



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL CASE NO. 18 OF 2014**  
**(FORMERLY KISII HCCR NO. 56 OF 2011)**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**PETER OJWANDO ONGUTO ..... ACCUSED**

**JUDGMENT**

1. According to the information dated 16<sup>th</sup> June 2011, **PETER OJWANDO ONGUTO** (“the accused”) is charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)* in that on 8<sup>th</sup> June 2011 in Migori County with others not before the court he murdered **JOO** (“the deceased”). The prosecution called 8 witnesses and the accused elected to give sworn testimony.
2. The Chief of Central Kanyamkago location, George Odhiambo Okoth (PW 1) recalled that on 8<sup>th</sup> June 2011 at around 3pm, the accused, who was his neighbour and cousin, came to his house as he was having lunch. He asked for the telephone number of the Officer Commanding Awendo Police Station as he stated he had killed the deceased who was referred to as “Young” and the deceased’s body was lying at the homestead. As PW 1 could not believe what he was saying, he decided to go to the accused’s homestead and confirm what the accused was saying. He found the deceased’s body lying at the entrance of the homestead. He was lying on his back with his throat cut. He also had several cuts on the stomach, hands and forehead. He called the deceased’s mother Margaret Awino Otieno (PW 2) and the Assistant Chief, Charles Omondi Migoya who happened to be at Awendo Police Station. Police officers from Awendo Police Station later came, photographed the scene and took the body to Rapcom Mortuary at Awendo. PW 1 testified that the accused and the deceased were his cousins and he was aware that the accused and the deceased’s family had a land dispute.
3. The deceased’s mother, MAA (PW 2), recalled that on the afternoon of 8<sup>th</sup> June 2011, while she was at Church, she received a call from PW 1 informing her that her son had been killed by the accused. PW 2 testified that the deceased was in form 4 at [Particular Withheld] Secondary School while the accused was her neighbour. After receiving the call, she rushed to the scene where she found PW 1. She observed that the deceased had head injuries, a cut on his throat and stomach.
4. Michael Deus Okello (PW 3) was one of the elders from Kawere IIB sub-location who was called

- by PW 1 as he was passing by his home. He arrived at the scene of the incident which was near the accused's house which was in the homestead of Mzee DO, the accused's father. He saw the deceased body. He also called the Assistant Chief. By the time the police came, he had left for his home.
5. Charles Omondi Migoya (PW 4), the Assistant Chief for Kawere IIB sub location, recalled that on 8<sup>th</sup> June 2011 at around 3p.m., he received a call from PW 1 informing him that the accused had killed the deceased and that he wanted him to go and confirm that fact since he knew both the accused and the deceased as they were residents within his jurisdiction. At the time he was called he was at Awendo Police Station where he had gone to collect a bond for a case in Rongo. While he was at the Police Station, the accused came in to surrender himself. He observed that the accused was dressed in a whitish shirt which had blood stains on the left sleeve. The Commanding officer asked the accused to remove his shirt and he was arrested.
  6. The Commanding officer arranged for a vehicle and he went with Sgt Richard Mutiso (PW 8) to the scene. When they arrived, a crowd had gathered at the homestead and the houses belonging to the accused and his mother were burning. He found the deceased's body was lying at the entrance of the homestead. The deceased was lying on the back with his throat was cut. PW 4 confirmed that there was a land dispute between the accused and the deceased family concerning land.
  7. On 8<sup>th</sup> June 2011 at about 4.00pm, Inspector Richard Mutiso (PW 8), the investigating officer, was at Awendo Police Station with PC Saina when the accused arrived at the station in a panic. The accused told them he had killed someone. He stated that some boys had attacked him and that he had killed the deceased. He noted that the accused was wearing a whitish shirt which had blood stains which he asked the accused to remove. As we they were talking, PW 1 rang the OCS and told him that the accused had gone to his place and told him he had killed someone. He proceeded to the accused homestead where he found villagers had burnt the accused house. The deceased body was in the accused's compound. He examined the body and noted cuts on the neck, forehead and stomach. He took photographs of the body and caused the body to be taken to Rapcom Mortuary at Awendo where the postmortem was performed by Dr Emmanuel Oyier.
  8. PW 8 took the white shirt and blood samples from the deceased to the Government Chemist laboratory in Nairobi accompanied by an Exhibit memo form instructing the Government Chemist to confirm the source of blood on the shirt. According to PW 8, the Government Chemist established that the blood on the accused shirt matched that of the deceased. PW 8 also established that there was a land dispute between the deceased's family and the accused. He recorded statements of witnesses and caused the accused to be charged with murder.
  9. Ann Wangechi Nderitu (PW 7), a Government Analyst, acknowledged that on 15<sup>th</sup> June 2011, the Government Chemist in Nairobi received the following items from Awendo Police Station: Item 1 – Blood sample in a bottle indicated as that of deceased John Omondi Otieno labeled "QR", Item 2 - A long sleeved shirt in a black polythene bag indicated as that of the suspect Peter Ojwando Onguto labeled 'JK'. She found that the long sleeved shirt, item 2 was stained with human blood on the cuff. She generated DNA profiles from item 1 and item 2 and upon examination of the DNA profiles, she concluded that the DNA profile generated from item 2 indicated as that of the suspect matched the DNA profile generated from item 1.
  10. The post-mortem was performed on the deceased's body by Dr Emmanuel Oyier (PW 6) on 10<sup>th</sup> June 2011 at Rapcom Mortuary at Awendo after the body had been identified by DAO (PW 5), the deceased's sister. The doctor observed multiple injuries all over the body as follows; the head had three cut wounds on the right parietal region, left frontal region and left temporal region, a shearing injury on the left temporal region and a wobbling of the neck; on the neck there was a deep wound four inches long extending to the trachea, on the abdomen three as a cut wound on the left lumbar region three inches long and lacerations on the epigastric part. There were two cuts on the forearm anteriorly each one an inch long and a cut on the thumb. Internal examination revealed a depressed skull fracture and a damaged brain on the left frontal part. PW 6 concluded that the

cause of death was asphyxia from a cut trachea, severe head injury and severe haemorrhage as a result of multiple injuries sustained from physical assault.

11. The accused elected to make a sworn statement in his defence. He recalled that on 8<sup>th</sup> June 2011, he returned home from his shamba at about noon having left in the morning. His wife, Margaret Awino Adhiambo, who was at home, told him that some people, one of whom was the deceased, were looking for him. He had lunch and went back to the shamba. When he returned home at about 2.00pm, he found two men one of whom was the deceased at the gate of his compound. The deceased was carrying a spear and a rungu while the other one was carrying a panga and a rungu. The two ordered him to stop. In response, he asked them why they were stopping him and invited them to his house to discuss what they wanted. Because he saw they had weapons, he moved away from them. He heard them say that he had come to live on their land by force and that he had been a problem for a long time. The two of them attacked him. He was beaten with a rungu on the back. He held the deceased and as they struggled, they both fell down. The deceased was on top of him and because he was down, he suddenly saw the other person cut the deceased because the deceased was on top of him. He stated that he did not know which part was cut but blood spilt on him as a result. He struggled with the deceased who had a panga, took the panga from him and cut him once. He further stated that he cut the deceased because if he tried to run away, they would have killed him. He further stated that he had grabbed the panga from the deceased after the struggle that he cut the deceased while standing. He also heard the other person saying, *“If you do not pay today, you are on your own.”* He suspected that the deceased had the other person’s debt. After the incident he immediately reported to PW 1 and also went to Awendo Police Station.
12. The accused stated that he not intend to kill Otieno when he cut him. He stated that the deceased accused him of living on their shamba. The accused produced court records that he had filed a land dispute against MAO at the Rongo Court namely Rongo PM Court Criminal Case No. 802/2010. He had sued her for trespassing on his shamba.
13. 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*.
14. The fact and cause of death of the deceased is not in dispute. The prosecution witnesses who went to the scene of the incident confirmed that they found the deceased’s body in the accused’s compound lying in a pool of blood with his throat slit and multiple body injuries. The observations of witnesses were confirmed by the autopsy conducted by PW 6. I find and hold that the deceased died and he died as a result of asphyxia caused by a cut trachea, severe head injury and multiple injuries which resulted in severe bleeding from physical assault.
15. As to whether the accused inflicted the injuries that led to the deceased death, the prosecution case was circumstantial in that there was no eye witness. However, the accused admitted that he had killed the deceased when he reported the incident to PW 1 and PW 8. In his sworn testimony, he also admitted that he assaulted the deceased by cutting him once with a panga. The fact that he was in the presence of the accused is supported by the testimony of PW 7 who conducted a DNA analysis on the blood found on his shirt and found that it matched the deceased blood.
16. The central issue for determination in this matter is whether the prosecution proved malice aforethought. Counsel for the accused submitted that the accused admitted that it was the duty of the prosecution to prove that accused had a motive. It was the defence case that the deceased attacked him with an unknown associate. She posited that the facts pointed to a confrontation between the accused and deceased and that the deceased was the aggressor as he is the one who

went to the accused's home in the company of another person hence the accused should benefit from doubt.

17. 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.*

18. 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** and 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.*

19. 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.*

20. I would also add that **where accused raises self-defence, the burden is still on the prosecution to prove the accused guilty beyond reasonable doubt. The accused does not thereby assume any burden of proving his innocence. It is for the prosecution to prove that the accused did not act in self defence. In other words the prosecution must disprove self defence and discharge this burden beyond reasonable doubt**

21. 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. It is not disputed that the family of the deceased and the accused had a long standing land dispute as evidenced by the existence of court proceedings. The testimony of witnesses confirm that the deceased was found lying dead in the deceased's compound which means that in fact the deceased must have gone to the accused's homestead. The only version of what happened is what was narrated by the accused.

22. According to the accused, the deceased was carrying a panga and spear when he attacked him. The accused struggled with the deceased, they both fell and the deceased fell on top of the accused. If the second assailant had cut the accused while he was down then the accused's version of events is inconsistent evidence set out in the post-mortem report which does not show that the deceased was cut on his back which would have been the case had the deceased been lying on the accused. The accused further stated that he cut the deceased with the panga after taking it from

him. How then did the deceased, who was carrying a rungu and a spear, suddenly have a panga in the course of his struggle with the accused? I find the accused's version of events incredible.

23. In addition, the viciousness of the cuts particularly on the throat and the multiple injuries inflicted on the deceased, particularly on the front part of his body, show that the act of the accused went beyond self defence and morphed into an intentional act to inflict grievous harm and indeed kill the deceased. The cuts are the kind that would have been inflicted by a person wielding a sharp weapon like a panga which the accused admits was in his hands. In considering the kind of force used on the deceased, I also find that the deceased was a young man compared to the accused and as such the force used in the circumstances was not only excessive but deliberate.

24. I find the suggestion that there was another person other than the deceased who could have inflicted the injuries on the deceased a story concocted to give credence to the accused's defence. The accused did not mention this to the first person he reported to so soon after the incident. According to the accused's testimony, the assailants were with him for a sufficiently long time for the accused to give a description of the other person. PW 1 as the chief would have been in a position to mount a search for the person had a description been given to him. The fact that the accused reported the matter immediately does not diminish his felonious intent. Perhaps he realized what he done wanted to create an opportunity to mitigate his guilt.

25. I therefore find **PETER OJWANDO ONGUTO** guilty of the offence of murder contrary to **section 202** of the *Penal Code* and convict him accordingly.

**DATED and DELIVERED at MIGORI this 22<sup>nd</sup> day of October 2015.**

**D.S. MAJANJA**

**JUDGE**

Ms Ochanji-Opondo, instructed by M.A. Ochanji-Opondo and Company Advocates for the accused.

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