



**IN THE HIGH COURT**

**AT HOMA BAY**

**CRIMINAL CASE NO. 24 OF 2013**

**(FORMERLY KISII HCCRC NO. 105 OF 2012)**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**BRUCE OCHIENG SHABAN.....ACCUSED**

**JUDGMENT**

1. The accused, Bruce Ochieng Shaban, is charged with 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 offence are that on 1<sup>st</sup> August 2012 at Konyango Location, Rachuonyo North District within Homa Bay County in the Republic of Kenya he murdered Victor Ogwen Otiemo.

2. The accused pleaded not guilty and the prosecution called 6 witnesses to prove its case. In summary, the thrust of the prosecution case was that the deceased and the accused were watching an evening football match at the village grounds when after a quarrel between the accused and the deceased, the accused left the grounds and came back with a knife which he used to stab the deceased.

3. PW1, Erick Ouma Omollo, a resident of Wang'adonji Village in Rachuonyo, testified that he knew the accused as they were from the same village. He recalled that on 1<sup>st</sup> August 2012 at about 6 pm he was at the village playground playing football with other boys. The accused came to the field and started watching the game. The deceased, who was on his way home, also stopped by to watch the game. He further testified that an argument ensued between the deceased and the accused. He and the other players went to separate them when they started fighting. When they stopped fighting, he saw the accused head home while the deceased sat down in the field as the game continued. Then the accused came back started fighting with the deceased. PW1 further testified that when they went to separate them again, he saw the deceased rise up and then fell. He also saw him bleeding on his chest. The accused ran away as he and other boys approached the deceased who was still alive. He stated that while the accused was running away he saw him carrying a knife which he described as a kitchen knife. He remained with the deceased while other people chased the accused. Thereafter the area Chief, who called the police, and other villagers came to the scene. PW1 concluded his testimony by stating that the incident occurred at 6.30 pm when there was adequate light and that he did not know what the accused and deceased were arguing about.

4. PW2, Hilden Omondi Otiemo, a secondary school student, is a brother of the deceased. He testified that at about 6 pm on 1<sup>st</sup> August 2012, he was among a group of boys playing football at Wang'adonji. He

saw deceased come and sit beside the pitch to watch. The accused later came and a quarrel ensued between the two and they began fighting. He stopped playing and went to separated them. They stopped fighting and went separate ways. He stated that the deceased sat down while the accused disappeared. Soon afterwards the accused returned and sat very close to deceased. He suddenly saw the accused draw a knife and stab the deceased. Together with other players they gave chase to the accused who was now fleeing towards his home which was nearby. As they got near, the accused's father came out with a panga which scared them away. He testified that before he chased the accused, the he went to see the deceased who had been stabbed on the chest. When he returned he found his uncle, Walter Odhiambo Nyamisi (PW3), with the deceased who had died.

5. PW3, Walter Odhiambo Nyamisi, a fisherman and uncle of the deceased, testified that at about 6.20pm on 1<sup>st</sup> August 2012, he was on his way home from Kendu when he saw the deceased lying down surrounded by boys playing who had been playing football. Among them was PW 2, his nephew, who told him what had happened. He observed that the deceased had blood on the left side of the chest. He called the deceased father and the area assistant chief. The police came they took the body to Simbiri Mortuary. He later attended the post-mortem on 8<sup>th</sup> August 2012 where he identified the body of the deceased. He confirmed that he knew the accused person as fellow villager and but that the accused was not at the scene when he got there.

6. Gedion Otieno Nyamisi, the father of the deceased, testified as PW4. He recalled that on 1<sup>st</sup> August 2012, he received a phone call from his brother, PW3, informing him that his son had been stabbed and was dead. He rushed to the scene at Wang'adonji where he found the deceased lying in the filed. He examined the deceased and saw a wound on the left rib cage. He reported the matter to the Assistant Chief who came with the police. The police collected the body and on 8<sup>th</sup> August 2012 he identified the body of the deceased at the post-mortem.

7. Dr Peter Ogolla, PW5, who was at the material time the Medical Officer of Health, Rachuonyo South conducted the post-mortem on the body of the deceased on 8<sup>th</sup> August 2012 after the body was identified by relatives. He observed that the body was that of a male African in the twenties. He had a single penetrating wound on the front of the left chest between the 5<sup>th</sup> and 6<sup>th</sup> ribs. The wound was approximately 2cms long and there was no other sign of trauma. When he opened the chest cavity he observed that the left lung had been perforated and there was blood in the left chest cavity. The left part of the heart which pumps blood to the rest of the body had also been perforated. There was also collection of blood around the heart. He concluded the cause of death was severe bleeding that resulted from perforation of the lung and heart which was probably caused by a sharp object. He also examined the accused and filled a P3 form where he noted that the accused had a swelling on the lower lip approximately 6 days old which was probably caused by a blunt object. He assessed the injury as harm. He approximated the age of the accused as 15 years old. He did not conduct a mental assessment.

8. PW6, Cpl Joseph Keter, a Criminal Investigations Department Officer stationed at Rachuonyo, testified that on 2<sup>nd</sup> August 2012 he was instructed to investigate a case of murder committed at Kendu Bay on 1<sup>st</sup> August 2012 after it had been reported at Kendu Bay Police Station. He recorded statements from the witnesses. His investigation revealed that the accused quarrelled with the deceased and fought. Two witnesses intervened and the offender went to his home which is 50 meters from the scene and returned to the scene at 6pm and found the others still at play. He confronted the deceased and drawing a knife stabbed him in the chest and run away. On 7<sup>th</sup> August 2012, he escorted the accused to Rachuonyo District Hospital for mental and age assessment which was carried out by Dr Ogolla, PW5, who then filled a P3 form. Based on the statement, he preferred charges against the accused. He did not recover the knife.

9. The accused gave sworn testimony after he was put on his defence. He recalled on 1<sup>st</sup> August 2012, he got home at about 5.00 pm after bathing in the lake at Kotieno beach. He passed by the football field where he saw children playing football then he went home to do his homework. He heard his brothers and sister crying so he left the house and opened the gate. When he asked what had happened, he was told that the deceased and his brother, PW 2, were fighting. He also asked them where PW 2 was. The

accused testified that when he went to the field he saw PW 2 running away towards the town. He saw the deceased, asked him what happened but the deceased could not talk. He stated that he could not have killed the deceased as he was his friend. He further testified that PW 4 came and asked him what happened and he informed him that PW2 and the deceased were fighting. He stated that they took the deceased to the hospital. He was told to go to the Police Station. At the station he found PW 2 already recording a statement.

10. The accused stated that the deceased and PW 2 quarrelled. He denied that he was at the field when football was being played and he never fought with the deceased. He only found the deceased lying down and he did not see any injuries on the deceased.

11. After the close of the defence case, Mr Osoro, counsel for the accused made submissions whose thrust was that there was insufficient evidence to convict the accused. He pointed to the fact that the evidence of the PW1 and PW2 was that they were playing football and that it would have been impossible for them to see the accused and deceased quarrel while playing football. He noted that the children who were crying were potential witnesses who could have been called to corroborate the testimony of PW1 and PW2 which leaves a gap in the evidence. He also faulted the police for failing to charge the father of the accused for allegedly threatening members of the public with a panga and causing a breach of the peace.

12. Mr Osoro submitted that the evidence of PW3 and PW4 was hearsay and was not of any assistance. He also noted that the murder weapon was not found and that PW 6, in giving evidence, did not state what efforts were made in recovering the murder weapon. Counsel asserted that the prosecution evidence could not support a conviction.

13. Ms Ongeti, counsel for the State, asserted that there was sufficient evidence to support a conviction. That the evidence of PW1 and PW2 established that the accused and the deceased had a fight and that the accused stabbed the deceased. That the post-mortem conducted by PW5 established that the deceased was stabbed and that failure to produce the murder weapon was not fatal to the prosecution case as long as the cause of death was established. She also submitted that malice aforethought was proved as the accused formed the intention to kill when he left football pitch and came back with the knife with which he stabbed the accused. The prosecution buttressed its case by asserting that the act of the accused running away after the act was a sign of guilt. Ms Ongeti urged the court to convict the accused based on the evidence.

14. The offence of murder is defined by **section 203** of the **Penal Code** as, “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” **Section 206** of the **Penal Code**. They are;

*Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—*

*a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*c. an intent to commit a felony;*

*d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

15. Under **sections 203** and **206** of the **Penal Code**, there are three ingredients of the offence of murder which must be established by the prosecution beyond reasonable doubt before the accused is convicted as

follows;

- a. Proof of the fact and the cause of death of the deceased.
- b. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person. This is what constitutes the *actus reus* of the offence.
- c. Proof that the said unlawful act or omission was committed with malice aforethought. This is what constitutes the *mens rea* of the offence.

16. As regards the first issue, the evidence is clear. PW 3 confirmed that he found the deceased dead at the football field on 1<sup>st</sup> August 2012. He saw the blood coming out on the left side of the chest. He also identified the body as that of the deceased on 8<sup>th</sup> August 2012 at the post mortem conducted by PW 5, Dr Ogolla. Dr Ogolla examined the body and found that there was a penetrating wound on the front side of the left chest between the 5<sup>th</sup> and 6<sup>th</sup> rib which perforated his left lung and heart. His conclusion recorded in the post-mortem report was that the cause of death was severe bleeding that resulted from perforation of the lung and heart which were probably caused by a sharp object. I therefore find and hold that Victor Ogweno Otieno met his death as a result of being stabbed with a sharp object.

17. The next issue is who caused the death of Victor. PW 1 and PW 2 were the key prosecution witnesses. PW 1 testified that he saw the accused and the deceased fight and after they were separated the accused left the field and came back. While he did not see the accused actually stab the deceased, he saw the deceased rise up and fall and his chest bleeding. He also saw the kitchen knife the accused was carrying and which he ran away with. PW 2 was also at the scene. He also witnessed the quarrel between the accused and the deceased. He also saw the accused go back to the house and return with a knife which he used to stab the deceased.

18. In this case, the evidence implicating the accused is direct evidence of PW 1 and PW 2. Both PW 1 and PW 2 knew the accused as they all came from the same village. The incident occurred in between 6.30 and 7.00 pm before it was dark as confirmed by the fact that the boys from the village were still playing football. These circumstances negate any chances of mistaken identity. PW 2 saw the accused remove the knife after stabbing the deceased. PW2 and PW3 saw the accused ran away with the knife that was used to stab the deceased. Although the knife was not found, the fact established is that the accused was seen stabbing the deceased and the injuries consistent with the stab wound were corroborated by the testimony of PW 5. This evidence forecloses any possibility that any other person other than the accused could have stabbed the deceased.

19. In his defence, the accused denied stabbing the deceased. The tenor of his testimony was that he came to the scene after the deceased had been stabbed and that he saw PW 2 running away. He later found PW 2 at the police station recording his statement. He found Victor who was unable to talk and together with PW4 they took the deceased to the hospital. His testimony is undermined by that of PW3 who stated affirmatively that when he arrived at the scene he did not find the accused. He also found PW2 as one of the person who was with the deceased. Even when PW4, the deceased's father came to the scene, the accused was not present. Both PW3 and PW4 testified that the police came and took the deceased body to the mortuary contrary to the accused's testimony that he took the deceased to Rachuonyo Hospital with PW 3. The issue of whether the accused was present at the scene of death when PW3 and PW4 were there was not put to them in cross-examination by defence counsel.

20. The accused's defence is further undermined by the fact that he testified that he did not see any injury or blood yet PW1, PW2, PW3 and PW4 all testified that there was blood on his chest. This is consistent with the finding of PW 5 that he had been stabbed in the chest. I therefore reject the accused defence that he merely came to the scene to assist the deceased and took him to hospital in the company of PW3. On the basis of the evidence, I find and hold that the accused stabbed the deceased and caused his death.

21. The third issue is whether the prosecution proved malice aforethought. By **section 206** of the **Penal Code**, malice aforethought is deemed to be established by evidence proving, among other things, an

intention to cause death or to do grievous harm. In this case both PW1 and PW2 testified that after the quarrel, they saw the accused leave and come back a while later whereupon he stabbed the deceased with a kitchen knife. The fact that after the quarrel, the accused went to get a knife which he used clearly established the intention to cause the deceased grievous harm by stabbing him.

22. The accused in his defence has asserted that he and the deceased were friends and that he could not have killed him. There is no evidence that he was provoked or that he acted in self-defence. After the quarrel with the deceased he decided to go to his home, which was about 50 metres away, collect a knife which he used to stab the deceased. The fact that he ran away from the scene with the knife after the incident is indicative of his guilt. I therefore find and hold that the prosecution established that the element of malice aforethought.

23. In his submissions Mr Osoro alleged that the accused's rights were violated when he was held in custody from 1<sup>st</sup> August 2012 to 7<sup>th</sup> August 2013 without any reason being furnished. While the violation of the accused pre-trial rights is regrettable, it was held by the Court of Appeal in ***Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008 [2010]e KLR*** that such violations do not have any bearing on the innocence or guilt of the accused.

24. I am satisfied that the prosecution has proved beyond any reasonable doubt that the deceased died and that he died from a single stab wound in his chest and that the death was a direct consequence of the accused's unlawful act of stabbing him in chest and that the unlawful act was committed with malice aforethought on 1<sup>st</sup> August 2012.

25. I therefore find you, **BRUCE OCHIENG SHABAN** guilty of the murder of the **VICTOR OGWENO OTIENO** and I accordingly convict you under **section 322 (1)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***.

**DATED and DELIVERED at HOMA BAY this 14<sup>th</sup> August 2014**

**D.S. MAJANJA**

**JUDGE**

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

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