



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISII**

**Criminal Case 30 of 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**LAWRENCE OMONDI OKELLO )**

**WILLIS OGOLLA alias RIAT ) ..... ACCUSED**

**JUDGMENT**

The 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 the 20<sup>th</sup> day of July 2008 at Mahena village, in Rongo District within Nyanza Province, they murdered **Joseph Ogada Ochuodho**, hereinafter referred to as “**the deceased**.”

The prosecution evidence briefly stated was as follows:

**Beatrice Agola Ogando, PW1**, was the wife of the deceased. She testified that on 20<sup>th</sup> July 2008 the deceased and his son, **Gregory Odhiambo, PW7**, and **Evans Oduor, PW8**, went to plough a parcel of land that was about 400 metres from the deceased’s home. They left at about 7.00 a.m. After about two hours, PW1 heard PW7 screaming while running towards their home. PW1 asked PW7 what had happened. He answered that the first accused had cut the deceased’s leg. When PW1 proceeded to the land which was being ploughed she found the deceased lying dead with multiple cuts on the head, neck, back and legs.

The first accused is a son of the deceased’s brother. PW1 found her brother in-law, **Peter Awuor Achuodho, PW6**, at the scene. He was crying and did not tell PW1 what had happened. At the time the first accused was not there. At about 2.00 p.m. police officers from Awendo police station came and removed the deceased’s body from the scene.

**Magdalina Agolla, PW2**, was a neighbour of the deceased. On the material day at about 8.00 a.m. she was in her farm which was next to that of the deceased. She saw the deceased ploughing his land together PW7 and PW8. She also saw the first accused at the farm. After a while she heard the deceased saying “**he has cut me**.” When she looked at the deceased she saw him staggering then he fell down. She saw the first accused cutting the deceased with a panga. PW2 did not see the second accused at that time. The first accused took off after he had assaulted the deceased.

**Beatrice Achieng Okope, PW3**, was with PW2, her grandmother at the material time. She corroborated the evidence of PW2.

**George Okumu Ayieko, PW4**, is a nephew of the deceased. After he was informed about the deceased's death he went to his home to find out what had happened. He met the first accused and enquired from him what had happened, having been told that he was the one who had killed the deceased. The first accused told him that the deceased had on the previous day destroyed their farm. The first accused further explained that when he attempted to talk to the deceased on the material day so that he could tell him why he had destroyed their farm, the deceased told him that he was a small boy and started chasing him away. He further alleged that the deceased threw a panga at him. The first accused got hold of the panga, cut the deceased's leg and fell down. Thereafter he cut his throat. PW4 persuaded the first accused to accompany him to Awendo police station and he accepted. The police arrested him and detained him in their cells.

**Police Constable Kipyegon Kirui, PW5**, was based at Awendo Police station when this incident occurred. He was one of the police officers who went to the scene to remove the deceased's body. He testified that on the same day 20<sup>th</sup> July 2008, PW4 escorted the first accused to the said police station. The first accused confessed that he had hiked the deceased to death.

On 24<sup>th</sup> July 2008, the first accused led PW5 to the place where he had thrown the panga which he used to murder the deceased. The witness recovered the panga.

PW5 was informed by **Evans Oduor, PW8**, that the second accused was together with the first accused when the deceased was killed. The second accused reported to have been urging the first accused to slash the deceased to death. Consequently PW5 traced the second accused and arrested him. He said that it took him a long time to trace the second accused and that was the reason for the delay in arraigning the two accused in court. The witness did not state the exact date when he arrested the second accused. However, there is evidence that the second accused arrested on 8<sup>th</sup> August, 2008.

**Peter Owuor Ochuodho, PW6**, a brother of the deceased testified that on 19<sup>th</sup> July 2008 at about 3.00 p.m. one **Jacob Odhiambo Obongo** went to his home and informed him that there were plans to kill the deceased because of the land that he was cultivating. PW6 was not aware of any land dispute that existed between the deceased and the first accused's father. Shortly thereafter he told the deceased what he had been told by Jacob Obongo but the deceased disregarded the warning.

On the following day PW6 saw his brother and his sons ploughing the land. Shortly thereafter he was told that the first accused had assaulted the deceased. He rushed to the scene and found several people. He saw the first accused running away while armed with a panga. PW6 also saw the second accused in a parcel of land that was next to that of the deceased.

**Gregory Odhiambo Ogada, PW7**, is a son of the deceased. He was about 11 years old when his father was killed. He was ploughing the land together with the deceased and **Evans Oduor**, his step brother. Shortly after they commenced ploughing PW7 saw the second accused and his mother ploughing on a neighbouring parcel of land. The second accused called the first accused and sent him to their home to get a rope. At that time PW7 saw the first accused cutting one of his father's legs with a panga. The deceased was holding the oxen plough with both hands. After the first accused cut the deceased he ran away. The second accused called out to the first accused and told him to do what they had agreed they would do. At that point PW7 started screaming and ran to their home and told family members what had happened. When they went back to the land they found the deceased lying dead with multiple cuts on his body.

**Evans Oduor, PW8**, who was together with the deceased and PW7, had seen the first accused going to the second accused's home and he returned with a panga. He pretended to be slashing a fence which was next to the land that they were ploughing. The witness heard the second accused asking the first accused to go to their home and pick a rope. Immediately thereafter the first accused cut the deceased's right leg with the panga that he had. When PW7 ran to their home PW8 remained at the scene. PW8

heard the second accused urging the first accused to “**finish**” the deceased. A person known as Jack tried to restrain the first accused but the latter said he had to accomplish his mission. PW8 saw the first accused cutting the deceased on the neck.

In his defence, the first accused said that on 20<sup>th</sup> July 2008 he heard the deceased screaming outside their homestead. He saw him chasing away an Assistant Chief who had delivered to him a letter from the District officer. The first accused said that the deceased was to be evicted from the land on which he had been cultivating. After a short while the first accused went to their farm to plant some vegetables. Shortly thereafter the deceased followed him up and asked him what he was doing on the land. At the time the deceased was armed with a panga and two iron bars, the first accused alleged. He went on to say that the deceased chased him out of the land and the deceased cut him on his leg with the panga that he had. When the first accused fell down the deceased ran towards him but he slipped and fell down as well. The deceased picked up a rod and pierced the first accused on his elbow. The first accused took a panga and cut the deceased with it. He then ran and reported to the police what had taken place and the police arrested him. He admitted that he was the one who led the police to the place where he had thrown the panga with which he had assaulted the deceased.

The accused lamented that although he was arrested on 20<sup>th</sup> July, 2008 he was not taken to court until 27<sup>th</sup> August, 2008 when they appeared before this court’s deputy registrar who set the date for plea as 6<sup>th</sup> October, 2008.

The second appellant testified that on the material day at about 8.00 a.m. he heard screams coming from a parcel of land on which the deceased and his sons were ploughing. He saw some people standing next to the deceased who was then lying on the ground. After a short while the area Assistant Chief arrived and he telephoned Awendo police station. Police officers rushed to the scene, took some photographs and removed the deceased’s body. He was eventually arrested on 8<sup>th</sup> August, 2008. He said that he was not at the scene when the deceased met his death.

Mr. Otieno for the accused submitted that there was conflicting evidence by prosecution witnesses as to whether the second accused was at the scene when the deceased was assaulted. Only PW7 and PW8 said that they saw him.

Counsel further submitted that the accused’s constitutional right as secured by the provisions of **section 72 (3) of the Constitution** of Kenya had been violated because they were not arraigned in court within the stipulated period of time. PW5 attempted to explain the delay but the explanation given was unsatisfactory. He cited **ANN NJOGU & 5 OTHERS –VS- REPUBLIC**, Miscellaneous Criminal Application No. 551 of 2007 and urged the court to acquit the accused.

From the evidence on record, PW7 and PW8 were together with the deceased when he was assaulted by the first accused using a panga. The two were eye witnesses. PW7 saw the first accused cutting his father, the deceased, with a panga on one of his legs. After that the first accused ran away but the second accused urged his co-accused to be bold and do what they had agreed they would do. The first accused gathered more courage and turned back and hacked the deceased to death. PW8 saw the first accused cutting the deceased on the neck.

Apart from these two witnesses, PW2 and PW3 also saw the first accused cutting the deceased with a panga. The first accused also told his uncle, PW4, that he had cut the deceased’s leg and throat. The first accused even agreed to accompany PW4 to Awendo Police Station where a report was made and his arrest effected.

It is apparent that there was a land dispute between the deceased and the father of the first accused. That land dispute and the threat of eviction of the first accused’s family from the land motivated the first accused’s action against his uncle. The first accused had malice aforethought.

Although there was no evidence that the second accused assaulted the deceased, it is clear that together with the first accused they had discussed and agreed on a plan of action. He was not only present

when the first accused assaulted the deceased but he told him to do what they had agreed upon. **Section 21** of the **Penal Code** states as follows:

**“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”**

In law, both accused persons participated in murdering the deceased. Their respective defences are wanting. The first accused wanted the court to believe that he was acting in self defence but the prosecution evidence dispels that kind of pretext.

I now come to the vexing issue of alleged violation of the accused’s constitutional rights. The first accused was arrested on 20<sup>th</sup> July, 2008 and the second accused on 8<sup>th</sup> August, 2008. Under **section 72 (3) (b)** of the **Constitution**, they ought to have been arraigned in court within 14 days from the date of their arrest or as soon as was practicable, in the circumstances of the case. They were brought to court on 27<sup>th</sup> August, 2008. On that day they were taken before a deputy registrar for purposes of fixing a hearing date. Strictly speaking, it was not right to present them before a deputy registrar. The appropriate court before which a murder suspect should appear is the High Court.

It may be that there was no judge in the station at the material time because of the High Court Summer vacation. However, there ought to be a duty judge in the station or in another High Court station in the region at any one given time.

It may be that the practice of causing murder suspects to first appear before a deputy registrar is necessitated by the need to have an advocate appointed to represent the accused since the law requires a murder suspect to be afforded legal representation, (if he is unable to engage one by himself) right from the first day of a hearing when a plea is taken. However, such an accused can still be taken before a judge at the first instance and if he has not engaged an advocate the judge can defer the plea and direct that an advocate be appointed to represent him.

But assuming that the accused herein were properly arraigned in court on 27<sup>th</sup> August, 2008, it was imperative for the prosecution to explain any delay beyond the 14 days’ period. PW5 said that he did not bring the first accused to court within 14 days of his arrest because he wanted to have him charged together with the second accused who had not been arrested by 4<sup>th</sup> August when the 14 days lapsed. However, the second accused was arrested on 8<sup>th</sup> August, 2008. Why did he then continue to keep them in police custody until 27<sup>th</sup> August 2008?

The first accused was in police custody for a total of 37 days while for the second accused it was 19 days. If 14 days are subtracted in respect of each of the accused it means that the first accused was in

unlawful custody for an extra 23 days and the second accused 5 days. In **ALBANUS MWASIA MUTUA –VS- REPUBLIC**, Criminal Appeal No. 120 of 2004, the Court of Appeal said that it was the duty of the court to enforce the provisions of the Constitution. The court went on to hold that unexplained delay in taking an accused person before court amounted to violation of his constitutional right and such violation will normally result in an acquittal irrespective of the nature and strength of evidence adduced in support of a charge.

In **GERALD MACHARIA GITHUKU –VS- REPUBLIC**, Criminal Appeal No. 119 of 2006, the appellant had been found guilty of robbery with violence and sentenced to death. His first appeal to the High Court of Kenya was unsuccessful. He preferred a further appeal to the Court of Appeal. One of the grounds of his appeal was that his constitutional right as enshrined in **section 72 (3)** of the **Constitution** had been violated. He had been held in custody for 17 days before he was arraigned in court. The law required that he presented to court within 14 days of his arrest, unless there was a good reason for any delay. The delay was therefore of 3 days. The Court of Appeal had this to say:

**“... although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72 (3) of the Constitution did not give rise to any substantial prejudice to the appellant and although on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72 (3) of the Constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested, to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.**

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**We therefore hereby order that the appeal be allowed, the appellant’s conviction quashed**

**and the sentence of death is set aside.”**

In this case, the police did not sufficiently explain the cause of the delay. The accuseds' constitutional rights were therefore violated. This court is bound by the above quoted decision of the Court of Appeal. For the reason that the accuseds' constitutional rights were violated, I am constrained to acquit each of the accused of the charge of murder. They are set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISII THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**25/9/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the State

Mr. Otieno for the accused.

**Court:** Judgment delivered in open court on 25<sup>th</sup> September, 2009.

**D. MUSINGA**

**JUDGE.**