



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 14 OF 2013**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**POLYCARP ODIWUOR OUSO ..... ACCUSED**

**JUDGMENT**

1. **POLYCARP ODIWUOR OUSO** (“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 10<sup>th</sup> April 2007 at Jimo West Sub-location, Nyakach District within Kisumu County he murdered **JARED ONYANGO ABAMA** (hereinafter “the deceased”).

2. The prosecution case was that the accused stabbed the deceased with a knife. The principle prosecution witness, Wycliffe Otieno Oyoo (PW 5) gave an account of what took place. He recalled that on 10<sup>th</sup> April 2007, he was at Harambee Market when he saw a group of people. He found the accused, whom he knew from school, and the deceased standing, a metre apart, opposite each. When he asked the deceased what was happening, he did not respond. Suddenly, the accused jumped on the deceased, stabbed him with a knife and ran away. He tried to follow the accused but he disappeared.

3. In the meantime, and as the deceased started bleeding and collapsed, PW 5 removed the deceased’s shirt and noted that he had suffered an injury on the left hand shoulder. He called his brother, George Otieno Abamo (PW 1), who arrived at the scene and assisted PW 5 to take the deceased to Pap Onditi District Hospital where he pronounced dead.

4. Justus Nyamolo Omollo (PW 2), the Chief of Central Nyakach Location, recalled that on the material day at about 10.00pm, the accused came to his home and informed him that the deceased had stabbed him on the left side of the arm. PW 2 showed him what he said was a stab wound but all he could see were bruises. He told the accused that he would summon the deceased to resolve the issue on the next day. After the accused had left, he received a call informing him that the deceased had been stabbed by the accused.

5. The accused remained at large until the deceased’s brother, Naaman Oluoch Ogola (PW 4) spotted him at the Kisumu Bus Park on 10<sup>th</sup> February 2013. He testified that it is the accused who introduced himself. He immediately relayed the information to PW 4 who alerted the police. PC Charles Kimathi Bundi (PW 6) was deputed to assist in arresting the accused. PW 4 got in touch with him and he assisted in identifying the accused who was arrested.

6. In his sworn defence, the accused denied that he stabbed the deceased whom he had known for many years. He told the court that on the material evening he was going home when he met a group of people. Among the group was the deceased and his brother, PW 5. When he went close, he found PW 5 and the deceased arguing. He asked PW 5 what the problem was and he was told be calm. At that moment, the deceased held him from the back and when he turned, the deceased slapped him. PW 5 separated them and as he going, the deceased held him back again whereupon the people present also held the deceased. He saw the deceased with something like a knife in his hand. The group pushed the deceased down while ran away.

7. PW 5 testified that he after the deceased was assaulted, he saw an injury on the left side of the shoulder. This injury was confirmed by the post mortem conducted by Dr Andagalu on 20<sup>th</sup> April 2007 at the New Nyanza Provincial General Hospital. The doctor observed that the deceased had a stab wound on the left scapula region which penetrated the lung. He accordingly certified that cause of death as a stab wound through the left lung.

8. As to whether the accused caused the unlawful act that led to the death of the deceased, the testimony of PW 5 points to the accused as the person who stabbed the deceased. Although the incident took place at night, I am satisfied that the conditions obtaining at the time were favourable for positive identification. The accused was a person well known to PW 5 and the deceased and PW 5 was close to both of them during the incident. When pressed in cross-examination whether he actually witnessed the stabbing, PW 5 stated that he saw the accused grab the deceased and suddenly started running away whereupon the deceased cried that he had been stabbed. I reject the accused's defence that he may have been stabbed by other people in the group as the issues raised in the defence were never put to PW 5 and were accordingly an afterthought.

9. The accused's culpability is further buttressed by the fact that he went to lie to PW 2 that he had been stabbed by the deceased when in fact he had not. His act of disappearing for a period of 6 years after the incident is inconsistent with his innocence and puts to rest beyond a shadow of doubt that he killed the deceased.

10. As regards malice aforethought, the prosecution did not exclude the possibility that the accused and deceased were in a fight. Although the accused lied to PW 2 that he had been stabbed, he showed the deceased that he had some bruises. The testimony of PW 5 does not account for the bruises which leaves open the possibility that he there may have been some form altercation. Having regard to the fact that the deceased sustained a single stab wound, I am prepared to give the accused the benefit of doubt. I therefore find and hold that the prosecution has failed to prove malice aforethought.

11. I therefore find the accused, **POLYCARP ODIWOUR OWUSO** guilty of manslaughter for the unlawful killing of **JARED ONYANGO ABAMA** contrary to **section 202** of the *Penal Code* and I convict him accordingly.

**DATED and DELIVERED at KISUMU this 21<sup>st</sup> day of September 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr P. D. Onyango, Advocate for the accused.

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