



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 27 OF 2009

BETWEEN

REPUBLIC.....PROSECUTOR

AND

GEORGE OTIENO JAHORO.....ACCUSED

JUDGMENT

1. On 15th July 2009, this court was informed that **GEORGE OTIENO JAHORO** (“the accused”) had murdered **JOSEPH OUMA NDHALA** on the afternoon of 13th June 2009 at Uloma Sub-location, North Uholo Location, Ugenya within Siaya District contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.

2. The accused and deceased were cousins. The prosecution case was that the deceased died after being assaulted by the accused when he went to the deceased’s home and confronted him about stealing beans from his shamba. The prosecution marshalled 5 witnesses and the accused elected to give sworn testimony. Chemitei J., heard the matter initially and took the testimony of 3 witnesses while I completed the matter.

3. On the afternoon of 13th June 2009 at about 3.00pm, the deceased and his brother, David Musewe (PW 2) were having a meal in the deceased’s house while the deceased’s wife, Syprose Majuma (PW 1), was busy threshing beans outside. The accused arrived and asked her where she got the beans. She told him that she had harvested them from her shamba. PW 1 further testified that the accused went into the house, held the deceased by his collar pulled him out of the house and then grabbed a jembe from the thatched roof and hit the deceased twice on the back of the head. Thereafter the accused threw the jembe in shamba as he proceeded to harvest the beans and leave the scene. The accused threatened PW 1 causing her to run away in fear.

4. PW 2 told the court that he had come to visit his brother on that day and while they were having lunch, the accused came and started accusing PW 1 of stealing his beans. He got into the house and confronted the deceased about the beans. As the accused started pushing the deceased to get out to see where the beans were from, he saw a jembe hanging from the thatched roof, grabbed it, pushed the deceased who fell whereupon he hit him three times. PW 2 became afraid and rushed out to call for help. When he returned with his friends, he found that the deceased, who had head injuries, lying down outside the house. The deceased was admitted in hospital for one week before he died on 23rd June 2009.

5. The investigating officer, PC Ayub Manyasi (PW 5), told the court that on 14th July 2009, PW 1 came to report that her husband, the deceased, had been assaulted by the accused on the previous day and he

was now in hospital. He proceeded to Sigomere District Hospital and confirmed that the deceased had been admitted. He observed that the deceased had an open head injury. He also proceeded to the deceased's homestead where he found blood stains next to the door. With the assistance of Corporal Moses Tali (PW 4), PW 5 arrested the accused on 15th July 2009 after receiving a tip off from an informer that the accused had been seen along Ugunja – Sigomere road. PW 5 further testified that the accused showed them the jembe which he used to assault the deceased.

6. When put on his defence, the accused elected to give sworn testimony. He testified that since he lived a distance from his shamba, the deceased used to take care of it and on the material day he decided to go and visit. He found PW 1 outside the house while the deceased was in the house with PW 2. As he was outside, he spoke to the deceased about the beans the deceased had taken from his shamba. He further testified that he disagreed with the deceased whereupon the deceased went back into the house and came back with a jembe. Because the deceased was angry, he decided to run away and while running away he took a piece of wood from a nearby pile of firewood and threw it at the deceased. In cross-examination, the accused stated that he did not know if the stick hit the accused.

7. The fact and cause of death was established by the testimony of Dr Awiti Ogolla who produced the post mortem form prepared by Dr Raute who conducted the post mortem on the deceased on 30th June 2009. She observed that the deceased had a deep cut wound, approximately 3 cm wide, on the scalp, occipital area involving the entire scalp thickness. Internal examination of the head revealed an extensive skull haematoma and a fracture at the back of the head with brain injury. She concluded that the cause of death was a severe head injury secondary to assault. These injuries were consistent with the injuries observed and described by PW 1, PW 2 and PW 5. I therefore find and hold that the deceased and he died because of a severe head injury resulting from an assault.

8. The substantial issue in this case is whether the accused caused the injury that led to the deceased's death. The accused accepted that he was at the deceased's home on the material afternoon. PW 1 and PW 2 are clear that the accused confronted the deceased in the house, and while pulling him outside the house, he took the jembe which he used to hit the deceased on the head. The accused case is that it is the deceased who took went into his house, took a jembe and started chasing him and to defend himself, he took a piece of firewood and threw it at the deceased.

9. I reject the accused's version of events. First, I believe the testimony of PW 1 and PW 2 that it is the accused who confronted the deceased and inflicted injuries on him with the jembe which was produced in evidence. The deceased injuries are consistent with a serious and vicious cut that could only have been inflicted deliberately as described by PW 1 and PW 2. Further, that injury was inflicted outside his door is confirmed by the blood stains PW 5 found when he visited the scene. A deep cut wound as described in the post mortem form would not have been caused by a piece of wood thrown by the accused from a distance of 5 to 10 metres.

10. I also reject the accused's version of events that it is the deceased who, after the disagreement, went back to the house and came out with the jembe. The testimony of PW 1 and PW 2 is clear that it the deceased who came and picked a quarrel with the deceased and assaulted him. I reject any suggestion that the accused acted in self-defence as the deceased was unarmed and did not present any threat to him.

11. I noted that there were some inconsistencies in the testimony of PW 1 and PW 2 regarding how many times the deceased was hit on the head or with which part of the jembe. I do not consider these inconsistencies material because PW 1 and PW 2 were observing the event from different vantage points and from their evidence they were clearly shocked by the turn of events. In any case, the only assailant was the accused who admitted in his defence that he was at the scene and there was no other person who could have assaulted the deceased other than the accused.

12. The totality of the evidence is that the accused came to the deceased's home, confronted him about harvesting of beans from his shamba. He went in the house where the deceased was with PW 2 and as he was pulling him out of the house, he took a jembe, he hit the deceased on the head causing a severe head injury. The injury on the head was inflicted with a jembe in manner leaving no doubt that the accused

intended to cause grievous harm or death within the meaning of **section 206(a)** of the *Penal Code*. In short, I find and hold that the prosecution proved malice aforethought beyond reasonable doubt.

13. In conclusion, I find the accused **GEORGE OTIENO JAHORO** guilty of the murder of **JOSEPH OUMA NDHALA** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 10th day of April 2017.

D.S. MAJANJA

JUDGE

Mr Anyumba, Advocate for the accused.

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