



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL CASE NO. 56 OF 2013**

**BETWEEN**

**REPUBLIC.....PROSECUTION**

**AND**

**THOMAS OTIENO ATELA..... ACCUSED**

**JUDGMENT**

1. The accused, **THOMAS OTIENO ATELA**, is charged with the murder of **PHILISTER MONYI NGERE** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The incident took place on 11<sup>th</sup> November 2013 at Kabienge Village, Nyakach District within Kisumu County. The prosecution case was that the accused and deceased were neighbours and following a dispute, the accused assaulted the deceased almost decapitating her. The prosecution marshalled 9 witnesses while the accused elected to give sworn testimony.

2. A grandchild of the deceased, Nicole Adhiambo (PW 1) gave unsworn testimony. She stated that on the morning of 11<sup>th</sup> November 2013, the accused and the deceased had a quarrel over the fact that the accused had cut down her trees. After the quarrel, the deceased came back to the house and left to go back to the shamba. PW 1 further testified that she saw the accused pass by with a panga, follow her grandmother to the shamba and cut her. After the act, the accused told her that if a dog came for her grandmother’s head, he would come and cut her too.

3. Another grandchild of the deceased, Jackline Achieng’ (PW 8) also gave unsworn testimony. She was in the house when she heard PW 1 crying. When she came out with her, she was the accused coming towards them carrying a panga headed towards the river. He told threatened to kill them if they cried. She told the court that she saw blood on the panga which the accused wiped on the grass. The accused told them go where their grandmother was and wait so that the dogs do not take her head. PW 8 went to the shamba and found the deceased lying under a tree with cuts on the head. After seeing what had happened PW 8 rushed to a neighbour’s home to look for help.

4. On the same day, Joseph Odhiambo (PW 2) recalled that about midday, he coming from school prayers, when he heard someone shouting words to the effect that, “*Whatever happens should happen,*” and, “*That woman has abused me enough.*” He recognised the voice as that of the accused whom he had known for a long time. He met the accused carrying a blood stained panga and as he proceeded he saw him wiping the panga on the grass while continuing to say, “*What should happen, should happen.*” While on his way to Bodo market, he found a child who told him that, “*Mama has died.*” He suspected she was referring to the accused and since he feared him, he went to inform David Asanyo Juma (PW 3) of his suspicion and what he had heard.

5. PW 3 recalled that after PW 2 informed him about the deceased, who was his immediate neighbour, he went to the deceased's homestead where he found her lying in her shamba with her head decapitated. He immediately called the Assistant Chief. George Ochieng Demba (PW 4), the deceased's grandson, also received news of the death. He immediately came to her homestead and found the neighbours gathered. He observed the deceased's body under a mango tree with her head cut, "*badly like meat in a butchery.*" He recalled that on the previous day, the accused had come to see the deceased and told her he would cut a tree to make charcoal and if she refused, he would kill her. While he was there PW 1 told him that the accused told her to wait for the deceased's head so that dogs do not eat it.

6. Meshack Were Washore (PW 7) was at Bodi when he was informed of the deceased's death. He immediately left for Kabienge Village where he found the deceased's decapitated body. He and other villagers went to the accused's home to find out what had happened. The accused reproached them for suspecting him without any reason. As they were still there, the accused told them he wished to relieve himself but disappeared. The police arrived thereafter.

7. One of the officers who arrived at the scene was the investigating officer, Senior Sergeant Joseph Ojune Ekasiba (PW 9). He confirmed that after receiving a call from PW 7, he proceeded to Kabienge village where he found the deceased lying in a pool of blood with her head disfigured as a result of panga cuts. At the scene, PW 9 interviewed various witnesses and started looking the accused at his home but he was not there. On the next day, he went back to the accused homestead and found a sharp panga at the accused's mother's house. The accused was later arrested when he surrendered at Pap Onditi Police Station. He organised for the post-mortem to be done on the deceased body.

8. In his sworn testimony, the accused denied that he murdered the deceased. He told the court that on the material day, he tended to his dairy cows and went to sell milk at Bodi market as usual. Although the accused admitted that he had had previous meetings with the deceased, he denied that he went to the deceased's house as alleged by the prosecution witnesses or that he had any disagreements with her. As regards the testimony of PW 2, he stated that he was lying as he did not have a good relationship with him. He also denied that the panga that was produced in evidence belonged to him. The accused further testified that when he came from Bodi, he found PW 7 at his home. He went out for a short call and they followed him. As they were outside, he saw a son of PW 5 shouting that the deceased had died and that he killed her. He was shocked about what had happened.

9. In order to prove murder, the prosecution must establish three key ingredients: first, the prosecution must prove beyond reasonable doubt 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*.

10. The fact and cause of death was not in dispute. The post mortem form was produced by PW 9. It prepared by Dr Tom Sewe who conducted autopsy on 19<sup>th</sup> November 2013 at Jaramogi Odinga Oginga Teaching and Referral Hospital after the body was identified by Caleb Odede Odongo (PW 5). He observed that the deceased's head was completely disfigured by multiple deep cut wounds with partial decapitation, an open skull and exposed brain matter, a deep cut wound on the right shoulder, multiple deep cuts on the right forearm and a deep cut on the left should. Dr Sewe concluded that the cause of death was a severe head injury with partial decapitation due to assault with a sharp object. The post mortem findings were consistent with the description of the deceased's body given by the witnesses who saw the deceased's body lying in the shamba.

11. As to whether the accused committed the unlawful act that led to the deceased's death, the prosecution relied on both direct and circumstantial evidence. The direct evidence implicating is the unsworn testimony of a child. The law on this issue is that the court can only convict the accused based on unsworn testimony of a child if it is corroborated in material particulars. **Section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* which states:

*Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf*

*of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

12. In **Bernard Kungu Kariuki v Republic NRB CA Criminal Appeal No. 362 of 2012 [2014] eKLR**, the Court of Appeal observed as follows regarding the unsworn testimony of children:

*The fact that the evidence of the three children was unsworn does not in our mind render it valueless. The said evidence was admissible and credible...it is a settled principle of law that where a child of tender years gives unsworn testimony then that evidence ought to be corroborated before the trial court can rely on it to sustain a conviction.*

13. In her direct testimony and in cross-examination, PW 1 stated that she saw the accused follow the deceased with a panga and cut her. Although she did not know him before the material day, when cross-examined she told the court that the deceased had told her his name before the assault. Her evidence that the accused and deceased had a verbal altercation before the incident and the fact that the incident took place in broad daylight leaves very little room for mistaken identity. PW 1 was firm clear as to what took place and I am satisfied she was telling the truth. The fact that she saw the accused cut the deceased is corroborated by the evidence of other witnesses who confirm that they found the deceased had been decapitated in her shamba. She also identified the panga that the accused used to cut the deceased.

14. Even if I disregard the direct testimony of PW 1, the circumstantial evidence pointing to the deceased is, in my view, watertight. Although, PW 8 did witness the incident, she was at the home and her testimony put the accused at the *locus in quo* carrying the panga he used to slay the deceased. The testimony of PW 2 also put the accused at the place of the incident with panga in hand. The testimony of PW 1, PW 2 and PW 8 place the accused squarely at the deceased's home before and after her death. I therefore reject the accused's defence that he was Bodi when the incident took place.

15. In addition to the direct and circumstantial evidence, the prosecution led evidence of motive. In **Choge v Republic [1985] KLR 1**, the Court of Appeal considered the issue of motive and held that:

*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.*

16. Although the accused denied that he had a disagreement with the deceased, PW 4 told the court that on the previous day, the accused had threatened the deceased with death if she did not allow him to cut her tree to make charcoal. PW 1 also recalled that on the material morning, the accused and deceased quarrelled over the deceased's tree. These threats provide further evidence that the accused clearly intended to assault the deceased.

17. The totality of the evidence is that on the material day, the accused had a quarrel with the deceased over her tree. They parted and when the deceased went back to her shamba, the accused followed her, struck her on the head with his panga several times and left the scene with his panga. His behaviour and statements he made to PW 1, PW 2 and PW 8 after killing the deceased betrayed his felonious intent.

18. In determining the question of malice aforethought, the court is entitled to take into account 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**). In this case, the deceased sustained cuts on the head that lead to partial decapitation. The head injuries were inflicted by vicious cuts with a panga could only have been intended to cause grievous injury if not death. These injuries were consistent with the unlawful killing of the deceased actuated by malice aforethought within the meaning

of **section 206(a)** of the *Penal Code*.

19. I therefore find the accused, **THOMAS OTIENO ATELA** guilty of the murder of **PHILISTER MONYI NGERE** contrary to **section 203** 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 Achura, Advocate for the accused.

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