



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 87 OF 2014
(FORMERLY KISII HCCR NO. 136 OF 2012)

BETWEEN

REPUBLIC PROSECUTOR

AND

MUSA OCHIENG OGOYA ACCUSED

JUDGMENT

1. According to the information dated 23rd October 2012, **MUSA OCHIENG OGOYA** (“the accused”) is charged with murder of **BERNARD OKOTH AIMO** (“the deceased”) on 20th October 2012 at Ogonja Village, Katieno 1 Sub-location, Kanyamkago Location within Migori County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. As this is a case of murder the prosecution is required to establish the following ingredients under the provisions of **section 203** and **204** of the *Penal Code*;
 - 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. The cause of death is not in dispute and was established by the post-mortem performed on the deceased’s body by Dr Jared Ndege (PW 10) on 25th October 2012 at Migori District Hospital after the body had been identified by Musa Otieno Obado (PW 8). The significant finding was that the deceased had an obvious wound on the left lateral side of the chest wall which penetrated the chest cavity between the 5th and 6th intercostal space, went into the right ventricle of the heart and thence into the lower lobe of left lung. PW 10 concluded that the cause of death was a penetrating injury or stab wound which went through the left lower lobe of the lung and right ventricle of the heart.
4. In order to establish who caused the deceased’s death, the prosecution called several witnesses. The principal witness was the deceased’s wife, Modesta Aimo Okoth (PW 3) testified that the accused was her husband’s uncle and a neighbour. She recalled that on 20th October 2012 at about 7.30 pm, she was at home with the deceased when the accused knocked the door. When she

- invited him, the accused said he would not come in to sit. He asked the deceased why he was spoiling his wife's name by calling her a witch. The deceased then told him to sit down so they could talk over the issue and solve it but the accused said that they could not discuss anything and that the issue must be resolved there. She also asked him to sit down and discuss the matter but the accused slapped her on the cheeks and she fell with her three day old baby she was holding. The deceased then asked the accused why he was beating his wife whereupon they started fighting.
5. PW 3 further testified that the deceased pushed the accused and they started struggling as they went outside the house. The accused went out first and the deceased followed. In the meantime she raised alarm as she also went out. She saw the accused remove a knife and stab the deceased in the lower abdomen as the two were holding each other. The accused ran away thereafter. PW 3 identified the knife that was used and which was produced in court as Exhibit No. 1.
 6. Linet Atieno Aimo (PW 6), the deceased's mother heard PW 3 screaming. She ran towards the deceased's homestead and found the deceased lying where he had been stabbed. As she was running, the accused tripped her causing her to fall. He told her that they were the ones who were accusing his wife of witchcraft. She did not see him carrying a knife. Damanus Oyugi Obado (PW 7), a neighbour, also responded to the screams. He ran out of his house and went to the deceased's homestead. He found the deceased had been stabbed. The deceased spoke to him and told him that the accused had stabbed him. PW 7 carried the deceased for about 100m and put him on a motorbike. PW 6 and PW 7 went with the deceased to St Theresa Rapogi Hospital and then to St Joseph's Omba Mission Hospital, Migori.
 7. Paul Aimo Junga (PW 1), the deceased's father, recalled that on 20th October 2012 at about 8.00pm, his brother Joseph Ayah, came to see him at Rapogi Primary School and informed him that his son had been stabbed by the accused. He immediately went to the hospital at Rapogi to see the deceased then proceeded to report to Rapogi AP Post. He visited Migori District Hospital where the deceased was admitted for two days before he died as a result of the injury sustained.
 8. APC Macharia Kendagor Kiptoo (PW 2), an administration police officer based at Rapogi AP Post, recalled that on 20th October 2012 at about 9.00 pm, PW 1 came to inform him that his son had been stabbed by the accused. He stated that his son had been taken to the hospital. They left with PW 1 and went to the accused's home where they found him and informed him of the allegations. PW 1 and another officer, APC Chesaro handcuffed him and took him to the AP Post. PW 2 further testified that he was blood near the entrance to the deceased's house. PW 1 showed him a knife which they took and which was produced in court as Exhibit No. 1. The officers arrested the accused and took him to Rapogi to await transport to take him to Awendo Police Station.
 9. At the material time, Inspector Richard Mutiso (PW 9), the investigating officer, was stationed at Awendo Police. He recalled that on 21st October 2012 at about 3.00 pm, PW 1 came to the Police Station and reported that his son had been stabbed by the accused on the previous day and was admitted at Migori District Hospital. PW 9 visited the hospital and found that the deceased was in a stable condition but he was in great pain. The deceased told him he had been stabbed by the accused in his home on the allegation that his wife accused his wife of being a witch. He recorded the deceased's statement and went back to the station. On the next day, he was informed that the deceased had passed away. He further testified that a knife allegedly used to stab the deceased was brought by an AP officer to the police station. He organized for the knife to be taken to the Government Chemist.
 10. Elizabeth Waithera Oyiengo (PW 5), a Government Analyst working with Government chemist, Nairobi testified that on 7th November 2012 at the Government Chemist Laboratory, Nairobi, the following items were received from PW 9; Item QR – A knife in a khaki envelope marked QR and Item LM – A blood sample in a bottle marked LM indicated as that of deceased Bernard Okoth. The instructions were to examine the blood stains and determine the origin. She noted that the

knife item QR was moderately stained with blood of human origin. She conducted a DNA analysis to determine the original of blood stains and concluded that the blood stains on the knife did not match that of the deceased and it was of unknown male origin.

11. When the accused was put on his defence, he elected to give sworn testimony. He recalled that when he arrived home on the evening of 20th October 2012 at about 7.30pm, he found his wife sitting by the entrance of his house crying. She told him that the deceased had beaten her after accusing her of taking his child's panty and taking it to a witchdoctor so that they could get children. He immediately went to the deceased's house. He found him, PW 3, one George Atula and PW 3's sister called Akoth having dinner. He testified that he was asked to sit down. He told them he was tired and wanted to go home and bathe. He asked the deceased why he beat his wife but the deceased did not answer. PW 3 responded, "*You have come to ask what happened. Don't you know your wife is a witch?*" Atula who was seated near the door told him that if he had come to bring witchcraft issues, he should leave. Atula slapped him on the chest and he fell down. When he got up, the deceased was holding the knife he was using to cut Ugali. He used it to threaten to kill him for bringing witchcraft. When he saw the deceased holding the knife, he began to run outside and he ran for about 20 metres when the deceased caught up with him. They struggled together and fell down.
12. The accused testified that the deceased had the knife which he was holding with his hand. He knew that the deceased would stab him if he released his hand. After they fell, PW 3 and Atula came. Atula kicked his private parts and when he was able to stand he ran off. He stated that the deceased had a knife but the knife which was produced as Exhibit No. 1 was not the same knife he saw the deceased with.
13. In his written submissions, defence counsel raised several points in urging the court to acquit the accused. He noted that the incident was unfortunate and not pre-meditated; that the knife recovered (Exhibit No. 1) did not inflict the injury on the deceased as the same was disowned by PW 1 and the evidence by PW 5 confirmed that the blood on the knife did not belong to the deceased. He submitted that the prosecution witnesses confirmed that there was a fight between the accused and the deceased.
14. The substantial issue is who inflicted the injury that led to the death of the deceased. The totality of the testimony of PW 3 and PW 7 was that the accused and the deceased engaged in a fight after the accused confronted the deceased about beating his wife and accusing her of witchcraft. PW 3, who was the only direct witness, admitted that she did not see the accused stab the deceased. In cross-examination she stated that when the accused came to the house, she saw him remove the knife while threatening them before putting it back in his pocket. She admitted that she did not recall this important fact when she recorded her original statement.
15. As I have found, the fact is that the deceased was stabbed. The evidence is that on that night the deceased fought with the accused and no one else and that in fact, there is no evidence that anyone else could have inflicted the injury. The accused admits that he fought with the deceased but that it is the deceased who had the knife. In addition, the deceased made a declaration to the PW 7 that the accused had stabbed him. Likewise, PW 9, the investigating officer stated that the deceased told him that he had been stabbed the accused for accusing his wife of practicing witchcraft. The totality of evidence leads me to conclude that the accused stabbed the deceased and therefore inflicted the injury that led to his death.
16. As regards malice aforethought, I find the same negated by the fact that it is clear that there was a fight between the accused and the deceased arising out of allegations that the deceased abused and assaulted his wife. The fact that there was one stab wound negates the formation of a felonious intent. The evidence raises reasonable doubt as to the issue of malice aforethought.
17. Before I conclude the judgment, I would like to comment on the knife that was produced as Exhibit No. 1. In cases where an item is taken for examination for DNA evidence, the chain of custody of evidence is important. It appears that this was not observed by the investigators. It is

clear from the post-mortem report that no blood sample was taken from the deceased. It therefore follows that a positive result could not be obtained even if the knife was identified as the one that was used to stab the deceased. In this case though, the evidence is clear that the accused and the deceased fought and one person was stabbed and consequently died and the evidence only points to the accused.

18. In light of the findings I have made, I find the accused **MUSA OCHIENG OGOYA** guilty of the lesser offence of manslaughter contrary to **section 202** of the *Penal Code* and convict him accordingly.

DATED and DELIVERED at MIGORI this 22nd day of October 2015

D.S. MAJANJA

JUDGE

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

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