



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL CASE NO. 26 OF 2006

REPUBLICPROSECUTOR
R

-VERSUS-

MICHAEL OTIENO ADUO Alias ONGONGA
OTIENOACCUSED

JUDGMENT

By an information dated 8th May, 2007 and filed in court on 23rd May, 2007, the state through **J. K Chirchir**, the then state counsel charged **Michael Otieno Aduo** alias **Ongonga** with murder contrary to section 203 as read with section 204 of the **Penal Code**. It was alleged that on 22nd March, 2006 in Kanyamgudho sub-location in Migori District of Nyanza Province, he murdered **Dennis Oluoch Anda**.

The accused returned a plea of not guilty and the trial commenced before me on 24th February, 2010.

PW1, **Milton Clement Ouma** the local chief testified that on 22nd March, 2006 at about 1.00p.m, he was in the office when one, **George Okumu Obonyo** came and reported that the accused had speared the deceased. He had in his office, the assistant chief as well as the local youth winger. He instructed them to look for the accused and arrest him. The accused was subsequently arrested and handed over to the AP's at Rapogi, D.O's office. On 14th April, 2006 he received information that the deceased had passed on. Since the accused had earlier been released, he caused him to be re-arrested again at Awendo. He was thereafter taken to Migori Police Station.

Cross-examined by **Mr. Ondari**, learned counsel for the accused, he stated that the accused was first arrested on 22nd March, 2006 for assaulting the deceased. The assault was reported to Migori Police Station by the deceased. The deceased was taken to hospital after the incident where he stayed for 3 weeks before he passed on. Though the accused was said to have speared the deceased, he was not arrested with the spear.

PW2, **Morris Okumu** was a cousin of the deceased. On 28th April 2006, he identified the body of the deceased to the doctor for purposes of post mortem. The body was subsequently released to him for burial.

PW3, **Kennedy Adek Odhiambo** was the nephew of the deceased. On 22nd March, 2006 at 11.00a.m. he was with the deceased fencing land belonging to his grandfather. They were digging holes with a jembe. The deceased had a jembe whereas the witness was planting fence trees. The accused approached them and demanded to know what they were doing. On being told that they were putting up a fence and that they intended to start ploughing the land the following day, he pulled out a club and aimed it at the deceased but missed him. In retaliation the deceased picked the club and aimed it at the accused but missed him as well. The accused then went back to his house, armed himself with a spear came back and speared the deceased without talking to them again. The deceased fell on the ground and the accused ran away. He knew the accused as a neighbour. Their houses were separated by a river. He did not know whether the accused had a claim over the same piece of land. After the incident, the witness ran home and informed his grandfather as to what had happened. When they came back, they found the deceased unconscious. He was taken to Rapogi hospital and was later transferred to Awendo where he died.

Cross-examined, he responded that it is the accused who first threw a stone at the deceased. The accused thereafter went to his home and came back with a spear. At his juncture, the witness started recanting what he had recorded in his statement with the police. He had told the police that the accused took a jembe from the deceased to his house and that he had used the jembe to hit the deceased, that the deceased had then followed the accused to his house to get back the jembe. Whilst there, they fought and the deceased was injured. He did not however accompany the deceased to the home of the accused. It was when the deceased followed the accused to retrieve the jembe that he was speared by the accused.

PW4, **George Okumu Obonyo** was a nephew of the deceased. On 22nd March, 2006 at about noon, he was coming from Rapogi centre when he met with people carrying the deceased on a bicycle. He got a vehicle and rushed the deceased to Rapogi Mission Hospital. He was unconscious. At Rapogi Mission Hospital, they were unable to deal with the deceased's condition and were referred to Migori District Hospital instead. He had been injured on the stomach. On 14th April, 2006, he visited the deceased at Migori District Hospital and found that he had passed on. The accused was a neighbour and he knew him very well. He had no grudge with him. His brother had instructed the deceased and PW3 to plant the fence. He had no grudge with the deceased over the land.

Cross-examined, he stated that he did not know who had speared the deceased as he was not present when it happened.

PW5, **Dr. Daniel Otieno Agulo** performed a post mortem over the body of the deceased at Pastor Machage Memorial Hospital Mortuary. Externally, he noted surgical incision running from the umbilicus upto the lower abdomen. surtures were still in place and healed scar with surture marks just above the left waist bone. Internally he noted a hole in the part of the large intestines with Iskemia. In his opinion, the deceased passed on as a result of cardio pulmonary failure due to sceptecimia secondary to the perforation of the colon. He tendered in evidence the post mortem report.

Cross-examined, he answered that he conducted the post mortem after 2 weeks. He had found out that the deceased had been undergoing treatment in the same health facility where he worked. Infact he had been operated upon in the same hospital. The area operated upon had a hole, which according to him was not a normal occurrence. It was possible that the deceased would have survived depending on the expertise of the surgeon who attended on the deceased.

PW6, **Dr. Ogutu Vitalis** appeared in these proceedings on behalf of **Dr. James Abwao** for purposes of

producing the P3 form with regard to the accused. He testified that **Dr. Abwao** was on 17th May, 2000 requested to assess the mental status of the accused. From his findings the accused was mentally fit to stand trial. He tendered in evidence the P3 form.

PW7, **Jared Okoth** testified that on 22nd March, 2006 at about noon, he was coming from his farm when he heard screams. He rushed towards where the noise was coming from and saw the deceased. On asking him what had happened, the deceased told him that he had been speared by the accused. From where the witness and the deceased were, it was 2 metres from the accused's house. Infact the witness heard the accused talking to his wife. He looked for a bicycle to take the deceased to hospital as blood was oozing from his left side of the chest. He managed to get a bicycle and took the deceased to the main road from where they hired a taxi and took him to Rapogi Mission Hospital. He was thereafter transferred to Pastor Machage Memorial Hospital at Migori. He was later informed that he had passed on.

Cross-examined, he stated that he was not present when the deceased was speared. The deceased was his cousin. The deceased was about 2 metres from the accused's house.

That then marked the close of the prosecution case.

Having carefully read and considered the evidence that had been led by the prosecution so far, I was persuaded that the prosecution had made out a prima facie case against the accused entitling him to be put on his defence and I so ruled. The accused elected to give unsworn statement of defence and called no witnesses.

In his defence, the accused stated that he was arrested on 14th March, 2006 when he had come back from Kanyamkago where he had gone to harvest tobacco. He found some cattle having strayed on his land. He caught hold of the herdsboy and caned him. He escorted both the herdsboy and the cattle to the owner of the cattle. At the home of the owner, a clansman threatened to beat him up for having caned their herdsboy. On 23rd March, 2006, he went to his place of work at Awendo. At around 2.00p.m. the chief came and informed him that he was required at Migori Police Station. He went and was asked whether he had killed the deceased. He denied and he was locked up for 103 days before he was charged. The herdsboy whom he had caned was not the deceased. That herdsboy was still alive. He therefore denied having killed the deceased. With that the defence closed its case.

In his final submissions, counsel for the accused stated that the prosecution had failed to prove that the accused killed the deceased. There were no independent witnesses. The evidence of PW3, a minor was not corroborated. The investigating officer was not called as a witness nor did they call the Doctor who treated the deceased following the incident as his treatment was questionable and may have led to the death of the deceased. He further submitted that the accused's constitutional rights were violated for he was locked up in the police cells for well over 103 days.

In response, **Mr. Gitonga**, learned state counsel submitted that the state had proved its case to the required standard in law. There was direct evidence provided by PW3 which was corroborated by the evidence of PW1. Failure to call the Investigating officer was not fatal because his testimony was cured by that of PW1 who was one of the arresting officers. PW5 testified and ruled out the possibility that the cause of death was anything but natural. The actions of the accused were the ultimate cause of death of the deceased. With regard to the alleged violation of the accused's constitutional rights, counsel urged the court to go by recent Court of Appeal decisions which are to the effect that, the accused had a remedy in seeking compensation and therefore should not be entitled to an automatic acquittal. With regard to his defence, counsel submitted that it was a mere afterthought. In the main the accused sought refuge on account of delay of 103 days.

Basically there are two issues for determination in this case, whether the deceased was murdered and if so whether he was murdered by the accused.

Murder is the killing of one person(s) by another or others with malice aforesaid. So that in a case of murder, the prosecution must prove that the accused caused the death of the deceased and he did so with malice aforethought.

In this case there is no doubt at all that the deceased passed on. This fact was confirmed by the testimony of PW2 and 4 who were both relatives of the deceased. They identified the body of the deceased to PW5, **Dr. Agula** who carried out the post mortem. The post mortem disclosed that the cause of death was a Cardio Pulmonary failure Secondary to Sceptecimia Secondary to Colon perforation. With that evidence the death of the deceased is not an issue. The contention of the appellant that the person he assaulted was still alive cannot therefore hold water. The evidence of PW3 and PW7 confirm that the deceased fought with the deceased and not the herdsman. The incident occurred in broad daylight. PW3 and PW7 knew the accused very well as they were neighbours. PW3 saw clearly the deceased fight with the accused. PW7 found the deceased lying 2 metres from the house of the accused and told him that he had been speared by the accused.

However was the death caused by the accused? From the recorded evidence, the deceased did not pass on immediately. Though assaulted on 22nd March, 2006, it was not until 14th April, 2006 that he passed on. In between he was undergoing treatment. According to the testimony of PW5, had there been proper management of the deceased's injury, the deceased could as well have not met his death. What this evidence seems to suggest is that the death could as well have been caused by the negligence of the medical staff detailed to take care of and manage the deceased's ailment and or medical condition. Indeed PW5 testified that the operation on the intestines was not properly carried out as it left a hole where there was perforation which led to a mixture of faeces and intestines. According to the doctor that was not a normal occurrence.

Of course under section 213 (a) of the Penal Code the accused cannot escape liability on that account since a person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death ***"...If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill..."***.

In this case, there is ample evidence that the accused speared the deceased. There was altercation between the deceased and the accused, I believe, over land. That altercation generated into a fight leading the accused to fatally wound the deceased with a spear. The incident happened in broad daylight, at 11.00a.m. to be precise. PW3 who was with the deceased throughout witnessed the incident. He testified categorically, that when his deceased uncle followed the accused to his house to retrieve the jembe, the accused came out armed with a spear which he threw at the deceased stabbing him in the chest in the process. There was, also the evidence of PW7. He stated that whilst coming from his farm at about noon, he heard screams. He rushed to where the screams were coming from and found the deceased. On asking him what happened, the deceased responded that he had been speared by the accused. The deceased was hardly 2 metres from the house of the accused. This evidence therefore links the accused to the spearing of the deceased. It is not suggested anywhere in the proceedings that these witnesses had any grudge with the accused as to make them testify falsely against him. Neither is he a victim of mistaken identity. These witnesses knew the accused very well. There is therefore no doubt at all in my mind that the accused fought with the deceased and in the process speared him and not a herdsman who is still alive as suggested by the accused in his defence.

However, it is not possible to tell whether the stabbing aforesaid was the ultimate cause of the death of the deceased. Is it possible that perhaps the surgical and medical treatment for the period that the deceased was in hospital could have led to his eventual demise? In the light of the evidence of PW5 that possibility cannot be ruled out wholly.

Section 213 (a) of the **Penal Code** aforesaid seems to have a proviso to the effect that ***"...the person***

inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill...". To enable the court to avert this conclusion, it was necessary that the prosecution leads evidence in relation to the deceased's surgical and medical treatment for the period between his admission at Migori District Hospital on 22nd March, 2006 and his death on 14th April, 2006. No such evidence was however led in the circumstances of this case. It is therefore difficult to tell whether such treatment was employed in good faith or with common knowledge or skill. Therefore there is doubt created in my mind as to the ultimate cause of death of the deceased. Like every doubt in criminal proceedings, it must be resolved in favour of the accused and I so hold.

In the case of **George Kimeli –vs Republic C.A No. 4 of 1995 (UR)**, the Court of Appeal in a similar scenario observed “... *it follows that evidence of the surgical or medical must in the circumstances set out above be led to establish that such treatment was employed in good faith and with common knowledge and skill. In the appeal before us, although the deceased was under surgical and medical treatment for a period of about 47 days, no evidence of such treatment was led at the trial of the appellant. Whether or not the deceased's surgical and medical treatment was the cause of his death is a matter of conjecture. The hiatus between the infliction of the injury on the deceased's abdomen and his death as is narrated above created a doubt as to his cause of death which doubt should be resolved in favour of the appellant...*”. The same situation obtains here.

However as already stated, I have no doubt at all that the accused speared the deceased. Evidence is galore. He therefore committed an offence. The offence disclosed on the evidence is one of greivous harm. Therefore although the appellant was charged with the murder of the deceased, the evidence proves the minor and cognate offence of causing grievous bodily harm contrary to section 234 of the Penal Code for which now I proceed to convict him accordingly.

The accused has raised the issue of violation of his constitutional rights. That he was detained in police custody for 103 days before he was arraigned in court. To my mind this allegation is an afterthought. He did not raise it when arraigned before me for plea. Neither did he raise it with the Investigating Officer. In any event and as correctly submitted by the learned state counsel the position appears to be that the person claiming that his constitutional rights were violated has a remedy in damages and not to seek for an acquittal in criminal proceedings as the accused has sought in this case.

Having convicted the accused of the offence of greivous harm, I note that the accused has been in custody since 26th March, 2006. In my view he has been sufficiently punished. I will therefore treat the period he has been in custody as aforesaid as prison term served with consequence that the accused should forthwith be set free.

Judgment dated, signed and delivered at Kisii this 8th day of April, 2011.

ASIKE-MAKHANDIA

JUDGE