



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL CASE NO. 15 OF 2013**  
**(FORMERLY KISII HCCR NO. 68 OF 2011)**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**AMOS OMONDI AREGO.....ACCUSED**

**JUDGMENT**

1. The accused, **AMOS OMONDI AREGO**, is charged with offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information are that on 4<sup>th</sup> July 2011 at Nyachebe Beach, Kasungu Sub-location, Gembe West Location, Mbita District, the accused murdered **CALNIX OUMA ODERO** (“the deceased”). The accused pleaded not guilty and the prosecution called 6 witnesses while the accused elected to give sworn testimony without calling any witness.

2. Erick Odhiambo Obunga (PW 1) recalled that on 4<sup>th</sup> July 2011 at about 5.00 pm, he was with Raphael Okinyi Orwa (PW 2) and the deceased when the Beach Management Unit (“BMU”) Chairman for Nyachebe beach, Kennedy Ochieng Odongo (“Kennedy”) came to inform them that a man had locked a school girl in a house and that they should go and arrest him. As part of the beach security team, the group proceeded to the house where they found the accused seated in the house with a school girl.

3. PW 1 got hold of the girl while the deceased got hold of the accused and they proceeded to the BMU office at the beach with PW 2 and Kennedy. Kennedy called the Assistant Chief, Joseph Oyuko Otieno (PW 4) as they proceeded to the office. PW 1 testified that when they entered the office, they asked the accused to sit down and explain to them why the girl was not in school. PW 2 pinned the girl down on the floor while the deceased told the accused to sit down but he refused. According to PW 1, the deceased got hold of the accused shirt and tried to force him to sit down but he refused. PW 1 stated that the accused had a knife hidden inside his trouser tied with a manila rope which he removed and stabbed the deceased on his left shoulder. When cross-examined, PW 1 stated that trouble started in the office when they were struggling to force the accused to sit down by force. He stated that he did not see the accused with a knife from the time they arrested the accused. He stated that it is only when someone asked what had happened that they started searching for the knife and that it is only when they recovered the knife that they knew that the deceased had been stabbed.

4. A village elder, Raphael Okinyi Orwa (PW 2), was present with PW 1 and the deceased when they went with Kennedy to arrest the accused. He testified that he was part of the group that proceeded to the

BMU office but he was walking a short distance behind PW 1, the accused and the deceased. While outside the beach office, he heard the deceased tell the accused to sit down at least three times. When he entered the office, he saw the deceased bleeding on the left shoulder. PW 1, the deceased and accused were inside the office while Kennedy entered thereafter. Other people started coming in and when the accused was asked what happened, he denied stabbing the deceased. PW 2 held that deceased and removed him from the office whereupon a motorcycle was called and the deceased taken to hospital. When cross-examined, PW 2 denied that he saw the deceased being stabbed or that he had seen the accused carrying the knife from the house to the beach office.

5. PW 2 further testified that when the accused seated outside the office, people began searching his pockets and clothes. They found a knife with a blue handle with a blue manila string tied to his trousers. Thereafter PW 4 came with two security officers, arrested the accused and took him to Mbita Police Station.

6. Joseph Oyuko Otieno (PW 4), the Assistant chief for Mbita Township, Gembe West location recalled that on 4<sup>th</sup> July 2011 at about 5.00 pm, he was at home when he received a phone call from Kennedy informing him that someone had been stabbed at Nyachebe beach. He rushed to the scene of the incident and found the deceased seated on the beach bleeding. He also found the suspect, whom he identified as the accused, standing and his hands had been tied at the beach. Kennedy, PW 1, PW 2 and other members of the Beach Management Committee were at the beach. Kennedy handed over to him a knife with a blue handle attached to a blue manila string and a coat belonging to the deceased. He was informed that the accused had been found with a school girl who was also present at the scene. He took the accused to the police station and directed that the deceased be taken Mbita District Hospital.

7. The autopsy on the deceased's body was conducted by Dr Ayoma Ojwang' on 16<sup>th</sup> July 2011 after the body had been identified by the deceased's wife, Beryl Awino Ouma (PW 3). By time of the hearing, Dr Ojwang had passed away and Dr Francis Ochieng (PW 5) produced the Post mortem report on his behalf. PW 5 testified that he had worked under Dr Ojwang' when he was the medical superintendent at Homa Bay District Hospital and was familiar with his handwriting and signature. The significant finding by Dr Ojwang' was that the deceased had a deep cut wound on the left shoulder with multiple subcutaneous bleeding on the left side of the chest upto the back. The left upper limb had lost function and it was dark as it had started getting infected. The left subclavian vein had been severed at the left shoulder and some of the veins were cut. As a result of the doctor concluded that the cause of death was severe bleeding.

8. The investigating officer, PC Edwin Nyongesa (PW 6) recalled that on 4<sup>th</sup> July 2011 at about 8.00 pm he was at Mbita Police Station when PW 4 brought the accused. PW 4 informed him that the accused was suspected of seriously assaulting the deceased at Nyanchebe Beach and that the deceased had been rushed to hospital for treatment. He re-arrested the accused and took possession of the knife with the blue handle and the deceased's coat. PW 6 thereafter went to hospital and found the deceased being treated for a shoulder injury. He left and came back on day to record his statement. He found him in pain but he was able to talk. He interrogated him and recorded his statement which I admitted in evidence in accordance with **section 33** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. PW 6 later learnt that on the night of 13<sup>th</sup>-14<sup>th</sup> July 2011, the deceased's condition deteriorated whereupon he was rushed to Sindo Sub-District Hospital. He was thereafter transferred to Homa Bay District Hospital where he died on 14<sup>th</sup> July 2011. PW 6 testified that he withdrew the case of assault he had preferred against the accused and charged him with murder when he learnt that the deceased had died.

9. The accused elected to give sworn testimony. He denied that he murdered the deceased. He testified that on the material day he was at his sister's house with his girlfriend. As the door was partially open he saw a group of about 7 people including PW 1, PW 2 and Kennedy coming into the house. The asked him to go to the beach. They got hold of him and his girlfriend. He was taken to the Beach office and told to sit down. They group started beating him with sticks. He tried to run away but he fell down and someone tied him. He heard people say that someone had been injured. They conducted a search in him and found nothing. His girlfriend who also tried to run away but was arrested. They were taken to the police station. He denied that he knew that the deceased was injured. He later heard that the deceased had died. He

denied that he had the knife that was found on him.

10. In order to secure a conviction for the offence of murder under **section 203** of the **Penal Code**, the prosecution must prove beyond reasonable doubt (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.

11. The fact and cause of death is not in dispute. PW 1, PW 2 and PW 6 all confirmed that the deceased had an injury on his left shoulder. The injury described by the witnesses was confirmed by the autopsy conducted by Dr Ojwang' who also established that the deceased died as a result of a stab wound injury inflicted on his shoulder which led to severe bleeding which resulting in death. Although the deceased died a few days after the injury, the proximate cause of death was the result of the shoulder injury.

12. The main question is whether the accused stabbed the deceased as contended by the prosecution. Mr Kisera, counsel for the accused, submitted that the prosecution failed to prove that the accused had the knife and that he stabbed the deceased. He contended that Kennedy was not called as a witness and that PW 1 did not see the accused stab the deceased while PW 2 was outside the office hence the court could not discern what transpired in the office. Counsel emphasized that the PW 1 and PW 2 were a group of vigilantes who could not be trusted and it is them who took the law into their own hands by arresting the accused and his girlfriend.

13. According to the testimony of PW 1, he was alone with the deceased in the BMU office when they forced the accused to sit down. PW 2 confirmed that he was not present while the deceased and PW 1 were forcing the accused to sit down. In my ruling dated 9<sup>th</sup> July 2015, I admitted the deceased statement recorded by PW 6 on 5<sup>th</sup> July 2011 and the deceased stated, in part, as follows;

*We decided to escort them to BMU office for further interrogation. When we reached at the BMU office we ordered the two to sit down but the boy refused to sit down. As Erick and I tried to force him to sit down so that we could interrogate them, the boy removed a knife from his trouser and stabbed me on the left shoulder. I started bleeding profusely and as he tried to escape he was arrested.*

14. I accept this statement as the deceased narration of events before the incident was consistent with the testimony of PW 1 and PW 2. There was no reason for the deceased to implicate the accused in a case of murder as at the time the deceased made the statement, the case was still one of assault.

15. As to whether the accused had the knife, I also accept the testimony of PW 1 and PW 2 that the knife from his trousers. The deceased also stated that the accused removed the knife from his trouser and stabbed him. I reject the accused's assertion that he did not have a knife. In light of the evidence, it was not necessary to carry out a forensic examination to confirm that the knife was the one used to stab the deceased.

16. I have considered the possibility of the accused acting in self defence. Did he believe that his life was in imminent danger to the extent that he was entitled to use force to protect himself? In **Ahmed Mohammed Omar & 5 others v Republic NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014]eKLR**, the Court of Appeal 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.*

17. The testimony of PW 1, PW 2 and the deceased's statement point to a struggle to force him to sit down so that they could interrogate him. It is likely that the accused feared that he would be assaulted to the extent that he used his knife to defend himself. The accused's fears were aggravated by the fact he was 16 years old at the time and was ambushed by beach youth in his sister's house and frog marched to the beach. Ms Ongeti, learned counsel for the prosecution suggested that by carrying the knife, the accused intended to stab the deceased. There is no evidence that the accused deliberately took the knife with intent to inflict injury on any person since the accused and his girlfriend were ambushed by the beach security. Furthermore, the fact that the knife was tied with a manila string means that he could not have tied the knife at the time he was ambushed. It could have been tied way before the incident.

18. While I accept that the accused may have apprehended that he was in danger, the use of the knife to stab the deceased was clearly excessive and unreasonable in the circumstances. I therefore find the accused guilty of manslaughter contrary to **section 202** as read with **section 205** of the *Penal Code* and I convict him accordingly.

**DATED and DELIVERED at HOMA BAY** this 16<sup>th</sup> day of December 2015

**D. S. MAJANJA**

**JUDGE**

Mr Kisera instructed by Omonde Kisera and Company Advocates for the accused.

Ms Ongeti, Prosecution Counsel, instructed by the Director of Public Prosecutions for the State