



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.22 OF 2016 [MURDER]**

**CORAM: HON. R.E.ABURLI J**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**PAUL OMONDI ODONGO.....ACCUSED**

**JUDGMENT**

1. The trial in this case begun in Kisumu High Court before Hon Mr. Justice H. Chemitei. The matter was transferred to Siaya High Court and proceeded before Hon Justice J.A.Makau who was later transferred to Nairobi High Court before concluding the trial. I therefore took over the trial from the learned judge and in compliance with section 200 of the Criminal Procedure Code with the consent of both the prosecution and the accused person and his counsel, the trial continued from where Hon Justice Makau had left.

2. The Accused person herein, PAUL OMONDI ODONGO, is charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 Laws of Kenya). The particulars of the offence are that on the 18<sup>th</sup> Day of November, 2011, at Nyalgunga Sub- location, Siaya District within Nyanza Province (as they were then, prior to devolution taking effect) he murdered DOMINIC OUMA ODHIAMBO. The Accused denied the charges.

3. The prosecution called seven (7) witnesses and from their testimonies the prosecution's case was as follows:-

4. **PW2, Eliakim Odhiambo Owuor**, testified on oath that the deceased was his son and that he was herding when he saw the deceased with a bicycle and inquired whether the deceased was going to the shop and could get some sugar. He stated that he got a call from one Paul Ouma that made him go to the scene. At the scene he found the deceased lying down and blood oozing from his body. The deceased had been cut with a panga. He also said that he had known the Accused since childhood and was not aware of any differences between the accused and the deceased. On cross-examination, he stated that he knew Otieno Ogonjo who was with Walter Ouma on that day.

5. **PW3, Walter Ouma Ogonjo** testified that on that day, 18.11.2011, he had gone to the shopping center to get some sugar when he found the accused and the deceased seated on a Form outside the shop and he greeted them. He saw both of them stand up and Omondi removed a panga and cut Dominic around the left arm. The deceased then moved next to him, PW3, then he headed towards the road where he fell. PW3 went and found that the deceased had died. He testified that the accused then followed the deceased and continued cutting him. PW3 was 10 meters away from where the deceased was. The accused then came after PW3 who took a stool and screamed. He then called the Assistant Chief and later the police who came and took the body from the scene. Both the accused and the deceased were known to PW3 since childhood.

6. On cross examination, PW3 stated that there was a lady at the shop, next to a hotel. He confirmed that he found the accused and deceased chatting and did not see them fighting. That he did not see a panga at that point, but that he witnessed the attack. He also stated that he was with other people who he identified as Edwin Odhiambo Okoth.

7. **PW4, Rose Asenath Akinyi Ondiko**, testified that on the material date, she had closed her shop and gone to her house. She later heard noise close to where she works and went to check what was going on. She saw people screaming and saying that Omondi had killed Dominic. The next day when she went to the center she saw blood from her shop to the hotel next to it. She said that she knew both the accused and the deceased, and that the latter frequented the center.

8. On cross examination, she stated that she could not tell who was saying Omondi killed Dominic.

9. **PW5, Mary Anyango Opolo**, stated that she was working in the hotel when at around 7:30pm, she heard some noise to the effect that someone had cut Dominic. When she left the kitchen, she saw blood on the curtain at the door. She locked the door, closed her business and went home. She heard noise but did not see anybody killing Dominic. She could hear the voice of Ooko.

10. On cross examination, she stated that when she went out that night, she did not meet Rose, who runs the shop next to her hotel as the latter had left. That the accused was known to her as he comes from the area.

11. **PW6, Peter Ochieng Keya**, the Assistant Chief of Nyalgunga Sub – location testified that on 18.11.11, he was at home when he was called by Walter Ouma Ongonjo who informed him of a fight at the Shopping Center, and was also told that Dominic had been cut by Paul Omondi Odongo and he was bleeding seriously. He went to the scene and found Dominic already dead beside the road. The deceased had a cut on the left armpit and the left arm. He found many people at the scene and when he inquired from them what had transpired, he was told that Dominic and Omondi were fighting and that Omondi cut Dominic and then ran away.

12. **PW6** called the police officers from Siaya Police Station who went to the scene and took the body to Siaya County Referral Hospital Mortuary. He collected the witnesses and asked them to go record their statements at Siaya Police Station. Three (3) months later, the O.C.S Siaya called him to go identify the person who had murdered Dominic Ouma, to which he identified Paul Omondi Odongo. Both the accused and the deceased were known to him before. He stated that there was bright light from the shop's security light so he was able to see the deceased very well.

13. On cross – examination, he stated that he did not hear of any problem existing between the family of Dominic and that of Omondi. He did not find the murder weapon at the scene.

14. **PW7, No. 67215, Sergeant Benson Ndambuki**, DCI Ugenya testified that on 18.11.2011 at about 10.30pm, he was at the station when he received a report from Peter Ochieng, the Assistant Chief (PW6) who informed him that there was a murder incident which had occurred in the area. He proceeded to the scene where he found the body of the deceased lying beside the road in a pool of blood. The deceased's body had one cut on the left armpit and another on the upper side of the left arm. At the scene he also saw marks which indicated that there were some struggle. He inquired from the people around and he was told that the two had quarreled and the accused cut the deceased with a panga after which the accused ran away. The police took the body to Siaya District Mortuary where a postmortem was conducted on 21.11.2011 witnessed by the family members. That on 5.2.12, the accused went to the police station and narrated to him what had transpired on that day. That the accused said he was the one who committed the murder, and had been hiding because he was fearing for his life.

15. On cross examination, PW7 stated that there were footmarks at the scene indicating that there were some struggles and he also confirmed that the two had a quarrel. He also testified that he learnt of the cordial relationship between the accused and the deceased prior to the incident. From what he established, when the accused was sitting with the deceased, he had no panga and that the accused went to fetch the panga then used it to cut the deceased.

16. The report of the postmortem performed by Dr. Rapenda on 21.11.2011 was produced by **PW1 Dr. Diana Odera**. She testified that she was conversant with Dr Rapenda's handwriting and signature as they worked together. That the report revealed that on external appearance, the upper limb was nearly dismembered, there was a cut on the fore arm, and the rest of the body was intact and all internal organs normal. The doctor concluded that the cause of death was blood loss secondary to a deep cut by a sharp object.

17. On cross – examination, she confirmed that there were only two injuries – deep wound on the upper limb, and forehead; and that the deceased must have probably been raising arms.

18. The prosecution then closed its case. After considering the evidence adduced by the prosecution, the Court made a finding that a prima facie case had been established against the accused, and to that effect, warranted him to be put on his defense.

19. The accused opted to give unsworn testimony with no witnesses to call after Section 211 of the Criminal Procedure Code was explained to him. The accused stated in his defence that on the said date of 18.11.2011, he was on his way home from Siaya after work and when he reached Kakum Center, he met his 'brothers' in the village quarrelling over items which had been stolen from the village. He asked them what the matter was, and it is when Dominic asked him as to who he was to question them, and Dominic hit the accused person with a panga. The accused person got annoyed and snatched the panga from Dominic and hit the deceased with it. The accused did not know which part of the body he had hit Dominic with the panga. The accused person then heard people shouting saying that the accused had injured Dominic so he ran away. Later after he had taken off, he learned that Dominic had sustained serious injuries as a result of their fight and that he had died. The accused person went to the Siaya Police station and reported what had happened. He also confirmed that Dominic was his relative and that the panga he used to cut the deceased belonged to the deceased.

## **DETERMINATION**

20. Having considered the prosecution's evidence as against the defence proffered by the accused person, in my humble view, the main issue for consideration is whether the prosecution have discharged the burden of proving the guilt of the accused person beyond reasonable doubt to sustain the charge of murder.

21. To prove a charge of murder, the prosecution has a duty to establish the following elements:

***i) the death and cause of death of the deceased;***

***ii) That the accused caused the death through an unlawful act or omission; and***

***iii) The accused possessed the intention to cause harm or kill or malice aforethought.***

22. According to the Information filed by the Prosecution, the Accused person Paul Omondi Odongo faces a charge of Murder contrary to section 203 of the Penal Code which section provides:

**“203: Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

23. Section 204 of the Penal Code is the Penal section upon conviction for the offence of murder.

24. The malice aforethought is a very important ingredient for the offence of murder. The prosecution has to establish malice aforethought. Section 206 of the Penal Code sets down the facts which constitute malice aforethought as follows:

**“206. 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 is 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 nor, although such knowledge is accompanied by indifference whether death of grievous bodily harm is accused 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”**

25. Therefore, on Whether the prosecution proved death and cause of death of the deceased herein, the postmortem on the body of the deceased was carried out by Dr. Rapenda and his report was produced by PW1 Dr. Diana Odera, who had worked with Dr Rapenda and was conversant with his handwriting and signature. She produced the postmortem report dated 21.11.2100 as exhibit 1.

26. PW7, No. 67215, Sergeant Benson Ndambuki, DCI Ugenya, testified that he proceeded to the scene of the crime on 18.11.2011 and found the body of the deceased lying beside the road in a pool of blood and took the body to Siaya District Mortuary. Family members of the deceased were present to witness the postmortem. The cause of death as per Exhibit 1 is due to blood loss secondary to a deep cut by a sharp object. The evidence of PW6 and PW7 corroborates that of the postmortem report that the accused had cuts and he was found lying in a pool of blood. The death of the deceased is therefore not in dispute as the accused also stated that when he learnt of the death of Dominic the deceased, he proceeded to report it at Siaya Police Station. I therefore find that the postmortem and the evidence of other witnesses named above proved the death of the deceased and the cause of the death, beyond a shadow of doubt.

27. On whether the accused caused the death of the deceased herein, the prosecution called only one (1) eye witness, PW3. The witness stated that he found the Accused and the deceased seated outside the shop of one George Sewe, who at the time of the incident was not at the shop, but had left a lady, Rose, (PW4) attending to the shop. Both the accused and the deceased stood and the accused hit the deceased with a panga. The deceased then moved toward the road where he fell beside the road. The accused then followed the deceased and continued cutting him. PW6 and PW7 stated that there were other people who witnessed the incident when it started and it is from what these people told PW6 and PW7 that formed the basis of the latter's evidence. PW3 also acknowledges that he was with two other people whom he identified as Nyamalo and Edwin Odhiambo Okoth. PW6 and PW7 were emphatic that there was a quarrel between the accused and the deceased. PW6 in his evidence specifically uses the word 'FIGHT' and PW7 stated that he saw marks which indicated that there were some struggles. The evidence of these witnesses do not agree on the material facts as to what happened at the scene. PW3 in his evidence does not state on what part of the body the deceased sustained injuries yet he alleges to have witnessed the attack. He could not have possibly missed the quarrel or fight, if any, between the accused and the deceased. The accused in his defence stated that there was a short exchange of words between him and the deceased. That it is the deceased who hit him first, then he hit the deceased out of annoyance. Even though this evidence is not corroborated with other evidence like, a medical report or a witness to show that the accused was actually hit by the deceased, the accused person's defence supports the prosecution's case. Two things remain constant:

i) *The accused hit the deceased with a panga and ran away when people shouted that he had killed the Dominic.*

ii) *The injuries sustained by the deceased and which led to his demise, according to the doctor who performed a[post mortem on the body of the deceased, arose as a result of the cut injuries.*

28. On whether the accused had malice aforethought, the state through the prosecution must establish facts that are consistent with existence of malice aforethought on the part of the accused. The Eastern Court of Appeal in the case of **Republiv v Tumbere S/O Ochen [1945] 12 EACA63** in determining whether malice aforethought had been established, considered the following elements:

**(1) The nature of the weapon used.**

**(2) The manner in which it was used.**

**(3) The part of the body targeted.**

**(4) The nature of the injuries inflicted either a single stab/wound or multiple injuries.**

**(5) The conduct of the accused before, during and after the incident.**

29. PW3's evidence was that there was no quarrel between the accused and the deceased before the attack. He implies malice on the accused by stating that the accused followed the deceased after the deceased fell beside the road and continued cutting the deceased with the panga. However, this evidence was not corroborated. There were other witnesses who were present when the incident started, and it is very unlikely that PW3, whose evidence is inconsistent with other witnesses on exactly how the incident occurred, was the only one who saw what transpired. I believe that if the killing of the deceased happened as stated by PW3, there was nothing to stop all other witnesses who were present at the material time from stating so clearly in their testimonies.

30. The Prosecution also implied malice, when PW7's testimony on cross examination he stated that the accused had left the deceased where they were, gone and fetched the panga, which he used to cut the deceased. This evidence is however inconsistent with that of the prosecution's eye witness PW3 who stated that he did not see any of the duo with a panga. It beats logic that PW7 saw both the accused and the deceased stand and witness the whole attack yet fail to notice at what point and by who the murder weapon was introduced to the scene. PW7 or any other witness could have seen from where the accused fetched the panga and at what exact point in the incident.

31. Nothing prevented the prosecution from bringing more evidence to erase this inconsistency, unless such evidence would be adverse to the prosecution. It is clear that the prosecution relied on the nature of weapon used and the conduct of the accused in establishing malice aforethought. The circumstances surrounding the weapon are not consistent and can therefore not be relied upon. How the panga was retrieved, whoever had it and how it was disposed has not been explained to this court. The conduct of the accused before the act does not in any way implicate the accused to the planning to execute the offence of murder. The accused's conduct during the incident is also not clear as the evidence of the prosecution's only eye witness, PW3 is also inconsistent with that of other witnesses and this brings doubt as to whether PW3 can be relied on to show that the accused had malice aforethought.

32. The evidence on record is clear that after the accused had cut Dominic, the people around the scene started shouting and saying that "Omondi had killed Dominic", prompting the accused person to run away. In this era of mob in justice, this court is persuaded that the accused ran away out of fear for his own life. PW7 stated that the accused took himself to the police station after he learnt of the deceased's death. This conduct of the accused after the incident does not implicate him to having planned to execute the murder as no witness demonstrated that the accused had prior to the incident threatened to kill the deceased. There is therefore no proof that the accused had a pre-meditation or *mens rea* to commit the murder of the deceased.

33. This being a murder charge, the prosecution must prove *mens rea* and *actus reus*. The *actus reus* has been established. The *mens rea* of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the case of **Joseph Kimani Njau v Republic (2014)eKLR** the Court of Appeal stated:

***"In both criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution ..."***

***In the present case, the circumstances that led to the fight between the appellant and the deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence where malice aforethought has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is unlawful act or omission that causes death of another."***

34. In the case of **Republic – V- Michael Muriuki [2014]eKLR** the court stated:

***"In Sawe – V- Republic (2003) KLR364, the Court of Appeal held:***

***1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.***

***2. Circumstantial evidence can be a basis of conviction only if here is no other existing circumstances relied on.***

***3. The burden of proving facts will justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.***

***4 .....***

***5 .....***

***6 .....***

***7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."***

35. In **ABANGA alias ONYANGO V REPUBLIC CR. ANO.32 OF 1990 (UR)** the Court of Appeal set out the principles applicable in order to determine whether circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established , (ii)those***

*circumstances should be of a tendency unerringly pointing towards guilt of the Accused; iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability was committed by the accused and none else.”*

36. In the instant case, there is no circumstantial evidence which has been adduced to prove *mens rea*. It is the evidence of all prosecution witnesses that no bad blood existed between the accused and the deceased. The circumstances prior to the fight between the accused and the deceased have also not been shown. Those circumstances are therefore unknown to the witnesses and to this court.

37. To an ordinary citizen, killing of another person is murder and nothing else matters especially where the accused himself testified and admitted that he cut the deceased with a panga and that he ran away when people around the scene shouted that he had injured the deceased, and he even surrendered himself to the police upon learning that the deceased was dead. However, the law says different things about the offence of murder. The burden is always with the prosecution to prove that the accused caused the death of the deceased and that there was malice aforethought. The prosecution needed to adduce evidence to establish the ingredients of the offence which are that the accused person is the one who inflicted the injuries on the deceased and that the injuries led to his death, and further that at the time he inflicted the injuries on the deceased he had formed the necessary intention to either cause death or grievous harm on the deceased.

38. I find that albeit there is overwhelming evidence from the prosecution witnesses and the accused himself testified that he cut the deceased with a panga and that therefore the injuries sustained by the deceased as a result thereof caused his death, I am unable to find that the malice aforethought is proved.

39. In my humble view, the evidence as adduced by the prosecution established beyond reasonable doubt the act of unlawful killing of the deceased by the accused person herein which unlawful killing is legally known as the offence of manslaughter,

40. Sections 179 of the Criminal Procedure Code stipulates:

*“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*

*(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”*

41. The application of Section 179 was given by the Court of Appeal in the case of **Rashid Mwinyi Ngusya and Another –Vs- Republic [1997] eKLR** in which it was held:-

*“In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial.....Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code.”*

42. The **Black’s Law Dictionary** 9<sup>th</sup> Edition page 1186 defines a cognate offence as:-

*“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.*

43. In **David Mwangi Njoroge vs. Republic [2015] eKLR**, Ngenye-Macharia, J observed:

*“...the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with.”*

44. In **Kalu –vs- Republic (2010) 1 KLR** the Court of Appeal observed thus:

*“With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading:-“Convictions for Offences Other than Those Charged” and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder”[emphasis added].*

45. Consequently, I find and hold that the accused person herein Paul Omondi Odongo is not guilty of the offence of murder as charged. He is accordingly acquitted of the offence of murder. I however find and hold that the prosecution evidence adduced has established beyond reasonable doubt that the accused person Paul Omondi Odongo unlawfully killed Dominic Ouma Odhiambo, and as the prosecution evidence has established the charge of manslaughter against the accused person beyond reasonable doubt, which offence is lesser than the offence of murder, I hereby substitute the charge of murder against the Accused as charged contrary to section 203 as read with section 204

of the Penal Code with the lesser charge of Manslaughter contrary to section 202 of The Penal Code as read with section 205 of the Penal Code and proceed to convict the accused person with the offence of manslaughter contrary to section 202 as read with section 205 of the penal Code accordingly, pursuant to section 215 of Criminal Procedure Code.

46. The upshot is that I find the accused guilty of the offence of manslaughter contrary to section 202 of The Penal Code as read with section 205 of the Penal Code and convict him accordingly, as stipulated in section 215 of the Criminal Procedure Code. I so order.

**Dated, signed and delivered in open court at Siaya this 12<sup>th</sup> Day of March, 2019.**

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

Mr Okachi Senior Principal Prosecution Counsel for the State

The accused person present and urges the court to read and deliver the Judgment in the absence of his advocate Mrs Margaret Ochanji Opondo

CA: Brenda and Modestar