



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 11 OF 2012
(FORMERLY KISII HCCR CASE NO. 38 OF 2010)

BETWEEN

REPUBLIC PROSECUTOR

AND

**VICTOR OWICH MBOGO
ACCUSED**

JUDGMENT

1. On 19th May 2010 this court was informed that **VICTOR OWICH MBOGO** (“the accused”) had murdered **JULIUS ODHIAMBO ODANDE** (“the deceased”) on 21st March 2010 at Nyambicha Village, Kadera Kuoyo Sub-location, North Sakwa Location of Awendo District within the Republic of Kenya 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 and the trial commenced before Maina J. I completed it under **section 200** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. The prosecution marshalled 9 witnesses to prove its case while the accused gave sworn testimony in his defence.
2. 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***.
3. As to the first ingredient of proof, the prosecution case was that on 21st March 2010, the deceased was found dead near his home. Moses Odhiambo (PW 1), the Assistant Chief of Kadera Kuoyo Sub-location went to the scene and identified the deceased. He had cut wounds on the head and neck. Debora Anyango Odhiambo (PW 2), the deceased’s wife, came to the scene and identified her husband. The police officers from Awendo Police Station came and took the deceased’s body to Rapcom Mortuary.
4. On 24th March 2010, Dr Aggrey Idagiza Akidiva (PW 8), conducted the autopsy on deceased’s

- body. He observed that the body had several cuts wounds as follows; a 6 inch long deep cut wound on the right shoulder with a fracture at the neck of the humerus, an 11 inch cut wound on the right cheek, a cut wound on the posterior neck on the upper cervical vertebra and spinal cord, a 6 inch cut wound at the back of the head and a stab wound at the right sub- mandibular region. The internal examination revealed that cardio-vascular system had collapsed due to severing of the carotid artery on the neck and the severing of the spinal cord at vertebra No. 1. PW 8 certified the cause of death as severe haemorrhage and spinal cord laceration. He opined that the injuries must have been caused by a sharp object. In light of the testimony of PW 1, PW 2 and PW8, I find and hold that the prosecution proved that the deceased died and he died as a result of severe bleeding from multiple cut wounds inflicted by a sharp object.
5. I now turn to the question of who killed the deceased. The prosecution case was founded on circumstantial evidence showing that it is only the accused who could have killed the deceased. PW 2 testified that on 21st March 2010, the deceased left with John Otieno (PW 5) in the morning. PW 5 had been staying with them as he was assisting with the deceased with ploughing land with his oxen. Paul Oketch Owuor (PW 7) recalled that the deceased called him and asked him to meet at Rongo before they proceeded to Riosiri while Charles Ochuka Orwa (PW 3) testified that the deceased called him on phone and asked him to join them at Riosiri. The deceased, PW 3, PW 5, and PW 7 had roast meat at Riosiri.
 6. After having lunch at Riosiri, the four of them returned to Rongo at about 4.00pm and proceeded to Annexe Bar where they watched football. At about 6.00pm, three of them left to go to their respective homes leaving PW 7 behind. Since it was late and there were a few motorbikes, PW 3 and PW 5 took one motorbike leaving the deceased waiting for another passenger so that the motorbike could leave. The deceased soon followed them after a while to Ringa where they disembarked to walk the rest of the distance home. PW 3 and the deceased walked with the deceased for about 700 metres then parted ways. PW 5 who had gone ahead arrived home first. PW 2 confirmed that PW 5 arrived home and informed her that the deceased was coming on another motorbike.
 7. At about 7.30 pm, PW 5 heard screams. He went to the scene, which was along a footpath about 300 metres from the deceased's home, with PW 2 who also heard the screams which mentioned that her husband had been killed. PW 3 was called to the scene by PW 1 while PW 7 came in response to a call by PW 3.
 8. At about around that time, Zacharia Omolo Achieng (PW 4), a peasant farmer, recalled that Awidhi Timon Mbogo (PW 6), the deceased's brother, came to see him as he wanted to go to Ringa Market to purchase a rope. They proceeded to Ringa Market purchased the rope and decided to go to the bar and have some beer. Thereafter, they went back home and on the way they found the deceased lying along the road. As both of them were drunk, they did not recognise the deceased immediately.
 9. PW 1 came to the scene and called the police from Awendo Police Station. One of the officers who arrived at the scene at about 12.30 am was the investigating officer, Inspector Richard Saimo (PW 9). PW 9 recalled that they found the deceased lying along a foot path. He had physical injuries on the back of the head and at the ear and the clothes had blood stains. PW1 was present and other people members of the public including the deceased's family. After interrogating members of the public, he prepared a sketch plan which showed that the deceased and the accused were neighbours and their homes were about 200 metres apart and the deceased was found about 300 m away from his home. On 22nd March 2010, he summoned several witnesses to record statements. PW2 stated that she had seen the accused in the vicinity on the material day. He also recorded the statements of PW 3, PW5 and PW 7 who were with the deceased in Riosiri and PW6, the accused's brother, and PW4 who had been with PW 6 that evening. He also took the statement of PW 1. The statement pointed to the accused as the perpetrator who was said to be in Nyatike.
 10. On 25th March 2010, PW 9 proceeded to Nyatike where the accused was found and arrested. After

arrest, he was brought to Awendo Police Station. PW 9 and PW 1 proceeded with the accused home to his house where they recovered a panga under the cupboard which the accused stated that he had used in committing the offence.

11. When called upon to make his defence, the accused elected to give sworn testimony. He testified that he had been working and residing at Muhuru Bay in Nyatike for 6 years prior to his arrest. His work was selling mandazis at Muhuru Bay in Nyatike. He stated that he could not recall the events of 21st March 2010 but that on 27th March 2010 at about 11.00 am he met two people while going to sell mandazis within Muhuru Bay Township. The two told him that they were police officers and asked him to proceed with them to Nyatike Police Station where he was asked where he knew the deceased. He responded that he knew the deceased as his father's cousin who lived and worked in Mombasa. He informed the officer that he last saw him in April 2008 and when he came to see his father who later died on 22nd December 2012. He learnt of the deceased's death while he was at Awendo Police Station. The accused further stated that from April 2008 to the day he was arrested, he had never gone home. He also stated that he had never built a house at home and that when he used to go home he used to sleep in his brother's house. He denied that he took PW 1 to his house and showed him the panga.

12. In his closing submissions, learned counsel for the defence, Mr Osoro, submitted that the prosecution had failed to prove the case against the accused. He contended that the accused was never seen with the deceased even though they were neighbours. He also pointed out that none of the witnesses saw the accused at his home and that the accused was not staying in the locality and could not have committed the offence.

13. As this is a case founded on circumstantial evidence, this court is guided by the dictum laid down in ***Kipkering Arap Koske & Another v Rex, [1949] EACA 135***, the Court of Appeal for Eastern Africa had laid it down:-

That in order to justify, on the circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt and the burden of proving facts which justify the drawing of the inference from the facts to the conclusion (sic) of any other reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused

14. The prosecution posited that the accused had the opportunity to commit the murder as he was within vicinity of the murder. The accused and deceased were members of the same extended family and according to the sketch plan drawn by PW 9, their homes were about 200 metres apart and the deceased was found along a footpath not too far from their respective homes. When neighbours gathered after alarm was raised that the deceased was killed, the accused was notably absent though he was a neighbour to the deceased. On his part the accused testified that he could not have been in the area as he lived in Muhuru Bay, Nyatike where he worked selling mandazis.

15. The accused's assertion that he was in Nyatike was contradicted by PW 6 who testified that the accused was married with a wife and children and that he lived in his own house in the parents compound. PW 6 further testified that he had not seen the accused that week, the defence did not put to him any question to suggest that the accused could have been in Nyatike during that week. In fact when cross-examined by counsel for the accused, PW 6 stated that the accused had been weeding that week. I therefore find that the accused was residing and working in Nyambicha Village at the time of the murder.

16. On the material day, that is 21st March 2010, the accused could not recall where he was but PW 2 testified that she had seen the accused at about 6 pm when he was passed by her house while going to the trading centre that evening. Further, PW 1 testified that on 22nd March 2010, the day after the murder, he called together members of the deceased's family as he suspected the accused and the accused was notably absent from the meeting.

17. PW 1 recalled that the accused sister called to inform them that the accused had reached Kadem, Nyatike early in the morning after the murder. PW 1 made arrangement for him to be arrested and with the help of PW 9. As I found earlier, the accused's testimony that he had been working in Nyatike was obviously a lie in light of the testimony of PW 1, PW 6 and PW 9. The only conclusion that I draw from this fact is that he was trying to run away after having committed the felonious act. His conduct was therefore inconsistent with his innocence.
18. The deceased's movements on the material day were accounted for and detailed by the testimonies of PW 2, PW 3, PW 5 and PW 7 who were with the deceased the entire day. My understanding of the testimonies of the said witnesses rules out the possibility that they could have committed the murder. The evidence of PW 4 and the accused's brother, PW 6, excludes the possibility that PW 6 would have committed the murder.
19. On the other hand, I find that it is only the accused who would have had the opportunity and means to commit the murder. His defence that he was in Nyatike and had not been home for a long time was clearly undermined by the testimony of the prosecution witnesses particularly his own brother, PW 6. He is the only one who could have done so with the murder weapon he furnished the police with. Although motive is not necessary for proof of murder, PW 9 testified about a grudge between the accused and the deceased when asked in cross-examination by counsel for the accused. He stated that the deceased owed the accused Kshs. 1,500/- incurred as a result of the accused harvesting the deceased's cane. PW 2 also alluded to some bad blood between the accused and the deceased when the accused implicated the deceased in the accused's brother's death.
20. Apart from proving the opportunity, the prosecution established the means by which the accused murdered the deceased. The accused led PW 1 and PW 9 to the place where he had hidden the panga which he used to kill the deceased. The injuries sustained by the deceased are consistent with those inflicted by a sharp weapon like a panga. I therefore find that it is the accused who inflicted the injuries and the injuries were inflicted by a sharp object namely a panga which resulted in the deceased's death.
21. As to the final element of malice aforethought, I find that the injuries sustained by the deceased were inflicted with such viciousness and fury leaving no doubt that the accused not only intended to cause grievous harm but to actually cause death of the deceased. I therefore find that the prosecution proved that the injuries were inflicted with malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.
22. Having considered all the evidence, I am satisfied that all the prosecution evidence leads to no other conclusion than to the accused's guilt. I therefore find the accused **VICTOR OWICH MBOGO** guilty of the murder of the **JULIUS ODHIAMBO OBANDE** and I therefore convict him.

DATED and DELIVERED at HOMA BAY this 26th day of August 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.