



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 19 OF 2016

REPUBLIC..... PROSECUTOR

VERSUS

COSMAS OMONDI OMORO ACCUSED

JUDGMENT

1. Cosmas Omondi Omoro 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 offences are that 15th day of June 2016, at **Elukhari** sublocation of **Marachi Central** Location within Busia County, murdered **Joseph Nalwoyo Omire**.
3. The prosecution case was that the accused attacked and injured the deceased with a hoe and ran away. He was pursued and arrested.
4. The accused in his defence contended that the deceased attacked his (accused's) wife and when he went to find out, the deceased attempted to attack him with a hoe. While struggling over it, the deceased was injured.
5. The issues for determination are:
 - a) Whether the accused was provoked;
 - b) Whether the accused acted in self-defence; and
 - c) Whether the action by the accused amounted to murder.
6. Rose Akumu (PW1) testified that she was attracted by the deceased cry of distress when he cried that Cosmas Omondi was killing him. She ran to the scene and saw the deceased having fallen down and the accused who was armed with a hoe started to run away on seeing her. She gave chase to him while raising an alarm. She only found the two at the scene.
7. The evidence of Henry Wesonga Omolo (PW2) was that he stopped the accused who was being chased by PW1 and who was raising an alarm that he had killed. There was also a crowd following him.
8. The accused in his defence contended that he heard his wife cry that she was being killed. He met with and saw her approaching while crying. The deceased was following her. When he enquired from the deceased what she had done to him, the deceased got hold of him and knocked him down. A struggle ensued between him and the deceased. The hoe the deceased had injured him on the head in the process. His wife Irene Ajuma Ouma (DW2) testified that the deceased chased her while armed with a hoe. When she raised an alarm, the accused went to her rescue. He snatched the hoe from the deceased and when they were struggling over it, the deceased was cut on the head.
9. The accused pleaded the defence of provocation though not explicitly. Provocation was defined in the case of **Duffy (1949) I ALL ER 932** as:

...some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind

Section 208 (1) of the Penal Code on the other hand defines provocation as follows:

The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be

likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

10. *Although the evidence by Rose Akumu (PW1) was to the effect that she did not find any other person, I am persuaded that the incident took place in the version the accused testified to. My finding is informed by the evidence of Rose Akumu (PW1) who said that the deceased and the accused have never had disagreements. Section 207 of the Penal Code provides:*

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

11. Though the accused contended that he acted in self-defence, the evidence of his wife does not support this contention. A struggle ensued after he had snatched the hoe from the deceased and there is no evidence that the deceased attempted to harm him. I therefore find that this defence is not available to him.

12. Dr Hillary Kiplagat (PW6) testified that the deceased sustained a fracture of the skull which amounted to severe head injury. This would have required some considerable force and it rules out an accidental injury while struggling over the hoe. It must have been a deliberate blow.

13. From the foregoing analysis of the evidence on record, I find that the prosecution has proved the lesser offence of manslaughter beyond any reasonable doubt. I accordingly find the accused guilty of the offence of manslaughter contrary to section 202 of the Penal Code and convict him.

DELIVERED and SIGNED at BUSIA this 6th day of May, 2019

KIARIE WAWERU KIARIE

JUDGE