



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 1 OF 2013

BETWEEN

REPUBLIC PROSECUTOR

AND

MOSES OCHIENG MATINDE 1ST ACCUSED

JOSEPH ODHIAMBO OKEYO 2ND ACCUSED

EVERLYNE AKINYI MATINDE 3RD ACCUSED

JUDGMENT

1. Moses Ochieng Matinde, the 1st accused, is the husband of Everlyne Akinyi Matinde, the 3rd accused, while Joseph Odhiambo Okeyo, the 2nd accused, is the brother of the 1st accused. On 3rd January 2013, this court was informed that they had jointly murdered Fredrick Otieno Osodo (“the deceased”) on 30th December 2012 at Waware North Sub-Location, Rusinga East Location of Mbita District contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. The accused pleaded not guilty and the trial started a pace before Maina J. I completed it under the provisions of **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The prosecution marshalled 9 witnesses to prove that the accused murdered the deceased. The material testimony of the witnesses was as follows.
3. On 30th December 2012, at 5.00 am, John Otieno Osodo (PW 1) held prayers for the deceased, his first born son, as he was preparing to construct his house on a piece of land about a kilometer away. PW 1’s son, Kenneth Odira (PW 4), and nephew, Godwin Omondi (PW 5), were assisting in the preparations.
4. The construction site was adjacent to a plot occupied by the 1st accused (DW 1). DW 1 had a shop thereon known as Mpeketoni Junction Shop where the 3rd accused (DW 3) worked selling vegetables and other household provisions while the 2nd accused (DW 2) assisted when he was not in school.
5. At about 1.50 pm, while PW 1 was showing the deceased where to construct a gate, the deceased’s vehicle stopped at the Mpeketoni Junction shop. PW 1 thought the vehicle was stuck in the mud so he went there with the deceased. They found PW 4, PW 5 and DW 2 standing and talking outside the vehicle. The deceased went and asked them what was happening. DW 1, who was in front of

- the vehicle, moved to the side. The deceased went to speak to him but DW 1 butted him with his head. The deceased staggered backwards but gained his ground and got hold of DW 1. PW 1 testified that he saw DW 3 came from behind and stab the deceased. The deceased staggered and started vomiting blood whereupon he asked PW 4 and PW 5 to rush the deceased to hospital.
6. Elkanah Sagoro Ogola (PW 2), a fisherman, was part of the group that was helping the deceased erect his home. Hearing what was happening he proceeded to the scene and found PW 4 and DW 2 arguing. He then saw the DW 3 rush from the shop and pierce the deceased in the back with a knife. DW 3 tried to ran away but she fell and threw the knife beside the road. He took the knife and put it inside the vehicle and left the scene. Edward Bolo Gowa (PW 3), who had been assisting the deceased to erect his house, heard screams and went to the scene where he found the deceased had been stabbed. He assisted in carrying the deceased to the vehicle and drove to him to hospital.
 7. PW 4, recalled that he was going to collect water with PW 5 to assist in the construction of the deceased's house. They decided to drive through the Mpeketoni Junction shop compound. He was stopped by DW 2 and when he came out of the vehicle, DW 2 slapped him before he could ask why he was being stopped. At that point his brother, PW 5, who was in the car, came out and told him to go back to the vehicle as he went to speak with DW 2. It is at this time DW 1 came in front of the vehicle while the deceased and PW 1 came to the scene. PW 4 further testified that the deceased went to speak to DW 2 and before they started talking, DW 1 struck him. The deceased staggered and as DW 1 and the deceased held each other, DW 3 came from behind and stabbed the deceased in the back with a knife.
 8. PW 5 testified that PW 4 went to talk to DW 2 while he was left inside the vehicle. He heard DW 2 tell PW 4 not to use that road again and as they spoke DW 2 slapped him. As the two got hold of each other, he came out of the vehicle to separate them and as he did so PW 1 and the deceased arrived. He told the deceased that DW 2 had stopped their vehicle. The deceased then approached DW 1 to talk to him and as they spoke, he saw DW 1 hit the deceased on the chest with his head. He saw the deceased stagger as if to fall but the two held onto each other. As he went to separate them, DW 3 stabbed the deceased on the back with a knife. He got hold of the deceased, who was bleeding from the mouth, assisted to put him in the vehicle which drove to Mbita District Hospital.
 9. Tom Mboya Onyango (PW 6), received a call informing him that the deceased had died. He rushed to Mbita District Hospital and arrived there at about 2.00 pm. He found that the deceased was already dead. He observed that the deceased had a cut on the back and blood was oozing out. He called the Mbita Station Commander to report the death and proceeded there to record a statement.
 10. Sgt Phillip Korir (PW 7) was an Administration Police Officer based at Lambwe AP Post. He recalled that on 31st December 2012 at about 8.00 pm he received a report that a woman who had stabbed a person was in hiding at Koyani. He proceeded to where she was with two police officers and arrested DW 3.
 11. Dr Ayoma Ojwang' (PW 8), the Deputy Director of Medicine – Homa Bay, testified that he conducted an autopsy on the body of the deceased on 1st January 2013 at Homa Bay District Hospital Mortuary. Upon external examination he observed a very deep stab wound on the right side of the back which had penetrated the right chest cavity causing a lot of bleeding. He concluded that the cause of death was severe bleeding due to stab wound. He also examined the three accused persons and found that they were mentally fit to stand trial.
 12. The final prosecution was the investigating officer, PC Edwin Nyongesa (PW 9) who was at the time material stationed at Mbita Police Station. He testified that at about 3.00 pm on 30th December 2012, he received a report of murder which was said to have occurred on Rusinga Island as a result of someone being stabbed and the person had died on his way at the hospital. At the time he received the report, DW 1 and DW 2 were already at Mbita Police Station where they

- had come to make a report. DW 2 had reported that the deceased had slapped him with a panga.
13. He proceeded to Mbita District Hospital with the Commanding Officer where they found the deceased's body in the pick-up vehicle. He also found the knife that was said to have been used to stab the deceased which he produced in evidence. After organizing for the body to be taken to the hospital, he proceeded to the scene. He prepared a sketch map of the scene. He noted that the vehicle was being driven by the deceased's brother through deceased's land and that is where the problem began. He noted that there was blood at the scene. He took statements from witnesses and thereafter arrested DW 1 and DW 2. On 31st December 2012 at 9.00 am while at Mbita Police station, he received information that DW 3 had been arrested by Administration police officers at Koyani. He went there and took her into his custody.
 14. PW 9 further testified that on 1st January 2013, he witnessed the autopsy done on the body of the deceased. He also escorted the accused for mental assessment. After his investigations he concluded that the accused should be charged with the offence of murder.
 15. After the close of the prosecution case, all the accused were put on their defence. DW 1 elected to give unsworn testimony. He recalled that on 30th December 2012 he was at Solea Guest House where he worked and at around 2pm, he heard his wife screaming from Mpeketoni Junction Shop which is about 60 – 70 metres away. He proceeded there and when he reached the gate, he was surprised to see the deceased with PW 1 in front of his shop. He also found Rispa, the wife of PW 1, cutting vegetables and white double cabin pickup parked next to the shop. He found PW 3 pushing PW 4 telling him to get out of the place. PW 2 was also pushing PW 5 telling him to get out his place. As he was approaching, he saw PW 1 assaulting DW 3 but when PW 1 saw him, he left her and turned towards him. He asked PW 1 why he was fighting DW 3 yet it is his family members had attacked her. Before PW 1 could answer, the deceased appeared armed with a panga and told PW 1 to get away so that he could clear him. DW 1 was surprised by the turn of events whereupon he asked the deceased what was wrong.
 16. DW 1 stated that he started moving backwards as he the deceased had a panga and he was bare handed. As he was going backwards, Gerald Osodo, who was beating DW 2, appeared from his back, pushed and kicked him on his leg causing him to stagger. The deceased got hold of him, pushed and kicked him causing him to fall down. The deceased pinned him down with his left hand while holding a panga with his right hand. Before the deceased could cut him, DW 3 appeared and got hold of the deceased from the back. The deceased began to struggle with DW 3. As he stood up and moved towards the shop, he saw PW 3 move to snatch the panga from the deceased and hand it to PW 2. The deceased tried to get the panga from PW 3 but PW 3 pushed the deceased and both the deceased and DW 3 fell down. PW 3 then pushed the deceased into the motor vehicle parked next to the shop. PW 3 came back, got hold of PW 5 and pushed him inside the vehicle and they drove off towards the main road.
 17. DW 1 told DW 3 to take their child home as people had not started gathering at the place. DW 3 told him that the deceased had slapped DW 2 with a panga and had run to his grandfather's homestead. He decided to go to Mbita Police station and on the way to Mbita, he met DW 2 crying. He had bruises and marks on his back. On the way they met their other brother Dickens Onyango Matinde, a motorbike rider, who carried them to police station.
 18. When they arrived at the Police Station, they met PW 9, who welcomed them and told them that he wanted to give them a note for DW 2 to go to the hospital. As he was going to make a report, he met PW 9 who told him he wanted to call John Otieno Osodo. PW 9 told him that his sister was married to PW 1's son called Geoffrey Osodo. When PW 9 came back, he saw his crushing the papers he had written instructions to take DW 2 for treatment to hospital. He left them locked inside the office.
 19. At about 6.30pm, he came back with the Commanding officer who asked him where DW 3 was. When he asked why they were under arrest, he was told that they investigating an incident. DW 1

- told him he had sent DW 3 to Oyani to call Christine Adoyo who was assisting him to pay fees for Joseph Odhiambo. They asked for directions to Christine's home. The Commanding Officer and PW 9 declined to release DW 1 and DW 2 but released Dickens who was later charged with creating disturbance.
20. On the next day at about 8.30am, he was taken to the office of the Commanding Officer where he met DW 3. He also met PW 1 with whom he had a civil case at Kisii High Court namely ***Kisii Civil Case No. 70 of 2012***. When the Commanding Officer asked him whether he knew what had happened to the deceased, he told him that the deceased wanted to cut him with a panga and who wanted to slap PW 3 and the panga was taken by PW 3 from him. He denied that he had committed the offence of murder and that were it not for his wife's screams, he would not have gone to the shop.
21. DW 2 was sworn and he testified that at the material time he was a Form 1 student at Lambwe Secondary School. He recalled that on 30th December 2012, he was in front of his brother's shop weighing and packing sugar. At the same time DW 3 was selling sukuma wiki to some ladies. At about 2.00 pm he heard a vehicle approach from the back of the house. The vehicle came, cut a clothes line that was running across from the house to a tree along the fence and parked near the shop. DW 2 asked them why they passed there and why they cut the line yet there was a main road. PW 4, who driving the vehicle told him that they wanted to prepare the road. When he asked they wouldn't ask for permission to pass through, PW4 replied to him that they would not ask for their parcel of land. PW 4 then got hold of him and slapped him and then PW 5, who was in the vehicle, came out of the vehicle, held his left hand and also slapped him. PW 5 also told him that he could not ask for land which belongs to them.
22. As both PW 4 and PW 5 were holding him, he heard the deceased tell the two of them to leave him. Before he could turn, the deceased slapped his back with the flat side of a panga. When he turned he saw the deceased with a panga. In the meantime, DW 3 was standing about 5 feet away from him. DW 2 then ran to his grandmother's home which was about 100 metres away but she was not there as she had gone to Church. He then went to Solea Guest House to look for DW 1 but he was not there. As the Chief's camp closed, he decided to go Mbita Police Station where he was arrested and later arraigned in court.
23. DW 3 testified under oath that she used to sell cut vegetables at their Mpeketoni Junction Shop. On the material day at about 2.00 pm, she was cutting vegetables while DW2 was packing sugar. She heard a vehicle screeching as it approached the shop from the back and then a loud bang caused by the snapping of the clothes line. Of the two people in the vehicle, she only knew PW 5 who spoke to DW 2 when the car stopped. As they were talking she saw a short person slap DW 2 and the other person came from the car and slap DW 2. She heard DW 2 ask them what had happened to the main road and why they decided to pass through the plot. The first person said they wanted a road to pass there.
24. DW 3 further testified that when PW 5 came out of the car, he asked DW 2 why he was refusing them to prepare a path through the land. She heard DW 2 state that if they intended to build a road they should ask for permission. While DW 3 and PW 5 were talking she saw PW 1 coming with a short person she had not seen before. The short person was running with a panga with which he slapped DW 2. After DW 2 was slapped, she saw and the person with a panga chasing him. She also saw some people appear from the right side of the shop, one person kicked her and another held her from the back holding my chest. She started screaming calling people to come and assist her. As she continued screaming, the people continued to beat her. She saw DW 1 coming from the road in front of the shop and at this point the person chasing DW 2 had not come back.
25. Before DW 1 reached where she was, PW 1 went to talk to DW1. She heard DW 1 tell PW 1 asking why his family was beating her in his presence. She did not hear PW 1's reply. At that time the person who had chased DW 2 with a panga came back. He told PW 1, "*leave me I clear with him.*" PW 1 stepped aside and the person with the panga got hold of DW 1 and lifted the panga as

if to cut DW 1. One of the boys who was beating her at the shop left her, went and kicked DW 1's leg from behind and he slipped as is to fall. DW 1 then shouted, "*why are you killing me, people from Osodo.*" It is then she ran when she heard DW 1 cry, she got hold of the person holding the panga from behind. She saw PW 3 snatch the panga from that person, push him causing both of them to fall down. DW 3 denied that she was holding anything in her hand.

26. DW 3 further testified that PW 3 came back, got hold of the person holding the panga and pushed him inside the vehicle. He also got hold of another brother of his and pushed him inside the vehicle and he drove off toward Mbita.

27. After the incident, she told DW 1 that DW 2 had ran towards his grandmother's place after being slapped and chased by the person who had the panga. DW 1 told her to go to see his sister, Christine Adoyo, at Koyani and inform her what Osodo's family had done. She reached Koyani at about 7.00 pm and stayed there until the next day when three officers came arrested her and took her to Mbita Police Station. She found PW 1 at the Police Station. She also saw PW 9 who came with DW1 and DW2. She denied that she knew the deceased when the Commanding Officer questioned her. She was later arraigned in court for the murder of the deceased. She denied that she killed the deceased

28. After the close of the defence case, the respective advocates filed and exchanged written submissions.

29. On behalf of the defence, Mr Okoth, submitted that several issues were not in dispute namely that the deceased died and he died at Mbita District Hospital and that he was the son of PW 1 who was a brother of one Odoyo Osodo. That Land Parcel **Rusinga/Waware/1302** is one of the parcels which is the subject of **Kisii HCCC No. 70 of 2012** between Odoyo Osodo as the plaintiff and DW 1 as one of the defendants. That the fight took place as the said property **Rusinga/Waware/1302** which is in the name of Odoyo Osodo but is occupied by DW 1. He accordingly framed the issues for determination as follows;

- a. Whether the deceased died as result of murder or manslaughter.
- b. Whether there existed an act of provocation.
- c. Whether any of the accused are guilty or not and if so for what offence.

30. As regards DW 1, counsel submitted that from the testimony of PW 1, PW 4 and PW 5, it was apparent that DW 2 only came to the scene when the quarrel was taking place and he was not armed with the panga whereas the deceased was armed with the panga throughout. That DW 1 went to the police station immediately after to report the incident as the deceased was being taken to hospital. He submitted that there is evidence from the testimony of PW 9 that when he reported to the Police Station, he may not have known that the deceased had died. He therefore contended that DW 1 could not have been guilty of the offence of murder or manslaughter.

31. Counsel submitted that DW 2 had an argument with PW 4 and PW 5 when they came on to the plot in a vehicle. He submitted that after the two had assaulted DW 2, the deceased arrived with a panga and slapped him with the flat side. He ran away from the scene and reported the matter to the police station. He stated that the evidence did not disclose the fact that DW 2 was involved in any way in the death of deceased and cannot he held guilty of murder or manslaughter.

32. Counsel submitted that taking the evidence as a whole, DW 3 did actually stick the knife in the back of the deceased. He, however, contended that the issue for consideration is whether the knife wound caused the death of deceased solely and if so whether the act was premeditated or whether it was done in the heat of the passion caused by provocation or not.

33. Counsel submitted that the prosecution witnesses tried very hard to conceal the fact that the deceased came to the scene with a panga, slapped DW 2 and got into a fight with DW 1 while still holding the panga. He submitted that it is when DW 3 witnessed a the fight between her husband,

who had no weapon and the deceased, who had a panga, and she heard her husband cry that she grabbed the knife she was used to cut the kales and came to her husband's help. He submitted that taking these circumstances into account, DW 3 acted in the heat of passion arising out of the provocation caused by the deceased and his family forcibly entering the land as well as assaulting her husband. Counsel submitted that the facts fell within the definition of provocation under **sections 207 and 208 of the Penal Code**. He cited *Marwa s/o Robi v Republic [1959] EA 660* and *Maina Thuku alias Maitha Nyaga v Republic [1965] EA 496* to support his submissions.

34. As regards the cause of death, Mr Okoth submitted that the death occurred as a result of several *actus interveniens*. These included that the fact the deceased was obese and that he did not obtain immediate care at the time.

35. Mr Oluoch, Senior Assistant Director of Public Prosecutions, submitted that prosecution proved its case against the accused. The thrust of his submissions was that the deceased was stabbed in the back by DW 3 as the deceased and DW 1 were holding each other and DW 1 standing thereby dispelling the notion that DW 1 had been felled and the deceased lying on him. He submitted that the attack was unprovoked.

36. Mr Oluoch further submitted that the prosecution had proved malice aforethought by producing the weapon used, the fact that the deceased was stabbed from behind thus disproving the suggestion that any of the accused were in danger and that other people were using the path yet only the deceased was stopped from using it.

37. He contended that DW 1's unsworn statement dealt with issues that were never put to the prosecution witnesses and that he learnt, not saw, the deceased with the panga yet he was there at the scene throughout the altercations. He contended that DW 2 left the scene after he had been slapped with a panga and was thus unable to testify how the deceased met his death. He condemned the testimony of DW 3 as disjointed, contradictory and incapable of belief and that her disappearance to her sister's place at Koyani was evidence of her culpability.

38. In commenting on the decisions cited by the accused's counsel, Mr Oluoch submitted that the defence of provocation was not available to the accused as at no time was the DW 3 or indeed any of the accused persons under any attack or threat of attack and that by using the knife to stab the deceased with excessive force meant that the act constituted malice aforethought.

39. 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 by **section 206 of the Penal Code**.

40. The first issue for consideration is proof of the fact of death and cause of death. According to the post mortem carried out by PW 8 on 1st January 2012, the deceased died of a very deep stab wound the right of his backside penetrating to the right chest cavity causing massive internal bleeding. The stab wound is consistent with the testimony of PW 1, PW 2, PW 4 and PW 5 who confirm that the deceased was stabbed. Mr Okoth submitted that the deceased's death could have been caused by his obesity and the fact that he did not receive treatment immediately. I reject this argument as the only reason that deceased was taken to hospital is that he had been stabbed and he died not as a result of inadequate or failure of treatment but as a result of the stabbing injury inflicted on him. I therefore find and hold that the deceased died and he died as a result of the stabbing inflicted on him resulting in severe internal bleeding.

41. The next issue is whether the deceased's death was a result of the direct consequence of the accused persons' unlawful act or omission. PW 1, PW 2, PW 4 and PW 5 all testified that they saw DW 3 stab the deceased with a knife in his back. PW 2 saw DW 3 fleeing with the knife after she had stabbed the deceased but she fell and threw the knife which he collected. The knife was produced in evidence as Exhibit No. 1 by PW 9. I have weighed that evidence against the testimony of DW 3 in which she states that she got hold of the deceased from behind and both of them fell down. Although she testified that she did not have a knife, she was the only person who was holding the deceased from his back when he sustained the injury. The knife produced in evidence was an ordinary kitchen knife. DW 2 and DW 3 testified that at about that time she had been cutting vegetables for women at the shop. In other words she had the opportunity and the weapon to inflict the injury. In light of this evidence, I find and hold that it is DW 3 who stabbed the deceased with the knife.

42. The main issue then is whether the stabbing was done with malice aforethought. Mr Okoth posited that DW 3's actions were provoked by the acts of the deceased and his family. **Section 207** of the **Penal Code** describes as "killing on provocation" as follow;

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

Section 208(1) of the Penal Code defines "provocation" as follows-

The term "provocation" means and includes, as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in relation of master or servant, to deprive him 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.

43. The implication of **section 208** of the **Penal Code** is that an unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation. It is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of the passion cause by grave and sudden provocation (see **Wero v Republic [1983]EA 549**). Furthermore, the accused does not shoulder the burden of proving the defence, the prosecution that must marshal evidence to disprove the defence beyond reasonable doubt. In **Kenga v. Republic [1999] 1 EA 141** the Court of Appeal stated, "It is a settled principle of law that the accused does not have to prove provocation but only to raise a reasonable doubt as to its existence."

44. Counsel pointed to several facts from which the court may infer provocation. He pointed to the existing land dispute between the Matinde's and Odoyo's, the fact that the deceased's motor vehicle entered the plot forcibly, that the deceased became violent when he slapped DW 2 with a panga while DW 3 was witnessing the same, that the deceased was armed with a panga when he confronted DW 1 and that DW 3 used a kitchen knife she was using to cut vegetables and only stabbed the deceased once.

45. It is not in dispute that there was a land between the Matinde's and Odoyo's which is evidenced by the law suit filed in **Kisii HCCC No. 70 of 2012**. However on that day, the issue boiled down to what amounted to an act of trespass. From the evidence, the Mpeketoni Junction Shop, is situated on a triangular plot at a junction of two roads. Due to the state of the road, pedestrians and other road users passed through the plot to the other side of the road. On that fateful day, the deceased car driven by PW 4. The car passed by the front of the shop which was a shortcut where pedestrians and other vehicles used to cross to the other side while avoiding part of the main road which was muddy as it had rained. I reject the testimony of DW 2 and DW 3 that the vehicle drove

through the back of the shop. All the witnesses testified that the events of the material day occurred in front of the shop and not at the back. I therefore accept the sketch plan (Exhibit No. 2) prepared by PW 9 as a true representation of the scene.

46. On that day, the act of PW 4 driving through the Mpeketoni Junction Shop plot is what sparked the commotion that attracted people to come. All the witnesses are clear that PW 4 started arguing with DW 2. This argument attracted other people, notably PW 1 and the deceased. Their testimony also points to the fact that DW 1 was present at the scene. I reject his statement that he came following screams by his wife. PW1, PW 4 and PW 5 saw DW 1 have an altercation with the deceased before DW 3 started screaming.
47. What is clear is that DW 1 and the deceased engaged each other. PW 1, PW 4, PW 5 and DW 3 saw them holding each other before DW 3 stabbed the deceased in the back. I therefore find that the deceased had an altercation with DW 1 and they held each other before the deceased was stabbed.
48. Did the deceased come to the scene with a panga? The prosecution maintained that the deceased did not have a panga. PW 1, who came with the deceased in response to the commotion, did not allude to seeing any panga. He witnessed DW 1 head butt the deceased causing them to hold each other before DW 3 stabbed him. Likewise PW 2 did not see the deceased with a panga. PW 4 specifically denied that he saw the deceased with a panga or that he slapped DW 2 with a panga.
49. In cross-examination, PW 5 admitted that in his statement to the police recorded on 30th December 2012, he stated that the deceased came to the scene armed with a panga and slapped DW 2 with it. He however denied he recorded such a statement or that the violence that broke out was provoked by the deceased slapping DW 2 with a panga. When PW 9, the investigating officer, was asked about the issue of PW 5's statement he stated as follows;

I am the investigating officer. I have the handwritten statements of the witnesses (file is given to counsel). This is the statement of Godwill Omondi Osodo [PW 5] both in handwriting and typed. (being asked to read page 3) The typed copy does not have the portion of Fredrick slapping the 2nd accused with a panga. The statement was typed by another officer. This might be a typing error. I relied on the handwritten copy to reach my decision to charge the accused persons. It could be true that the deceased was the first person to become violent at the scene. We did not edit statements of the witnesses. I have admitted this one was edited.

50. Although Mr Oluoch submitted that since the statement was not produced, it should be disregarded, I find that the evidence is important and cannot be wished away. First, PW 9 admitted that there was such a statement and that it was tampered with. He did not give a reason or explanation for this or counter the suggestion by PW 5 in cross-examination that, "*The police put words in my statement.*" The value of such statements cannot be underestimated particularly when recorded at or immediately after the incident when the memory is still fresh. In ***Tekerali s/o Korongozi & 4 Others v R [1952] 19 EACA 259*** it was observed that;

We have had reason before to commend on the fact, particularly in cases tried in Tanganyika, that evidence of the first complaint made to a person in authority has not been adduced. Such statements are admissible under Section 157 of the Indian Evidence Act which applies in the Territory. Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others. [emphasis mine]

51. Although all the prosecution witnesses did not allude to the deceased carrying a panga, the

recorded handwritten statement of PW 5, which is clear that the deceased had a panga, tends to support the accuseds' case. Moreover, PW 5 was a relative of the deceased, why would he lie in his first statement to implicate him as the person carrying a panga. In the circumstances, I am entitled to draw a negative inference against the prosecution case. The negative inference is that the deceased had a panga and that the panga was used to assault DW 2 and would likely have likely to be used against DW 1.

52. What emerges from the testimony of the prosecution and the defence is that both sides were trying to cover up for each other. On the prosecution side, the witnesses were clear that the deceased did not have a weapon but the testimony of PW 5 and PW 9 was telling. Why did PW 5 so soon after the incident record that the deceased was carrying a panga and why was the typed statement was tampered with to remove references to the panga. It is possible that the deceased may have had a panga with which he assaulted DW 2 and attempted to assault DW 1 which caused DW 3 to try and defend her husband.

53. On the defence side, the clear intention of DW 1 was to cover up for his wife who had committed the act. DW 1 did not respond to the screams from his wife but he came to the scene earlier on when the commotion started. He intended to shield his wife from the consequences of her act and that is why he rushed to the police station pretending that he was unaware of what had been committed while at the same time he sent her to his sister's place at Koyani ostensibly to collect fees for DW 2.

54. It is the duty of the prosecution to prove malice aforethought beyond reasonable doubt while the accused need only raise the facts that constitute the defence. In this case, I find that it probable that the DW 3 was provoked by the fact that the deceased had slapped DW 2 with the panga and her husband, with whom she stands in a filial relationship, was threatened with assault. She acted in the heat of the passion when she saw the two engaged in a fight.

55. Mr Oluoch submitted that the manner of attack and the weapon used displaced any notion of that DW 1 was attacked. I think the test here is whether the accused acted in the heat of the passion as a result of what she saw. As I have found, the deceased had a panga and he had attacked DW 2. Her reaction then was not unreasonable in the circumstances. I therefore find that DW 3 was provoked and she is therefore guilty of manslaughter.

56. In order to find DW 1 and DW 2 guilty, I would have to infer that they all acted with common intention. **Section 21** of the **Penal Code** states as follows;

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

57. The East Africa Court of Appeal in the case of **Wanjiro d/o Wamerio v R, 22 EACA 521** defined common intention by follows;

Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.

58. The events of 30th December 2012 were not a pre-mediated plan. They were triggered by a random act of PW 4 and PW 5 passing through the Mpeketoni Junction Shop Plot that led to an altercation between PW 5 and DW 2 which sucked in DW 1 and the deceased. In any case having found that DW 3 was provoked into acting the way she did, I cannot infer a common intention as regards DW 1 and DW 2. There is no evidence to suggest that DW 3 acted at the behest of DW 1 or DW 2 or in the course of the altercation, the parties established a common intention to assault the deceased.

59. The result of my findings is that I acquit **MOSES OCHIENG MATINDE** and **JOSEPH ODHIAMBO MATINDE** of the murder of **FREDRICK OTIENO OSODO**. I find **EVERLINE AKINYI MATINDE** guilty of manslaughter contrary to **section 202** as read with **section 205** of the *Penal Code* and I convict her accordingly.

DATED and DELIVERED at HOMA BAY this 30th day of April 2015

D.S. MAJANJA

JUDGE

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.

Mr Okoth instructed by G.S. Okoth and Company Advocates for the accused.