



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 48 OF 2012

BETWEEN

REPUBLIC.....PROSECUTOR

AND

WALTER ODHIAMBO OGUYO.....ACCUSED

JUDGMENT

1. The accused, **WALTER ODHIAMBO OGUYO** was charged with the murder of **KEVIN OTIENO OBONYO** contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The murder took place on 10th July 2012 at East Katieno Sub-location, Kisumu West District within Siaya County. After pleading not guilty, the prosecution called 5 witnesses. I completed hearing the case after Chemitei J., had heard two witnesses. The accused gave sworn testimony in his defence.

2. The fact and cause of death is not disputed. Dr Abiero Joram (PW 5) produced the medical report on behalf of Dr Ochola who conducted the postmortem on the deceased body of 12th July 2012 at the then New Nyanza Provincial General Hospital. The main observation by the doctor was that there was a deep cut on the left side of the head extending from the temporal to the parietal region which could be seen on internal examination. He certified the cause of death as intracranial haemorrhage secondary to a deep cut on the skull.

3. The prosecution case was based on direct evidence. The key witness George Owino Omondi (PW 4) testified that on the evening of 9th July 2012, he was at home tethering his cows when he heard his cousin, the accused, shouting abuses about his father. As he went out to confront him, he could see the accused pacing up and down. The accused picked up a panga which was near a mango tree and as he continued coming towards him, while still shouting, PW 4 decided to go to a nearby house. Alice Otieno (PW 2) appeared and tried to calm the accused while telling PW 4 to leave the accused alone. PW 4 recalled that the deceased who was in a nearby house, heard the shouting and also emerged to tell the accused to go home.

4. PW 4 further testified as PW 2 came to calm the accused down, the accused lifted his panga as if to cut her but she bent down to avoid being cut. Since the deceased was behind PW 2, the accused cut him on the head causing him to fall to the ground. PW 4 saw the accused raise the panga again but the deceased's brother, Fredrick Ouma Obonyo (PW 1) intervened by holding the panga but he too was injured in the course of trying to take the panga and after a struggle, the panga fell.

5. PW 1 recalled the on the material day, he heard some shouting as he was coming from the shamba. He saw the accused cut the deceased with a panga and as he was going to cut PW 2, he rushed there to

intervene by trying to take the panga but his fingers were cut in the process. He told the court that deceased had tried to intervene when the accused and PW 4 were quarreling.

6. PW 2 told the court that as she was coming home, she heard people shouting. She found the accused and PW 4 standing apart from each other. She recalled that the deceased, who was standing at a distance started coming towards the accused and PW 4. She asked why the accused and PW 4 were quarreling. PW 4 told her that the accused was abusing his parents. The deceased then called the accused and told him to stop abusing their parents and that he should go home. PW 4 further testified that she suddenly saw the accused collapsing while bleeding.

7. Polycarp Odongo Okota (PW 3) was at home when he heard two people quarrelling. He recognised the voices of the accused and PW 4 whom he knew since childhood. When he went outside, he could see them facing each other from his house and hear them exchanging words. He then saw the deceased and PW 2 going towards the accused and PW 4 in an attempt to calm the accused. PW 2 was standing in front of the deceased when the accused swung the panga as if to hit PW 2 but she moved and he slashed the deceased instead.

8. By the time the deceased collapsed, other villagers had come to witness the commotion. The deceased, who was now bleeding profusely, was taken to Kombewa Hospital but due to the seriousness of his injuries, he was referred to then Nyanza Provincial General Hospital where he died.

9. In his sworn testimony, the accused denied that he assaulted the deceased. He recalled that on the material day, he was in his shamba when PW 4 confronted him with a rungu and accused him of abusing his father. When PW 4 started assaulting him, he saw him remove a panga from his trouser, he became afraid and started running away. In the meantime, the deceased who was nearby, saw what was happening and started warning PW 4 to leave the accused. As the accused ran away, he saw the deceased and accused struggling as the deceased tried to take away the panga from PW 4. The accused testified due to the injuries he had sustained from the assault, he collapsed and only woke up on the next morning. He went to the police station to report the assault but was arrested on suspicion of being having assaulted the deceased.

10. The second issue for consideration is whether the accused caused the unlawful act that led to the deceased's death. This is a case where the key witnesses saw what happened on the material evening. The incident took place in the evening between 5.00pm and 6.00pm and the accused and all the witnesses knew each other as they were relatives. The collective evidence of PW 1, PW 2, PW 3 and PW 4 is that the accused had a panga when he was quarreling with PW 4 when PW 2 came to calm him down. The deceased also came after hearing the shouting and while PW 2 was still talking to accused, the accused swung his panga as if to cut PW 2 but she avoided being cut so the panga cut the deceased instead.

11. I reject the accused's defence that implied that PW 4 is the one who assaulted the deceased with a panga after the deceased prevented PW 4 from assaulting him. The testimony of the witnesses was consistent in material respects in so far as they all observed what was happening from different vantage points. The entirety of the evidence is that it is only the accused who had a panga and the injuries inflicted on the deceased were consistent with the one deep cut on the head with a sharp object as described by the witnesses. I find and hold that it is the accused who inflicted the deadly injuries on the deceased which resulted in his death.

12. In the submissions, counsel for the accused suggested that the accused was in his shamba carrying on his activities when he was attacked by the deceased and others. The question then is whether the accused acted in self-defence? I have already rejected the accused's version of events that the accused attacked him. However, the question for the court is whether the accused believed he was under threat from the deceased or PW 4. There is testimony from PW 2 that PW 4 had a rungu but the testimony of PW 2 that PW 4, with whom the accused was quarrelling, had already left when PW 2 came to calm down the accused. According to PW 3 both the PW 2 and the deceased had come to calm the accused down when he became wild. The accused would have slashed PW 2 but he cut the deceased instead. Even after slashing the deceased, he attempted to cut PW 2 with the panga but PW 1 intervened and held the panga

and was cut on his hands.

13. By the time, the accused was assaulting the deceased, PW 4 had already retreated and it is only when PW 2 and PW 4 came to calm him down that he decided to use the panga. Even if I accept that PW 4 had a rungu, he had left and the accused proceeded to cut the deceased and when the deceased collapsed, he once again tried to cut PW 2. Furthermore, there is evidence that the accused came shouting abuses at the deceased's and PW 4's father. It is him who was looking for a fight. I therefore reject any notion of self defence.

14. The accused knew that the use of his panga to assault someone would probably cause death or grievous harm to any person in sight. I find and hold that the prosecution proved that malice aforethought in terms of **section 206(b)** of the **Penal Code** which defines malice aforethought as:

206(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some other 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.

15. I therefore find the accused, **WALTER ODHIAMBO OGUYO** guilty of murder of **KEVIN OTIENO OBONYO** contrary to **section 203** as read with **section 204** of the **Penal Code** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 20th day of November 2017.

D.S. MAJANJA

JUDGE

Mr Ariho, Advocate for the accused.

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