceased, who was his nephew. He had witnessed the post mortem and noted that there was bleeding in the head. The prosecution then closed its case.

20. After considering the evidence on record, the court, while noting that none of the witnesses had witnessed the incident and that the case was based on circumstantial evidence, found that the prosecution had established a prima facie case against the accused and placed him on his defence.

21. The accused elected to give sworn evidence and call no witnesses. In his defence, he stated that he works at Finlays as a painter on contract. He had worked for Finlays from 2004 until he was arrested in 2013. He lived in Nairobi Camp within Tenderet Estate, Chemamul, where there were 297 houses.

22. With respect to the material day, the 7<sup>th</sup> of September 2013, which was a Saturday, he had woken up at 6.00 a.m and gone to work at the Manager's office, one Geoffrey. He had started work at 7.00 a.m with two other painters and worked till midday. They did not have paint for the ceiling so he had gone to town to buy the paint. That he had agreed with the two painters that they would meet the next day. He had left at 1.00 p.m. and gone to Kericho town, where he stayed until 8.00 p.m., when he left town. He had found the vehicle that he would use to the estate had left, so he waited for it and boarded it at around 8.00 p.m. That the vehicle left town around 8.30 p.m. and he got home around 9.30 p.m. When he got home, he went to sleep.

23. He further testified that on 8<sup>th</sup> September 2013, he heard someone knocking. That he thought it was his two painters. He opened the door and found two watchmen, Bernard Sang (PW3) and Cleopas Sang (PW2). He knew them as they were watchmen in the estate. He asked them what they wanted and they told him there was work somewhere. That he went with them from the camp and when they reached the road, they called for their motor bike which arrived in 5 minutes. That they put him on the motor vehicle and went to Tenderet or Maramara Police Station. He asked why he had been taken there and was told that there had been a fight at the camp.

24. He denied that he had been at the camp, and that he was in town at 8.00 p.m when the fight took place. The police had not listened to him and he spent one night at Maramara. In the morning, he was

taken to Sotik Police Station, though he was not told what he had done. He was charged with (causing) grievous harm. He had denied the charges and was remanded in custody at Kericho Prison, where he stayed for about 2 weeks. He was later told that the person he was charged with assaulting, had died and he would be charged with murder.

25. With respect to the evidence adduced against him, he stated that the evidence of Bernard Sang (PW3) and Cleopas Sang (PW2) was not true. That there was a reason why they had given false evidence. He alleged that he had once gone to repair PW3's house on 7<sup>th</sup> August 2013, when he was repairing window glass (panes). He had cut the panes and started putting them in. That he had finished and left for home around 5.00 p.m. That he had met some two young men carrying a power saw walking to PW3's house, and they had entered the said house. He had not spoken to them.

26. That the following day, there was an announcement that something was lost at the camp, and the owner, one Recho, a contract worker at Finlays, said she had lost a power saw the day before. The accused testified that he had told the supervisor that he had seen a power saw being taken to PW3's house, and the power saw had been found there. That PW3 had come the following day and threatened him, and told him that he would do to him what the accused had done to him. He had understood this to mean that PW3 would assault him or do something else to harm him. He had reported the threats to PW3's office. He was later arrested, and it had not taken long between the threats and his arrest. That he had been threatened on 7<sup>th</sup> August 2013 and been arrested on 8<sup>th</sup> September 2013. He stated that he had no quarrel with Cleopas Sang (PW2), did not know the deceased, and denied that he had been involved at all in the death of the deceased.

27. In cross-examination, he stated that on the material day, he had been painting and when the paint got finished, he had gone to town to buy paint between 12 and 8 p.m. He had gone to a shop near the police station. He had then gone home using a Nissan Matatu in which he had paid Kshs.100/-. He had not used the company vehicle. He did not know the deceased, Robert Arama, and had never seen him.

28. He repeated his testimony in his evidence in chief that he had been working at PW3's house on 7<sup>th</sup> August 2013, and about the two young men he had seen carrying a power saw. He further repeated his allegation that PW3 had threatened him. He asserted that there were other people present when PW3 made the threat, whom he named as Peter Ngetich and Charles Nyabuto, the painters he used to work with, but conceded that he had not called them as witnesses. He further testified that on the Saturday he went for paint, he was with Peter Ngetich and Charles Nyabuto. He did not know that he could call them as witnesses. In re-examination, he stated that he could not reach either Peter Ngetich and Charles Nyabuto who were present when he was threatened as Charles Nyabuto is in Nairobi and he does not have his number while he did not know the whereabouts of Ngetich.

29. Mr. Motanya for the accused filed written submissions which he did not wish to highlight but asked the court to rely on in rendering its decision. Ms. Keli for the state indicated that she would be relying on the evidence on record. I will revert to the defence submissions later in this judgment.

30. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 provides that:

***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

31. Section 204 prescribes the penalty for murder by providing that any person convicted of murder shall be sentenced to death.

32. At section 206, the Penal Code sets out what "malice aforethought", an essential element in the offence of murder, shall be deemed to be. It provides as follows:

***Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

33. The question that I am confronted with in the present case is whether the prosecution has proved, to the required standard, that the accused in this case is guilty of murder; that he, with malice aforethought, caused the death of the deceased, Robert Arama.

34. The evidence before me shows that on the night of 7<sup>th</sup> September 2013, the deceased was hit on the head and grievously injured. He was admitted to the Kericho District Hospital where he succumbed to his injuries on 15<sup>th</sup> September 2013. A post mortem was conducted on the deceased and a report in respect of the deceased dated 19<sup>th</sup> September 2013 produced by Exekiel Kibor (PW5), a Medical Officer at Kericho District Hospital. The report indicated that the deceased, who was 22 years old at the time of his death, had a fracture of the temporal bone and bleeding in the head. The report further indicated that the cause of death was severe head injury caused by a blunt object.

35. The question is whether the accused is the person responsible for the injury sustained by the deceased, which culminated in his death. No eye witnesses testified before the court, and the only evidence relied on by the prosecution was circumstantial. There was thus no direct evidence linking the accused to the death of the deceased.

36. The evidence linking the accused to the death of the deceased came from PW2, PW3 and PW4. PW2, Cleopas Sang, testified that on 7<sup>th</sup> September 2013, at about 8.00 p.m., he had been informed that two people at the Nairobi Chemamuel camp in Finlays had injured each other. He had walked there and arrived at 8.30 p.m. He had found the deceased lying in bed, and the deceased had said that it was the accused who had injured him.

37. PW2 had gone to the house of the accused but did not find him. He returned around 5.00 a.m and found the accused. The accused had told him that the deceased had also injured him on the leg. He was limping though he had no visible injury. PW3, Bernard Sang, corroborated the evidence of PW2 that the accused had told them that the deceased had injured him on the leg, while the accused had hit the deceased with a stick on the head. In cross-examination, he reiterated that the accused stated that the deceased had stepped on his foot.

38. The evidence of PW4, the investigating officer, was that he had gone to see the deceased at the hospital on 8<sup>th</sup> September 2013. The deceased, whose speech was blurred, had told PW4 that he had been beaten by an old man; that they had fought over change after they went to a shop together, and that the accused had hit the deceased on the head with a hammer.

39. The evidence for the prosecution linking the accused to the injuries that resulted in the death of the deceased consist, therefore, in the deceased's declaration that he had been hit by the accused, and the accused's own statement to the two witnesses, PW2 and PW3, as well as PW4, that he had hit the deceased and the deceased had injured him on the leg.

40. The deceased and the accused worked together as contractors in Finlays. They also lived in estate premises, according to PW2, some 200m apart. The deceased told at least three people that the person

who had caused the injuries that were to result in his death a few days later was the accused. The deceased had told PW2 on the night of the assault that he had been injured by the accused. The following day, when his condition was getting worse and his speech, according to PW4, was blurred, he told the investigating officer that he had been beaten by an old man. PW2 and PW3, who were watchmen at Finlays, had no doubt about the person that the deceased had mentioned, and they had gone to the house of the accused where they did not find him. They had, however, found him at 5.00. a.m when they returned to his house. The accused had then told them that he had hit the deceased as the deceased had stepped on his foot and injured him.

41. What we have in this case, then, is the dying declaration of the deceased, and the confession of the accused to having caused the blow that resulted in the injury to the head that the deceased ultimately succumbed from. The deceased identified the accused soon after the incident as the person who had injured him.

42. In the case of **Chengo Nickson Kalama vs R**, the Court of Appeal sitting in Malindi observed as follows:

***Of course, a dying declaration is receivable in evidence in terms of Section 33(a) of the Evidence Act. However, before such evidence can be received and acted upon, certain conditions must be met; the person who made the declaration must be dead, the trial must be for the person's death, the statement must relate to the cause of death, the person must be a competent witness and there must be circumstances which goes to show that the deceased could not have been mistaken in his identification of the accused. See Pius Jasanga s/o Akumu v R [1964] 21 E.A. 331 and Choge v Republic [1985] KLR 1.***

43. In this case, the deceased made the statement that it was the accused who caused the injury that resulted in his death shortly after the incident. He repeated the same assertion the following day, to the investigating officer.

44. Section 33 of the Evidence Act provides for the admissibility of statements made by deceased persons. Section 33(a) deals specifically with statements by deceased persons relating to the cause of death, and it provides that statements made by a deceased person relating to the cause of death are admissible:

***“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;”***

45. In his submissions on behalf of the accused, Learned Counsel, Mr. Motanya, argued that hearsay evidence adduced by PW2 was not sufficient to identify the accused as the perpetrator of the offence. Further, that the evidence of identification of the accused was tendered, not by the identifier himself but by someone, PW2, who was told by the identifier, who was not called to testify.

46. It was further submitted that the accused had raised an alibi that he was not anywhere near the scene but was only framed because one of his colleagues had a score to settle.

47. I have considered these submissions against the evidence on record. It is true that PW2 testified that one Francis had called him. However, the evidence of PW2 was not that the said Francis told him that the accused had injured someone. His evidence was that “ ***I recall that*** (sic) ***7/9/2013 at 8.00.p.m. I was notified by telephone that there were people who had injured each other. Its Francis who called me.***”

48. He further testified that “***I went to see the injured who was Robert. He had been bandaged on the head...He said it is Joseph Onyikwa who had injured him.***”

49. It is not correct therefore that PW2 testified on the basis of hearsay evidence with respect to the accused being the person who had injured the deceased. PW2 was called by Francis and informed that two people had injured each other. He went to the house of the person injured, the deceased, who informed him that the accused had injured him. The evidence of PW2 with respect to what the deceased told him was therefore admissible under section 63 of the Evidence Act as direct evidence of what the witness had heard. The witness knew the accused, who worked in the quarry. Like the deceased, the accused lived in Nairobi Chemamuel Camp.

50. The accused was therefore identified by the deceased as the person who had injured him, and the statement of the deceased made to PW2 with respect to the injuries that he sustained is admissible and reliable under section 33(a) of the Evidence Act.

51. Further, taken together with the evidence of PW2, PW3 and PW4 that the accused had told them that he had hit the deceased because he had stepped on his foot, I believe that there is sufficient evidence that it was the accused who injured the deceased. The statements made to these three witnesses was in the nature of confessions by the accused. A confession is defined in section 25 of the Evidence Act as follows:

***“25. A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”***

52. In **Sango Mohamed Sango & Another vs Republic- Malindi Court of Appeal Criminal Appeal No. 1 of 2013**, the Court opined that there was nothing in the Evidence Act that prohibits an accused person from ***voluntarily*** making a confession to a private citizen. In this case, the accused volunteered the information to PW2 and PW3 that the deceased had injured or stepped on his foot and he had hit him on the head with a stick. There was nothing to show that the accused was under any form of compulsion when he made these statements. The persons the confession was made to were, like him, employed by Finlays. They were watchmen. They were not in positions of authority over him, which would vitiate his confession to them.

53. In his sworn evidence, the accused alleged that there was a grudge between him and PW3, Bernard Sang, who had testified that the accused had told him that he had hit the deceased with a stick. Two things stand out with respect to this allegation. First, the issue of a grudge between PW3 and the accused was never raised during the testimony of PW3, nor did the defence challenge the said evidence on the basis that there was a grudge.

54. Secondly, the accused confirmed in his evidence that there was no grudge between him and PW2. Thus, even if the allegation that there was a grudge between the accused and PW3 was accepted, the evidence of PW2 that the accused told him that he had hit the deceased with a stick because he had injured him on the leg did not suffer from the same weakness. It cannot be said to have been fabricated because of an existing grudge. All in all, I am satisfied that the prosecution has established that it was the accused who caused the blow that proved fatal to the deceased. The question is whether the evidence shows, beyond reasonable doubt, that the offence of murder had been committed by the accused.

55. In his decision in **Republic vs Andrew Muecha Omwenga, Maraga J** (as he then was) considered the provisions of section 203 of the Penal Code and then expressed himself as follows with respect to what the prosecution must prove to establish the offence of murder:

***“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.”***

56. The question is whether, in the present case, the prosecution has proved these elements beyond reasonable doubt. Regrettably, the only evidence before the court is that of PW2, 3 and 4 with respect to what the deceased told them, that he and the accused had quarreled over change, and the accused had hit him with a hammer, and the confession by the accused that he had hit the deceased with a stick. I say regrettably because there was mention of a specific person, a Samuel Chepkwony, at whose shop the incident is alleged to have taken place, but who was not called as a witness. It seems to me that the evidence of this Samuel Chepkwony would have greatly assisted in arriving at the truth in this matter.

57. Nonetheless, I find that on the evidence, while the accused did hit the deceased, there was no malice aforethought in his actions. The evidence adduced by the prosecution shows that the two quarreled over change, as the deceased stated, and the accused hit him on the head, according to the deceased with a hammer, and according to the accused, with a stick. Whatever was used in the incident, it caused such an injury to the deceased as led to his death. I am not, therefore, satisfied that the accused, while he did cause the death of the deceased, did so with malice aforethought.

58. Consequently, in accordance with section 179(2) of the Criminal Procedure Code, I hereby reduce the offence charged to manslaughter. I acquit the accused of the charge of murder but convict him of the lesser offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

**Dated, Delivered and Signed at Kericho this 27<sup>th</sup> day of July 2017**

**MUMBI NGUGI**

**JUDGE**