



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CRIMINAL CASE NO. 66 OF 2014

BETWEEN

REPUBLIC.....PROSECUTION

AND

DAVID OCHIENG OWUONDO.....ACCUSED

JUDGMENT

1. On 27th October 2014, this court was informed that the accused, **DAVID OCHIENG OWUONDO** had murdered **NICHOLAS ODHIAMBO OGADA** (“the deceased”) on 1st July 2014 at Nyahera Sub-location, Kisumu West 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)*. After the accused pleaded not guilty, the prosecution marshalled 7 witnesses while the accused elected to give sworn testimony. The prosecution case was as follows.

2. On 10th May 2014, Elly Ogalo Aloo (PW 6), who owned a video hall at Dago market, Nyahera, recalled that while he was at his hardware shop, he was called to go to the video hall as some customers were fighting. When he arrived, he found the accused, whom he knew as Solo, and the deceased outside the hall. The deceased who was laying on the ground bleeding. When he inquired from onlookers what had taken place, he was told that the accused confronted the deceased about smoking in the hall whereupon a fight ensued between them.

3. Nicholas Otieno Ouko (PW 3), who was in the hall at the material time, testified that the accused, whom he knew as Solo, and deceased started quarrelling when the deceased started smoking in the hall. He told the court that the accused followed the deceased after he left the hall. After a while, he heard screams and when he went outside, he found the deceased on the ground with an injury on the back side of the neck while the accused was nowhere to be seen. PW 3 immediately called the deceased’s brother, Malon Olang Oganda (PW 1).

4. PW 1 recalled that on that evening, the deceased had passed by his stall at Dago market and informed him that he was going to watch a football match at the video hall. After a while PW 6 called him and told him that his brother had been injured. He rushed to the hall where he found his brother lying in a ditch with head injuries. Although he could not respond the first time when PW 1 asked him what happened, he later told PW 1 that, “Solo has killed me.” As the time he did not know who Solo was but when he asked around, he was informed that Solo had gone to Nyahera Hospital. He took the deceased’s phone and called the accused on the phone. While he was at the hospital, he could hear the accused’s phone ringing.

The accused picked the call and asked him to be forgiven as he did not know what he had done.

5. The deceased was first taken to Nyahera Hospital and then to Jaramogi Odinga Oginga Hospital (“JOOTRH”). His mother Mary Akeyo Ogada (PW 4) went to see the deceased in hospital on the next day. She noted that he had an injury on the neck which had been bandaged. The deceased told her that it is Solo who had assaulted him. She testified that the deceased was discharged but he did not get better. He was taken to Port Florence Hospital for further treatment but his condition did not improve. He was again discharged and but his condition deteriorated until he died on 1st July 2014.

6. On 3rd July 2014, Sergeant Kandawala Mukanda (PW 5) recalled that he received a report of the deceased’s death from PW 4. She reported that he had been assaulted on 10th May 2014 at Dago. When he booked the report but also found that the accused by the name Solo had made a report at Dago Police Post that he had been assaulted by the deceased. He investigated the matter, took witness statements and organised for a post mortem to be done and thereafter decided to charge the accused.

7. The post-mortem on the deceased’s body was done by Dr J. T. Massawa on 16th July 2014 at JOORTH. Dr Patrick Omondi (PW 7) produced the medical report. The key observation by Dr Massawa was that there was a fracture of the lower cervical spine and left clavicle. He concluded that the deceased died from a closed injury of the cervical spine secondary to trauma.

8. In his sworn defence, the accused admitted that on the material he was at Dago watching football at the hall. He testified that the deceased came towards him and started blowing smoke at him. When he walked out of the hall, he encountered the deceased and two other people he did not know. They started assaulting him until he lost consciousness. When he recovered, he found himself in a ditch. He proceeded to Dago Police Post to report the incident. He was referred to Nyahera Hospital where he was treated and issued with treatment notes which he produced in evidence. He told the court that although he was given a P3 form it was not filled as the doctor demanded Kshs. 3,000/- which he did not have. After treatment he went back to work as turnboy servicing the Migori-Kisumu route until he was arrested after 3 months.

9. To prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, 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. As regards the cause of the death, the evidence is clear that the deceased was assaulted and that died as a result of the injuries sustained after the assault. PW 1, PW 3 and PW 6, who saw the deceased immediately after the assault confirmed that the deceased had been injured on his head particularly around the neck. These injuries are consistent with assault on the neck as confirmed by the post mortem done by Dr Massawa. I therefore find and hold that the deceased died and he died as result of assault on the neck which resulted in a fracture cervical spine.

11. The next issue is whether the accused assaulted the deceased. PW 6 testified that according to his investigation the accused attacked the deceased with a piece of wood after the deceased had been fighting in the hall. Although he told the court that he had been given this information by PW 6, PW 6 told the court that by the time he arrived, the accused and deceased were outside the hall and the deceased was on the ground. He told the court what he had been told and did not witness the fight. PW 3, who was in the hall, saw the accused and deceased fight then he saw the accused follow the deceased outside. He only heard screams and when he went outside, he found the deceased had been injured.

12. Although no one saw the actual assault, the evidence pointing to the accused is irresistible and it points to the accused alone. In addition, there are the statements made by the deceased to PW 1 and PW 4, that the accused, who was known as Solo, had assaulted him. These statements, having been made by the deceased after his assault and prior to his death, fall within the definition of dying declarations and are admissible under the provisions of **section 33(a)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Such statements must however be received with the necessary caution and circumspection although is it not a requirement of law that they must be corroborated to support the conviction (see *Choge v Republic* [1985] KLR 1 and *Pius Jasunga s/o Akumu v R* [1954] 21 EACA 331).

13. In his defence, the accused admitted he was at the hall and although his case was that he was assaulted by strangers, the evidence suggests otherwise. When he went to report the matter at Dago Police Post he recorded that he had been assaulted by someone known to him. The P3 form he produced was clear on this point. Moreover, his story that he was beaten and left unconscious was inconsistent with the testimony of PW 1, PW 3 and PW 6 who arrived at the scene immediately after the incident and found the deceased on the ground. The accused was initially present and then he ran away. He was therefore not beaten by the strangers as alleged. The totality of the evidence is that the accused and the deceased fought and the accused inflicted the injuries on the deceased that led to his death.

14. I now turn to consider the issue of malice aforethought. All the witness testified that the accused and deceased fought. From the treatment notes issued to the accused at Nyahera Hospital, the accused sustained bruises on the hands, eye, face and mouth. None of witnesses who testified saw the weapon that was used although the accused must have used a weapon or blunt object. The prosecution failed to prove malice aforethought beyond reasonable doubt. I therefore find and hold that the accused did not intend to kill the deceased.

15. I therefore find the accused, **DAVID OCHIENG OWUONDO** guilty of manslaughter for the unlawful killing of **NICHOLAS ODHIAMBO OGADA** contrary to **section 202** of the ***Penal Code*** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 23rd day of October 2017.

D.S. MAJANJA

JUDGE

Mr S. M. Onyango and Ms Ayieta, Advocates for the accused.

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