



IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 25 OF 2013

(FORMERLY KISII HCCRC NO. 117 OF 2012)

BETWEEN

REPUBLIC PROSECUTOR

AND

NELSON OCHIENG OUNDAACCUSED

JUDGMENT

1. **NELSON OCHIENG OUNDA**, 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)*. The particulars of the information were that on 12th September, 2012 at Sota Village in Homa Bay District he murdered **ISAAC OKAYO ADEK** (“the deceased”).

2. The accused pleaded not guilty to the charge and a trial ensued. The prosecution called a total of seven witnesses. The trial was initially conducted by Maina J., and completed upon compliance with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

3. The prosecution’s case was that the accused and deceased son, George Onyango Adek (PW 1), has been arrested and placed in custody at Ngegu Police Post on 12th September 2012 after they had had a fight earlier on that day. Later that evening, the deceased came to collect his son and they proceeded to their home. The accused had been released earlier that evening and had proceeded to his home which was in the same direction as the deceased’s home. As the deceased and PW 1 went home, the prosecution case is that the accused attacked the deceased with a panga, cut him and left him to die.

4. In order to prove the offence of murder under the provisions of **section 203** and **204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;

- 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 which is the *actus reus* of the offence.
- c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the *Penal Code*.

5. The first two ingredients of the offence were proved by the prosecution. The body of the deceased was identified by George Onyango Adek, PW 1, his son, who saw the body at the scene of

the murder. PW 3, Otieno Anyango Migeni, also saw the deceased's body with the head covered in blood. PW 4, Corporal Ignatius Okinda, who visited the scene of the murder also found the deceased's body lying on the ground and the head chopped in three pieces. The body was later taken to Homa Bay District Hospital Mortuary where it was identified by PW 1 and PW 2, the deceased's brother, before the autopsy was conducted by Dr Ayoma Ojwang.

6. Dr Ayoma Ojwang, PW 5, the doctor who conducted the post-mortem on the deceased's body on 15th September 2012, observed that the deceased had suffered deep and extensive wounds on the head penetrating the neck and the skull upto the brain. He observed that the whole face was blood stained and that there was closed fracture of the left humerus but the skin was intact. The major finding on internal examination of the head was it had multiple linear fractures and the spinal cord at the cervical region. He concluded that the cause of death was severe head injury and transection of the spinal cord. These findings were consistent with the observations of PW 1, PW 3 and PW 4 on the body. PW 5 recorded the observations and findings in a post-mortem report which was produced in evidence.

7. I therefore find and hold the deceased, Isaac Okayo Adek, was killed and that he died as a result of severe head injuries and transection of the spinal cord inflicted by a sharp object.

8. The main issue in contention in this case is whether the accused committed the act for which he is charged and the evidence proffered by the prosecution is as follows. PW 1, George Onyango Adek, the deceased's biological son testified that he knew the accused since they were children and on 12th September 2012 at 9 am while he was in his father's shamba, the accused came and asked him why he was slashing in his shamba. Before he could answer, the accused cut him on the head. The accused ran away when the deceased came after being called by PW 1.

9. Thereafter he went to Ngegu Dispensary for treatment and then to Ngegu Police Post to make a report accompanied by his father, the deceased. They did not find an officer at first but they returned at 2 pm where they also found the accused present. PW 1 and the accused were held and later released and told to go back on 14th September 2012. On the way home that the PW 1 stated that the accused killed his father.

10. PW 1 testified that as they approached, the accused's home, he went to the bush for a long call. While he was there he heard his father crying that the accused was killing him. When he went there he saw the accused ran away. He ran to call Otieno Migeni, PW 2, who advised him to call his mother. He stated that he called the officer in charge of Ngegu Police Post. Before going to the police post he went to the scene with his mother. He later came to the scene accompanied by an officer, Moris Sungu Okoko. He stated that the Police later came at about 10 pm and removed the body from the scene and took it from the mortuary.

11. When cross-examined by Mr Osoro, counsel for the accused, PW 1 stated that when he was arrested with the accused they were released at about 6 pm and that the accused was released first but before he reached the main road he was also released. He stated that he accused was not carrying anything when he left the police post.

12. PW2, Thomas Owigo Okundi, testified that on 12th September 2012 at 7.30 pm, while in Nairobi, he received a telephone call from PW 1 informing him that the accused had killed his father. He travelled overnight and confirmed that the deceased's body was in the mortuary. At 9.30 am, a police officer from Ngegu Police Post telephoned to inform him about the arrest of the accused as the person who had killed his brother where upon they went to the scene and saw blood. From there he accompanied the police officers to the home Wilfrida Omollo, PW 4, the accused's aunt. He further testified that PW 4 told them that the accused had given to her the panga used to kill the deceased. She pulled a panga from her roof and gave it to the police. PW 4 also directed them to the accused's brother's place where the bicycle was recovered. He stated that they found the bicycle in the bush which was being used by the deceased.

13. Otieno Anyango Migeni, PW3, testified that he knew the deceased and on 12th September 2012 at about 2 pm while he was at home, the deceased came and borrowed a bicycle to go to Ngegu. Although the deceased did not tell him exactly where he was going to vote or for what reason, he gave him the bicycle. At about 7.30 pm, PW 1, came and told him that the accused had killed his father. He told PW 1 to go and call relatives and they went to the place where the deceased was killed. He stated that the place was next the home of the accused's mother home Wilfrida Omolo, PW 4. He stated that the next morning police came to the scene and they went to the scene where he saw a panga and a bicycle which he identified as the one he lent to the deceased.

14. PW 4, Wilfrida Omolo Awuor, testified that she was the mother in law of the accused. She testified that on 12th September 2012 at about 7.30pm she was in her house but did not hear any screams. She recorded a statement with the police after they came to her house with a motor bike took her to the police station. Upon application by the prosecution, PW 4, was declared a hostile witness. She confirmed that in her recorded statement she stated that she heard screams at the road but did not go outside since it was at night. She recorded that she heard people mention the accused's name. She stated that the reason she recorded the statement is because the police came with a gun and her to accompany them. She maintained that the police recorded what she did not say and there was no truth in the recorded statement which she was asked to thumbprint.

15. PW 6, Lawrence Kinyua Muthuri, an analyst working with the Government Chemist testified that on 21st September 2012 at Government Chemist laboratory in Nairobi, he received from Corporal Joseph K. Munguti of Homa Bay Police Station the following items which he was requested to examine and determine the presence and source of bloodstains;

- A. Panga
- B. Grey long trouser indicated as belonging to the accused
- C. Green jumper indicated as belonging to the accused
- D. A blood sample indicated as that of the deceased.

He noted that all the four items were moderately stained with human blood.

16. After profiling the DNA on the items, PW 5 concluded, in a report signed by him and dated 13th August 2013, as follows:-

- a. The DNA profiles generated from the blood stains on the trouser (item B) and jumper (item C) both matched and were of unknown male origin.
- b. The DNA profiles generated from the panga (item A) matched both the DNA profiles generated from the blood of the deceased (item D) and another DNA profile of unknown source.

17. PW 7, Corporal Ignatius Okinda, testified that in 2012 he was the officer in charge of Ngegu Police Post when on 12th September 2012 at about 8.45 pm, PW 1 came and introduced himself as a son of the deceased and told him that accused had killed his father. He informed the OCS Homa Bay Police Station and thereafter visited the scene within Suta area. He found the deceased was lying on the ground, face was facing sideways and his head was chopped in three pieces. The body was photographed and taken to Homa Bay District Hospital Mortuary.

18. PW 7 further testified that on 13th September 2012 at around 12:10 pm, he was told that the accused had been seen at Nyangweso waiting for a vehicle to go to Nairobi where his brother was. He quickly mobilized two officers and they rushed to the stage where they arrested him and took him to the police post. When they interrogated him and he told them where the murder weapon and

the deceased's bicycle were. He recovered these items from the PW 4's home which was fifty meters from the crime scene. He asked PW 4 for the panga and although reluctant at first she removed the panga from the ceiling of her kitchen. He recovered the bicycle from the accused's brother's homestead. He took the exhibits to Homa Bay Police Station where they were labelled. A blood sample was taken from the deceased and then they were taken to the Government chemist for analysis. The accused was charged with murder as the blood on the panga matched that of the deceased.

19. In cross-examination PW 7 confirmed that PW 1 and the accused had been arrested and placed in the cells because of fighting. He stated that there was a history of a boundary dispute between the two families and they had fought over that boundary and that when the matter was reported they had intended to charge them with affray. He confirmed that the PW 1 and the accused were released separately between 6 and 6.30 pm and the deceased was arrested. The accused was released first and he remained with the deceased with whom he was talking about the dispute while PW 1 was waiting and that it was not more than one hour after he released them that the murder occurred.

20. The next day when they visited the scene of the murder, PW 1 showed him the place he had gone to relieve himself which was about 30 to 40 meters away. PW 1 told him that by the time he rushed to the scene, his father had already died and that he did not see him being attacked by the accused person. He denied that he took PW 4 to the police station. He confirmed that the panga was recovered from the ceiling of her kitchen. In re-examination, PW6 was asked to read the report made by PW 1. He stated that, *"He heard his father scream and when he rushed to the scene his father had already been killed."*

21. After the close of the prosecution case, the accused was placed on his defence. He elected to give an unsworn statement. In that statement he denied committing the offence. He stated on 12th September 2012 very early in the morning he had gone to collect money after supplying mandazis which he used to sell at Nyangweso. As he was coming home on a bicycle, he fell down and was injured and went to Ngegu Dispensary for treatment. He was told to return on 13th September 2012. On the next day as he was going back to the Dispensary he was arrested by officers from the Ngegu Police Post about an incident he did not know anything about. He was taken to Homa Bay Police Station and later arraigned in court.

22. Mr Osoro submitted there was no evidence that the accused was seen killing the deceased and that none of the items recovered, the panga and the bicycle connected the accused to the deceased.

23. Mr Oluoch, learned counsel for the State, is that accused was identified and that this was a case of recognition and the circumstances of the incident were favourable to positive identification. Furthermore, the panga was recovered at the home of PW 4 and even though she recanted the evidence, the evidence of PW 1 and PW 7 was clear and that the panga had the deceased's blood on it. He urged the court to infer malice aforethought from the nature and extent of the injuries inflicted on the deceased.

24. In considering whether the accused caused the death of the deceased the prosecution case is that there is both direct and circumstantial evidence. I will deal with direct evidence first. PW 1 stated that the incident happened at about 6.30 pm when there was still daylight. He knew the accused hence this case is one of recognition particularly because both PW 1 and the accused had been at the Ngegu Police Station earlier. PW 1 testified that he heard his father crying that the accused was killing him and after he went there he saw the accused running away with a panga. He immediately informed PW 3 of the fact that it is the accused who had killed the deceased. In his report to PW 7, the PW 1 stated that he heard his father scream that the accused was killing him and when he rushed to the scene he had already been killed. He did not mention that he saw the accused running away which was an important fact. In my view, had he seen the accused running away with the panga he would have reported this fact at the first possible opportunity. I therefore find that the

PW 1 did not see the accused at the scene.

25. The second issue is whether there he heard the deceased cry that he was being killed by the deceased. **Section 33 (a)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* provides as follows;

Statements, written or oral, of admissible facts made by a person who is dead are themselves admissible in the following cases:

a. *When the statement is made by a person as to the cause of his death, or as to any circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;*

26. In ***Pius Jasunga s/o Akumu v R, [1954] 21 EACA 333***, the Court stated as follows:

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval..... It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R-v-Eligu s/o Odel & Another, (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused..... But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.

27. On this issue, I have considered the report first made by PW 1 as stated by PW 7. Although it referred to the deceased screaming, it did not refer to what the deceased said. The precise words of the deceased would have been important since the deceased knew the accused and would have identified him as the person assaulting him. Had the deceased mentioned the accused's name in his dying declaration, PW 1 would have reported it in the first instance. I therefore reject the statement made by the deceased as a dying declaration implicating the accused.

28. The prosecution relied on physical evidence comprising a bicycle, panga and DNA to connect the accused to the murder. The panga and the bicycle were recovered by PW 7 who testified that upon interrogation of the accused he led them to where the panga and the bicycle were. The recovery was confirmed by PW 2. In his own words the PW 7 stated that, "*I mobilized two officers and we rushed to the stage and arrested him and took him to the police post. We interrogated him and he told me where the murder weapon and deceased's bicycle were.*" In my view, this was an extra-judicial confession made by the accused as it tended to prove his guilt. Counsel for the accused did not object to the statement or to the production of the items recovered as a result of the statement made by the accused to PW 7. I must therefore consider the other evidence which implicates the accused.

29. The DNA test conducted by PW 6 showed that the panga had blood from the deceased which means it was possibly the weapon used to slay the deceased. PW 1 identified the panga as the one the accused used to cut him on the morning of 12th September 2012. PW 7 stated that that the panga was recovered from the rafters of PW 4 kitchen in the presence of PW 2 and PW 7. On her part, PW 4 recanted her own statement and was declared a hostile witness hence her testimony lacks any credibility and is accordingly disregarded.

30. According to the prosecution, the panga recovered was tied to the accused because it contained the deceased blood. PW 7 testified that a blood sample was taken from the deceased. The Exhibit Memo Form (Exhibit No. 5) shows that it is Corporal Munguti who forwarded the specimen

to the Government Chemist. The post-mortem report dated 15th September 2012 (Exhibit No. 3) shows that no specimens were taken from the deceased. According to the report, in response to space for, “*The following specimens have been removed for further examination..*” PW 5 wrote, “*NONE*”. Corporal Munguti was not called to testify how the blood from the deceased found its way to the Government Chemist without PW 5 extracting the same at the time the post-mortem was conducted. I therefore find that the prosecution did not establish that the deceased blood was collected and sent to the Government Chemist. There is therefore doubt that the blood on the panga recovered was that of the deceased.

31. It was important for the prosecution to establish that the green jumper and grey long trouser that were sent to the Government Chemist were worn by the accused either on the date of the murder or on the day of his arrest. The items were not brought to court to be identified by PW 1, who was with the accused on the day of the murder and by the arresting officers, who were not called testify. This fact undermines further undermines the DNA evidence connecting the accused to the death of the deceased.

32. Another issue that undermines the prosecution case is that there were blood stains are those of an unknown male on the green jumper and grey long trouser. It is possible that the blood stains belonged to a third party who was involved in the murder. The fact that the chain of custody of the material tested for DNA was not water tight, there exists considerable doubt as to the guilt of the accused.

33. The prosecution relied heavily on the conduct of the accused after the incident to buttress its case. According to PW 7, the accused was arrested on the next day after the incident at Nyangweso stage where he had gone to board a vehicle to go to Nairobi where his brother was. PW 7 also stated in cross-examination that a clan elder informed him that the accused wife and children had left home with all the animals when he went there after the incident. In the absence of testimony from the arresting officers and the clan elder, the evidence remains hearsay and cannot be relied upon to draw an inference of guilt.

34. The only evidence that ties the accused to the murder is the extra judicial statement made to PW 7 that led to the recovery of items connected to the deceased. Although no objection was raised to it, I heed the warning of the Court of Appeal in ***Kanini Muli v Republic* NRB CA CRA NO. 238 OF 2007 [2014]eKLR** where stated:

*It has consistently been stated by the courts in this country that it is the duty of every trial judge and magistrate to examine with the closest care and attention, all the circumstances in which a confession has been obtained to ensure that it was made voluntarily. The rationale for insisting that a confession should be voluntary is to ensure that it is ultimately reliable. A confession that is made due to torture, threats, promise, inducement, or similar conduct is not reliable since it could have been made with no regard to the truth but purely to avoid harmful consequences or to gain some advantage. (See *Njuguna s/o Kimani & Others v Regina* [1954] EA 316, *Githinji s/o Njaguna & Another v Regina* [1954] EA 410). The duty of every trial court to examine with the closest care and attention, all the circumstances in which a confession has been obtained is not restricted to confessions recorded by the police. Rather, it applies to all extra-judicial confessions.*

35. In light to the light of the evidence I have analysed and gaps in the prosecution case, I am not prepared to convict the accused on the basis of such an extra-judicial statement alone. Although there is very strong suspicion pointing to the accused as a person involved in the murder, suspicion is not a substitute for evidence. The prosecution had failed to prove its case beyond reasonable doubt.

36. As a result I find the accused **NELSON OCHIENG OUNDA** not guilty of the murder of the **ISSACK OKEYO ADEK** and I acquit him. He is set free unless otherwise lawfully held in custody.

DATED and DELIVERED at HOMA BAY this 25th day of November 2014

D.S. MAJANJA

JUDGE

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

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the State.