



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL CASE NO. 17 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MOURICE OGALLO ONYANGO.....ACCUSED

JUDGMENT

1. Mourice Ogallo Onyango is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 18th day of August, 2016, at Raphedhi village, Ndhiwa Sub County of Homa Bay County, murdered Fredrick Onyango Okoth.
3. The prosecution case is that the accused found the deceased lopping a tree that was on their common boundary and hit him with a hoe. The deceased succumbed to the injury.
4. Mourice Ogallo Onyango in his defence contended that the deceased and his son attacked him and in an attempt to ward off the attacks, he hit the deceased on the head.
5. The issues for determination are:
 - a. Whether the accused acted in self defence or not; and
 - b. Whether the offence of murder was established.
6. Sipania Adede (PW1) was the only eye witness in this case. He testified that on the material day he was ploughing with oxen while his father, the deceased herein, was lopping a tree that was in the boundary between their land and that of the accused. The accused was working in his garden. His evidence was that the accused went to where the deceased was and asked him why he was cutting the tree. When he told him that he was cutting the branches off for it was putting shade to his maize, the accused hit him on the head with a hoe he had. When he (PW1) attempted to go near, the accused pelted a stone at him.
7. The accused on the other hand contended that the deceased went to him while armed with a machete and wanted to kill him. He (deceased) was joined by his son Sipania Adede (PW1). The latter had a machete. In an attempt to ward off the machete blows from the deceased, he hit the deceased on the head with his hoe.
8. The Court of Appeal in **Kiilu & Another V. Republic** [2005] 1 KLR 174 held that:

Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.

In the instant case I find that the conditions obtaining at the time of the offence were favourable for recognition. Secondly, the accused in his defence was incoherent. At one point he denied any knowledge of the deceased herein but later conceded that he was his brother. Thirdly, his defence was clearly an afterthought for at no time was Sipania Adede (PW1) confronted with the allegation.

9. I therefore dismiss the defence of the accused. There was no evidence to support his claim that he had been attacked. He is the one who inflicted the fatal injury on the deceased.

10. In order to found conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

11. In the circumstances of this case, there is no evidence to show that the offence was premeditated. The accused felt aggrieved, rightly or wrongly, and hit the deceased only once. I therefore, find that the prosecution has not proved the offence of murder against the accused. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit him of the charge of murder. I find him guilty and convict him for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF JULY, 2021.

KIARIE WAWERU KIARIE

JUDGE