



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL CASE NO. 30 OF 2018**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**DONALD ONYANGO OTIENO .....ACCUSED**

**JUDGMENT**

1. On 13<sup>th</sup> August 2018, this court was informed that **DONALD ONYANGO OTIENO** (“the accused”) had committed the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 25<sup>th</sup> May 2018, at Randani village, Kiango sub-location within Kenyena Sub-county, the accused murdered **KARORI OMARE** (“the deceased”). The prosecution called 4 witnesses to prove that the accused had murdered the deceased. The accused gave sworn testimony and called two witnesses to support his defence.

2. The evidence was as follows. On 23<sup>rd</sup> May 2018, Thomas Giango Ombo (PW 2) requested the deceased to find 10 people to help him move the roof of his home to another house he was building. PW 2 gave him Kshs 1,000/- to pay all the 10 people. The accused was one of the people engaged by the deceased and according to PW 2, the accused asked the deceased to give him his part of the money later. On 25<sup>th</sup> May 2018, PW 2 learnt that the deceased had been killed.

3. PW 1 recalled that on 25<sup>th</sup> May 2018 at around 7.00pm, she went to see the deceased in his rented house. On her way she met the deceased’s cousin, Omoga, who was also waiting to see the deceased. As they waited, PW 1 heard the deceased talking though she could not clearly hear what he was saying. Omoga left at around 8.00pm. PW 1 recalled that she heard the deceased say that he owed Kshs. 100/- to someone he referred to as uncle. PW 1 stated she saw the accused who was about 15-20 meters away from her because of the light from Randani School. When PW 1 moved closer, she asked the accused not to beat the deceased because she could pay the deceased’s debt to him. She further testified that the accused had two pangas, one in each hand when he held the deceased by the collar. The accused mother, who lived nearby, also came and asked the accused not to beat the deceased. As they stood by watching, the accused cut the deceased on the left side of the neck. The deceased told PW 1 that he wanted the accused to die before PW 1 could report the incident. The accused ran away and was arrested later.

4. The investigating officer, Corporal Andrew Masinde (PW 4), together with other police officers, proceeded to Randani Secondary School on the night of 25<sup>th</sup> May 2018 to investigate the incident of murder. They found PW 1 at the scene who informed him that the accused had killed the deceased. PW 4 observed that the school had electric security light. The deceased’s body, which was lying near the gate, had an injury on the left side of the neck. PW 4 arranged for the deceased body to be removed and taken to Nyamache District Hospital for the postmortem. PW 4 testified that the accused was arrested in Elburgon on 11<sup>th</sup> August 2018 after being tracked through his mobile phone.

5. PW 4 also organized for a postmortem which was done by Dr. Ogando Zoga on 31<sup>st</sup> May 2018. The deceased body was identified by PW 2 and Kefa Makori (PW 3). Dr Zoga concluded that the cause of death was a deep cut wound on the neck by a sharp object.

6. The accused elected to give sworn testimony in his defence. He recalled that he was in Randani Village on 24<sup>th</sup> May 2018 when he was informed that PW 2 needed help to move his roof. He went out to help. After the assignment, PW 2 gave out a Kshs 1,000/- note to be shared by the 10 people but he could not wait as he wanted to see other people. He had also received a call from school that his child was sick started so he started making arrangements to head back to Elburgon. The accused testified that he left at around 1.30pm. He met the deceased who gave him Kshs 100/-. He then saw the Chairman of the *Chama* whom he informed that he could not pay the full monthly amount as his child was sick. He then left for Elburgon thereafter and arrived there at about 6.30pm. The following day he went to the school

and took his child. From a telephone conversation between a clan elder and his wife, he received information that he was a suspect in the murder of the deceased.

7. A teacher at the Mother of Mercy School, James Charles Nyawama Mose (DW 2), recalled that on 25<sup>th</sup> May 2018 he was on duty. He told the court that at break time the accused came to the school and was given a leave chit to take the child home. Joseph Koina Mogaka (DW 3) was the Chairman of the local Chama. He testified that on 24<sup>th</sup> May 2018 at around 2.00pm, the accused came to his house. He wanted to be excused from paying the monthly contribution as his child was sick. DW 3 excused him and testified that on 25<sup>th</sup> May 2018 he called the accused who was already in his home in Elburgon and also spoke to his wife.

8. The offence of murder is defined by **section 203 of the Penal Code** as follows, “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” The prosecution must prove beyond reasonable doubt the following three ingredients; it must prove the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

9. The fact and cause of death of the deceased is not in dispute. The postmortem was conducted by Dr Ogando Zoga confirmed that the deceased died as a result of a deep deep cut wound on the neck caused by a sharp object. This was consistent with the evidence of PW 1, PW 3 and PW 4 who had seen the deceased body and the neck injury.

10. The main issue for determination is whether the accused is the one who cut the deceased on the neck. The case against the accused is grounded on the direct evidence of a single witness in what can be described as circumstances that are difficult for positive identification as the incident took place at night. The guiding principles to be applied by courts when considering such evidence is well summed up in the well-known case of **Abdallah Bin Wendoh & Another v Regina [1953] EACA 166** where the Court held:

*Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence circumstantial or direct pointing to guilt is needed.*

11. When considering such evidence of identification, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See **R v Turnbull [1967] 3 ALL ER 549**). This requirement is, however, relaxed when dealing with the case of recognition because, “recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.” (see **Anjononi & Others v Republic [1980] KLR 59**). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

12. The key witness in this case was PW 1 who told the court that she knew the accused as they were neighbours hence the case was not one of identification of the stranger but recognition of a person well known to her. As to the conditions of lighting at the scene of the incident, PW 1 testified that although it was 8.00pm, she was only 7-10 meters away from the accused and the lighting from the security lights of Randani School made it possible for her to see clearly. The fact that there was adequate light was confirmed by PW 2 who arrived at the scene on the material night while PW 4 also observed that there were electric lights at school gate.

13. The totality of the evidence on this point is that there was adequate lighting from the nearby school and given the familiarity between PW 1 and the accused, the distance between them from the time PW 1 heard the accused and deceased talking to the time she saw the accused cut the deceased. I therefore find that the circumstances were favourable for positive identification.

14. But as I have stated elsewhere, even in such circumstances where witness knew the deceased, it is possible to be mistaken hence the need for caution. It is in light of this that I now must weigh the prosecution’s case against the alibi raised by the accused. The accused case is that on 25<sup>th</sup> May 2018 he was in Nakuru County. He left for Randani, Kisii on 24<sup>th</sup> May 2018 after receiving information that his daughter was sick. The testimony of DW 2 placed him in Nakuru County on 25<sup>th</sup> May 2018 at about 10.00am while that DW 3 corroborated what the accused’s testimony that he went to see him on 24<sup>th</sup> May 2018 before leaving for Kisumu.

15. This court has to consider whether the accused defence of alibi raised reasonable doubt in the prosecution’s case. In the case of **Kiarie v Republic [1984] KLR 73**, the Court of Appeal held that:

*An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.*

16. In **Sekitoleko v Uganda [1967] EA 531** the Court stated, in relation to alibi evidence, that as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else and that the burden of proving an alibi does not lie on the accused. In **Uganda v Sebyala & Others [1969] EA 204**, the court observed that:

*The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.*

17. The testimony of PW 2 established that the accused and other people came to assist him on 24<sup>th</sup> May 2018 at about 11.00pm. The accused testified that thereafter he met the deceased, who gave him his money, at about 1.30pm where after he met DW 3 before proceeding to Elburgon where he arrived at about 6.30pm. On the date of the murder, 25<sup>th</sup> May 2018, DW 2 confirmed that the accused came to collect

his daughter at about 10.45am.

18. Whether the prosecution proved its case turns on the testimony of DW 2 who placed the accused at Elburgon on 25<sup>th</sup> May 2013 and that testimony of PW 1 who clearly saw him assault the deceased. DW 2 only testified that he saw the accused at 10.30am on the material day. The incident took place on the night of 25<sup>th</sup> May 2013 hence the alibi does not dent the prosecution case particularly in light of the evidence of positive recognition.

19. In rejecting the alibi defence, I am fortified by the accused own testimony that he was informed that he was a suspect in death of a child in the village, yet he did not report to the police immediately to discount the allegation. His disappearance from Randani for a period of four months until his arrest in Elburgon is inconsistent with innocence.

20. Counsel for the accused raised the issue that the prosecution failed to interview or record any statements from security guards at the school who would have witnessed the incidents. PW 1 stated in cross-examination that the security guards did not come to the scene. In light of the clear testimony of PW 1, I do not think that such testimony would have added any value nor was it suggested that the evidence would be exculpatory. In conclusion, I found the testimony of PW 1 clear and consistent. There was no suggestion that she would randomly implicate in the death of her son as a result of a grudge.

21. Under **section 206** of the **Penal Code** malice aforethought is 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.**

c. **An intention to commit a felony.**

22. Evidence of malice aforethought may direct or indirect depending on the peculiarity and facts of each case at the trial. In **Republic v Tubere s/o Ochen [1945] 12 EACA 63**, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. PW 1 testified that the accused had two pangas, one in each hand when he confronted the deceased. Although PW 1 tried to intervene, the accused warned her and proceeded to cut the deceased at the back of the head. These circumstances culminating in a deep cut on the neck point to an intention to commit grievous harm.

23. I find that the prosecution has proved its case against the accused beyond any reasonable doubt. I therefore find **DONALD ONYANGO OTIENO** guilty of the murder of **KARORI OMARE** and I convict him accordingly.

**DATED and DELIVERED at KISII this 7<sup>th</sup> day of FEBRUARY 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyangwencha, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.