



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT HOMA BAY**  
**HCCR NO. 6 OF 2012**  
**(FORMERLY KISII HCCR NO. 57 OF 2011)**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**D O O.....ACCUSED**

**JUDGMENT**

1. On 21<sup>st</sup> June 2011 this court was informed that **D O O** (“the accused”) had murdered **MESHACK OMONDI** (“the deceased”) on 9<sup>th</sup> June 2011 at Iyembe Village, Ndihiwa District of Homa Bay Country contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. At the time of his arrest, the accused was a secondary school student in Form 1.
2. I completed the hearing under **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* after the trial had commenced before Maina J. The prosecution’s case, supported by 9 witnesses, was that the accused stabbed the deceased who was his cousin.
3. In order to secure a conviction for the offence of murder under the provisions of **section 203** and **204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;
  - a. Proof of the fact and the cause of death of the deceased.
  - b. That the cause of the deceased’s death was a result of the direct consequence of the accused’s unlawful act or omission.
  - c. Proof that the unlawful act or omission was committed with malice aforethought as defined in **section 206** of the *Penal Code*.
4. Dr Ayoma Ojwang, PW 5, conducted the post-mortem on the body of the deceased on 20<sup>th</sup> June 2011 at Homa Bay District Hospital Mortuary. The body was identified by PW 3, Simeon Oganda Osuta, the deceased’s father. PW 8, PC Peter Gachie, the investigating officer, testified that the body had been removed by from the scene at Iyembe Village and taken to the mortuary for the postmortem.
5. PW 5 observed that the deceased had multiple stab wounds on his body; two were at the anterior chest

and three at the back which all penetrated the chest cavity. Internal examination revealed that two ribs were severed and that there was blood in right chest cavity and the right lung had collapsed. He also noted that there was blood in the pericardium and cavity. The liver had also sustained injury. PW 5 extracted blood samples from the deceased which were forwarded to the Government Chemist. PW 5 formed the opinion that the cause of death was severe bleeding and certified the death accordingly.

6. The injuries observed by PW 5 are consistent those described by PW 8 who found the deceased's body lying in a pool of blood at his home. I therefore find and hold that the deceased died from severe bleeding as a result of multiple stab wounds inflicted on the chest and back.

7. Who caused the injuries which resulted in the death of the deceased? The accused recalled on oath that on the evening of 19<sup>th</sup> June 2011, as he was coming from school, he found the deceased beating his mother, Tabitha Oyugi (PW 4). He was shocked by the act and went to rescue her. As he was trying to get hold of him, the deceased threw a kick at him, missed and fell down. He noticed that the deceased had a knife which also fell. He picked it up and tried to wave it and unfortunately it landed on the deceased who ran towards his home. After the deceased had left, he went to his home and told PW 4 what happened. PW 4 asked him what he was doing with the knife and he informed her that the deceased wanted to stab him. PW 4 told him that they should go to the police station and report the matter. They both proceeded to Ndhiwa Police Station where he handed over the knife. He was arrested and placed in the cells. The accused denied that he had a grudge with the deceased.

8. The case posited by the accused through his advocate's submissions is that the prosecution failed to prove that the accused killed the deceased and that the circumstances of the fight were not proved and that the court should consider the case for manslaughter. The accused by his own admission stated that he had a fight with the deceased. His testimony suggests that he was defending himself or that he was provoked by the act of the deceased beating his mother.

9. The prosecution, on its part, sought to prove that the accused killed the deceased with malice aforethought. The prosecution witnesses testified as follows. PW 1, Grace Achieng Oganda, the deceased's mother, testified that on 19<sup>th</sup> June 2011 between 5.00pm to 5.30pm, while she was at home outside her kitchen, she saw the deceased running towards her bleeding on his back with blood oozing from his mouth. He entered the house and collapsed. Shortly thereafter she saw the accused, armed with a knife and wearing a blood stained vest, follow the deceased but he rushed to back to his home which was nearby. She identified both the knife and the vest which were produced by PW 8 in evidence.

10. PW 2 immediately reported the matter to PW 3, Samson Amolo Owiny, the Chief of West Kachiel location, Riana Division in Ndhiwa District. PW 2 testified that he was a resident of Iyembe village and that he knew the accused and the deceased. He testified that PW 1 came to his home on the evening of 9<sup>th</sup> June 2011, shaken and scared, and informed him that the accused had killed her son. He immediately went to PW 2's home where he found villagers already mourning the deceased. He found the deceased's body lying in a pool of blood at the doorstep of PW 2's house. He observed that the body had stab wounds on the back around the ribs. He called the Commanding Officer, Ndhiwa Police Station who requested him to come to the police station. He went to the Police Station and later returned with police officers who collected the body.

11. PW 4, the accused's mother, testified that on the material day she was at Adek Market when she received a call from her daughter in law informing her that her son had killed the deceased during a fight. When she came home she found villagers at her home mourning while the accused was seated at the doorstep. She decided to go with him to Ndhiwa Police Station. They arrived at the Police Station at about 8.00 pm where they met PC Jephsa Nyatta (PW 7). The accused informed him that he had stabbed the deceased. The accused then handed over the knife and the blood stained T-shirt which he was wearing. PW 7 then arrested the accused and placed him in custody. He handed over the items to PW 8, the investigating officer.

12. PW 8 stated that the Commanding Officer had instructed him to proceed to Iyembe Village and he was preparing to do so, the accused and PW 4 came to the Police Station. He noted that the accused was

wearing a blood stained blue T-shirt and that he had a blood stained knife. These items were handed over to him by PW 7. He produced them as exhibits in this case.

13. PW 9, Lawrence Kinyua Muthuri, a Government Analyst working with the Government Chemist, Nairobi testified that on 23<sup>rd</sup> June 2011, he received four items from PC Justin Munene of Ndhiwa Police Station. These were: Item A-A blood sample indicated as that of Meshack Omondi (deceased). Item B-A bluish sleeveless T-shirt in a Khaki envelope and which was indicated as that of D O O (the accused), Item C-A knife in a Khaki envelope. Item D-A a blood sample indicated as that of D O O (the accused). The instructions were to examine the items and determine the presence and source of blood stains.

14. He conducted a DNA profile of the blood stains on the T-shirt and knife and blood samples and concluded that the DNA profiles generated from blood stains on Item B-T-shirt and Item C- Knife both matched the DNA profile generated from the blood sample A from the deceased. He recorded the findings in a report dated 10<sup>th</sup> August 2012.

15. The totality of the prosecution evidence is the accused stabbed the deceased. His own testimony placed him in the presence of the deceased where injuries were inflicted. PW 4 also saw the accused chase the deceased immediately after the deceased had been stabbed. The Blue T-shirt the accused was wearing and the knife he delivered to the police contained the blood of the deceased as confirmed by the DNA blood profiles conducted by PW 9. This evidence leaves no doubt that the accused is the person who inflicted injuries on the deceased and I so find and hold.

16. Final question is whether the prosecution proved malice aforethought. Malice aforethought is defined in **section 206** of the *Penal Code* as follows;

*Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—*

*a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some 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;*

*c. an intent to commit a felony;*

*d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

17. It is clear from the evidence of the doctor, PW 5 that the degree and extent of the stabbing that the accused did not merely intend to cause the deceased grievous bodily harm, but such grievous bodily harm that ultimately led to death. The issue then is whether the injuries were inflicted in self-defence as the accused seemed to suggest. There is also evidence that the accused may have been provoked by the fact that the deceased attacked his mother.

18. I will deal with the issue of provocation first. For the defence of provocation to hold under **section 207(1)** of the *Penal Code*, the accused must establish the stabbing of the deceased which caused his death was caused by sudden provocation and before there was time for his passion to cool down. The burden on the accused is evidential and the accused need only establish the defence on a balance of probabilities. Provocation as defined under **section 208(1)** of the *Penal Code* as an act which is likely to deprive the person provoked of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

19. The accused's testimony in this respect is, to say the least, an afterthought. His mother, PW 4,

testified that on the material day she had gone to market and came home after receiving a call from her daughter-in-law that the accused had killed the deceased. Her testimony did not allude to any attack by the deceased. No question was put to her in cross-examination to suggest that she had been attacked by the deceased and that the accused came to her assistance. I therefore find that there is no basis for finding that that accused was provoked by the deceased.

20. The law regarding self defence is to be found at **section 17** of the **Penal Code** which states as follows;

*17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.*

21. Recently, the Court of Appeal considered the law regarding self defence in **Ahmed Mohammed Omar & 5 others v Republic NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014]eKLR** stated as follows;

*The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v Morgan [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v Morgan (Supra) it was held that:*

*.....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.*

22. The Court continued;

*Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test. The learned Judge's attention was not drawn to the current position of the English Common Law as regards the defence of self-defence. We believe that had the Judge's attention been drawn to the case of DPP v Morgan (Supra) his decision would have been different.*

23. Accordingly, the issue for determination is whether under the circumstances, the accused believed that his life was in danger to the extent that he was entitled to use force to protect himself. As I have found, the accused version of events that he tried to intervene to stop PW 4 from being beaten is not true. The accused inflicted five stab wounds; two in front of the chest and three at the back negate any notion of self defence. While it possible that the accused and deceased had a fight, the stab wounds inflicted at on the deceased's back could not have been inflicted to repel any attack. The stab wound were inflicted with such viciousness and force that they severed the ribs and caused massive internal bleeding.

24. It is clear that the multiple stab wounds demonstrate malice aforethought as do the number of 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**.

25. I therefore find the accused **D O O** guilty of the murder of **MESHACK OMONDI** and I convict him accordingly.

**DATED and DELIVERED at HOMA BAY this 16<sup>th</sup> day of February 2015**

**D.S. MAJANJA**

**JUDGE**

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

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