



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 8 OF 2012**

**GEORGE OTIENO OYARO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[From original conviction and sentence in Principal Magistrate's Court at Maseno Criminal Case No. 997 of 2010 Before Hon. J.M. Nangea]*

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

**Introduction**

1). The appellant herein was charged with the offence of manslaughter. The particulars are that on the 12th day of September 2008 at East Kalunje sub location Kisumu West District within Nyanza province, unlawfully killed **Moses Awiti Okwako**.

The appellant after full trial was convicted and sentenced to 20 years imprisonment hence this appeal.

**Facts**

**PW2, Lukas Nyesi Kongo** told the court that on the night of 11-9-2008 at 10 p.m he was asleep in his house when he heard people shouting. He went outside and found people who included George Otieno, the appellant, one Otieno and Pamela assaulting the deceased. Otieno the son of Pamela had a panga and a knife while the appellant had a club. Otieno hit the deceased with the panga on both legs and near the stomach. He said that he told the four people to leave his compound and they obeyed. Apparently during the fight he was stabbed on the chest by Otieno and he sought treatment at Miranga hospital. He told the court that he fully recognized the appellant as there was a strong moonlight and that they were 3 meters away from him.

3). The deceased was left at the scene till the following morning when **PW3, Nicholas Opiny Mbeke** the village elder and Jennifer Aluoch the assistant chief came. From the evidence of the two at the time they arrived at the scene the deceased was still alive but he died soon thereafter.

4). It emerged from the evidence of PW5, the assistant chief that on the fateful night she was informed by Pamela about the assault on the deceased by the appellant and Otieno who apparently was Pamela's son but she did not take any action. Pamela told PW5 that the deceased had tried to steal a hen from her and she was then assaulted by a mob.

5). Further, when PW5 reported the matter to the police the O.B. stated that the deceased had been killed by a mob. The deceased body was taken to the mortuary and later a post mortem was conducted

where PW6, Sila Otieno Okwallo the deceased brother identified the body.

6). **PW7, P.C Michael Kisinga** who was the investigating officer produced all the exhibits including the post mortem report on behalf of a doctor who failed to turn up.

### **Analysis and Determination**

7). This being the first appeal this court is enjoined to re-evaluate afresh the evidence and come up with afresh and independent finding.

The appellant has mounted 10 grounds of appeal. The issues that can be gleaned from them are as follows:

0. **Whether the court analyzed and evaluated the evidence properly.**
0. **Whether the prosecution established their case beyond reasonable doubt.**
0. **Whether the alibi evidence by the appellant was sufficient to acquit him.**

8). The court found that the prosecution had proved their case beyond any shadow of doubt and this convicted the appellant. Did the prosecution connect the death of the deceased with the appellant?

9). PW2 told the court that he saw three people assaulting the deceased. He told the court that the appellant was armed with a club while Otieno had a panga and a knife. The deceased was cut on both legs and the stomach by Otieno. He said that the appellant had a club but he assaulted the deceased with fists.

10). If he had a club why use his fists to assault the deceased? It should be noted that the trial magistrate found his demeanor to be wanting. From the evidence also it appears that a part from PW2 no other eye witness to the assault was called. Pamela who was to be the star witness was not called neither did investigating officer confirmed or denied that she wrote any statement.

11). Interestingly the said Pamela is the wife to the deceased having been inherited. Otieno Pamela's son stabbed PW2 and he is the one who cut the deceased. Why then did Pamela not record any statement or at least be called to testify?

12). I further find the evidence of PW3 the village elder and PW5 the assistant chief wanting in this case. Both talked of the deceased being alive when they arrived. PW3 said:

**“I did take the police to the scene where the victim lay down near Pamela's house. He was still alive but badly injured. He had a cut wound on one of his thighs----- The victim died when still at the scene”.**

PW5 said:

**“The following day I went to Pamela's home with a village elder. We found him still lying down about 300 meters from Pamela's home. His hand was broken. His legs were bleeding. The village elder spoke with the suspect. He could talk with us. He told us he had been assaulted for allegedly stealing a hen. A dead hen was also lying near the suspect”.**

13). From their testimonies the deceased did not mention the appellant as one of the assailants. Did the two administrators care to inquire from him who had assaulted him? They seemed not to have bothered.

14). I equally find PW5 to have been very reckless. She seemed uninterested when Pamela brought her the information. She told Pamela **“to stay with the victim so he would be taken to hospital the following day”**. This was not consistent with a prudent administrator. She should have taken the liberty of going to the scene and ensuring that the situation was under control or at least save the life of the deceased.

**15).** What was the cause of the deceased death? Nobody knows. The post mortem report was produced by the investigating officer who told the court that the deceased died from assault. Assault by what objects? There were panga, knife clubs and fists used by Otieno and the appellant allegedly. which of those weapons cause the death? Clearly these were questions to be answered by the doctor.

**16).** Further, it appears that the trial court did not bother to inquire whether the appellant had any objection to production fo this report. I do find that this went contrary to the provisions of section 77 of the Evidence Act Chapter 80 laws of Kenya in relation to production of such important professional documents. The court ought to have inquired from the appellant whether he had any objection to its production by a police officer and move to state whether he had any objection.

**17).** Consequently, in the absence of the maker of the document although it forms part of the record it is difficult to ascertain the cause of death in this case.

But was the appellant part of the people that assaulted the deceased? PW2's evidence suggests so but as found by the court his demeanour was wanting. At some point he suggested that he had a club but used his fists to attack the deceased. Again why not use the club?

**18).** From the evidence on record the role of Pamela was never clarified. It is conceded that she was among the people that were assaulting the deceased. Why then if the deceased was her husband or rather staying with her did she tell PW5, the assistant chief that the deceased was a thief who wanted to steal a hen? PW7, the investigating officer told the court that the body lay 80 meters from Pamela's house whereas PW5 told the court that the body lay 300 meters from Pamela's house. This discrepancy in distance is so wide that it shows something was amiss.

My finding is that Pamela was an essential compellable witness. By mere reporting to PW5, she ought to have made statement with the police and be called to testify on whether indeed the deceased was her husband by virtue of inheritance and whether the appellant assaulted the deceased together with her son as claimed by PW2 and whether the deceased had tried to steal her chicken.

**20).** The sum total of this court's finding is that this case was poorly investigated. The crucial witnesses namely the doctor was not availed to testify and no cogent reason was given by the prosecution. Further, Pamela who was a key witness did not write any statement or called to testify. It is then difficult to established the cause of the deceased death which is an essential ingredient in such a case.

I do therefore allow the appeal and set free the appellant unless lawfully held.

**Dated, signed and delivered at Kisumu this 28th day of November, 2013.**

**H.K.  
JUDGE**

**CHEMITEI**