



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Case 59 of 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**PETER GETANGE OERI ..... ACCUSED**

**JUDGMENT**

1. The court is informed by the Deputy Public Prosecutor on behalf of the Republic that PETER GETANGE OERI hereinafter referred to as the accused is charged with the offence of murder contrary to **section 203** as read with **204** of the **Penal Code**. Particulars of the offence are that on the 25<sup>th</sup> November 2008 at Bokurati 1 sub location in Nyamira District within Nyanza Province murdered JAMES NYAKARIKIA OERI.
2. The charge having been read and every element thereof explained to the accused person in a language which he understands and upon being asked to respond to the charge he denied the same and the court entered a plea of not guilty.
3. On the 3<sup>rd</sup> November 2009 Mr. Kemo for the state told the court that on 25<sup>th</sup> November 2008 at 4.00 p.m., JOSEPH OERI was resting in bed when he was called by JOSEPH BITANGE and told that his two brothers were fighting. JOSEPH OERI went and separated them. The accused, who was one of the brothers fighting, immediately went to his house armed himself with a panga, came out and chased the deceased and cut him severally. The deceased died as he was being taken to Nyamira Hospital.
4. The prosecution called a total of six (6) witnesses. PW1 CHARLES MORARA a secondary school teacher from Ekerenyo told the court that the deceased was his neighbour. On the 25<sup>th</sup> November 2008 he was walking home when he heard screams from the deceased's house. He went to his own home which shares a fence with that of the deceased and on looking into the deceased's compound, he saw the deceased lying down unconscious with blood all over him. The deceased's brother by the name BITOYO OERI asked for a wheel barrow from PW1 and together they put the deceased on it and took him towards the main road. At about 7.00 p.m. PW1 was told that the deceased had succumbed to the injuries.
5. On cross examination, PW1 stated that his house is about 50 metres from that of the accused and there is a barbed wire fence and K-apple fence. There was sufficient light and he saw the deceased lying down.
6. PW2 AARON OGETII NYAKERIGA who also stays at Ekerenyo told the court that he did business with the deceased who was his father. He recalled that on the 25<sup>th</sup> November 2008 AT ABOUT 4.00 P.M. he was at Ikonge which was about 3 kms from his home when he received a call from someone who told him that his father had been assaulted and was being taken to hospital. He told the court that he rushed

home only to find his father on a wheel barrow and a big crowd had gathered. He found that the deceased was covered in a lot of blood. They put the deceased on a vehicle and headed for the hospital together with his uncle but on reaching Nyamira Hospital the deceased died. The deceased had cuts on his left hand and right leg. He stated that the accused is a younger brother to his father and that there was no bad blood between them.

7. On cross examination, he told the court that he was far from home when he was informed of the deceased's attack and that the injuries sustained were on the left hand and right leg.

8. PW3 PHILIP MASENGE MONGITI, the Assistant Chief Bokurati sub location told the court that on the 25<sup>th</sup> November 2008 around 3.00 p.m. he received a call from Aaron Ogetii Nyakeriga telling him that his father had been assaulted by the accused and a few minutes later he was again called by Aaron to say that his father had died before reaching the hospital. He started looking for the accused but did not succeed that day. The following day 26<sup>th</sup> November 2008 the accused was arrested at Nyamariba village while in possession of a panga believed to have been the murder weapon. On arrest PW3 took the accused to Ekerenyo AP Camp and from there, accused was escorted to the Nyamira police station.

9. On cross examination PW3 told the court that he never witnessed the accused assaulting the deceased. He also did not identify the panga the accused had been found in possession of.

10. PW4 was NO.65442 CORPORAL EDWARD GOZANGA attached to Merich Police Post and formerly of Nyamira Police station. He told the court that on the 26<sup>th</sup> November 2008 he was at the crimes branch office Nyamira police station when he was asked to investigate a case of murder. Accused had been brought to the station by the local chief PW3 and an AP PIUS ABOK. At the station it was alleged that the accused had cut the deceased with a panga and the body had been taken to a mortuary. He further states that he recorded witness statements and confirmed that accused had killed his brother due to disagreement. The accused had been told by the deceased to do away with his wife because she had not got children which statement infuriated him.

11. PW4 further testified that after the two having been separated the accused person ran away but returned shortly armed with a panga, chased the deceased who fell down and the accused found a chance to severely cut him. He says that he witnessed the post mortem and he also recovered the panga that was used by the accused which had blood stains the same having been brought to the police station by PW3. He says that he forwarded the panga to the Government Chemist to ascertain whether the blood thereon was that of the deceased. He produced an exhibit memo after producing the panga and also he produced a report from the Government Chemist and both were marked as **MF1-1** and Panga **P. Exhibit 2**.

12. On cross examination PW4 confirmed that he was the Investigating Officer but PW1 and PW2 are the ones who may have witnessed the incident. He also stated that the panga was brought to the police by PW3 and an AP and that what he told the court was gathered from the witnesses he interviewed.

13. PW5 DR. LILIAN KERUBO BOSIRE a Medical Officer of Health from Nyamira District Hospital told the court that she knew Dr. Ombaye who she was working with at the said hospital in 2009. She further told the court that she could recognize a document prepared by the said Dr. Ombaye as she knew his handwriting.

14. She was given the post mortem report and from the report Dr. Ombaye received a report to do a post mortem on 3<sup>rd</sup> December 2008 and she explained to the court what Dr. Ombaye observed.

#### Generally

- *Clothing was blood stained.*
- *Male Negro 51 years.*

External body

- *Right leg – compound tibial-fibular fracture.*
- *Severed blood vessels of the posterior tibial artery.*
- *Left arm had compound radial vascular fracture and severed blood vessel*

In Dr. Ombaye's opinion, the cause of death was severe hypertension secondary to severe external haemorrhage. She said that Doctor Ombaye signed the postmortem report and confirmed the signature on the post mortem report as Dr. Ombaye's. She then produced the post mortem report on behalf of Dr. Ombaye which was marked as **P. Exhibit 1**.

15. On cross examination, PW5 confirmed also having done a post mortem examination. She also explained that Dr. Ombaye had been posted to Migori Hospital but he was mentally disturbed and could not perform normal duties of a doctor though while in Nyamira he was okay.

16. She further testified that she joined Nyamira District Hospital on 8<sup>th</sup> August 2009 and that the fractures could have been caused by a sharp object because of severed blood vessels and fracture of the bone.

17. The last to testify was PW6 NO.230356 MR. ROBERT NATWOLI former OCS Nyamira Police Station who was by then a Chief Inspector of police and had served at Nyamira Police station between 1<sup>st</sup> March 2008 to July 2009 butd was now no longer in the police force.

18. He testified that on 26<sup>th</sup> November 2006 at 11.00 a.m. he was at the Nyamira police station. PW3 and an AP brought a suspect by the name OERI who it was alleged had killed somebody. After booking him he assigned PW4 to investigate the allegations. On the same day he directed PW4 to bring the suspect to his office for purposes of taking his confession or the statement and enquiry.

19. After the suspect was brought in PW6 asked him what language he understood and if he would avail any relative as a witness before they undertook the exercise. The accused accepted to call his wife by the name JANE KERUBO.

20. PW6 then administered the usual caution, introduced himself as a Chief Inspector of police attached to Nyamira police station and working as the OCS and also told him he was enquiring into the alleged offence of murder.

21. After being taken through the questions the accused agreed to say something in the presence of his wife and the statement was produced as **P.Exhibit 2**. The same was read in court in Kiswahili. PW6 stated that the suspect voluntarily made the statement in the presence of his wife. PW6 was able to identify the accused.

22. On cross examination PW6 told court that he became an Inspector of police in 1997. He confirmed that he enquired about the language the accused understood and that if accused had asked for interpretation into Ekegusii he would have provided one. He further stated that he was aware of the rule relating to confessions. He also established the length of time the accused had been in custody though he did not record the medical condition of the accused.

23. When the accused was placed on his defence, he chose to give an unsworn statement after the court complied with the provisions of **section 306 (2) of the Criminal Procedure Code**.

24. In his statement PETER GETANGE OERI the accused herein told the court that on the 26<sup>th</sup> November 2008 in the morning the chief (PW3) went to where he was working in the farm. The Chief was accompanied by a big crowd of people. PW3 told him they were looking for him and tied him with a

rope and took him to the AP Camp. Shortly thereafter a police land cruiser came to the AP camp and picked him and took him to Nyamira police station where he was put in an office. He says that he recorded a statement he knew nothing about. He did not call any witnesses.

25. In his final submissions, Mr. G.J.M. Masese counsel for the accused person told the court that none of the six prosecution witnesses who testified before the court linked the accused with the alleged crime save for PW6. PW6 is the one who charged and cautioned the accused.

26. Counsel further submitted that the charge and caution statement was retracted by the accused and in the circumstances therefore that the said evidence needed to be corroborated but there was no such corroborative evidence on record. He submitted that the court was duly bound to acquit the accused for lack of evidence.

27. In a charge of murder the prosecution must prove all the following three ingredients of the charge:-

1) *The death of the deceased person and the cause of death.*

2) *That the deceased met his death as the result of an unlawful act or omission on the part of the accused which forms the actus reus of the offence.*

3) *That the said act or omission was committed by the accused with malice aforethought which forms the "mens rea" of the offence.*

28. In the instant case the facts and cause of death have been satisfactorily proved. PW1 and PW2 have both stated that they saw the deceased when he was unconscious after having been assaulted. They confirm they saw blood from the deceased and they have told the court that the deceased died before reaching the hospital. PW4 the investigating officer after interrogating witnesses told the court that the accused and the deceased were brothers and that after an argument the accused took a panga chased the deceased with it and cut him on the left hand and right leg leaving him for dead.

29. The court should take judicial notice of the fact that two witnesses who are the brothers to the accused and who probably witnessed what transpired during the incident refused to answer to summons to testify before the court. Though a panga was recovered from the accused the next day with blood stains, no report was tendered to confirm whose blood it was.

30. PW6 the Doctor produced the medical report by doctor Ombaye whose opinion was that the cause of death was severe hypertension secondary to severe external haemorrhage. The fractures could have been caused by a sharp object because of severed blood vessels and fracture of the bone.

31. PW3 the chief also told the court that on the particular day after receiving information that the deceased had been assaulted by the accused, he tried to find the accused person but he was nowhere to be seen, meaning that he had disappeared. In his defence accused has not stated where he was on the 25<sup>th</sup> November 2008 when his brother was allegedly assaulted.

32. The accused was arrested in the morning of 26<sup>th</sup> November 2008 by PW3 and an AP. The accused was carrying a blood stained panga. The accused actions and the events surrounding the attack and disappearance by the accused on the evening after the deceased was assaulted were spontaneous. If he did not commit the offence he would have been around trying to assist his brother. I find that the first ingredient of the offence herein has been proved through circumstantial evidence.

33. The evidence of PW3, PW4 and PW6 tend to prove the second ingredient as the accused was found with a weapon very early the next morning. It is said that the said weapon still had blood stains although it is not known whose blood it was and the accused never gave a satisfactory answer in his defence to explain this very obvious adverse piece of evidence which thus remains unshaken.

34. Lastly from the evidence of PW3, PW4 and PW6 it is clear that there was a quarrel between the

accused and the deceased when the deceased suggested that the accused should send away his barren wife. In his defence the accused did not deny having had a quarrel with his brother which made him angry and he decided to pick a panga and cut the deceased. All these actions clearly link the accused to the offence and put him at the scene of crime.

35. Malice aforethought is defined under **section 206** of the **Penal Code** thus:- *“Malice aforethought shall be deemed to be established by evidence proving by one or more of the following circumstances:-*

*a) An intention to cause 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 intention 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.*

36. In this particular case the unlawful act complained of was the severe cutting of the deceased with a panga. The evidence from the pathologist was that the cut was severe and it caused severe haemorrhage. It is clear that the accused delivered a very deep and forceful cut to the deceased's right leg and left arm. The accused must have been well aware that the severity of that cut would kill or at the very least cause grievous harm to the deceased. I am satisfied therefore that malice aforethought as defined under **section 206 (b)** has been proved. I therefore find that in inflicting deep cuts to the deceased as he did the accused had the requisite mens rea required for the offence of murder.

37. As I have noted above two brothers of the accused never came to court to testify in this case. Did the failure of the two to testify in any way weaken or diminish the prosecution case? In my view the answer is in the negative. The circumstances of the occurrence of the assault, disappearance of the accused and his arrest the next day with a blood stained panga are all inconsistent with the innocence of the accused, and show that he sensed danger if he stayed at home hence his flight until next day. The chain of events is cogent and needs no additional evidence. Information gathered by the investigating officer and in particular the quarrel between the accused and the deceased just before the deceased died make the prosecution case water tight. For these reasons I find that notwithstanding the failure of some witnesses to give their evidence the prosecution has discharged their burden of proof in this case. I am also satisfied that the guilt of the accused herein has been proved beyond reasonable doubt.

38. There is the final point about the charge and cautionary statement taken by PW6. In the final submissions, the defence contended that this statement was retracted. That position taken by the defence is however misleading in that there is no record of such retraction. The fact that counsel put questions to the witness concerning that statement, did not amount to retraction. The statement was produced in evidence with the consent of the defence, and in the statement, the accused says in part:-

**“From that point, I cut my brother with the panga and he fell down; and I ran away out of fear. I hid myself in the maize plantation until the next day on 26/11/08.”**

39. In the result, I find the accused guilty of the offence of murder and convict him accordingly under **section 322 (1)** of the **Criminal Procedure Code**.

40. It is so ordered.

**Dated and delivered at Kisii this 31<sup>st</sup> day of January, 2013**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Shabola (present) for State

Mr. S.M. Sagwe h/b for G.J.N. Nasese for Accused

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**