



**NO. 2809**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL CASE NO. 25 OF 2009**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**DANIEL ORWA OKEWE.....ACCUSED**

**RULING**

The accused was charged with the murder of **Peter Otieno Oreche** vide information dated 28<sup>th</sup> April, 2009 and filed in court on the following day. It was alleged that on 13<sup>th</sup> March, 2009 at Kanyajwa sub-location in Homabay District within Nyanza province, he murdered; **Peter Otieno Oreche**, deceased. He pleaded not guilty to the information and the trial ensued in earnest.

The facts of the case as presented by the prosecution are that on 13<sup>th</sup> March, 2009, **Dalmas Wesonga Okewe** (PW1) was sleeping in his house at about midnight when he heard his dogs barking. He came out and saw the deceased fighting with the accused who was the witness's last born brother. The deceased was a neighbour. There was moonlight which enabled him to see the combatants very clearly. The accused was armed with a panga with which he was using to assault the deceased. The deceased was unarmed. Out of fear, he refused to intervene. Instead he went to the deceased's home and found his brother **Oreje** to whom he reported what he had observed. They came back to the scene together with **Oreje**. He thereafter went to sleep. The following morning he was woken by people screaming at the scene. They were claiming that the accused had killed the deceased. He went to the scene and saw the body of the deceased. The deceased's hands had been tied with a rope. He was not aware of any differences between the accused and deceased.

On 14<sup>th</sup> March, 2009 at about 5.00a.m **Florence Ajwang**, the assistant chief for Kanyanjwa sub-location received a report from a village elder, **Nahashon Juma Oswom** to the effect that the accused had killed

the deceased. She rushed to the scene. However, before reaching thereat, he met with the accused riding a bicycle and had a panga. She stopped him and on interrogating him, he stated that he was going to the police station. She accompanied him to Rangwe Police Station where he was arrested. The assistant chief with police officers came back to the scene, and evacuated the body to Homa Bay District Hospital mortuary. The deceased was lying on the ground tied with a rope.

The accused was arrested at the police station by chief Inspector **Elias Kibiti Rugoria** (PW4). He thereafter proceeded to the scene in the company of the Assistant Chief and found the deceased bound by ropes on both his limbs. He had several cuts on the head. He also found at the scene the weapon used to kill the deceased – a panga. He evacuated the body to Homa Bay District Hospital mortuary and commenced investigations. After collecting the evidence, he established that the accused had attacked and killed the deceased. Given the circumstances, he recommended that the accused be charged with manslaughter. He was however overruled by his superiors. With that the prosecution closed its case.

In his written submissions on no case to answer, **Mr. Omwega**, learned counsel for the accused stated that the prosecution had not established a case to warrant the accused being put on his defence. The prosecution did not call any medical evidence to confirm whether **Peter Otieno Oreche** died and if so what the cause of his death was. The failure by the prosecution to adduce medical evidence in that regard was a serious flaw on its part and on that basis the case must flop. The prosecution evidence adduced and on record does not prove or establish that the accused had malice aforethought and that he is the one who actually killed the deceased.

**Mr. Gitonga**, learned state counsel in response submitted that the prosecution had established a prima facie case through credible and direct testimony of PW1. He saw and recognized the accused at the scene of crime as he fought with the deceased whilst armed with a panga. The deceased was not armed at all. The evidence of PW1 was corroborated by that of PW3 as well as of PW4. He submitted that by fighting whilst armed with a panga, the accused had intended to cause the death of or at any rate cause grievous harm to the deceased hence he had the malice afore thought.

I have no doubt at all in my mind that the prosecution at this stage has failed to establish a prima facie case against the accused to warrant him being placed on his defence. Even if the prosecution evidence was to be left intact and no evidence in rebuttal called by the accused, it cannot find a conviction. I say so because it is trite law that in an information of murder, the prosecution must not only prove that the accused killed the deceased but that he did so with malice aforethought. In the circumstances of this case, there is no prove that the deceased died and that he died as a result of the actions of the accused. No post mortem report, death certificate and or even a burial permit was tendered in evidence to establish the fact of the death of the deceased. In other words, no medical evidence was tendered to establish or confirm that a person known as **Peter Otieno Oreche** was murdered by the accused on 13<sup>th</sup> March, 2009.

Again it is trite law that the standard of proof in any criminal cases is beyond reasonable doubt. Thus it behoves the prosecution to prove beyond reasonable doubt and with evidence beyond pre-adventure that the deceased infact died. That fact cannot be left to suppositions, speculation and assumptions. Nothing stopped the prosecution from tendering in evidence the aforesaid documents to establish the fact of the death of the deceased. It is not even apparent from the record whether they had such evidence. Ordinarily, when a post-mortem is conducted on the deceased, the body of the deceased is identified to the doctor conducting the post mortem by a relative or even a friend of the deceased in the presence of a police officer. No witness was called by the prosecution to confirm that he or she ever identified the body of the deceased to the doctor who conducted the post mortem. Nor did the prosecution tender the evidence of a police officer who was present when the post mortem was conducted. Ordinarily again, a dead person would be buried or cremated. As such there would be evidence of such burial or cremation. There would be a witness or witnesses who attended the burial or cremation. In this case no such evidence was led by the prosecution as to the burial or cremation if at all of the deceased. There is no evidence at all that the

body was released for burial or cremation and indeed such burial or cremation took place. The wife did not attest to that fact nor any other relative or friend of the deceased. So that if indeed the deceased died remains speculative.

Besides lack of proof of such death, the prosecution is also required to place the accused at the scene of crime through watertight direct or circumstantial evidence. The cause of death must bear direct linkage to the activities of the accused. There must be a nexus between the actions of the accused and the death of the deceased. Such nexus can only be established by the doctor's opinion as to the cause of death in his post mortem report. In the absence of such evidence how can we be sure that the death of the deceased if at all had a direct relation to the actions of the accused. The deceased could as well have died of other causes or complications unrelated to the assault allegedly administered on him by the accused. There is no room for speculation in criminal proceedings. The doubts created as to the death of the deceased if at all and the cause of such death must in the end be resolved in favour of the accused.

Of course, I am aware of the case of **Republic –vs- Cheya and Another (1973) E.A 500** in which the judge rendered himself on the above issues thus “...*However the absence of medical evidence as to death and the cause of it is not fatal because as I said at that stage post mortem reports primarily are evidence of two things; the fact of death and the cause of death. Therefore it was open to the prosecution to produce and rely on other evidence to establish these facts .....*”. I do not wholly agree with this position. Luckily it is a decision of the High court of Tanzania that is not binding on me. I must repeat that there was no medical evidence to support the contention by the state that the accused can be said to have caused the deceased's death within the meaning of section 203 of the **Penal Code** or that the specific injuries which he inflicted on the deceased in the course of this attack resulted in his death. It is instructive that though the accused raised these issues in his submissions, the state did not see the need to respond or rebut the same. Indeed the state gave the issues a wide berth. But again even if I was to accept the above position, I will still find it difficult to attribute the death of the deceased to the accused. There is no other evidence proving that the deceased died and that he died as a result of the activities of the accused.

In the absence of such crucial evidence, I am left with no other choice but to hold that nobody by the names of **Peter Otieno Oreche** was murdered by the accused on 13<sup>th</sup> March, 2009 as per the information. Since the prosecution has failed to establish a prima facie case against the accused to require him to be put on his defence, he stands acquitted of the information. It is so ordered.

**Judgment dated, signed and delivered** at Kisii the 30<sup>th</sup> day of May, 2011.

**ASIKE-MAKHANDIA**

**JUDGE**