



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CRIMINAL CASE NO. 25 OF 2011

BETWEEN

REPUBLIC.....PROSECUTOR

AND

HAROLD OKELLO OMONDI.....ACCUSED

JUDGMENT

1. The accused, **HAROLD OKELLO OMONDI**, was charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 24th March 2011 he murdered one **PETER ONYANGO ORIEDI** (“the deceased”) at Ahomo Village, Marenyo sub-location, Siaya District within Nyanza province. After the accused denied the charge, hearing of the case commenced before Ali-Aroni J., who heard two witnesses. The case did not take off for some time before I took over and completed it. The prosecution called 6 witnesses to prove that the accused assaulted the deceased with a panga and he died as a result.

2. Mary Ann Odhiambo (PW 3) recalled that on 24th March 2011 at around 5:00pm, she was looking for the deceased when saw him arguing with the accused. The accused was holding a panga. She heard the accused tell the deceased that he would cut him and the deceased was asking him why. As she approached them, she saw the accused cut the deceased on the shoulder with a panga. PW 3 told the court that the deceased tried to run but the accused caught up with him and continued cutting him with the panga. PW 3 raised alarm and other villagers came and restrained the accused.

3. On the same evening, the deceased’s niece, Patricia Owuor Odhiambo (PW 5), had seen the deceased herding his goats before going to the river. While at the river, she heard people screaming the accused’s name from the direction of her home. She ran to the direction of the screams and found the accused holding a panga while the deceased had his hands up. She heard the deceased say that the accused was killing him whereupon the accused cut him with the panga. PW 5 testified that after being assaulted, the accused stumbled back to his house.

4. PW 3 testified that the neighbours, who responded to the alarm, came and assisted to take the deceased to the hospital while PW 5 went to report the incident at Sinaga Police Post. The deceased was rushed to Sagam Hospital but due to the seriousness of the injuries, he was taken and admitted at Siaya Level 4 Hospital. PW 3 stated on cross examination that when she went to visit him in hospital the deceased was all bandaged but could talk and walk. The deceased was discharged, went home, but after three days his condition began to deteriorate. He was taken to Siaya Level 4 Hospital where the doctors advised that he

required further treatment. The deceased passed away on 9th April 2011 at Moi Teaching and Referral Hospital in Eldoret.

5. The duty officer at Sinaga Police Post on 24th March 2011, PC Isaac Mwaura (PW 4), recalled that PW 5 arrived at 8.00pm and reported that the accused had assaulted the deceased with a panga. After a while, the accused was brought by members of the public together with the panga that he was alleged to have assaulted the deceased with. PW 4 testified that he visited the deceased at Siaya District Hospital on 25th March 2011 and recorded his statement. He forwarded the matter to Yala Police Station for further investigations.

6. The investigating officer, Chief Inspector Michael Were (PW 6) testified after investigations, the accused was charged at Siaya Law Courts for the offence of causing grievous harm to the deceased in **Siaya Principal Magistrates Criminal Case No. 195 of 2011**. On 12th April 2011, the charge was withdrawn and the accused charged with murder after the death of the deceased.

7. In his sworn testimony, the accused told the court that his father died in 1996 when he was about 10 years old. His mother remarried and they moved to Kitale. In 2010, he decided to move back to his father's home at Ahomo Village but his extended family was hostile to him as they had divided his father's land among themselves. The accused recalled that on the material day, he returned home and found the deceased, PW 3 and a relative, Charles Onyango, a brother to PW 5, in a discussion. He also saw the deceased's goats grazing on his maize farm. He asked them why they allowed the goats to destroy his maize. They told him that the maize field was their grandfather's. The accused chased the goats away and started arguing with Charles over the issue. Charles took a stick, hit him and they began fighting. As they fought, PW 3 and the deceased joined in and started hitting him with sticks. The deceased came with a panga and cut the accused on the arm. The accused raised alarm and the villagers came to his aid. One of them grabbed the panga from the deceased and the accused saw him fall to the ground wounded. The accused went to report the matter to the police post and while there, PW 5 came with other people and reported that he had assaulted the deceased and he was arrested.

8. Apart from establishing the fact and cause of death, the prosecution must establish that the accused committed the unlawful act which resulted in the death of the deceased and that he did so with malice aforethought. In **Aboud Rogo Mohammed & 3 others v Republic Criminal Case No.91 of 2003 [2005] eKLR**, the court stated that:

In a charge of murder, it must be shown that the accused's conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought. This is a technical term and it has a technical meaning quite different from the ordinary popular meaning of the two words.

9. The deceased was assaulted on 24th March 2011 and he died on 9th April 2011. Before he died, he was examined by Simon Nyamusembe (PW 1), a clinical officer at Siaya who noted the following injuries; bruises on the left side of the face, cut wound at the back measuring 10 cm long and 0.5cm deep, cut wound on the left hand measuring 15cm around 4.5cm deep, cut wound on the right lower limb, laterally on the thigh. PW 1 opined that the injuries could have been caused by a sharp object.

10. Dr Bob Owino (PW 2) produced the post mortem form prepared by Dr Peter Asava who conducted the post-mortem at Siaya Sub-District hospital on 14th April 2011. Dr Asava noted that the deceased had external injuries as follows left distal ulnar bruise measuring 4 cm, right distal ulnar wound, right thigh lateral bruise measuring 4 cm and right axillary wound with evidence of suturing measuring 12cm extending to the right posterior acromion. Dr Asava concluded that the deceased died from a blood clot in the pulmonary blood vessels. The underlying cause, according to Dr Asava, was hospitalisation due to assault.

11. PW 3 and PW 5 testified that the deceased was cut several times with a panga. The initial report of the

injuries, as evidenced by the P3 medical report produced by PW 1, confirm that he suffered several cut wounds for which he was hospitalised. The post-mortem confirmed as much and the direct cause of the deceased's death was that he had been hospitalised due to the injuries sustained following the assault. In other words, the deceased would not have died absent the injuries. I therefore find and hold that the deceased died and he died as a result of the injuries inflicted on him by a panga.

12. As to whether the accused is the person who assaulted the deceased, the direct testimony of PW 2 and PW 5 is that the accused, while armed with a panga, was arguing with the deceased. PW 3 saw him strike the deceased not only once but several times as the deceased tried to run away. The possibility of mistaken identity was excluded by the fact that the incident took place in broad daylight and the accused, deceased and witnesses knew each other as they were relatives.

13. The deceased recorded a statement before he died in which he gave an account of the incident. This statement is admissible as it falls within the definition of a dying declaration under the provisions of **section 33(a)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. This statement must however be received with the necessary caution and circumspection although it is not a requirement of law that it 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*).

14. In that statement recorded by PW 4 on 28th March 2013 at Siaya District Hospital the accused stated as follows:

I am the above named Luo male and married and a farmer at Marenyo and I do remember on 24/3/2011 at about 1830hrs when I was looking after my sheep at my Shamba, one male by the name Harold Okelo Odianga was cutting the fence that boulder my Shamba, he told me that my sheep had eaten his vegetable. I do recall Haron telling me that he will cut me with that panga.

I do recall Haron come with his panga and I do recall Miss Mary Odhiambo asking him what have I done and Haron didn't respond to her instead he come towards me and started cutting me using his panga. I do recall he cut my right hand when I tried to block his panga. I do recall I asking Haron why he wanted to kill me and instead he went on cutting me. When I was running away he cut me at the back of right hand then he cut me on the right leg when I was entering my house. Then he used the same panga to slap me on the face.

I do recall Haron went on and used the same panga to cut me on the left hand and on the left shoulder.

I do recall he ran away and entered to his father compound then member of the Community came and took me to Sagam hospital then at Sagam Hospital I was not admitted and I was referred to Siaya Hospital where I was admitted on the same day at 1930hrs. The following day they took me to X-ray room and that is all I can state.

15. I am satisfied that the statement was made when the deceased had the capacity to express himself as testified by PW 3 who had seen him in hospital and PW 4 who took his statement. The contents therein are mirrored by the testimony of PW 3 and PW 5 as regards that series of events and to cap it all the deceased's description of injuries sustained is consistent with that in the P3 medical report and post mortem form.

16. Against the prosecution evidence is the accused's defence that he did not assault the deceased. He alleged that it is the villagers who came to rescue him that assaulted the deceased. I reject this line of defence because the testimony of PW 2, PW 5 and the deceased's statement are all clear that the accused was the one who assaulted the deceased. The accused also stated that he was initially quarrelling with Charles Onyango but this issue was not put to PW 2 and PW 5, who were direct witnesses, in cross-examination. The deceased's statement was also silent on Charles Onyango. The fact that he sustained injuries is because he was assaulted, not by the deceased, but by the villagers who had come to help the deceased.

17. The evidence of PW 2 and PW 5 is also clear that the deceased did not have a panga and after he was assaulted he stumbled back to his house while the deceased continued to cut him. Since the accused is the one who initiated the assault and he attacked the deceased who was not armed, I reject any suggestion that that the accused was attacked as a result of a family feud or that the witnesses were motivated to frame him on account of the land issues. The sum of all the evidence is that the accused is the person who committed the unlawful act that led to the deceased's death.

18. I now turn to the issue whether the accused killed the deceased with malice aforethought. The testimony of PW 3 and PW 5 taken together with the deceased's statement is that the accused person used a panga to cut the deceased several times even after the deceased asked him why he wanted to cut him and even after he started running away. PW 3 recalled that he did not stop cutting him even when the deceased started running away. The medical report and post-mortem form confirm that he suffered several cut wounds inflicted by the panga which was produced in evidence. All this evidence goes to show that the accused's act was deliberate and intended to cause grievous harm or death. It also negates any notion of provocation or self-defence. I am therefore satisfied that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

19. I therefore find the accused, **HAROLD OKELLO OMONDI** guilty of the murder of **PETER ONYANGO ORIEDI** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 27th day of November 2017.

D.S. MAJANJA

JUDGE

Mr Yogo, Advocate for the accused.

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