



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 11 OF 2019**

**REPUBLIC.....PROSECUTOR**

**Versus**

**GEORGE ODHIAMBO OKUMU.....ACCUSED**

**JUDGMENT**

George Odhiambo Okumu was by the information dated 31/10/2019, charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 6/10/2019 at Manyatta village, East Kamagambo Location in Rongo Sub County, Migori County, jointly with others not before the court, murdered Richard Okeyo.

The accused denied the charge and the case proceeded to trial with the prosecution calling a total of ten (10) witnesses. The accused was represented by Mr. Oywer Advocate while the Prosecution was led by Learned Counsel, Mr. Kimanathi.

**PW1 Rhoda Atieno** testified that she had employed the deceased, Richard Okeyo as a motor cycle rider (boda boda). On 9/10/2019, about 10:00 p.m, she heard a Motor cycle arrive at her home. She was with her children including Japheth Ochieng Otieno. On going outside, found the deceased seated on her veranda. PW1 observed the deceased and noticed blood on his body. Using a lamp she saw him bleeding from the left eye. On enquiring from the deceased what had happened, the deceased told her that he had been stabbed by Odhiambo Ondiso. She knew Odhiambo son of Ondiso. PW1 asked her son to rush the deceased to report at the police station and then hospital. PW1 went to report the matter to deceased's grandmother (PW2). The deceased was treated, discharged and came back to her home. The deceased's grandmother organized to have him collected next day and PW1 later heard that the deceased had died while undergoing treatment at a hospital in Rongo.

**PW2 Melita Auma Mbogo** was the deceased's grandmother . She also knew the accused from childhood. She recalled having been informed of the deceased's injuries by PW1 on the night of 9/10/2019. PW2 found the deceased outside PW1's home and had an injury to the left eye which was stitched. That deceased told PW2 that Odhaimbo Odiso pierced him with a spear after he had carried him on the motor vehicle and took him home. The deceased was later taken home and that he was disturbed and kept going out of the house claiming that it was too hot. Later, PW2 heard him fall and next day, took him to Rongo hospital the same night by which time he was not speaking. They were advised to take deceased to Migori County Referral Hospital but shortly thereafter, the deceased died. PW2 organized to take the body to the mortuary. PW2 knew that deceased had worked for PW1 for 1 – 2 months.

PW3 Japheth Ochieng Otieno, a son to PW1 confirmed that the deceased worked as a motor cycle rider for PW1 his mother (PW1) for two (2) months. He also knew accused since childhood. He recalled that on 9/10/2019 the deceased went to their home about 10:00p.m, parked the motor cycle and sat on the veranda. PW3 observed the deceased and removed his clothes which were soaked in blood, the motor cycle had blood and he was bleeding from the left eye. On being asked who caused the injury, he informed him that it was George Odhiambo Odiso, that pierced him with a spear. He took the deceased to report at Kangeso Police Base where the deceased made a report and then proceeded to Rongo hospital where he was treated and was discharged. His relatives picked him up next day and he later died at Rongo Hospital. PW3 also said that the deceased claimed to have carried the accused to his home but he refused to pay and that is when he pierced him with a spear.

**PW4 Dennis Otieno**, an uncle to the deceased recalled picking the deceased from PW1's home and taking him home; that on asking him how he got injured, he explained how he carried the accused person from Opapo to his home. That accused refused to pay 50/= and he stabbed him. The same night, they took him back to Rongo Hospital where his condition deteriorated and he died 16/10/2019, PW4 identified the deceased's body to the doctor before postmortem was done.

**PW5 PC Nancy Kerubo Orina** of Kangeso Police Post recalled that on

9/10/2019, She recalled that she was at work when Richard Okeyo who was injured and bleeding on the left eye reported that he was pierced

by George Odhiambo using a spear and she booked the report in the OB – NO 06/09/2019. PW5 advised him to go to Rongo Hospital. A day later, she learnt that the person who had reported had died.

**PW6 DR. Awindo Victor Omolo** of Migori County Referral Hospital carried out a post mortem on the body of the deceased on 16/10/2019 and found the cause of death to be intracerebral haemorrhage due to penetrating sharp object consistent with assault. He also found a cut wound on the forehead which was stitched and a penetrating wound on the forehead fracturing the frontal bone deep into the brain with sub-dural hematoma and cranial hemorrhage in the nervous system.

**PW7 Kennedy Ochieng Otieno**, a clinical officer at Rongo Sub County Hospital examined the deceased on 9/10/2019 about 11:20 p.m; that the person had an injury on the forehead and a bleeding cut. He was sent for an X-ray and he was examined on 10/10/2019 mid night and he could not walk or talk. He was referred him to Migori Referral Hospital but he died soon thereafter. He produced the treatment notes as an exhibit (P.Exh.4).

**PW8 Samuel Odhiambo Magambo**, the Chief of East Kamagambo knew accused since childhood. On 11/10/2019, the Deputy OCS Rongo Police Station asked if he knew Odhiambo Odiso who he alleged had killed a person. Later informer informed him of the accused is whereabouts but on going to the home, found he had left. On 12/10/2019 he again received information that Odiso was in Ndhiwa Sub County in Homa Bay County. Together with three officers, they proceeded there and he was arrested.

**PW9 Polycarp Luta Kweyu**, a Government Analyst from Kisumu, received some specimen from PC Mutegi of DCI Rongo i.e cartilage from the deceased's finger nails, blood samples for George Odhiambo Okumu and a spear. He was requested to ascertain the origin of the blood. He prepared a report on his findings. He found that the spear had human blood and all items generated DNA; that the DNA profile from the finger nails and cartilage of the deceased matched the DNA profile generated from the blood stains on the spear.

**PW10 PC Thomas Mutegi** of DCI Rongo was assigned this case as the investigating officer on 11/10/2019; that one Richard Okeyo had succumbed to injuries inflicted on him and he proceeded to Kangeso Police Post where he found a report in the OB, He then proceeded to the suspect's home where there were lights on but there was nobody in the house. They searched accused's house, found a blood stained spear which they took possession of and kept as an exhibit. Next day, he learned that the accused had been arrested at Ndhiwa Sub County and detained at Kamagambo Police Station. On 16/10/2019, he was present at the post mortem after the body was identified by PW2 and PW1. He took cartilage from the deceased's finger nail and the spear for analysis by the Government analyst. After accused was mentally assessed and found to be fit to stand trial, he was charged with this offence.

After the close of the prosecution case, the accused was called upon to defend himself and he testified on Oath that he left his home on 5/10/2019 to visit his stepmother at Kabuoch. He was doing fencing and on 12/10/2019 police went for him and took him to Rongo Police Station. He denied being aware why he was arrested. He denied knowing the deceased or the allegations against him.

Both Counsel filed closing submissions. Mr. Oywer, counsel for the accused filed his submission on 14/11/2021 where he urged that though it is not disputed that the murder weapon was a spear, the prosecution failed to establish the nexus between the Spear and that accused, or that it was recovered in accused's house; that the accused raised an alibi defence where he claimed to have gone to visit his relatives and therefore it was the duty of the prosecution to dislodge the said alibi which they failed to do. He relied on the decision of **Kiarie v Republic (1984) KLR** where the Court of Appeal held that even when an accused raises an alibi defence, he does not bear any burden of proving the truth with of the said alibi.

Counsel also submitted that the prosecution failed to prove that it is the accused who caused the deceased's death as there was no eye witness; that the case was not proved to the required standard because there were contradictions and inconsistencies in the prosecution evidence which raised doubt in the case and the doubts should be resolved in favour of accused; that PW7 produced a flawed clinic attendance card; that PW5 who claimed to have recorded the deceased's report in the OB did not produce an extract and also failed to point out exactly where the deceased was injured, raising the question whether it was the deceased who made the report; that PW1 claimed to have seen blood oozing from the deceased's left eye which contradicted the Doctors' findings; that there were material contradictions that go to the root of the Charge. It was further submitted that the recovery of the spear was a hoax because PW10 never drew the sketch map of the scene; that though PW8 testified, he never mentioned the visit to the accused's abandoned homestead and recovery of the spear.

In his submissions, **Mr. Kimanthi** submitted that the prosecution proved its case to the required standard because the deceased told PW1 and PW2 who had assaulted him; that it is the deceased who made a report at Kangeso Police Post which report was booked in the OB of 19/11/2019; that PW5 took the report from the deceased; and that the said report is admissible by dint of Section 33 of the Evidence Act.

To prove a charge of murder under Section 203 of the Penal Code, the prosecution has to prove beyond reasonable doubt the following ingredients:-

- i) proof of the death of the deceased;***
- ii) that the accused caused the unlawful act or omission that caused the death;***
- iii) that the accused had malice aforethought.***

#### **Proof of death:**

The death of the deceased is not in doubt. PW2, the deceased's grandmother took the deceased to the hospital at Rongo on 9/10/2019 where he died before he could be transferred to Migori Referral Hospital. PW4, the deceased's uncle is the one who organized to take the deceased to hospital at Rongo where he died before transfer to Migori County Hospital. Both PW2 and PW4 present at the mortuary when PW6 (Dr. Awindo) performed post mortem on the deceased's body. It is PW2 who identified the deceased's body to the Doctor. The Doctor formed an

opinion that the deceased sustained a penetrating wound on the forehead fracturing the frontal bone deep into the brain causing subdural haematoma and intracranial haemorrhage. He formed the opinion that the cause of death was intracerebral haemorrhage due to penetrating wound caused by a sharp object consistent with assault.

#### **Whether the accused caused the deceased's death:**

Nobody witnessed the incident whereby the deceased was injured. The deceased was working as a motor cyclist. For PW1 and he returned to PW1's home about 10:00 p.m when he was injured and was soaked in blood. Apart from what the deceased told the witnesses PW1, PW2, PW3 and PW4 how he got injured, nobody else witnessed the incident. This case therefore turns on circumstantial evidence and a dying declaration.

PW1, PW2 and PW4 testified that the deceased mentioned the person who assaulted him before he died. Under Section 33(a) of the Evidence Act, a statement made by a deceased person relating to his cause of death is admissible in evidence.

Section 33(a) provides:-

**“when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”**

In **Choge vs= Republic (1985) KLR 1**, the Court of Appeal held as following in regard to a dying declaration:-

**“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”**

In the more recent decision of **Philip Nzaka Watu vs= Republic (2016) eKLR**, the Court of Appeal said that; Under Section 33(a) of the Evidence Act

**“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.**

In the instant case PW1, PW2, PW3, PW4 and PW5 all testified to the fact that they talked to the deceased at different times and he told them that Odhiambo Odiso or George Odhiambo Okumu alias Odiso or son of Odiso stabbed him with a spear. To PW2, PW3 and PW5, the deceased explained that the accused stabbed him after he carried him on the motor cycle to his home; that accused refused to pay fare and instead attacked him with a spear. All the witnesses testified to have known Odhiambo Odiso or George Okumu Odhiambo alias Odiso before as the same person. PW8 the Chief of the area testified to have known the accused for over twenty (20) years since his childhood and even knew his home. He helped the police trace him as he had disappeared from his home. It was clear that the deceased was referring to a person well known to the witnesses and a report was made to PW5 and a record of the same was made in the OB 06/09/10/2019 by

PW5 on the same day the incident occurred. The identity of the assailant was consistently repeated to five witnesses and it was even put in writing in the OB. I am satisfied that the deceased knew who assaulted him and made a report to that effect.

The question that begs is whether the dying declaration is sufficient to be relied upon. The law is that corroboration is not a requirement for the court to base a conviction on a dying declaration (See Nzaka's case supra).

In this case PW10, told the court that , relying on evidence of an informer, he went to the deceased's home where there was nobody but the doors were open and lights were on, evidence that the owners of the home my have just fled. PW10 recovered a blood stained spear which was examined by PW9, a Government analyst, who found that the DNA profile on the blood generated from the spear matched the DNA profile from finger nails and cartilage taken from the deceased. Unfortunately, the investigating officer (PW10) did not get any evidence to connect the home where the spear was found to the accused. For example PW10 did not disclose who identified the accused's house. The Chief may have been useful in identifying the house.

The accused raised an alibi defence, that he was not at home when the offence was allegedly committed. PW8, the Chief of the area who knew accused for over twenty (20) years testified that when the OCS informed him that the accused had killed someone, accused could not be traced in his home and he is the one who helped trace the accused. PW7 told the court that one time, they tried to trace accused to a home he was said to be hiding but found he had just left. I am satisfied that the alibi defence was dislodged by the dying declaration made by the deceased to the five witnesses who gave a consistent account of the said declaration. I therefore reject the defence as untrue.

**On malice aforethought;** PW1, PW2, PW3 PW4 and PW5 all testified that they saw the deceased bleeding from the eye. PW6, (the Doctor)s found the deceased to have been injured on the forehead and so did PW7. The defence had submitted that the prosecution evidence was contradictory as to where the deceased was injured but I found no contradictions. The eye can be described as being on the forehead

depending on which part was injured.

The injuries that were inflicted on the deceased were a penetrating wound which had fractured the frontal bone, went deep into the brain causing subdural haematoma and intracranial haemorrhage in the nervous system. The deceased said that the weapon used was a spear. The injuries found on the deceased were consistent with use of a sharp object like a spear.

Section 206 (b) of the Penal Code states as follows:-

**“206 malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances:-**

**a) .....**

**b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to same person, whether the person is the person actually killed or not although such knowledge is accompanied by indifference. Whether death or grievously bodily harm is caused.”**

In **Republic vs Tubere s/o Ochen (1945)12 EACA 63 the E. A.** Court of Appeal set out the circumstances in law under which malice aforethought can be inferred:

**a) the nature of the weapon used, (whether lethal or not)**

**b) The part of the body targeted (whether vulnerable or not)**

**c) The manner in which the weapon is used (whether repeatedly or not)**

**d) The conduct of the accused before and after the attack.**

See also **Abong’o alias Onyogo vs Republic CRAP 32 of 1990.**

In this case, a lethal weapon was used i.e a spear; the part of the body that was targeted was the head, and lastly, even though the injury was inflicted once, the spear must have been thrust with such force that it penetrated and fractured the skull, and caused the resultant injuries all these point to an inference of malice aforethought. The accused intended to cause the death of the deceased or cause grievous harm to the deceased.

Having found that the dying declaration made by the deceased to the five witnesses sufficiently pointed to and identified the accused as the assailant, I also find that the nature of injuries inflicted are evidence of malice aforethought.

I am satisfied that the prosecution has proved beyond any doubt the charge of murder under Section 203 of the Penal Code that accused faces. He is found guilty and convicted accordingly.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 17<sup>TH</sup> DAY OF JUNE, 2021.**

**R. WENDOH**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

Mr. Kimanthi State Counsel

Ms. Nyauke court assistant

Mr. Oywer for Accused

Accused present