



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 66 OF 2010

REPUBLICPROSECUTOR

VERSUS

WILLIAM MATOLA ONGOTE ACCUSED

JUDGMENT

The information filed herein on the 26th November 2010 and dated 23rd November 2010 presents a charge of murder contrary to S. 203 read with S. 204 of the Penal Code against the accused, **WILLIAM MATOLA ONGOTE**.

It is alleged that on the 14th November 2010 at Changarawe Village Lugari District Western Province the accused murdered Benjamin Wafula Ongote. The case for the prosecution was founded on the evidence of seven (7) witnesses who testified to the effect that on the material date at about 8.00 a.m., the deceased, a brother to the accused, was at his home nursing a leg injury when he was paid a visit by his brother **PETER WANJALA ONGOTE (PW 1)**. While the two were there, the wife to the accused arrived and complained that she had been thrown out of the matrimonial home by the accused. She was advised to return to her home and would be followed by both the deceased and Peter (PW 1). Indeed the two followed her to her matrimonial home and found her crying. They also found a grandfather at the home. Within minutes of their arrival, the accused emerged holding a machete (panga) and even without greeting them ordered that they leave his homestead. In the process, he slashed the deceased with the panga. He thereafter confronted Peter who fled from the scene and went to his home from where he heard people shouting "He has killed! He has killed." Later, he learnt that the deceased had been taken to hospital but died while undergoing treatment. Prior to that, he (PW 1) found the deceased at a local health centre and noted that his hand had been slashed off and was bleeding profusely.

The deceased's wife **CATHERINE NAFULA WAFULA (PW2)** was at home with the deceased on the night of 13th/14th November 2010 when the accused's wife went there and said that she had quarreled with the accused. She was accompanied by her infant child and after spending the night at the homestead she left in the morning saying that she was going to see her grandfather Boyi Makokha. She returned later and collected her child and at the same time confirming that she had already summoned her said grandfather. The deceased and Peter (PW 1) accompanied her to her home but after a while, Catherine (PW 2) heard screams from that homestead. She rushed there and found that her husband (deceased) had been slashed on his left hand while attempting to escape. His hand had been slashed at the elbow joint. She (PW 2) learnt that the deceased had been slashed by the accused who was at the scene uttering threats but was overcome and held by villagers who took away the panga in his possession. The deceased

was taken to hospital while bleeding profusely.

VINCENT NYONGESA ONGOTE (PW 3), a brother to both the accused and the deceased was on that material date at about 9.00 a.m. in his home preparing to go to church when he spotted the accused walking along a nearby road holding a panga. He enquired from the accused the purpose of the panga but the accused remarked that it was his property. Vincent left the accused alone and proceeded to a neighbour's house from where he heard screams and shouts. People were saying that the accused had slashed the deceased with a panga. Minutes later, Vincent saw the deceased with his arm hanging by a piece of skin. The deceased then proceeded to the home of Vincent while he (Vincent) and others proceeded to disarm and apprehend the accused whom they handed to a nearby Administration Police (AP) Camp. The deceased died while undergoing treatment at Kitale District Hospital.

BEATRICE MUKITE MAYENDE (PW 4) was at her home on the material date at 10.00 a.m. when she was informed by the deceased's wife (PW 2) who is her sister to proceed to her (PW 2's) home and help her. On arrival there, she (PW 4) found the accused having been held by many people and the deceased lying on the ground with his arm slashed off and hanging by a piece of skin. She (PW 4) and others took the deceased to a nearby health centre while the accused was taken to the nearby A.P Camp. The deceased was transferred to Kitale District Hospital but died while undergoing treatment.

An autopsy report (P.Ex 3) produced by **DR. EDWARD ODHIAMBO (PW 5)** on behalf of his colleague Dr. Felix Ochieng indicated that the deceased died from cardiorespiratory failure due to severe anaemia due to bleeding from deep cut wound on the left elbow.

Dr. Odhiambo also produced a medical a medical examination report (P3 form) (P.Ex 2) indicating that the accused was of sound mind to stand trial.

AP.C PIUS MUTUA (PW 6) of Mabusi Chief's Camp was on duty on the material date at 11.18 a.m. when the accused was taken there on allegation that he had assaulted the deceased. He (PW 6) directed that the deceased be taken to the nearest health centre as he was bleeding excessively from his left arm. Later, he (PW 6) escorted the accused to the Matunda Police Station. A panga (P.Ex 1) allegedly used in the assault was recovered.

P.C KENNETH MUMO (PW 7) of Matunda Police Station investigated the case and thereafter charged the accused with the offence of assault which was later enhanced to murder after the deceased died from injuries inflicted on him.

In his defence, the accused denied the offence. His case was that on the material date at 8.00 a.m. he was at his home when he heard screams and cries. He rushed to the scene of the noises which was the homestead of the deceased. On arrival, he found the deceased on the ground with an injury and surrounded by Peter (PW 1) and Vincent (PW 3). All these people were his (accused's) brothers.

He (accused) was held by his said brothers to go and fetch transport to ferry the deceased to hospital. He found a tractor which carried the deceased to a nearby health centre. On the way to the health centre, they passed through an A.P Camp where he (accused) was held as a suspect. It was alleged that he had assaulted and injured the deceased. He was taken to Matunda Police Station where he was charged. He contended that he did not assault the deceased and that he assisted in having him taken to hospital. He also contended that he did not know who assaulted and injured the deceased and also that the evidence by Peter (PW 1) and Vincent (PW 3) was not the truth. He alluded to a grudge between him and Peter over a bag of maize. He denied having been in possession of the material panga.

From all the foregoing evidence, there is no dispute that the deceased died as a result of an unlawful act of assault committed against him. The post mortem report (P.Ex 3) confirmed that the cause of death was due to cardiorespiratory failure due to severe anaemia due to bleeding from deep cut wound on the left elbow.

The basic issue for determination is whether the fatal assault was occasioned by the accused. The

defence raised is a denial. The accused denied any responsibility for the assault and implied that the deceased was assaulted by persons unknown to him. In fact, the accused indicated that he was one of those who went to the aid of the deceased after the accident. He said that he sourced for the tractor which took the deceased to hospital. He appeared to blame his predicament on his brothers Peter (PW 1) and Vincent (PW 3) who according to him testified falsely against him and were responsible for taking him to the law enforcers.

However, the evidence against him and in particular that of Peter (PW 1) directly implicated him which the fatal assault occasioned to the deceased.

Apparently, the scene of the offence was at the accused's homestead. This was confirmed by not only Peter (PW 1) but also the deceased's wife (PW 2). She (PW 2) confirmed that the deceased and Peter (PW 1) had gone to the accused's homestead after his wife had raised issues pertaining to their matrimonial relationship. Peter (PW 1) was at the scene when the offence occurred during the morning hours. He witnessed what happened. His testimony showed the circumstances under which the offence occurred. He was very firm and positive that the deceased was assaulted with a panga by the accused. Prior to that, Vincent (PW 3) had already seen the accused in possession of a panga. It was believed and confirmed that that panga was the actual assault weapon. After the incident, the deceased's wife (PW 2) arrived at the scene after alarm was raised. Also to arrive at the scene were Vincent (PW 3) and Beatrice (PW 4). They all found the accused at the scene. They also found the deceased lying on the ground with his arm having been slashed and hanging to the rest of the body by a piece of skin.

Catherine (PW 2) said that the accused was at the scene uttering threats. He was however, overcome and held by villagers including Vincent (PW 3). The panga in his possession was taken away.

The evidence by Peter (PW 1) when considered with that of those who arrived at the scene immediately after the incident clearly proves without any reasonable doubt that the accused and no other person was responsible for the fatal assault against the deceased.

It would appear that the accused was enraged by the action of his brothers including the deceased in "interfering" with his domestic affairs. That was however, not a justifiable cause for him to vent his anger on the deceased the way he did. He used violent and extreme force which ended in the demise of the deceased. His defence herein has been rendered incredible by Peter's (PW 1) evidence which in the opinion of this Court was steadfast and credible such that it raised no doubt as to the accused's culpability in the offence.

With that finding, it behoves upon the Court to determine whether in assaulting the deceased, the accused acted with malice aforethought. From the evidence, it is apparent that the accused intended to cause grievous harm to his deceased brother rather than kill him outrightly. There was no indication that he continued assaulting his deceased brother after he had already inflicted the initial but serious injury. The panga must have been very sharp. It took a single forceful blow to slash the deceased's arm and leave it hanging by a piece of skin.

There is all indication that had the deceased received prompt and proper medical attention he would have survived. The major cause of his death per the autopsy report (P.Ex 3) was excessive bleeding from the cut wound.

It is therefore clear that although the accused attacked and fatally injured the deceased he did not do so with malice aforethought. Consequently, he cannot be held guilty of murder but of manslaughter contrary to S. 202 (1) of the Penal Code. He is accordingly convicted.

[DELIVERED AND SIGNED THIS 3RD DAY OF NOVEMBER, 2011]

J.R. KARANJA
JUDGE

3/11/11

Before – J. R. Karanja – Judge

Court Clerk – Andrew

Mr. Oluoch for State

Mr. Miyianda for accused

Accused present

J. R. KARANJA

JUDGE

Court:

Judgment delivered to accused.

J. R. KARANJA

JUDGE

3/11/11

State Counsel:

Accused may be treated as first offender.

J. R. KARANJA

JUDGE

3/11/11

Mitigation by Mr. Miyianda:

Accused is remorseful. The deceased was his brother. He prays for leniency. He is married with children. His family depends on him. He is a peasant farmer aged 23 years old. He was just starting his life as a family. This incident is a dent on his otherwise responsible life. He could be given another chance in life. A non custodial sentence would help him reconcile with his family members.

J. R. KARANJA

JUDGE

3/11/11

Court:

Accused is a first offender. Mitigation noted. Offence must be treated with seriousness deserved. He had no cause to attack and fatally injure his own brother the way he did. He deserves a custodial sentence. He should have known better prior to picking up the panga and slashing his brother to death.

Sentence:

To serve ten (10) years imprisonment.

J. R. KARANJA

JUDGE

3/11/11

Right of appeal.

J. R. KARANJA

JUDGE

3/11/11