



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL CASE NO.7 OF 2008**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**FRANCIS JUMA ODUOR.....1<sup>ST</sup> ACCUSED**

**JOHN NYONGESA ODUOR.....2<sup>ND</sup> ACCUSED**

**J U D G M E N T**

Francis Juma Oduor (1<sup>st</sup> Accused) and John Nyongesa Oduor (2<sup>nd</sup> Accused) were charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 26<sup>th</sup> June 2008 at Monda Village, Kingadole Sub-location of Busia District, the Accused persons, jointly murdered James Omoto Olula (the deceased). When the Accused persons were arraigned before this court, they pleaded not guilty to the charge. The prosecution called a total of nine (9) witnesses in its bid to prove the charge against the Accused persons. When they were put on their defence, the accused persons adduced sworn evidence in their defence. They further called two witnesses in bid to disprove the case brought against them by the prosecution. This case was heard by three judges. Muchemi J heard majority of the prosecution witnesses save for PW8 Christopher Omoto and PW9 PC Kennedy Lubembe. The two witnesses testified before Onyancha J. Muchemi J again resumed the hearing of the case after the Accused persons were put on their defence. The Learned Judge heard the testimony of DW1 Francis Juma Oduor. This court then took over the proceedings and heard the evidence of DW2 John Nyongesa Oduor, DW3 Hellen Nabwire Manyanya and DW4 Maria Oduor. The Accused persons did not raise any objection to the proceedings being taken over and heard by the respective judges.

After the close of both the prosecution’s and defence’s respective cases, Mr. Wanyama for the Accused persons made closing submission urging the court to find that the prosecution had failed to establish its case on the charge of murder to the required standard of proof. He submitted that the defence had established that the injuries that caused the death of the deceased were inflicted by his own son who hit him (the deceased) as he was attempting to assault the 1<sup>st</sup> Accused with a piece of wood. Mr. Kelwon for the State submitted that the evidence adduced by the prosecution witnesses had established that it was the Accused persons who assaulted the deceased on account of a dispute in regard to where the wife of the deceased who had just died would be buried. He urged the court to find the Accused persons guilty as charged. This court shall revert back to the arguments made by the respective counsel for the prosecution and the Accused persons in their closing submission after setting out the facts of the case.

The Accused persons are the nephews of the deceased. The deceased was the younger brother of the father of the Accused persons, Silvano Oduor Olula who had predeceased him in 1996. The deceased and

the Accused persons had a long standing land dispute. The dispute was in respect of two parcels of land registered as LR.Nos.Marachi/Kingadole/16 (Kingadole land) and Marachi/Esikoma/736 (Esikoma land). From the evidence adduced, it was apparent that the dispute was in respect to whether or not the deceased and members of his family were entitled to reside in the Kingadole land. This parcel of land was registered in the name of the father of the Accused persons. The two parcels of land were previously owned by the father of the deceased and his late brother Silvano Oduor Olula (the grandfather of the Accused persons). The father of the Accused persons was registered as the owner of the Kingadole land pursuant to succession proceedings. From the evidence adduced by both the prosecution witnesses and the witnesses for the defence, it was clear that both families preferred to reside on the Kingadole land as contrasted to the Esikoma land. In fact, both the family of the deceased and that of the Accused persons were residing side by side in the Kingadole land. The dispute between the two families essentially was in relation to which of the two families would be required to relocate to the Esikoma land. That dispute is pending determination before the Busia and Bungoma Law Courts. The family of the deceased and that of the Accused persons lived on Kingadole land in a state of open hostility. However, there was no fence separating the respective households of the members of the family of the deceased and that of the Accused persons.

The background of the circumstances that led to the assault and the eventual death of the deceased was the death of the 2<sup>nd</sup> wife of the deceased. The deceased was married to two wives. His 2<sup>nd</sup> wife, Faustine Omoto (Faustine) died of natural causes. The body of Faustine was taken to Busia District Hospital Mortuary for preservation pending burial. According to the prosecution witnesses, PW1 Margaret Auma Omondi, the 1<sup>st</sup> wife of the deceased, PW2 Francis Onyango Ochieng, PW3 Alfred Angoro Akumu, PW4 Stephen Odhiambo and PW5 Vincent Omoto, on 26<sup>th</sup> June 2008, the deceased hired a motor vehicle with a view to collecting the body of the deceased from the Busia District Hospital Mortuary for burial at their Kingadole home. According to PW5 Vincent Omoto, a son of the deceased, as they were leaving their home on the fateful morning to collect the body of Faustine, the 1<sup>st</sup> Accused confronted them at the entrance of their compound and showed them a letter from their advocate. PW5 recalled that the letter was from Wanyama Advocate. The 1<sup>st</sup> Accused did not allow them to read the letter but rather told them its contents. The 1<sup>st</sup> Accused warned them not to return with the body of Faustine to the Kingadole land because he would not allow them to bury the body of the deceased on the land. PW5 testified that the 1<sup>st</sup> Accused told him that they would not be allowed to bury the body of Faustine without their permission. The deceased advised PW5 and the people that were accompanying them to the mortuary to ignore the warning of the 1<sup>st</sup> Accused.

According to PW4 Stephen Odhiambo, while at the mortuary, as they were preparing to bring the body of Faustine back to Kingadole, the deceased received a call from one of his sons, PW5 Vincent Omoto who informed him that the two Accused persons were causing trouble at home and had in fact indicated that they would not allow the body of Faustine to be buried on the land. The deceased advised PW5 to keep calm. He advised him to seek assistance from the area Chief. According to PW5, the incident was reported to the Chief but he was no help in the matter.

After collecting the body of the Faustine from the mortuary, the deceased and the members of the family who had accompanied him travelled back home. PW1, PW2, PW3, PW4, PW5 and PW6 Boniface Ouma testified that when the vehicle carrying the body of the deceased reached the entrance to the homestead of the deceased, the 1<sup>st</sup> and 2<sup>nd</sup> Accused confronted them. The 1<sup>st</sup> Accused was armed with a club (rungu) while the 2<sup>nd</sup> Accused was armed with a panga. The two accused persons attempted to stop the motor vehicle by snatching the ignition key from the driver. The driver resisted this move. Meanwhile, the deceased had alighted from the motor vehicle. He pleaded with the accused persons to let him bury his wife. The Accused persons did not heed the plea of the deceased. According to the said witnesses, the 1<sup>st</sup> Accused then hit the deceased on the head with a club. While the deceased was on the ground, the 2<sup>nd</sup> Accused cut him on his head with a panga. There was commotion after this attack. The Accused persons after the assault, escaped from the scene. The deceased was carried to his house by among others PW5. He told the court that he administered First Aid to the deceased by tying a piece of cloth on his bleeding head. Shortly thereafter, the deceased became unconscious. The body of Faustine was removed from the

vehicle. The same vehicle was used to rush the deceased to Murumba Health Centre where the cuts on his head were stitched before the deceased was referred for further treatment at Busia District Hospital. The deceased was admitted at the said hospital. At 3.00 a.m. on the same night, the deceased succumbed to his injuries.

According to the said prosecution witnesses, a report of the assault was made to the Area Chief who acted by arresting the Accused persons. He took them to Bumala Police Patrol Base. PW9 PC Kennedy Lubembe, then based at Busia CID office, was assigned to investigate the case. After concluding his investigations, including recording witness statements from all the witnesses, he reached the conclusion that a case had been made for the Accused persons to be charged with the offence of murder. Post mortem was performed on the body of the deceased by PW7 Dr. Zacharia Njau. He made the following observations: He saw a cut wound on scalp extending from the frontal to the vertex (stitched). The other parts of his body had no injury. On internal examination of the head, he noted that there were two extensive fractures on the vertex skull. There was also intracranial hemorrhage. The doctor formed the opinion that the cause of death of the deceased was cardiopulmonary arrest due to very severe head injury from intracranial hemorrhage. He produced the post mortem report as Prosecution's exhibit No.1. On 15<sup>th</sup> July 2008, the doctor examined the Accused persons and noted no injury on the Accused persons. After interviewing them, he formed the opinion that the Accused persons were mentally fit to stand trial. The P3 forms were produced as Prosecution's exhibits No.2A and 2B.

When the Accused persons were put to their defence, they denied assaulting the deceased. In their sworn testimonies, the 1<sup>st</sup> and 2<sup>nd</sup> Accused while conceding there existed a dispute over land between their family and that of the deceased, they testified that it was the deceased who had provoked the events that led to his death. They testified that according to the Luhya culture, a body of a deceased person cannot be allowed to pass through the entrance of a compound of a different family into that of a deceased, because if such an event took place, misfortune would befall such family. According to the Accused persons, on the material day at about 3.00 p.m. they heard a motor vehicle hooting outside the entrance to their compound. When they went to investigate, they found the motor vehicle was ferrying the body of Faustine. They were surprised that the deceased, who was in the motor vehicle, was directing the motor vehicle to enter the homestead through their compound.

The accused persons testified that they went to where the motor vehicle was and told the deceased to use the entrance to their (the deceased's) compound. A commotion ensued. The sons of the deceased, including PW8 who was armed with a piece of wood started assaulting them. It was in the course of aiming a blow at the 2<sup>nd</sup> Accused that PW8 hit the deceased on the head. The 2<sup>nd</sup> Accused testified that he ducked when PW8 aimed the blow on his head as a result of which the blow which was meant for him landed on the deceased. They testified that because of the fracas that occurred at the time, they were both injured. Their mother, Maria Were Oduori who testified as DW4 and Hellen Nabwire Many, the wife of the 1<sup>st</sup> Accused corroborated their evidence. DW4 testified that in the fracas, she was assaulted and injured by members of the family of the deceased to the extent that she was admitted at Busia District Hospital for a period of one month. The Accused persons and DW4 produced medical documents to support their evidence that they had been so injured. The medical documents were produced as Defence exhibits Nos.1, 2 and 3. In essence, it was the Accused persons' defence that they were innocent of the charge that was brought against them because it was actually a son of the deceased who had mistakenly hit the deceased on the head thus causing him to sustain fatal injuries.

In criminal cases, the burden of establishing the guilt of an accused person to the required standard of proof beyond any reasonable doubt is on the prosecution. The prosecution is required to discharge this burden. The Accused persons are under no legal obligation to prove their innocence. This burden does not at any time shift to the Accused persons. In the present case, the issue for determination by this court is whether the prosecution established the charge of murder to the required standard of proof beyond any reasonable doubt. There are certain challenges that this court faced in determining this case. As stated earlier in this judgment, this court took over the proceedings of the case from two previous judges who substantially heard the case. In fact, the entire prosecution's case was heard by the two judges. This court took over the proceedings at the defence stage. To a large extent therefore, this court reached its verdict on the basis of the proceedings before the two previous judges who saw the witnesses as they testified and

therefore were able to form an impression on the demeanour of the respective witnesses. However, from the said proceedings, this court was able to evaluate the evidence and reach a verdict which it shall render shortly.

Upon evaluation of the evidence adduced by the prosecution witnesses, it was evident that the theory advanced by the prosecution was that because of a land dispute that existed between the families of the deceased and that of the Accused persons, the Accused persons sought to prevent the deceased from burying his 2<sup>nd</sup> wife on the parcel of land that was the subject of the dispute. That a land dispute existed between the families of the Accused persons and that of the deceased is not in doubt. There are two cases pending before court. This court has earlier in this judgment given a background to the nature of land dispute that exists between the two families. It was therefore evident that on the material day of 26<sup>th</sup> June 2008, the Accused persons, according to the prosecution witnesses (PW4 and PW5), had made their intention known that they would not allow the deceased to bury his 2<sup>nd</sup> wife on the suit parcel of land. This intention was communicated to the deceased in the presence of PW4 and PW5 on the morning of 26<sup>th</sup> June 2008 when the 1<sup>st</sup> Accused confronted the deceased as he was preparing to go to Busia District Hospital Mortuary to collect the body of Faustine for burial. The Accused persons had even obtained a letter from their advocate warning the deceased not to bury his deceased wife on the suit parcel of land. The deceased ignored the warnings. He brought the body of his late wife from the said mortuary to the suit parcel of land.

The prosecution was able to establish that the Accused persons were prepared to physically prevent the deceased from bringing the body of Faustine for burial in the suit parcel of land. This court analyzed the evidence adduced by the prosecution witnesses (PW1, PW2, PW3, PW4, PW5, PW6 and PW8) and reached the conclusion that the said witnesses' testimonies were consistent, cogent and corroborated each other in material respects. Their evidence was consistent that it was the 1<sup>st</sup> Accused who first assaulted the deceased with a club. After the deceased had fallen to the ground, the 2<sup>nd</sup> Accused cut him on his head with a panga. The nature of the injuries that the deceased sustain on his head were consistent with injuries caused by both blunt and sharp objects. This was noted by the doctor who performed post mortem on the body of the deceased. The Accused persons in their defence testified that the injury that the deceased sustained was caused by being hit by a piece of wood by PW8. That evidence is not supported by the post mortem report. The doctor noted that the cut wound on the scalp extended from the frontal lobe to the vertex. A piece of wood could not cause a cut injury. The cut injury was consistent with the evidence adduced by the prosecution witnesses that the deceased was cut on his head with a panga. Having evaluated the evidence adduced by the prosecution, it was clear that the prosecution established to the required standard of proof beyond any reasonable doubt that it was the Accused persons that assaulted the deceased respectively with a club and a panga, and thus caused him to sustain the fatal injuries. The evidence was direct. The incident was witnessed by several witnesses who adduced evidence that was consistent. Their evidence corroborated each other.

The defence of the Accused persons did not dent the strong evidence adduced by the prosecution witnesses. In fact, the defence of the Accused persons was incredible. The Accused persons testified that it was the deceased who provoked the situation by attempting to bring the body of his deceased wife through the entrance to their compound. It was their case that this was taboo according to Luhya Customary Law. This evidence was contradicted by the testimonies of the prosecution witnesses. In the first place, it was confirmed in evidence that there existed no fence between the homestead of the deceased and that the members of the family of the Accused persons. There was no entrance *per se* in form of a gate. The entrance to the two homesteads was just an opening with no distinction between the two compounds. Further, if the Accused persons' defence was to be believed by the court, then, the evidence adduced by the prosecution witnesses which was to the effect that the Accused persons had earlier that morning warned the deceased not to bring back the body of Faustine, would be of no factual basis.

The Accused persons' defence discounts the uncontroverted fact that there existed a land dispute between the family of the deceased and that of the Accused persons. This cannot be because it was the land dispute that was the actual cause of the difference between the Accused persons and the deceased. The Accused

persons would like this court to believe that their assault of the deceased was provoked by the deceased's action in ferrying the body of Faustine through the entrance to their compound or that the assault was spontaneous. The prosecution was able to displace the basis of the defence of Accused persons. The prosecution established to the required standard of proof beyond any reasonable doubt that the assault of the deceased by the Accused persons had a background of the land dispute and also the warning that the Accused persons had issued earlier in the morning of the assault to the deceased not to bury the body of Faustine on the suit parcel of land. The fact that the 1<sup>st</sup> Accused and his mother DW4 testified that they were injured on the material day does not in any way lessen the criminal liability of the Accused persons in the unlawful killing of the deceased.

The prosecution has established the *actus reus* i.e. that it was the Accused persons who assaulted the deceased and caused him to sustain injuries which proved fatal. The prosecution is also required to establish *mens rea* on the part of the Accused persons. In a charge of murder under **Section 203**, *mens rea* is what is described as malice aforethought. The circumstance under which malice aforethought is established has been set out in **Section 206** of the **Penal Code**. It provides thus:

***“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.”***

In the present case, it was clear that the Accused persons were determined to prevent the deceased from burying his late wife on the suit parcel of land. They were prepared to use violence to achieve their objective of ensuring that the deceased did not bury his late wife on the land. Evidence was adduced on how in the morning prior to the assault, the 1<sup>st</sup> Accused had warned the deceased not to bring the body of Faustine to the suit parcel of land. For added emphasis, he told the sons of the deceased that he would not allow the deceased to bury the body of Faustine on the suit parcel of land without his permission. When the deceased arrived on the land with the body of Faustine, the Accused persons confronted him while armed with a club and a panga.

The Accused persons had every intention to physically harm the deceased for failing to heed their warning not to bring the body of Faustine to the suit parcel of land. By respectively hitting and cutting the deceased on his head, the Accused persons clearly meant to cause grievous harm to the deceased. The resultant death of the deceased was therefore a natural consequence of their action. The assault of the deceased by the Accused persons was therefore premeditated.

The prosecution therefore proved malice aforethought to the required standard of proof beyond any reasonable doubt. The charge of murder was therefore proved to the required standard of proof. The Accused persons are accordingly convicted of the charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is so ordered.

**L. KIMARU**

**JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 8<sup>TH</sup> DAY OF AUGUST 2013.**

**F. TUIYOT**

**JUDGE**