



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO.67 OF 2009

REPUBLICPROSECUTOR

VERSUS

STEPHEN ODHIAMBO OCHOLAACCUSED

JUDGMENT

1. The accused herein Stephen Odhiambo Ochola was arraigned in court on the 27th October 2009 on one count of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 8th day of May 2009 at Racha sub location area in Ndhiwa District within Nyanza Province murdered Florence Otulo Owaga. He pleaded not guilty to the charge and the case proceeded to full trial. The prosecution called a total of eight (8) witnesses to prove their case.

2. Briefly, the facts of the case are that at about 8.00 p.m on 8th May 2009, the deceased, together with her two daughters, Aska Atieno Owaga, PW1, and Jane Anyango Otieno, PW3, were taking supper as they warmed themselves around a fire outside the house. The accused herein, who is a neighbour, went to the deceased's home. The accused was armed with a spear, a panga and a club. He confronted the deceased, telling her that she should not undermine him in the same way she had undermined the accused's father.

3. The deceased stood up and sought to know what was wrong. The accused then severely cut the deceased on the left hand, almost severing it off. On seeing her mother being cut by the accused, Jane Anyango Otieno stood up and went to assist her mother, but she was cut on the right shoulder with the same panga the accused had used to cut the deceased. The deceased who was bleeding profusely was assisted to St. Camillas Hospital but she died on arrival thereat. A postmortem examination was done on the deceased and it revealed that the deceased died from severe haemorrhage leading to cardiovascular arrest.

4. The prosecution's case was that the attack on the deceased by the accused was unprovoked and unwarranted and that by visiting the deceased's home at 8.00 p.m. without invitation, the accused intended to murder the deceased. The prosecution maintained that the accused's action was premeditated and well planned, by choosing to strike at 8.00 p.m when the deceased was at home with her two daughters and a daughter in-law.

5. The prosecution's evidence is as follows:- PW3, Jane Anyango Otieno testified that on the evening of 8th May 2009 at about 8.00 p.m she was at her maternal home in the company of her mother, Flora Otuto Owaga and her younger sister Aska Atieno Owaga, PW1 when she heard the dogs barking. Soon thereafter, she saw the accused walking towards the fireplace where they were seated. The accused then stood beside them and she saw him clearly with the help of moonlight which was bright. The

accused was wearing a black overall. The accused then asked the deceased, **“why are you talking aimlessly?”** On hearing that question, the deceased stood up and asked the accused to explain how she was talking aimlessly. Instead of giving her the answer, the accused told the deceased that she would see. The deceased then asked the accused to return the following day.

6. At that point, PW3, the deceased, PW1 and PW3's brother, Erick Owino, all stood up to go to the house, but the accused ran ahead and blocked them from entering the house. The door to the house was open and there was a lantern burning on the table.

7. Then the accused removed a panga from inside the overall, and aimed it at the deceased's left hand and cut her just above the elbow; when PW3 tried to intervene, the accused cut her on the right shoulder joint (the court was shown a scar running from top of the right shoulder to the armpit). Then the accused fled into the night and was not arrested until 11th October 2009.

8. PW3 also testified that during the attack on the deceased, the accused was only some 7 metres away from the fireplace where the family had gathered for their supper. She also stated that she was able to clearly see the accused as there was moonlight as well as light from the fire which they were using to prepare their evening meal. She also testified that apart from the lamp that was alight in the house, there was another lamp outside where they were.

9. After the attack, PW1 and her sisters screamed and neighbours came and assisted in taking the deceased to hospital where she was pronounced dead on arrival.

10. PW1, Aska Atieno Owaga testified that on that fateful night, she was together with the deceased and her older sister PW3 when the accused appeared carrying a panga and a spear. The accused then asked them why they had treated his father with contempt. On hearing the accused's question, the deceased stood up and asked him what was wrong and within no time, the accused cut the deceased on the left hand twice. The accused also cut PW3 on the right shoulder once before he fled.

11. Both the deceased and PW3 fell down after they were cut. The screams of pain and anguish brought some neighbours to the home. PW1 stated that she was able to clearly see the accused with the help of moonlight and the fire around which they had been warming.

12. Among the people who heard the screams was Margaret Atieno Ogola, a sister to the deceased who testified as PW5. When she arrived at the deceased's home, PW5 found the deceased already being wheeled to the hospital. On making inquiries, PW5 was informed by PW3 that it was Odhiambo who had assaulted the deceased and had also assaulted her (PW3).

13. Peris Akinyi Olewa, PW7, also heard the screams emanating from the deceased's home as she (PW7) was coming from the market. When she got to the deceased's home, PW7 made inquiries as to what had happened to the deceased. PW3 informed PW7 that it was Odhiambo who had attacked them and cut the deceased on the left hand while he cut PW3 on the right shoulder. PW7 testified that she was able to see clearly that evening because there was moonlight.

14. Everline Atieno Jabuya testified as Pw6. She corroborated the testimonies given by PW3 and PW1 as to how the accused attacked the family as they ate their supper by the fire outside the house. PW6 is a daughter in-law to the deceased. Soon after the deceased entered the compound, there was a brief exchange between him and the deceased before the deceased was heard screaming and saying **“He has cut me.”** PW6 testified that she saw with her own eyes when the accused was cutting the deceased on the left hand just above the elbow. She said she also saw him cutting PW3 on the right shoulder. PW6 further stated that she was able to clearly see everything because of very bright moonlight, and that the accused was well known to her because they lived in the same area. She described the clothes the accused was wearing as a black T-Shirt and a light blue trouser.

15. PW2, Henry Owaga Odhiambo, husband to the deceased, heard screams from his home as he was returning from a chief's baraza. On arrival home, he accompanied the deceased and PW3 to hospital.

PW2 testified that there was a land dispute between him and the accused's father. PW2 also testified that there was bright moonlight on the fateful night.

16. Peter Osee Ngare, PW4 drove the deceased and PW3 to hospital. He recalled that the deceased's left hand had almost been severed off when she was wheeled to his vehicle, and that PW3 was also badly cut on the right shoulder.

17. Number 26410 Police Constable Titus Kinoti testified as PW8. He stated that on the 9th May 2009, he was instructed by his station commandant, Chief Inspector Charles Mwangi to investigate the instant case. Together with other officers from Ndhiwa police station, he went to the scene of crime to commence investigations. During the investigations he was informed of how the accused went to the deceased's home armed with a panga, spear and club and attacked the deceased as the deceased and her family ate supper around a fire at about 8.00 p.m on 8th May 2009. PW8 also learnt that during the attack, PW3 was also badly cut on the right shoulder.

18. PW8 further testified that he visited St. Camillas Hospital and removed the deceased's body to Homa Bay District Hospital for preservation and postmortem examination which was carried out on 11th May 2009 by Dr. Icole. Dr. Icole was not available to produce the post mortem report. PW8, as investigating officer produced the same as **P. Exhibit 1**.

19. PW8 also testified that after burial of the deceased, the accused went underground and was only arrested on 11th October 2009 in Migori. During cross examination, PW8 told the court that from the post mortem report, the deceased died from excessive bleeding. PW8 also stated that there was a discrepancy between the post mortem report and the charge sheet as far as the name of the deceased is concerned; while the post mortem report gave the name of the deceased as Florence Atieno Owaga, the charge sheet had the name of Florence Otulo Owaga. He however stated that the body of the deceased, Florence Otulo Owaga was positively identified by her husband, PW2 and her sister, PW5.

20. When called upon to defend himself, the accused gave an unsworn statement in which he denied any knowledge of the allegations made against him. It was his testimony that on 30th September 2009, he went to his place of work at Migori where he was also living. In the evening, he went back to his house, took a shower and then went to sleep. At about 9.00 p.m, he heard a knock on the door and when he opened, he saw police officers who were accompanied by some civilians. He was arrested and taken to Migori police station where he was detained for 13 days. On 14th October 2009, he was transferred to Ndhiwa police station. This was after he spent one day at Homa Bay police station. He was then taken to court and charged.

21. The accused stated that he knew nothing about the allegations of murder; that on 8th May 2009, he was at his place of work in Migori where he had been since the year 2000. He said that he could not have participated in the alleged crime because he was far away from the scene of the alleged offence at the material time and further that he had no grudge with the deceased. He also denied inflicting any injuries on PW3. He stated further that he does not know how the deceased died nor who killed her. The accused attributed his woes to the fact that he is a foreigner in Rachar, and that that is the only reason he was being connected with the alleged offence.

22. In his final submissions, Mr. Minda, appearing for the accused submitted that the prosecution has not proved its case against the accused person to the required standard of beyond any reasonable doubt. He submitted that there is a big doubt as regards the identity of the deceased since the name in the post mortem report is at variance with the name in the information. That the explanation by the accused as to where he was on the night of the alleged offence completely exonerates him from the alleged murder; that the motive for the deceased's murder was not brought out and that it sounds incredible that a neighbour could attack another in the manner suggested by the prosecution witnesses. Counsel urged the court to let the accused free.

23. There is no doubt that the onus of proof in this case lies squarely at the feet of the prosecution.

The prosecution must thus demonstrate that the accused herein had the malice aforethought to cause the death of the deceased by an unlawful act or omission. In other words, the prosecution must establish the three ingredients of the offence of murder as set out under **Section 206** of the **Penal Code**. **Section 206** of the **Penal Code** reads as follows:-

“206. 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.”**

1. Essentially therefore, the prosecution is required to prove the fact as well as the cause of the deceased's death; it is also to show that the death of the deceased resulted from an unlawful act or omission on the part of the accused person and finally that such an unlawful act or omission was committed with malice aforethought as provided under **Section 203** of the **Penal Code**.

2. There is no doubt that on the night of 8th May 2009, one lady who was wife to PW2, Henry Owaga Odhiambo and mother to both PW1 and PW3, Aska Atieno Owaga and Jane Anyango Otieno respectively was killed by being viciously cut on the left hand just above the elbow. She bled to death as she was being rushed to St. Camillas Hospital. The post mortem report which was compiled and signed by Dr. Icole was produced by PW8, Number 26410 Police Constable Titus Kinoti as Dr. Icole could not be availed to testify. From the report, the cause of death of one Florence Otulo Owaga was severe haemorrhage leading to cardio respiratory arrest.

3. Two issues have been raised by the defence regarding first the identity of the deceased and second the fact that Dr. Icole was not called as a witness for purposes of producing the post mortem report. As regards the identity of the deceased, it is argued that the name appearing in the information, namely FLORENCE OTULO OWAGA from the name of the body, the subject of the post mortem report, namely FLORENCE ATIENO OWAGA.

4. After a careful analysis of the prosecution evidence, both in chief and on cross examination, I am satisfied that the person who was slashed to death at about 8.00 p.m on 8th May 2009 was FLORENCE OTULO OWAGA and that the body that was submitted to Homa Bay District Hospital by Ndhiwa police station was that of FLORENCE OTULO OWAGA. The body was identified by Henry Owaga, PW2 and Margaret Atieno Ogola PW5 who is a sister to the deceased. The mistake made by the doctor who had initially given the name of the deceased as **“Margaret Atieno Owaga”** before partially correcting it to read **“Florence Atieno Owaga”** does not in my view go to the root of the prosecution case that the deceased in this case is Florence Otulo Owaga. Her husband and her two daughters who were present during the attack testified to the name of the deceased. I saw and heard all these witnesses and none of them seemed to be in doubt as to the identity of the deceased. I believe them wholly and for that reason, I find that the concern raised by the defence as to the identity of the deceased has no merit and I dismiss it altogether.

5. As regards the production of the post mortem report by PC Kinoti, the same was admitted under **Section 77 (3)** of the **Evidence Act**. I ruled during the objection proceedings that though it was

desirable for the maker of the report to personally tender the evidence in court, it was not mandatory that they do so. In any event, it was indicated to the court that Dr. Icole was dead, though no certificate of death was availed to court. It was clear that refusing to admit the post mortem report through PC Kinoti would have caused further delay of a case that was already old and that would have meant miscarriage of justice to the accused person. What I am saying here is that the post mortem report was properly produced to the court as an exhibit.

6. From all the above, I am satisfied that the prosecution has proved both the fact and the cause of death of Florence Otulo Owaga.

7. The next issue that arises for determination is whether it was the accused person herein who through an unlawful act or omission caused the death of the deceased. From the evidence of PW1 and PW3, it is alleged that the accused entered the deceased's home from the side of the compound as the deceased and her family enjoyed their evening meal around a fire. The time was 8.00 p.m, and therefore the question of identification or recognition in this case is at the centre of whether or not the witnesses clearly identified/recognized the accused or whether, they were under the illusion that they had seen the accused who admittedly is a neighbour to the deceased's family.

8. Questions of identity/recognition have been the subject of many a decision by the courts in this country, both at trial and at appellate stages. In **Simiyu & another -vs- Republic [2005] 1 KLR 192**, the Court of Appeal sitting in Eldoret held, *inter alia*, that “*in every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or person who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.*”

9. In the case of **Nzaro -vs- Republic [1991] KLR 70**, the appellant was tried and convicted of murder and sentenced to death. His conviction was based on identification and recognition by his mother who testified that it was the appellant who first cut her with a panga and when she fled for safety, the appellant turned onto the deceased who was his brother and inflicted serious injuries upon him. On appeal, the Court of Appeal sitting at Mombasa held, *inter alia*, that “*whenever a case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of identification or identifications.*” In this case, the accused has put forward the defence of alibi, which suggests that the identifications by both PW1 and PW3 must be wholly mistaken. Is that the case?

10. In the case of **Wamunga -vs- Republic [1989] KLR 424**, the Court of Appeal sitting at Kisumu was told that the offence having taken place at night and the only available form of lighting being torches, the identification of the appellant as one of the assailants was unreliable. In the case, some of the prosecution witnesses had alleged that the appellant was a neighbour and a report of his involvement in the robbery was made to the authorities and that the appellant was not arrested until some five days after the incident. The Court of Appeal rendered itself thus on the issue of identification:-

“We now turn to the more troublesome part of this appeal namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW13). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them. We have already recounted the material parts of this evidence and there is no need to recite it again. What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was

succinctly stated by Lord Widgery C.J., in the well known case of R. -v- Turnbull [1976] 3 All E.R. 549 at page 552 where he said:-

“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

11. In the present case, the principal witnesses on identification are PW1, PW3 and PW6 who were eye witnesses to the incident and PW2, PW5 and PW7 who testified that they were informed by one or the other of the principal witnesses that it was Odhiambo who had attacked both the deceased and PW3. According to PW3, this is what she stated:-

“We had just made supper and we were at the fireplace outside the house. There were also dogs around. There was nobody in the house, but the door was open. There was a lamp in the house. I then heard the dogs barking. I then saw the accused walking towards us. I saw him face to face. He was standing beside us.----- I heard accused asking my mother ----- Then accused told my mother she would see. ----- I saw accused remove a panga from inside the overall and cut off my mother's left hand. ----- The accused also cut me on the right shoulder joint with the same panga.”

PW3 also stated thus:-

“It was at night, but there was moonlight and the fire we were using to cook. The room was full and the fire was very bright.”

12. As regards the evidence of PW2 on the source of light on the material night, he stated in cross examination:-

“There was moonlight, and I could recognize a person in the moonlight – up to the door (10 metres away). When I got home I could see people and things because of the moonlight.”

And PW6 stated the following:-

“I remember 08/05/2009 and the events of that day. On that day which was a Friday, some minutes to 8.00 o'clock in the night, Odhiambo came to our home through a side gate claiming that he was despised. I was not alone. I was with Jane. There was also Aska and my mother-in-law Flora.---- I was about five (5) metres away. ----- Apart from hearing my mother-in-law saying she had been cut, I also saw her being cut. Then my sister-in-law Jane stood up and got hold of Odhiambo and they both fell down.”

13. PW6 also testified that there was very bright moonlight on the night of the attack.

14. From all the above evidence, I am fully satisfied that Odhiambo, the accused, was clearly and properly identified and recognized by the principal witnesses. I am also satisfied that there was sufficient bright light from the moon which enabled these witnesses to recognize the accused who was their next door neighbour. In addition to the moonlight, I am also satisfied that the fire provided additional lighting which enabled the witnesses to clearly see and recognize the accused. I saw and heard all the witnesses and I have no reason to doubt what they told the court concerning the attacked.

15. Counsel for the accused submitted that there was no reason why the accused could have attacked the deceased. It is clear from the evidence of PW2 that there was a boundary dispute between himself and the father of the accused. In my view therefore, there was good motivation for the attack by accused on the deceased. From the words uttered by the accused when he approached the deceased asking her why she was talking so carelessly, and telling her that she would see when the deceased sought to know how she was talking carelessly, the accused was prepared for the consequences that followed his entry into the deceased's home.

16. And this being a case of recognition rather than identification of a stranger, I agree with the words of the Court of Appeal in **Anjononi -vs- Republic [1976-80] KLR 1566** that “--- **recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other ----.**”

17. In the premises, I am satisfied that the prosecution has proved beyond doubt that the accused herein, Stephene Odhiambo Ochola did, on the 8th day of May 2009 at Racha sub location area in Ndhiwa District within Nyanza Province, murder Florence Otulo Owaga. I accordingly find the accused guilty of the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and convict him accordingly in line with the provisions of **Section 322 (1)** of the **Criminal Procedure Code**.

18. Orders accordingly.

Delivered, dated and signed at Kisii on this 23rd day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Majale (present) for State

Mr. Okemwa for Accused

Mr. Bibu - Court Assistant

29/10/2014

Before R.N. Sitati, J.

bibu – cc

Mr. Soire for C.A. Okenye (present) for accused

Mr. Otieno (present) for State

Accused – present in person

Language – Dholuo with Akinyi

Court on Sentence

There is evidence on record that with one single blow with a sharb panga, the accused cut off the deceased's left hand and left it hanging only by a piece of flesh. The court finds that the attack was extremely beastly and inexcusable.

Accordingly, and pursuant to the law, I sentence the accused to suffer death as by law provided. R/A to Court of Appeal within 14 days.

R.N. SITATI

JUDGE.