



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 44 OF 2014

BETWEEN

REPUBLIC PROSECUTOR

AND

ELISHA OGUTU ATIENO ACCUSED

JUDGMENT

1. On 31st October 2014, this Court was informed that on 21st September 2013 at Lower Kwandiku Sub-Location, Kanyamwa Central Location, Ndhiwa, **ELISHA OGUTU ATIENO** (“the accused”) jointly with another person not before the Court murdered **S O N**.
2. The prosecution’s case was that at around 10.00am on 21st September 2013, the deceased had gone to his shamba at Iyiembe Village when the accused and another person, who were armed, attacked him. They cut him with their weapons and fled. The accused was arrested a year later. The accused pleaded not guilty and the trial proceeded a pace with the prosecution calling seven witnesses. The accused gave sworn testimony and called two witnesses.
3. The prosecution’s key witness was the deceased’s 12 year old son, **V O O** (PW 1). After a voire dire, I directed that he gives unsworn testimony. He recalled that on the morning of 21st September 2013 at about 10.00am, he was going to the shamba. When he was about two metres away, he saw the accused, whom he knew as a neighbour, assaulting his father with a panga and a spear. The accused was with another person. PW 1 told the court that the accused cut the deceased on the right hand and right leg. When the two assailants saw him they started chasing him. He ran home and informed his brother’s wife, **M A O** (PW 2) what was happening.
4. PW 2 told the court that on the material day, she was at home when PW 1 came and told her that the accused was killing the deceased who was her father-in-law. Together with PW 1 and another sister-in-law, **A A** they rushed to the scene which was near a footpath. PW 3 recalled that she saw the accused and another assailant **Omollo**, at a distance of about 20 metres, running away from them carrying pangas. She recalled that she did not see their faces. When she found the deceased, she noted that he had been injured on the leg. PW 2 and her sister-in-law began raising alarm causing people to come to the scene. In the meantime, PW 2 called her husband **F O O** (PW 4).
5. PW 4 told the court that on the material day he was at Mirogi Center, when PW 2 called to inform him that his father, the deceased, had been killed by the accused. He immediately proceeded to the scene and found his father lying in the shamba surrounded by PW 1, PW 2 and other villagers. He observed the deceased had cuts on the back, right leg and right side of the chest at the ribs. He

immediately rushed to Ndhiwa Police Station and came back with police officers. The police officers arrived, took photographs and collected the deceased's body to the mortuary. PW 4 accompanied the body which was taken to Homa Bay District Hospital Mortuary.

6. The deceased's wife L A O (PW 3) told the Court that she was in Ahero when PW 2 called her and informed her that her husband, the deceased, had been killed. She immediately left for Ndhiwa. Along the way she met and boarded the vehicle taking the deceased body to the Homa Bay District Hospital Mortuary.
7. One of the officers who arrived at Iyiembe Village that fateful morning was PC Shadrack Melly (PW 7). Upon arrival, the officers were directed to the scene which was about 10 metres from the homestead. PW 7 told the Court that there was a group of people gathered around the deceased who was lying face up in a pool of blood. PW 7 turned the body and found two deep cuts on the back which went through the clothes and a deep cut on the right foot which went through the gumboot he was wearing. PW 7 took photographs of the scene which he later handed over to Corporal Shem Ondiek Mogaka (PW 6) for processing. After interrogating members of the public who were present, he left with the deceased's body accompanied by the PW 1, PW 2, PW 3 and PW 4 who went to the police station to record their statements. After recording statements, PW 7 organised for the body to be taken to Homa Bay District Hospital Mortuary for post mortem.
8. The post mortem on the deceased's body was conducted by Dr Ayoma Ojwang on 26th September 2013 at Homa Bay District Hospital Mortuary after it was identified by PW 3 and PW 4. Since Dr Ojwang had passed away during the trial, the post-form was produced by Dr Fredrick Ochieng (PW 5) under the provisions of **Section 77** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. He confirmed that he had worked under Dr Ojwang for about six years and was familiar with his handwriting and signature. Dr Ojwang recorded the following observations;

[The deceased] Had 4 very deep cut wounds on his body viz.

- a. *Two very large extensive ones on his back posteriorly (25 X 7 X2)cm³ and (20 X 10 X3)cm³.*
- b. *One at the back of his right lower limb just above the archiles tendon (10X3X2)cm³.*
- c. *The fourth cut on his head anteriorly (31X1X1)cm³.*

Dr Ojwang concluded that the cause of death was severe bleeding due to extensive panga cuts as a result of violent trauma from other persons.

9. When the accused was put on his defence, he elected to give a sworn statement. He told the Court that he lived in the same village as the deceased but denied that he killed him. The accused stated that he used to sell chicken to hotels in Sori. On 21st September 2013 he had gone to Sori to sell chicken and since it was a Friday, he decided to stay at his uncle's place to await payment. He denied that he had fled from the area after the incident and stated that he had remained at home but would continue to do business in Sori. He recalled that he was arrested on 24th October 2014 on the way from church.
10. Loise Achieng Okeyo (DW 2) testified that she was an elder of the Faith Church in which the accused attended. She stated that between 2013 and 2014, she would see him coming to Church every Sunday.
11. Charles Okech Otieno (DW 3) testified that the accused was his nephew. He told the Court that he was used to supply water to hotels in Sori. He recalled that on 21st September 2013 or around that time, he was with the accused at Sori. He testified that the accused would come to Sori on Fridays to sell chicken and stay at his house until he was paid on Tuesday the following week or until such time as he would be paid.
12. In order to secure a conviction for the offence of murder under **section 203** of the **Penal Code**, the

prosecution must prove beyond reasonable doubt that; (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought as defined under **section 206** of the **Penal Code**.

13. The fact and cause of death was established by the post mortem done by Dr Ojwang. He confirmed that the deceased suffered deep panga cuts on his body which led to excessive bleeding. These injuries are consistent with the injuries observed by PW 1, PW 2, PW 4 and PW 7. I therefore find and hold that the deceased died as a result of violent trauma inflicted by a sharp weapon namely a panga causing him to bleed to death.
14. Whether it is the accused who inflicted the injuries that led to the deceased's death turns on the credibility of PW 1's testimony. He narrated to the Court how he saw the accused in the company of another person cut the accused with a panga. The incident took place at about 10.00am which was in broad daylight and PW 1 was about two metres away, which was a sufficient distance for the witness to recognise the accused. Moreover, the accused was a person well known to PW 1, PW 2, PW 3 and PW 4 all of whom confirmed that the accused was a neighbour of the deceased's family.
15. I am convinced that PW 1's testimony was credible as I found his testimony consistent, sufficiently detailed and was not shaken in cross-examination. Furthermore, the testimony was corroborated by other aspects of the evidence. First, PW 1 immediately went and informed PW 2 that he had seen the accused. When PW 2 came to the scene she saw the accused running away. Although she admitted she did not see his face, I am satisfied that since he was a person she had known for a long time, she would easily have recognised him even if he was not facing her. Secondly, the description of the injuries sustained by the deceased were consistent with the manner PW 1 described the attack particularly the cut on the right leg which was evidenced by the cut on the gumboot produced as Exhibit No. 1.
16. In light of the credible testimony of PW 1 and the other witnesses, I reject the alibi proffered by the accused for several reasons. In this respect, I accept the statement of principle stated in **Uganda v Sebyala & Others [1969] EA 204** where the learned Judge quoted a statement by the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where he observed:

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.
17. First, there is no evidence suggesting that the deceased's family manufactured this case to frame the accused. Second, despite the fact that PW 1, PW 2, PW 3 and PW 4 knew the deceased, nothing was suggested to them in cross-examination that the accused used to work in Sori for periods of time selling chicken making it likely that he would have been in Sori at the time. Thirdly, the testimony of DW 3 only shows that the accused used to go to Sori on occasion to sell chicken but it does not in my view, surmount direct evidence mounted by the prosecution. The alibi defence was in effect an afterthought.
18. The accused's conduct after the incident also points to his guilt. After the incident, he took off from the village and was arrested after a year. PW 3 testified that after the incident, the accused and the other assailants all ran away. PW 7 told the Court that PW 3 alerted when the accused appeared in the village. He went to the accused's home and it is the accused's wife who pointed him out when he went to arrest him on 26th October 2014. When cross-examined, PW 7 told the court that the accused's home was about 800 metres from the scene and when he visited the homes of the assailants they had fled. In this respect, I reject the DW 2's testimony that the accused was in the locality before he was arrested as the accused was a well-known person and if he was in the village, he would have been sooner arrested.

19. Finally, I find that there was sufficient evidence of a motive. Under **section 9(3)** of the *Penal Code* the prosecution is not required to prove motive to establish the offence of murder. Motive may however be useful in piecing all the circumstantial evidence together (see *Choge v Republic* [1985] KLR 1 and *Libambula v Republic* [2003] KLR 683). Although there was direct evidence implicating the accused, **PW 3 and PW 4 testified that there was dispute between the deceased and the accused's brother from whom the deceased had bought land and wished to have the land transferred to him.**

20. The totality of the prosecution evidence is that the accused acting with another person is one of the people who inflicted the injuries on the deceased which led to his death. It is also clear that the cuts inflicted on the deceased's body demonstrate malice aforethought as do the extent of the injuries. These injuries could only have been intended to cause the death of or do grievous harm to the deceased. I therefore find that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

21. I therefore find the accused, **ELISHA OGUTU ATIENO** guilty of the offence of murdering **S O N** and I convict him accordingly.

SIGNED and DATED at KISUMU this 24th day of June 2016.

D.S. MAJANJA

JUDGE

DATED and DELIVERED at HOMA BAY this 27th day of June 2016

H.A. OMONDI

JUDGE

Mr Osoro instructed by Osoro and Company Advocates for the accused.

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