



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CRIMINAL (MURDER) CASE NO. 25 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ERICK OCHIENG AMIMO.....ACCUSED**

**JUDGMENT**

1. **Erick Ochieng Amimo (the accused)** herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

The particulars are that:

**On the 03rd October, 2018 at around 22.00 hrs at Onong'no village, Masogo sub-location, Nyando sub-county, within Kisumu County murdered William Otieno Odoyo**

2. The prosecution summoned a total of 8 (eight) witnesses in support of its case while the defence called only the accused.

**Prosecution Case**

3. **PW 1 Gonza Oyuke Osiko** stated that on 03.10.18 at about 10.00 pm, he was called to the home of one Samuel Odep by one Joseph Olowe. On arrival, he found the Joseph Orowe, Mama Anna and other people who included William Otieno Odoyo (deceased) who was alleged to have stolen chicken from Anna and Ouma but deceased denied it. That thereafter, accused arrived at the scene and threatened to beat the deceased for allegedly implicating one Joshua in the theft of the chicken and one Akongo separated them. The witness said that he went away but was called in the night by Mama Anna who informed her that the deceased who had been seriously injured by the accused had been taken to hospital.

4. **PW 2 Anne Anyango Okumu** stated that on the material night, she and Rose went to the deceased's house to look for their chicken that were stolen. That while they were talking to the deceased, accused arrived at the scene and asked the deceased to produce the lost chicken. It was her evidence that the deceased went into his house and accused followed him there and when they emerged fighting, the deceased had an injury on the right hand. That thereafter, the deceased fell and accused went away with the panga he had cut the deceased with after snatching it from deceased.

5. **PW 3 Rose Adhiambo** said she heard the deceased screaming and upon arriving at his house found him injured. She also stated that she saw accused who was armed with a panga beating the deceased.

6. **PW4 Joseph Orowe** arrived at the scene after the deceased was injured and was informed by PW2 and PW3 that accused had cut the deceased with a panga.

7. **PW5 Fabianus Odoyo** the deceased's cousin identified his body to the doctor that conducted a postmortem on 09.10.18 at Ahero Sub-County Hospital.

8. **PW6 PC Philip Ochieng Otieno** received the murder report on 04.10.18, went to the house of accused who was alleged to have been the assailant and from there recovered a blood stained panga which was suspected to have been the murder weapon. Accused was then arrested and charged.

9. **PW7 Dr. Benard Oduor** conducted a postmortem on deceased's body on 09.10.18 and found that it had a bruising over the left eye, both shins, left lower chest wall and cut on right elbow. He produced the postmortem report as **PEXH. 1** and stated that he had formed an opinion that the deceased died of excessive bleeding from the cut wound on the right elbow.

10. **PW8 PC Richard Kinyua**, the investigating Officer stated accused who was alleged to have cut the deceased with a panga as a result of which he died was arrested and charged. He forwarded the panga **PEXH. 2** recovered from accused's house and deceased's blood sample to the government chemists and received a report **PEXH. 3** that the blood on the panga and that of the deceased had similar DNA profile.

### **The Defence Case**

11. At the close of the Prosecution case, this Court ruled that the Accused person had a case to answer and put him on his Defence.

12. In his sworn defence, Accused stated that he had found one Nicholas Ouma who was armed with a panga and a metal bar beating deceased. He stated that he was struggling with the deceased and the said Nicholas to take the panga away and it was then that the deceased was injured on the hand. He conceded that the panga was recovered from his house

### **ANALYSIS AND FINDINGS**

13. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **ANTHONY NDEGWA NGARI VS REPUBLIC [2014] eKLR**, the main elements of the offence of murder were listed as follows: -

**a) That the death of the deceased occurred;**

**b) That the accused committed the unlawful act which caused the death of the deceased; and**

**c) Malice aforethought**

14. The death of the deceased has been proved by the postmortem report **PEXH. 1** which shows that deceased died of excessive bleeding from a cut wound on the right elbow. Accused stated that he had found one Nicholas Ouma who was armed with a panga and a metal bar beating deceased and that he was struggling with the deceased and the said Nicholas to take the away the panga when it injured deceased on the hand. His evidence that he was struggling to take the panga from the deceased and Ouma is however unpersuasive for the reason that it was Ouma and not the deceased that had the panga. Why then would he be struggling to take a panga that the deceased did not have. On the other hand, Accused's defence that one Nicholas Ouma fought with the deceased has been denied by PW2 and PW3 who were at the scene with accused had followed deceased into his house and that when they emerged fighting, the deceased had an injury on the right hand and accused was holding a panga.

15. From the totality of the evidence on record, it is evident that the fatal injury was caused by the accused.

16. The court must then determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. There is of course no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. The ingredients of murder were explained in the case of **Roba Galma Wario vs Republic [2015] eKLR** where the court held that;

**“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”**

17. Malice aforethought was defined in the following cases;

**(a) Nzuki vs Republic [1993] KLR 171** where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

**- Intention to cause death**

**- Intention to cause grievous bodily harm**

**-Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.**

**(b)** In the case of **Daniel Muthee vs Republic Criminal Appeal No. 218 of 2005 (UR)** cited in the case of **Republic Vs Lawrence Mukaria & Another [2014] eKLR**, Bosire, O'kubasu and Onyango Otieno JJA.,

while considering what constitutes malice aforethought observed as follows:

**“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan**

in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

18. In the case of Republic Versus Tubere 1945 12 EACA 63 where the Eastern court of Appeal held as follows:

“Malice aforethought in murder may be established by ascertaining the nature of the weapon used, the manner in which it is used, the part of body injured by it, the nature of the injuries inflicted, the conduct of the accused before, during and after the incident”.

19. The requirements to prove malice aforethought in both direct and indirect malice has been considered. In the recent decisions by the Court of Appeal in the cases of Ogeto vs. Republic (2004) KLR 19, it was held that where the appellant in possession of a knife stabbed the deceased on the chest causing fatal injuries, intention to cause the death of another is deemed to be established. In the second authority of Guyo Fora Duba V Republic [2000] eKLR, the circumstances were that the appellant armed with a rifle shot his colleague fatally causing his death in cold blood and the court held it was murder.

20. Further in the case of Ernest Asami where Abanga alias Onyango Versus Republic CR. App No. 32 of 1990 and James Masomo Mbatha Versus Republic 2015 eKLR, the court held interalia that malice aforethought is deemed to be established by the sheer force and gravity of the nature of multiple injuries inflicted and the parts of the body targeted against the deceased by the offender.

21. In applying the above principles to the facts of this case, one can easily say that the killing of the deceased was without malice aforethought.

#### **Disposition**

22. Consequently, I find accused **GUILTY** of the lesser offence of manslaughter contrary to section 202 as read together with section 205 of the Penal code and convict him accordingly. It is so ordered.

**DATED AND SIGNED THIS 11th DAY OF December 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant -**

**Accused -**

**For Accused -**

**For the State -**