



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 53 OF 2014

(Formerly Kisii High Court Criminal Case No. 20 of 2014)

REPUBLIC..... PROSECUTOR

-VERSUS-

ALPHONE ODHIAMBO WAO.....ACCUSED

JUDGMENT

1. **ALPHONE ODHIAMBO WAO** was arraigned before the High Court of Kenya at Kisii on 26/02/2014 and faced an information on murder. The particulars of the offence were as follows:-

“On the 28th January 2014 in Rongo District within Migori County in the Republic of Kenya murdered E O A”.

2. The accused person denied committing the offence and the case was set for hearing. Before the trial began the case was transferred to this Court where the trial was conducted as from December 2014. **Hon. Majanja, J.** recorded the entire prosecution's evidence whereas I recorded the rest of the evidence upon compliance with **Section 200(3)** of the **Criminal Procedure Code**.

3. The prosecution availed seven witnesses who testified in support of the information facing the accused person. **PW1** was **E A O**, a female adult and the deceased's wife. **PW2** was the deceased's 15 year-old son one **K O O**. **PW3** was the Chief of West Kamagambo Location one **NICHOLAS OJWANG ORWA** whereas the deceased's brother one **E S A** testified as **PW4**. The investigating officer **No. 680292 PC DANIEL CHOGE** testified as **PW5**. **PW6** was the Assistant Chief of West Kanyimamba Sub-Location one **GEORGE OCHIENG OMUONO**. The last prosecution's witness, **PW7**, was the Doctor who produced the mental assessment report for the accused person and thereafter the prosecution closed its case.

4. The prosecution's case was very straight forward. In the night of 28/01/2014 at around 08:30pm the deceased was seated on the verandah between two houses belonging to his two wives as **PW1** was preparing supper in the kitchen adjacent to the verandah whereas **PW2** was studying together with his young brother in one of the two houses. The deceased had on that material day returned home from a land dispute case with the accused person's mother before **PW3** and, for want of documentation on the ownership of the land, the parties had been asked to gather the same and return thereto three days later. As the night had fallen, both **PW1** and **PW2** were using D-Lite solar lamps, which according to them, they produced sufficient light to illuminate not only where the lamps were but also the surroundings. Further **PW2** had a torch.

5. Suddenly the deceased's dogs which were outside the houses began barking and the deceased asked

PW2 and his brother to check out if there was anything wrong, but they delayed. Before long PW2 heard some footsteps of a person slowly walking from the back of the house he was in towards where the deceased was seated. PW2 then heard the sound of a panga cutting something and he stood up and opened the window which was just next to him and which was opening towards the verandah where the deceased was seated. Using his torch PW2 illuminated towards the deceased and saw the accused person running away from the scene. PW2 raised alarm and called her mother, PW1, who also quickly opened the window and using the lamp she had equally saw the accused person running away from the scene into the nearby sugarcane bush. On observing the deceased, both PW1 and PW2 saw that the deceased had been seriously cut on the head and was bleeding profusely. He then fell on one side of the seat; dead!

6. PW1 then raised alarm and the neighbourhood gathered. The local administration was informed as well as the police who visited the scene and took away the deceased's body to the Homa Bay District Hospital mortuary for preservation. A post mortem examination was thereafter conducted on the deceased's body by one Dr. Ojwang after PW4 had identified the body.

7. PW5 then commenced investigations and recorded statements from various witnesses which pointed to the accused person's culpability. However as the accused person had escaped from his home which was neighbouring that of the deceased, a manhunt was initiated and the accused person was subsequently arrested in another sub-location and arraigned before Court facing the current charge.

8. At the close of the prosecution's case, the accused person was placed on his defence where he opted to give unsworn testimony and called a witness, **ENOSH LIGANDA GWADO** who testified as **DW1**. The accused person denied committing the offence and stated that the prosecution's case was only but false. The evidence of the accused person and that of DW1 corroborated each other on how the accused person was arrested on. There was no doubt that the accused person was arrested at DW1's homestead by the Chief of Rakwaro Location, PW3 and PW6 who were in the company of some Administration Police Officers from Rukwaro AP Post. He was then handed over to the police.

9. At the close of the defence case Counsel for the accused person Mr. Sam Onyango made strenuous oral submissions on two fundamental aspects. He challenged the evidence on identification of the accused person as well as the failure by the prosecution to prove the cause of the deceased's death. He urged this Court to acquit the accused person. The prosecution through Learned State Counsel Mr. Okaka urged this Court to find a conviction against the accused person in the face of the overwhelming evidence.

10. It is now on the basis of the foregoing that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder.

11. The offence facing the accused person is an information of murder contrary to Section 203 as read with Section 204 of the Penal Code, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction in any charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

13. I will first deal with the issue of proof of the fact and cause of death of the deceased. Evidence was led to the effect the deceased died. That was confirmed by several witnesses including PW1, PW2, PW4, PW5 and PW6. As stated hereinabove PW1 and PW2 were the deceased's wife and son respectively who saw the deceased dead at their home and who also confirmed that the deceased's body was taken by the police to the mortuary. PW4 was the deceased's brother who witnessed the post-mortem examination of the deceased's body at the Homa Bay District Hospital Mortuary. PW5 who was the investigating officer

visited the scene and collected the deceased's body and took it to the mortuary. He also witnessed the post-mortem examination being conducted on the deceased's body. PW6 who was the area Assistant Chief also visited the scene and saw the deceased dead and witnessed the body being taken away by the police. There is therefore no doubt that the deceased herein, **E O A** died in the night of 28/01/2014.

14. As to the cause of the deceased's death, PW7 who was the only medical personnel who testified in the case did not state anything to do with the possible cause of the deceased's death. PW7 only confirmed that the accused person was assessed and found to be fit to stand trial before he was arraigned in Court.

15. The post-mortem examination for the deceased was conducted by one Dr. Ojwang who passed on before he testified. The prosecution so informed the Court and sought for time to avail the Medical Officer of Health of the Homa Bay District Hospital to attend Court for purposes of producing the Post Mortem Report. The request was allowed on 31/08/2015 and the case was fixed for further hearing on 28/09/2015. Come the hearing date, the doctor did not attend Court for reasons that he was attending to some official duties. An adjournment was allowed despite an objection from the defence Counsel and the case was set for further hearing on 12/11/2015. The prosecution was granted the final adjournment and Summons issued to the Doctor. The prosecution then closed its case without the evidence of the results of the post-mortem examination.

16. I reiterate that the purpose of a post mortem examination is to ascertain the possible cause of death of a deceased person. In the absence of such evidence the Court is only left to speculate on the possible cause of death. That is the position which this Court now finds itself in. I am however aware of some instances where Courts have been compelled to ascertain the cause of death without such an examination. Such instances may arise when the deceased's body is in such a state that no such examination can be possibly conducted.

17. That is however not the position in this case. The deceased's body was well preserved and indeed an autopsy conducted and accordingly witnessed. I may say here that the prosecution was able to do more than it did so that the crucial evidence on the possible cause of the deceased's death was part of the record. There was no indication as to whether or not the Doctor had been served with the Summons. Be that as it may, if there was some difficulty in availing the intended Doctor to testify, there was no evidence that an attempt was made to avail an alternative doctor since the possibility that the late Dr. Ojwang had worked with his other colleagues cannot be said to be far-fetched. In a worst-case scenario the prosecution would have attempted to recall the investigating officer and lay a legal basis for the production of the document. There was equally no indication that the defence Counsel had rejected a request to have the Post Mortem Report produced by consent.

18. I have deliberately made the foregone observations given that this was a case where there was some eye-witness evidence which this Court would have interrogated to ascertain if the accused person was indeed involved in one way or the other with the death of the deceased. Even if I now decide to take that route, nothing much may come out of it since this Court is not in a position to make a finding on the possible cause of the deceased's death. This Court also notes that the accused person denied either committing the offence or even being at the scene of crime on the alleged day when then deceased met his death.

19. Having therefore failed to ascertain the cause of the deceased's death, it will serve no purpose to deal with the other ingredients of the offence of murder since as matters stand now, the deceased could have died out of any other reason and not necessarily out of an act of another person.

20. I now come to the conclusion that the information of murder facing the accused person has not been proved. The accused person is hereby found not guilty of the murder of **E O A** and is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of January 2017

A. C. MRIMA

JUDGE