



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 7 OF 2016

(CORAM: J. A. MAKAU – J)

REPUBLIC

VERSUS

GEORGE ODHIAMBO OKAL

JUDGMENT

1. The Accused **GEORGE ODHIAMBO AKAL** alias **OGALL0** is charged with an 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 charge are that on the 19th day of March 2016 at Mahanga Beach, Mageta location, in Bondo Sub-County within Siaya County Murdered **KENNEDY OTIENO OUGO**.

2. The Prosecution called 5 witnesses. The facts of the Prosecution's case are that PW1 Peter Otieno Odago was on 19.3.2016, at Mageta at around 5.00 p.m. when he proceeded to Mahanga Beach and on returning home he found Odhiambo, whose other names he does not know, seated on a chair at the door step and his mate sleeping on a net at the door, having a dispute whose contents PW1 did not know. PW1 left them, proceeded to feed the cows and burn the rubbish. When PW1 returned he found Odhiambo telling his mate that he would kill him and be jailed as the mate is taken to mortuary. That time PW1 was 6 metres from the two. The mate of Odhiambo came out of the net and started going towards the hotel as Odhiambo got up, took a knife from a basin and followed his mate, who picked a stone and hit Odhiambo on the head, but Odhiambo approached his mate and stabbed him on the chest. PW1 was then about 10 metres from the two and his view was clear. The mate fell down and Odhiambo returned to his seat, and put the knife in the net. PW1 went and called his employer, Rasta Onam who came and also members of public came. Rasta Onam escorted Odhiambo to Mahanga Police Post. Police came to the scene of crime later, and took photographs. PW1 checked on the stabbed person and noted he was dead. The Police took the body of the deceased and PW1 with them. PW1 recorded his statement at Mageta Police Base. PW1 stated the Odhiambo he was talking about is the accused in the dock (pointing at him) and stated the accused was known to him as they were both employed by Rasta Onam and that each had his own place of residence. PW1 identified the knife he saw and stated that it had blood stains, marked MFI – 1.

3. PW2, Samwel Oyego Onam, told the Court that on 29.3.2016 he was mending fishing nets with George Odhiambo Akal also known as Ogallo. That after finishing repairing the nets, they were taken to the lake and PW2 went to watch football. On return to his home PW2 was informed Ogallo had killed Ken. PW2 found Ogallo seated in front of PW2's door, talked to him and he told him what had happened. PW2 stated the accused told him the deceased told him as the accused had beaten him and caused him to have a scar he would also cause him to have a scar. That Ken retreated, got a stone and hit him near the eye. PW2 found the accused bleeding from the head. PW2 found Ken lying on the ground on a path near

PW2's house. PW2's heard members of Public planning to kill the accused as he had killed the deceased. PW2 then asked the accused to accompany him to Police Base to make a report. PW2 and Willice Opiyo Ombura (PW3) took the accused to Mageta Police Base. PW2 returned to the scene with 4 Police Officers and noted a hole on left side of Ken's T-shirt which was stained with blood. He noted a stab wound on the left side of Ken's chest. PW2 told the Court that he knew George Odhiambo Akal alias Ogallo for 1 year as his fellow fisherman but the deceased was not a person known to him, but he used to see him as a fisherman at Mageta Mahanga Beach. That Police who went to scene of crime took photograph and took the deceased's body to Usenge. PW2 told Court the Accused told him he used a knife to stab the deceased which he picked from the utensils.

4. PW3, Willice Opiyo Ombura, told Court on 19.3.2016 at 5.30 pm he was at Mahanga Beach when he saw a crowd of people around the home of Rasta (PW2), proceed there, where he found a man lying on the ground, was told the man had been stabbed and he was shown the person who had stabbed the deceased, being one Ogallo Ja-Ugenya. PW3 approached Ogallo who told him the deceased hit him with a stone and he took a knife and stabbed him. PW3, PW2 and the accused then proceeded to Mageta Police Station Beach and made a report. The Police went to the scene, took photograph and took the body to Mortuary. PW2 noted the deceased's body had stab wound on the left side of the chest. PW3 stated that he had known Ogallo for 1 year and identified him as the accused in the dock. PW3 told court he did not know the deceased but he knew he was an employee of Samwel Onam (PW2).

5. PW4, Dr. Evans Ogoti, performed the postmortem on the body of the deceased on 30.3.2016 at 9.30 am and produced the same as exhibit P2. The Doctor found the deceased had a stitched scalp wound measuring 10c.m., a "left, penetrating chest injury over the upper left lemi thorax measuring 2 cm by 5 cm. The Doctor was of the opinion that the cause of death was penetrating injury of the chest involving the left lung with massive left sided hamothorax with resultant respiratory failure, most probably from sharp object such as a knife.

6. PW5, No. 61908 PC Francis Musili, the Investigating Officer in this case told the court that on 19.3.2016 at and 6.00 pm he was at Mageta Police Patrol Base on duty with the in-charge Snr. Sgt. Julius Ruto when they received the accused person George Odhiambo from the members of Public on an allegation of having murdered Kennedy Otieno Ougo. PW5, and Snr. Sgt Ruth proceeded to the scene of the incident at Mahanga Beach and at the scene of crime they found the deceased lying on his back dead. The body had a deep fresh stab wound on the left side of the chest. They found a kitchen knife on the ground few metres from the body which was stained with blood. They enquired from the members of public and they told the same knife had been used by the Accused person to stab the deceased. They recovered the knife and kept it as an exhibit and took the body of the deceased to Bondo Sub-District County Hospital Mortuary for Postmortem. PW5 recorded witnesses statements and escorted the Accused person to Usenge Police Station and handed the Accused to OCS C.I. Bulima together with witnesses statements and knife MFI – P1. On 30.3.2016 PW5 witnessed Postmortem at Bondo Sub-District Hospital Mortuary with P.C. Kyallo Kieti. The Accused was subsequently arraigned in Court charged with the offence of Murder. PW5 produced a blood stained knife with green stain as exhibit P1. PW5 told Court the suspect who was brought by members of Public is the Accused (pointing at him) in the dock. He stated he did not take the knife for further analysis.

7. The Accused on being called upon to defend himself, he stated on oath, that on 19.3.2016 he was at Mageta Island fishing. That he does not know one Kennedy Otieno Ougo. That in the morning he left the lake and proceeded to go to take Busaa within the Island from 12 noon upto 3 pm but on his way home, he met a young man who was blocking his way as he was looking drunk. That it was his first time to meet him. That he bypassed the young man, who asked him why he had abused him, he looked at his back and saw him carrying a knife, as the young man turned and followed him asking him why he had abused him. DW1 on seeing him with a knife he started running away as the young man chased him, he tripped on a stone, fell down and immediately got up and ran towards his home as he could hear people saying leave them alone as they are intoxicated. DW1 stated he ran away to his house leaving the young man behind and that he did not know what became of him. That after entering into his house he went to bed and slept. DW1 stated from the place he met the young man to his place is about 1 kilo metre. DW1 stated he woke up at 4.30 p.m. when he heard his door being knocked and upon opening he found it

was his employer Samwel Onam (PW2) who asked him to accompany him to the Police Station. DWI accompanied PW2 to Mageta Police Patrol Base. He told the Court he heard the evidence given before the Court and it was not true that he was bleeding from his forehead and that he was put in Police cells without being told why.

8. The Accused faces a charge of Murder.

Section 203 of the Penal Code provides as follows:-

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

9. To prove an offence of murder the prosecution must prove that the accused had formed the necessary intention to cause death or grievous harm of the deceased. **Section 206 of the Penal Code** describes the circumstances which constitute the same 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 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 not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused 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.

10. To prove a charge of Murder, the Prosecution has a duty to establish the following ingredients:

(a) The death of the deceased and its cause.

(b) That the accused caused the death of the deceased through an unlawful act or omission.

(c) That the accused possessed an intention to cause harm/kill or had malice aforethought.

11. **Whether Prosecution proved death of the deceased and its cause?** The postmortem was carried out on the body of the deceased by Dr. Evans Ogoti on 30.3.2016, in presence of No. 61908 PC Francis

Musili and P.C. Kyalo. PW1, PW2 and PW3 who were at the scene of the incident of crime and who witnessed Police collect the body testified the deceased was dead. There is therefore no dispute on the death of the deceased. PW4, Doctor Evan Ogoti, who carried out Postmortem produced the Postmortem Report as exhibit P2. The cause of death as per exhibit P2 made by Dr. Evans Ogoti was due to penetrating injury of the chest involving the left lung with massive left sided haemothorax with resultant respiratory failure most probably from sharp object such as a knife. I therefore find that the prosecution has proved death of the deceased Kennedy Otieno Ougo and the cause of death.

12. I now turn to the issue of who caused the deceased's death? The Accused denied having known the deceased and having caused his death. In this case there is only one witness who claims to have witnessed the commission of the offence. PW1, Under **Section 143 of the Evidence Act** it is provided that a fact can be proved by the testimony of one witness and that there is no particular number of witnesses required to prove a fact. PW1 testified the incident took place at 5.00 p.m. when he was about 5 metres from the scene of crime. PW1 knew the accused but did not know the name of the deceased. He heard the two arguing but he did not know what they were arguing about. PW1 later heard Odhiambo, the Accused, telling the deceased that he will kill him and be jailed as the deceased is taken to a mortuary. PW1 saw the deceased going towards a nearby hotel as the accused stood and picked a knife from a basin, the deceased saw him, picked a stone with which he hit Odhiambo on the head. The Accused approached the deceased and stabbed him on the chest. PW1 was then 10 metres from the two and he witnessed what happened. The deceased then fell down and accused returned to where he was seated and put the knife on the net. PW1 went and called PW2, Rasta Onam, who came to the scene of crime, followed by other members of public. PW2 came to the scene and found the accused at the scene of crime as members of public were threatening to kill the Accused as he had killed the deceased. The Accused told PW2, that he had stabbed the deceased and gave him the reason for doing so. PW2 saw the deceased lying on the ground. PW3 also came to the scene and found the deceased lying on the ground and the Accused at the scene of the crime. PW2 and PW3 escorted the accused to Mageta Police Station Base and PW5 arrested the accused and put him in the cells.

13. The evidence of PW1, PW2 and PW3 put the defendant at the scene of crime. His defence is a defence of alibi, that on the material date he was not at the scene of crime and that he had gone to take Busaa and on the way he was confronted by a young man but he ran to his house. He stated that he did know the young man nor does he know what happened to the young man.

14. It has been held in myriads of authorities that in a case where a defence of alibi is raised the accused person does not assume the burden of proving the defence of alibi. In criminal cases the burden of proof lies squarely on the Prosecution to prove their case beyond reasonable doubt except in those cases where the Section creating the offences specifically places some evidential burden on the Accused to establish a fact or rebut a presumption or prove a defence of a particular kind. It is the duty of the prosecution to disapprove of alibi defence an accused puts forward unless it appears to the court that the alibi cannot be sustained or was raised at the time which did give room for Prosecution to check it out and disapprove it (see the case of **Njuki & 4 Others V R (2002) 1 KLR 771**)

15. I have evaluated the defence of alibi and I find that the accused raised his defence of alibi at a time which did not give room for the prosecution to check it out and disapprove it. I further find that the defence cannot be sustained as PW1, PW2 and PW3 in their evidence they placed the Accused at the scene of crime. PW1 saw the Accused arguing with the deceased and threatening to kill him. He saw him stab the deceased with a knife. PW2 and PW3 found him at the scene of crime with the deceased's body lying there. I find the evidence of PW1, PW2 and PW3 dislodged the Accused defence of alibi. I find the same to be an afterthought as the accused even told this court that he was not injured on his forehead in his evidence on oath.

16. Having come to that conclusion, I have in this case, I am satisfied the Accused is the person who caused the death of the deceased herein.

17. Whether the Accused had malice aforethought? PW1 told the Court that on the material date he found the deceased and the Accused having an argument. He left them and went to give cows grass and

burn rubbish. That when he returned he heard the Accused telling the deceased he will kill him and go to prison when the deceased will be taken to mortuary. That when the deceased left for a nearby hotel the Accused picked a knife, followed the deceased and stabbed him on the chest. On cross-examination, PW1 stated when he saw the Accused carrying a knife he talked to him but he did not reply to PW1. PW2 stated that if the Accused was drunk he had taken a little drink and his mental status was not affected by the drink. On the Re-examination PW2 stated when he met the Accused he was not drunk and he told PW2 he was not drunk. That though the Accused has not admitted the Offence nor raised the defence of intoxication, he claimed he had been to taking Busaa when he met a young man who threatened him with a knife. I have found that his defence of alibi was dislodged by Prosecution's witnesses. PW1, stated both the deceased and Accused were drunk but did not state to what level, whereas PW2 stated if the Accused was drunk it was a little and that did not affect his mental status. In re-examination PW2 stated the Accused was not drunk and he told him he was not drunk. The Accused explained to this court how he was able to run from the young man who was threatening him with a knife for a distance of 1 kilometre. I find from his defence that if he was then drunk he had taken a little Busaa and that is why he was able to run from the young man he claims he met. I therefore find the Accused at the material time of the attack of the deceased he did not act under the influence of alcohol and his sense of judgment was not impaired at all. Further according to PW1 the attack arose after the Accused had told the deceased he will kill him and go to jail as the Accused is taken to Mortuary. The stoning of the accused on the head by the deceased which accused denied cannot be a defence of provocation or acting in self-defence as the accused life was not in danger nor had he sustained serious injuries (if any) as he stated in his defence he was not bleeding from his head. He had before then told the deceased he would kill him; and indeed took a knife, followed the deceased to execute his intention. He used excessive force and as such I find though the defence of provocation and self-defence was not raised, the same is not available to the accused in the circumstances. That when the deceased left for a nearby hotel, the Accused picked a knife followed the deceased and stabbed him. The Accused knew his action of stabbing the deceased on left side of the chest, near the heart and the lungs, that would cause either death or grievous harm to the deceased. He had earlier on threatened to kill the deceased. I find the Accused knew what he was doing, he had intention of killing the deceased, he had planned to kill the deceased and did kill the deceased as planned. I therefore find and hold that malice aforethought is proved.

18. The upshot is that I find the Accused George Odhiambo Akal alias Ogallo guilty of murder of KENNEDY OTIENO OUGO. I accordingly convict the Accused with an offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

DATED AND SIGNED AT SIAYA THIS 9TH DAY OF FEBRUARY, 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

IN THE PRESENCE OF:

MR. R. OTIENO FOR THE ACCUSED

M/S. ODUMBA FOR STATE

C.A.

1. GEORGE NGAYO

2. P.B. OCHIENG

3. S. OORO

J.A. MAKAU

JUDGE