



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 60 OF 2013

BETWEEN

REPUBLIC PROSECUTOR

AND

NICHOLAS OKOTH OUMA.....ACCUSED

JUDGMENT

1. **NICHOLAS OKOTH OUMA** (“the accused”) and the deceased **PETER OTIENO OGUR** (“the deceased”) were both motorbike riders. On 6th September 2013, the accused was being carried on a motorbike going home when he met the deceased riding towards Magunga. The deceased stopped the accused and an argument ensued between them whereupon the accused removed a knife and threatened the deceased who ran away. A while later, the accused followed the deceased and stabbed him. The deceased was rushed to the hospital but died on arrival.
2. On 19th September 2013 this court was informed that the accused had murdered the deceased at Homa Village, Samba Sub-Location, Suba District within Homa Bay County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The accused pleaded not guilty. The prosecution marshalled 12 witnesses while the accused elected to make an unsworn statement without calling any witnesses.
3. The accused and the deceased were not strangers to each other. Patrick Achola Nyaburi (PW 3) testified that the deceased worked for him as a motorbike rider. They had agreed that he would ride his motorbike registration No. KMCR 178W and pay him Kshs. 1,800/= per week. When the deceased acquired his own motorbike, he introduced the accused to PW 3 who began to ride his motorbike.
4. As regards the events of 6th September 2013, Fredrick Onyango George (PW 1) testified that he knew the accused, whom he knew as Carlos, and the deceased were from the same locality. He recalled that on the material day, the accused had requested him to ride his motorbike registration No. KMCR 178W as he was not feeling well. The accused called at about 8.00pm and requested to be picked up and taken home. PW 1 picked him up at a bar in Magunga and they proceeded to the accused’s home. They met the deceased riding a motorbike registration No. KMDV 654R along the way. The deceased stopped them, removed the ignition key from the motorbike the accused was riding and an argument ensued between the accused and the deceased. PW 1 told the court that the accused removed a knife and when the deceased saw this, he ran off and the accused followed him. The accused returned and started slashing the tyres of the motorbike KMDV 654R which the deceased was riding. As PW 1 left for Magunga, the accused told PW 1 that he was

- waiting for the deceased. At about 9.00 pm, PW 1 heard people wailing from Magunga Health Centre (“the Health Centre”). When he rushed there, he found the deceased was already dead. He noted that the deceased had injuries on his forehead and left chest.
5. On the same night Julius Ochieng Odingo (PW 4), a motorbike rider who knew both the accused and the deceased, recalled that on the way home from Magunga he found the accused and PW 1 near the accused’s home. He heard the accused say, “*I must kill someone.*” He removed a knife and slashed the tyres of the motorbike belonging to the deceased. Since he had a passenger, he proceeded with the journey but before he could reach his destination, he heard people calling for help. He went back and found people surrounding the deceased who was lying on the ground. He left once the deceased was put on a motorbike and taken to the Health Centre.
 6. Joshua Ogutu Nyonga (PW 2) also testified that he knew both the accused and the deceased as they hail from the same village. He recalled that on the material night at around 8.00pm while he was in his house, he heard someone screaming, “*Jaduong, I am dying.*” He stated that he was referred to as *Jaduong* in the village. Although he could not tell who it was, he nevertheless ran out and followed the screams. He found the deceased lying on the ground bleeding while bleeding. The deceased told him, “*Carlos has killed me.*” The deceased requested PW 2 to assist him to remove the phone and ignition keys from his pocket and to open his shoes. As he was assisting the deceased, people started arriving at the scene. Among the people who came was another motorbike rider, Kevin Okoth Okinyi (PW 8) who assisted in taking the deceased to the Health Centre. PW 2 handed over the keys and mobile phone he was given by the deceased to a village elder who handed over the same to the police.
 7. PW 8 recalled that on the material night he was riding his motorbike with a passenger from Magunga to Kitereka. As he was riding, he saw the accused, whom he knew, by the road. He did not talk to him but rode on. As he was about to reach his destination, he heard people raising alarm. He went back with the passenger and found people had gathered around the deceased who was lying on the ground. He knew the deceased as motorbike rider from the village. He heard the deceased ask for his shoes to be removed. The people present assisted to carry the deceased and put him on his motorbike whereupon he proceeded to take him to the Health Centre. Along the way PW 8 recalled the deceased fell off the motorbike and by the time they arrived at the Health Centre, he was dead. He thereafter went to report the incident to Magunga Police Station.
 8. Sergeant Robert Mutai (PW 12) told the court that at about 8.00pm, on the material night, PW 8 came to the police station to report that the deceased had died as a result of being stabbed by the accused. PW 12 instructed Chief Inspector Stephen Kibet (PW 11), the officer in charge of the Crime Section, to proceed to the scene of the incident. Together with other officers, PW 11 went to scene and found a motorbike registration number KMDV 654R which had flat tyres which he secured. There was also blood on the ground. PW 11 commenced searching for the accused by going to his home which was about 150 metres away but they did not find him. Together with the other motorbike riders, they continued to search for him but did not find him on that night.
 9. In the meantime, PW 12 called him and told him that he had been called by a motorbike rider, Dennis Ouko Nyasoko (PW 5) who had seen the accused along Lambwe Road towards Nyatike in Migori County. PW 11 requested PW 5 to arrest the accused. PW 5 testified that the accused was his nephew and a fellow motorbike rider. He recalled that he has received information that the deceased had been stabbed by the accused. PW 5 further recalled that early in the morning of 7th September 2013, he had taken some customers to Karungu (Sori), Migori County. As he was returning at about 7.00am, he met the accused on motorbike headed towards Sori. He pulled the accused from the motorbike, wrestled with him for a while, overpowered him and tied him with a rope and took him to Sori AP Post from where police officers from Magunga came to take him. Both PW 11 and PW 12 testified that they proceeded to Sori AP Camp where the accused was under arrest. They re-arrested the accused and brought him to Magunga Police Station.
 10. On 10th September 2013, PW 12 organised for a post-mortem of the deceased body to be conducted at St Camillus Hospital Mortuary by Dr Ojwang Ayoma. The body was identified by

relatives of the deceased; Dominic Seko Ogur (PW 6) and Naftali Odira Okuro (PW 7). At the post-mortem, PW 12 took custody of the deceased's t-shirt. Since Dr Ojwang had passed away during the trial, the post-mortem report was produced by Dr David Onyango Nyawade (PW 9) 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 4 years and he was familiar with his handwriting and his signature.

11. The significant finding by Dr Ojwang was that the deceased had two deep stab wounds at the scalp interiorly approximately 6x2x1 cm. There was another at the anterior chest wall between the left armpit approximately 3x1x6cm. The wounds severed the left subclavian vessels causing a lot of bleeding. Dr Ojwang concluded that the cause of death was as a result of severe haemorrhage, deep stab wounds which were penetrative and violent trauma. He also took a blood sample from the deceased. PW 9 opined that the injuries could have been caused by a sharp object as evidenced by the penetrative nature of the injuries. PW 9 also produced a medical report (P3 form) prepared by Dr Ojwang who examined the accused on 9th September 2013, to ascertain his mental status and capacity to stand trial. Dr Ojwang certified that the accused was mentally fit to stand trial.
12. The investigating officer, Sergeant Robert Mutai (PW 12), gave evidence on how he recorded witness statements. When the accused was arrested, he took the accused's clothing namely; a purple jacket (Exhibit No. 3), a reddish T-Shirt (Exhibit No. 8) and a pair of blue jeans (Exhibit No. 9). He also took a T shirt, black in colour with white stripes, on the left side of the chest where there was cut from the deceased. He revisited the scene on 7th September 2013 and took a soil sample where he found a pool of blood (Exhibit No. 7). He also took possession of two bunches of keys respecting the two motorbikes (Exhibit 11A and 11B) and a mobile phone (Exhibit No. 12).
13. PW 12 prepared an exhibit memo (Exhibit No. 6B) forwarding various the exhibits to the Government Chemist, Nairobi. Elizabeth Waithira (PW 10), a Government Analyst at the Government Chemist Nairobi, confirmed that she received several items from PW 12 accompanied by Exhibit No. 6B with instruction to examine and determine the presence and origin of blood. The items were as follows;
 - Blood sample indicated as that of Peter Otieno (the deceased)
 - A stripped T shirt in a khaki envelope marked B indicated as that of the deceased.
 - Soil marked C in a khaki Envelope indicated to have been collected at the scene.
 - A red – T shirt in a Khaki envelop marked D indicated as that of the accused.
 - Two set of keys in a khaki envelop.
 - A purple jacket in a khaki envelop marked F indicated as that of the accused.
 - A blue jeans trouser in a khaki envelop marked G indicated as that of the accused.
 - Blood sample in a bottle marked H indicated as that of the accused Nicholas Okoth.
14. PW 10 examined all the items submitted and reported the results in a report dated 16th December 2015. The result of the examination was that T shirt item B and Item C were heavily stained with blood of human origin. The keys Item E were moderately stained and Item F were moderately stained with blood of human origin. The T shirt item D and the jeans trouser Item G were not stained with blood. On analysing the blood stains to determine the DNA, she determined that the DNA profile generated from the blood stains on the T-shirt, Item B of the deceased, the soil item C collected from the scene and the keys Item E had the profile matching that generated from item A indicated as that of the deceased. Attempts to generate a DNA profile from the jacket -Item F belonging to the accused were unsuccessful.
15. In his unsworn statement, the accused denied that he murdered the deceased. He stated that on 6th September 2013, he left home early in the morning to visit Sukari Industries, Ndhiwa. When he reached the tarmac of Sori to Ndhiwa, he met his cousin who told him his best friend had died and that he needed to go to Sori to sort something out. As they were talking, people gathered and asked him to go with them to the Police Station at Sori. The police officers from Magunga came and took him to Magunga. He was later brought to Homa Bay.

16. 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 by **section 206** of the *Penal Code*.
17. As to the first ingredient of murder, there is no doubt that the deceased died and that he died as a result of a stab wound on the chest. The witnesses who saw the deceased at Magunga Health Centre testified that the deceased had an injury on his chest. The shirt that the deceased was wearing confirms that he was stabbed through the chest close to the heart. The finding by Dr Ojwang confirmed that the deceased was indeed stabbed and as a result suffered serious bleeding that led to his death. Given the nature of the injury, I agree with the opinion by PW 9 that the injury was most likely inflicted by a sharp object or weapon.
18. The next issue is whether the prosecution proved that the accused committed the unlawful act which caused the death of the deceased. The case against the accused is grounded on circumstantial evidence in that no one saw him stab the deceased. In such circumstances, it is important to recall the principle that has been restated by our courts on many occasions, that is, that in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Rex v Kipkering Arap Koske & Another [1949] 16 EACA 135* and *Mwangi & Another v Republic [2004] 2 KLR 32*).
19. In order to form the chain of circumstantial evidence against the accused, the prosecution relied on several pieces of evidence. First, the accused was within the vicinity of the incident. Second, he threatened the accused with a knife and acted in manner consistent with guilt. Third, immediately after the incident, the accused disappeared from the scene and could not be found at his home and was in fact caught trying to run away from the area. Lastly, he had motive to kill the deceased.
20. From the testimony of the witnesses, the incident took place between 8.00pm and 9.00pm. PW 1 was with the accused when an argument arose between him and the deceased threatened the deceased with a knife and caused him to run off. PW 4 saw the accused with the knife slashing the deceased's motorbike tyres and threatening to kill someone. PW 2 saw the accused within the vicinity when passed by but returned when he heard the deceased screaming. When he arrived at the scene, the deceased implicated the accused as the person who was killing him. PW 8 saw the accused within the vicinity of the incident and when he arrived the accused had been stabbed. He is the one who went and made a report of the incident to PW 12. The collective evidence of PW 1, PW 2, PW 4 and PW 8 place the accused at the vicinity of the incident. I would also add that the conditions of identification were most favourable to positive identification of the accused. All the witnesses knew the accused as he was a fellow motorbike rider and they all came from the same village. They all interacted closely particularly with PW 1 who rode with him. In my view, this was a case where there possibility of mistaken identity could not have arisen as the accused was not a stranger. This is further fortified by the deceased's dying declaration heard by PW2 implicating 'Carlos', the accused, as the person who had killed him.
21. PW 1 gave clear testimony of how the accused threatened the deceased with a knife. These threats are confirmed by the testimony of PW 8. The testimony of PW 1 and PW 8 confirm that the accused had a knife which was the likely weapon used to inflict the injury on the deceased. The accused act of slashing the motorbike tyres only adds weight to a possible motive.
22. PW 1, PW 2, PW 4 and PW 8 all confirmed that the accused was not within scene after the incident took place. PW 11 confirmed that he visited the accused home, which was not far, and did not find him. The accused was arrested in the next morning as he was going towards Sori.

According to the testimony of PW 5, the accused had to be wrested and tied before his arrest. That the accused could not be found at his home on the material night, yet his home was within the vicinity of the incident and the fact that he was trying to run away from Magunga buttresses the prosecution's case as his conduct is inconsistent with his evidence.

23. I hold that the totality of the prosecution evidence points exclusively to the accused as the person who stabbed the deceased. He had an argument with the deceased and threatened him with a knife. The accused told PW 1 to leave for Magunga. As the deceased was still within the vicinity, the accused found him and stabbed him twice. The deceased's screams attracted other people who came and took him to hospital where he died. Thereafter the accused fled from the scene and was arrested in the next morning trying to leave the County. The accused's unsworn defence related to the manner of his arrest and did not in any way include the possibility that someone else would have killed the deceased. I therefore find and hold that the prosecution proved the fact that the accused is the person who killed the deceased.

24. The accused's act was deliberate and intentional. After the argument with the deceased, the accused is the one who removed a knife and chased the deceased and even waited for him before he plunged the knife in his chest. The deceased was not armed and there is no evidence that the accused was threatened with violence. The totality of the evidence excludes any notion of provocation or self-defence. Finally, the prosecution alluded to the motive for the action. According to PW 12, the accused complained to the deceased that he was spoiling his name yet he is the one who introduced him to PW 2.

25. 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 stab wound inflicted by a knife near the heart which resulted in severe bleeding. I find that this injury was inflicted by a blow stab pointing to an assault 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*.

26. I therefore find the accused **NICHOLAS OKOTH OUMA** guilty of murdering **PETER OTIENO OGUR** 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 Andabwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.