



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 73 OF 2013

BETWEEN

REPUBLIC PROSECUTOR

AND

JARED OTIENO OSUMBA ACCUSED

JUDGMENT

1. According to the information dated 18th November 2013, **JARED OTIENO OSUMBA** (“the accused”) murdered **ZEDEKIAH ODHIAMBO OSUMBA** (“the deceased”) on 15th November 2013 at Pala Village, Upper Kakwajuok Sub-location, North Rachuonyo District within Homa Bay County with others not before the court contrary to **section 203** as read with **section 204** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. He pleaded not guilty and the trial proceeded a pace with the prosecution calling 7 witnesses. The accused elected to give sworn testimony in his defence.

2. The prosecution case is that the accused and the deceased had a land dispute and that on the night of 15th November 2013, the accused accompanied by a gang of people, went to the deceased’s homestead and lured him out of the house by breaking some window panes. When the deceased came out, he was brutally attacked. He sustained severe injuries from which he died.

3. The fact and cause of death of the deceased is not in dispute. Dr Peter Ogola (PW 5) performed the autopsy on the deceased’s body on 19th November 2013 at Simbiri Mortuary after it had been identified by the deceased brothers; Wilson Osumba (PW 2) James Odhiambo (PW 3). On external examination, the doctor noted the following multiple lacerations; a skull deep cut wound on the right side of the head, a cut wound the right side of neck which had cut the muscles, a bone deep cut on the anterior part of the right shoulder measuring 8 cm in length, a 15cm bone deep cut in the inner aspect of the right lower arm and two cuts on the anterior chest wall on the right side. At the back, there was a cut at the base of the neck at middle-line which had gone up to the spinal column and which upon internal examination revealed a fracture of the three spinal bones. Further internal examination disclosed that the left chest cavity was punctured and both major vessels of the neck had been severed on the right side and that the laceration on the skull had caused a cut on the brain leaving blood collection in the skull. As a result, PW 5 concluded that the deceased died as a result of severe haemorrhage and a head injury that resulted from a skull fracture due to trauma caused by a sharp object.

4. Who caused the injuries that led to the death of the deceased? On the night of 15th November 2013, Corporal Felix Mwangi Gachunga (PW 4) recalled that he was on duty at Kosele Police Station when he was alerted that Wilson Otieno (PW2), James Odhiambo (PW3) had come to report a murder. Earlier that night, two village elders including one Elizaphan Bwana had made a report that a gang had raided the

deceased home and kidnapped him. PW2 and PW3 confirmed that the deceased's body was lying in the compound. The Commanding Officer at the Station instructed him to proceed to the deceased homestead. As they were leaving, the accused came to the report office. He had a deep cut on the head which was bleeding profusely and his jacket was soaked in blood. He stated that he was the deceased's brother and that they had fought over land at about 10.00pm. He was put in custody as PW 4 proceeded to the scene of the incident.

5. On 16th November 2013, the accused was taken to Rachuonyo District Hospital under police escort. PW 6 examined the accused and noted that he had a cut on the right side of the forehead approximately 8cm in length with a depth just below the skin. He was still bleeding though there was dried blood covering his face and neck. He also had what appeared to be human bite marks on the 2nd and 3rd fingers of the left hand. PW 6 opined that the cut and bite marks were caused by a sharp weapon. According to the treatment notes produced by PW 6, the accused had been seen 12 hours earlier at the hospital. His injuries were stitched and he was given antibiotics and pain killers. PW 6 classified the injuries as harm. He also carried out a mental examination and found that the accused was fit to stand trial.

6. The investigating officer, Corporal Thomas Mbuvi (PW 7), testified that the accused made a confession on 17th November 2011 before Chief Inspector Joseph Mutia. The accused requested his cousin, Dorcas Akoth to be present. In his sworn testimony and in the confession, the accused stated that he went to see the deceased on the evening of 15th November 2013, after he found that someone had put a boundary in the shamba separating his homestead and that of his late brother, Daniel Onyango Osumba, by planting *Euphorbia* and uprooting his plants. When he confronted the deceased about the issue, the deceased told him that the shamba belonged to him and if he continued talking like that he would die. In his confession, the accused narrated what happened as follows;

He [the deceased] came out carrying a panga and a spear. He cut me on the forehead right side with his panga. I grabbed him and struggle went outside the house I floored him on the ground and all his weapons fell down. He struggled and bit me on the left hand middle finger. When we stood, I hit him. Using my knee and he fell down. I took his panga and the spear and cut him on the head and using the spear, I pierced it on him several times on his body until he died. I was very angry and started breaking his house window glasses. I left him dead was about 10 metres way from his main house door. I then went home and told my wife that I had killed Zedekiah and I was going to report to the Police Station because I was tired of quarrelling about the shamba every time. I left my home and came to Kosele Police Station and reported

7. The confession was admitted in evidence without objection from the accused. I also find and hold that it satisfies the conditions for admission set out in **section 25A** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** as it was taken before an officer of the rank of inspector and in the presence of a third party chosen by the accused. As the deceased also confirmed in his sworn testimony that he killed the deceased, I find and hold that he is the person who inflicted the injuries that led to the deceased's death.

8. The final issue then for consideration is whether the unlawful act that caused the deceased's death was inflicted with malice aforethought within the meaning of **section 206** of the **Penal Code**. There is no dispute that there was a land dispute between the accused and the deceased. They were brothers although the accused and another brother, Daniel Onyango Osumba, were sired by the person who is said to have leverated their mother. The accused contended that the land in dispute, Parcel No. 1687, belonged to his deceased brother, Daniel, who had left behind children he was taking care of. He stated that when their mother died in the year 2010, the accused wanted to sell the land but he objected as his brother's children would be left landless.

9. The Assistant Chief of Upper Kakwajuok Sub-location, Athanasio Otieno Onduto (PW 6) confirmed that there was indeed a land dispute between the accused and the deceased. He received a report regarding the dispute concerning parcel No. 1657. He called the elders meeting in September 2013 which was attended by the deceased and the accused to deliberate on the matter. The elders resolved that the land belonged to their mother and she had given it to the deceased before she died. PW 6 further testified that the accused had sold part of his land leaving very little of it causing him encroach on the deceased's land.

He further recalled that when he asked both parties to bring documents to prove their ownership, the deceased provided a search certificate while the accused did not have any document. He asked both of them to accompany him to the Lands Office to resolve the issue but only the deceased turned up for the meeting. He was informed on the morning of 16th November 2013 that the deceased had died.

10. Counsel for the accused submitted that the accused was unduly provoked by the deceased uprooting his farm produce. He further contended that the accused and the deceased fought and that the accused's reaction was caused by sudden and grave provocation and fear of imminent danger when he was cut on the head. In counsel's view, the deceased invited his own misfortune by attacking the accused and occasioning him serious bodily harm which made the accused to react in desperation.

11. The accused's case is that he was provoked into acting in the manner he did. **Section 207** of the **Penal Code** describes as "killing on provocation" as follows;

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.

12. 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 caused by grave and sudden provocation (see **Wero v Republic [1983]EA 549**). Furthermore, while the accused does not shoulder the burden of proving the defence, the prosecution must marshal evidence to disprove the defence beyond reasonable doubt (see **Kenga v Republic [1999] 1 EA 141**).

13. Implicit in the accused's case is that he also acted in self-defence. 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.

14. The Court of Appeal recently 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.

15. Accordingly, the issue for determination is whether under the circumstances, the accused was provoked to act in the manner he did and whether he believed that his life was in imminent danger to the extent that he was entitled to use force to protect himself. In this respect the testimony of the deceased's wife is critical in the determination.

16. Jane Awino Odhiambo (PW 1) recalled that on 15th November 2013, she was at home with the deceased and her children. They went to sleep at about 9.30pm after having dinner. Before they fell asleep, it started raining and in a while she heard the shattering of the window glass in the bedroom followed by the other windows in the house. The deceased got up from bed and went to the front door. Although, she tried to restrain him, he still went ahead and opened the door. As she was scared she locked the door behind the deceased as he went out.

17. PW 1 then used her mobile phone spot light to look through the sitting room window. At a distance of about 10 – 15 metres, she saw a group of people, among them the accused, fighting with her husband. They were beating him while he was on the ground. She recalled that although the torch was not bright and it was still raining, she could still see the accused using his hand to hit her husband. She started screaming and left through the back door to call her brother in law, Wilson Osumba (PW 2). As she was there James Osumba (PW 3) also came and they asked her to remain behind as they went to back to the deceased's home to find out what was happening. They came back and told her they had not seen the deceased. They asked her to show them where the deceased was being beaten so they all went back to the homestead and found the deceased lying dead in the homestead close to the fence.

18. When cross-examined by counsel for the accused, PW 1 stated that the deceased left the house annoyed and that he was naked and since he left the house abruptly, she could not remember whether he was carrying any weapon. She also stated when she looked through the window, she saw a number of people around her husband. She recalled that when she recorded her statement with the police she stated that she saw the accused and other people whom she did not know.

19. The deceased's bother PW 2 recalled that on the night of 15th November 2013, he was asleep when he heard PW 1 screaming, he rushed outside and met PW 1 crying. She told her the she saw the accused with a group of people came to kill her husband. He went to the homestead and looked for the attackers and the deceased but did not find them. As he did not find the deceased, he went to report to Elizapan Bwana, a clan elder, who went to report to Kosele Police Station.

20. At the time many people had come to the homestead including PW 3, who had heard and responded to the alarm raised by PW 1. They went back to the deceased's homestead and began looking for the deceased using a spot light. They found him near the fence lying down with multiple injuries. PW 3 recalled that the deceased was in his underwear and that he did not have clothes on his upper part.

21. The accused version of events that he was assaulted by the accused cannot withstand the credible testimony of PW 1. Although he stated that he went to the accused house to confront him about the fence and that they had dinner together, such a version of events was not put to PW 1 in cross-examination. Her testimony was clear that the deceased went outside the house when he was attacked. I believe PW 1's testimony because the deceased's was described as being naked when he was found near the fence of his homestead. Although the postmortem report said he had clothes, such clothes could have been his under garments or sleeping clothes hence there reference to him being naked. If he had been having dinner with the accused present, would he have been in such a state of undress when he was found near the fence?

22. PW 1's version of events is further corroborated by the fact that she described how they were woken up by the shattering glass of window panes not only in the bedroom but also in other parts of the house. The fact that the window panes were shattered was confirmed by PW 2, PW 3 and PW 6 who went to the homestead after the incident. When PW 4 went to the deceased's homestead he found that five window panes had been shattered. The accused, in cross-examination, explained that when they started fighting in

the sitting room, they landed on the window next to the door and it broke. The accused version could not account for how the other windows panes were broken. I therefore find that there was no fight between the accused and the deceased in the sitting room or within the house as stated by the accused.

23. I reject the accused's version of events and his confession and that he could have acted been provoked or acted in self-defence. The testimony of PW 1 is clear and consistent that the deceased was lured out of his house by the breaking glass window panes and when he went out he was attacked by amongst others, the accused, who PW 1 saw very clearly. The accused was not under any threat of force. The deliberate action of luring the deceased to his death negates any defence of provocation. In any case, the act constituting provocation occurred long before the attack giving the accused a reasonable time to cool. The accused, having been injured while assaulting the deceased, tried to cover his tracks by immediately reporting to Kosele Police Station and making a confession to turn the tables on the deceased.

24. Counsel for the accused submitted that the prosecution failed to prove that the accused was in the company of other unknown persons. I accept the credible testimony of PW 1 that she saw the accused in the company of other people assault the deceased. The fact that she told PW 2, PW 3 and PW 4 that she had seen several people assault the deceased immediately after the incident lends credibility and consistency to her testimony. Further the multiple injuries sustained by the deceased are consistent with assault by several persons. I therefore find that the accused was part of a gang that acted with common intent to kill the deceased. I would however add that in view of accused's confession that he fought with deceased, a contrary finding that he was alone when he killed the deceased would not absolve him.

25. While it possible that the accused and deceased had a fight, I find and hold that it is the deceased who was trying to defend himself when he cut the accused. The multiple injuries sustained by the deceased also tell a different story. The accused was hacked viciously several times on the front part of his body and once in back fracturing the spinal column. These injuries are in my view inconsistent with self defence as portend excessive force morphing into malice aforethought. Likewise the nature of the multiple injuries at the front and back inflicted by a sharp object negate the defence of provocation.

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

27. I therefore find the accused **JARED OTIENO OSUMBA** guilty of the murder of **ZEDEKIA ODHIAMBO OSUMBA** and I convict him accordingly.

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

D.S. MAJANJA

JUDGE

Mr E. Nyakwana instructed by Odero Osiemo and Company Advocates for the accused.

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