



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 37 OF 2012**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**HORACE OWITI OLWENY .....ACCUSED**

**JUDGMENT**

1. **HORACE OWITI OLWENY** (“the accused”) was charged with the murder of **PETER ODERO ODAWO** (“the deceased”) which took place on 23<sup>rd</sup> May 2012 at Bugo Market in Kabondo West Location in Nyakach District of Kisumu County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The prosecution marshalled 7 witnesses to prove that the accused gravely assaulted the deceased for insulting him thereby occasioning his death.

2. Dr Nelly Wanjala (PW 7) produced a post mortem report of an autopsy performed by Dr. Ocholla on 24<sup>th</sup> May 2012 at Jaramogi Odinga Oginga Teaching and Referral Hospital indicating that the deceased’s died as a result of excessive bleeding following a deep cut on the lateral aspect of the neck. This evidence corroborates the testimony of the deceased’s wife, Vera Adhiambo Odero (PW 1) who recalled that on the evening of 23<sup>rd</sup> May 2012 at around 7:30pm, as she in their house, she heard the deceased calling her to open the door. He kept saying that Horace has killed him. When she opened the door, the deceased took one step into the house and collapsed. She observed that the deceased had a cut on his neck. PW 1 rushed to the house of Julius Odawo (PW 2), the deceased’s brother, to seek help. They both returned to the house and found the deceased already dead.

3. PW 2 recalled that on the material evening at around 7:00pm, he went to the accused’s shop at Bugo Market to purchase some items. While there the accused informed him that the deceased had insulted him and he was unhappy about it. PW 2 promised the accused that he would talk to the deceased about it. PW 2 testified that while walking to the shop he had heard the deceased speaking in a local eatery. After leaving the shop just a few meters away, he had someone screaming, “*Horace, why have you cut me?*” He looked behind and saw the deceased running in his direction saying that Horace had killed. At the same time, he saw the accused going behind his shop. PW 2 testified that he followed the deceased who was by then several meters ahead of him. When he got to the entrance of their home, he met PW 1 and they both went back to the house where they found the deceased dead. PW 2 testified that he called Caleb Ochieng Oyoo (PW 4), the area assistant chief who in turn called Chief Inspector Thomas Mondo (PW 5) who came to the scene with other officers and took the deceased’s body away.

4. Kambona Ogutu Deya (PW 3) testified that on the material day he was grazing cattle near the accused’s farm. At around 4:00pm it began drizzling and he went to seek cover in a banana plantation leaving the cows behind. While there he heard the deceased calling that the cows had strayed to the accused potato farm. PW 3 asked the deceased to assist him in removing them from the farm. When the accused joined, a quarrel ensued between the accused and deceased over the damaged crop. PW 3 testified that he apologised to the accused and everyone went their way. He was later to learn about the murder.

5. The investigating officer, Corproral Kenneth Muyale (PW 6) testified that after he received instructions to conduct investigations into the murder. He went to the scene where he recorded several statements from various witnesses. He established that the accused murdered the deceased following a quarrel they had had earlier in the day. Following such investigations, he decided to charge the accused with the murder.

6. When put on his defence the accused (DW 1) opted to give a sworn statement and called one witness. He denied any involvement in the deceased’s death. He stated that on the material night at around 9.00pm he was at his shop when he was attacked by unknown people who tried to break down his door while accusing him of killing the deceased. He managed to escape from the attackers and he went to Pap Onditi Police Station to seek refuge. It is while at the Police Station that he was arrested.

7. PC Edison Mwambaji (DW 2) testified that he was the officer on duty at the front desk at Pap Onditi Police Station when the accused arrived at the station seeking protection from some people who wanted to lynch him on suspicion that he had killed someone. DW 2 testified

that he offered the accused refuge at the station until PW 5 instructed him to arrest the accused as he was a suspect in the murder.

8. **Section 203** of the **Penal Code** defines murder in the following terms, “Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” Thus the central ingredients of the offence of murder are malice aforethought and an unlawful act or omission on the part of the accused causing death of the deceased.

9. The fact and cause of death of the deceased was not in dispute as I have stated elsewhere the deceased died of excessive bleeding as a result of a cut wound on the neck. The main issue for determination is whether the accused caused the unlawful act that led to the deceased’s death. On this issue, the evidence is circumstantial in that no one saw the accused assault the deceased. In considering the evidence, I am guided by the seminal case of **Rex v Kipkering Arap Koskei and Another [1949] 16 EACA 135**, where the East Africa Court of Appeal distilled that principle that;

*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 other than that of his guilt.*

10. Before I deal with the evidence, I note that after PW 2 testified, the judge hearing the matter noted that, “I have noted the demeanour of the witness and the fact that his statement to the police is very different from his statement in court.” It is apparent that the judge was not impressed by his testimony and having taken over the conduct of the matter under **section 200** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, I cannot possibly depart from this finding as I did not have the opportunity of observing the witness and I am therefore constrained to reject the testimony of PW 2. I would also point out what was stated in **Joseph Ndungu Kimanyi v Republic [1979] eKLR** where it was held;

*The witness upon whose evidence its proposed to rely should not create an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.*

11. I now turn to the rest of the evidence. The key evidence against the accused is the deceased’s dying declaration that implicated him. Before the deceased fell and collapsed, he told his wife that the accused had killed him three times. This statement is admissible as it falls within the definition of a dying declaration under the provisions of **section 33(a)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. It must however be received with the necessary caution and circumspection although it is not a requirement of law that it must be corroborated to support the conviction (see **Choge v Republic [1985] KLR 1** and **Pius Jasunga s/o Akumu v R [1954] 21 EACA 331**).

12. In my view, there is no reason to disbelieve PW 1. Her testimony on this issue was unshaken and she knew the accused and there is no evidence or even suggestion in cross-examination that she had a grudge with the PW 1. The other evidence that gives support to the prosecution case is that there is evidence of motive. In **Choge v Republic [1985] KLR 1**, the Court of Appeal dealt with the issue of motive as follows:

*Under section 9(3) of the Penal Code, the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1<sup>st</sup> appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.*

13. There is also evidence that the accused had quarrelled with the deceased earlier in the day over some cows which had destroyed his potato crop. PW 3 testified that the accused quarrelled with the deceased over the cows and that although PW 3 apologised, the accused was very angry about it. This evidence points to a disagreement between the accused and deceased.

14. The accused, in his defence, denied that he knew the deceased despite the testimony of PW 3. The evidence of PW 1 and PW 3 points to the fact that the deceased is the person who assaulted the deceased and he only ran into the police station because he feared for his safety as the villagers threatened to lynch him. I therefore find and hold that the accused is the person who caused the death of the deceased. The evidence suggests that there was a fight or a scuffle that had spilled over from the morning and given that the nature of the injury was a single blow to the neck, I find that malice aforethought was not proved.

15. I therefore convict the accused, **HORACE OWITI OLWENY**, of the offence of manslaughter contrary to **section 202** of the **Penal Code** for the unlawful killing of **PETER ODERO ODAWO** and I convict him accordingly.

**DATED and DELIVERED at KISUMU this 5<sup>th</sup> day of March 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Omondi T., Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.