



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 18 OF 2011

BETWEEN

REPUBLIC PROSECUTOR

AND

JOASH FRANCIS ASIENGA OKINDA ACCUSED

JUDGMENT

1. **JOASH FRANCIS ASIENGA OKINDA** (“the accused”) was charged with the murder of **JOHN OKETCH ODHIAMBO** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. In the information, it was alleged that on 13th March 2011 at Marenyo Sub-location of Siaya County, he murdered the deceased. After the accused pleaded not guilty, the prosecution called 6 witnesses while the accused made an unsworn statement.

2. On 13th March 2011 at about 5.00pm, James Ombedo Odhiambo (PW 3) was at the home of Joyce Asiko Odhiambo (PW 5) drinking chang’aa. He was with Dick Opany and the accused. PW 3 recalled that when the deceased arrived, he asked the accused for bhang’. The accused was annoyed by the request and when he wanted to beat the deceased with a bottle, PW 3 intervened. Another fight erupted between the accused and deceased and, once again, PW 3 separated them. PW 5 also recalled that when the deceased arrived he started arguing with the accused over bhang. She testified that the deceased is the one who started the arguments while the others were telling them to stop. At any rate, they all left the house.

3. PW 3 told the court that after leaving PW 5’s house, the accused and deceased continued fighting and he separated them. Thereafter, the deceased started walking while the accused returned to PW 5’s house. PW 3 heard the accused say that the deceased had thrown some soil at him. The accused went back to PW 5’s house and came back with a piece of firewood and beat the deceased on his back. PW 3 told the court that the deceased started running away as the accused chased him. As PW 3 was walking home, he met the accused going back to PW 5’s place. PW 5 testified that after the group left her house, she did not hear any commotion but the accused returned to her house after about 5 minutes and took a piece of wood which he said he was going to use as a walking stick. After about 10 minutes, the accused came back and returned the piece of wood on the pile of firewood.

4. After the accused had passed PW 5, Opany told him he had seen someone in the nearby shamba. When they both went the shamba they found the deceased in great pain. They immediately went to the deceased’s home to report the incident. The deceased’s wife, Martha Adhiambo Ochieng (PW 6), testified that she was called by Opany and told to go to the shamba where the deceased had been injured. She noticed that the deceased had a deep cut on his head and eye brow. He also appeared to have whip marks on his back. She called a motorbike rider who came and took the deceased to Yala Sub-District Hospital

where he died while undergoing treatment.

5. The deceased's father, Francis Odhiambo Oketch (PW 4), told the court that after hearing of the incident, he proceeded to the hospital where the deceased was undergoing treatment. He found the deceased bleeding profusely from the head. After the deceased succumbed to the injuries, he went to report the matter to the police station.

6. The investigating officer, Chief Inspector Michael Were (PW 2), recalled that at about midnight on 13th March 2011, PW 4 came to Yala Police Station, to report the incident. PW 2, PW 4 and other officers went to the scene of the incident, where they were directed by PW 6. PW 2 testified that there was a lot of blood in the shamba and he recovered a piece of wood, about 6 inches long, which he produced in evidence. They went to PW 5's house where they found 3 pieces of wood in heap which had blood on them. He arrested PW 5. On the next day, 14th March 2011, the accused was arrested by members of the public at Ebuyangu market and taken to Ebuyangu Patrol Base. Thereafter he was taken Yala Police Station and charged.

7. The accused elected to make an unsworn statement. He stated that on 13th March 2011, he went to the home of PW 5 where he found many people drinking chang'aa. As they were drinking, a young man, who was drunk, came in and started demanding a cigarette and bhang'. The accused responded that he did not have any. The man came towards him with the intention of assaulting him. As the accused stood up, he was told to get out of the house as he was from Western Province and not Nyanza where the PW 5's home was situated. As he got out of the house, deceased removed a chain from his waist and struck him on the head. The accused stated that he took a piece of wood which was nearby, hit the man once and left. The accused was arrested on the next day while he was at his place of work. The accused told the court that he did not intend to kill the person but merely intended to defend himself.

8. For the prosecution to secure a conviction for murder, it must prove the fact and cause of death of the deceased, prove 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. It must also prove that the said unlawful act or omission was committed with malice afterthought which constitutes the "*mens rea*" of the offence.

9. The fact and cause of death is not really in dispute. Dr Bob Owino (PW 1) conducted the autopsy on the deceased's body after it was identified by PW 4. The significant observations by PW 1 were that there was a deep stab wound on the left forehead about 2cm in length, a deep cut on the occipital region about 8cm with sub-periontal haemorrhage, a linear fracture on the same side about 8 cm oozing with blood and an epidural haematoma in the occipital region. As a result, PW 1 concluded that the cause of death was intracranial haemorrhage due a fracture skull secondary to assault. These findings were consistent with the head injuries observed by PW 2, PW 3, PW 5 and PW 6.

10. I now turn to the issue of whether the deceased's death was caused by the accused's unlawful act. The events leading to the death of the deceased took place at the home of PW 5 while the parties were drinking chang'aa and an altercation arose between the accused and deceased which resulted in them leaving. Both PW 3 and PW 5 identified the people who drinking at the house. Though it was at night, I am satisfied that the conditions were satisfactory for positive identification. In any case, all the people who were in that house knew each other thus excluding the possibility of mistaken identity.

11. PW 3 testified that he saw the accused assault the deceased with a piece of firewood causing the deceased to run away with the accused giving chase. After the accused had beaten the deceased, he met PW 3 when he was going back to PW 5's house. This fact is corroborated by the testimony of PW 5 who confirmed that the accused returned to her house after the group had left, took a piece of firewood and returned it a while later. Not so long after the deceased was found writhing in pain in a nearby shamba leaving no doubt that it is the accused who assaulted him.

12. In his unsworn statement the accused suggested that the deceased assaulted him by striking him with a chain and he retaliated by hitting him with a piece of firewood to stop the deceased from assaulting him

further. An unsworn statement is not evidence as that expression is generally understood and has no probative value, but should be taken into consideration in relation to the whole of the evidence (see **May v Republic NRB CA Criminal Appeal No. 24 of 1979 [1979]eKLR**). I reject the accused's statement when considered alongside the testimony of PW 3 and PW 5. None of the witnesses saw the deceased assault the accused with a chain. The evidence is clear that the accused assaulted the deceased while he was running away. He chased him and assaulted him in the nearby shamba leaving him in a state of distress.

13. I further find that the accused's act was calculated and deliberate. After the group had left PW 5's house, the accused went back to the PW 5 and took a weapon with which he assaulted the accused. The nature of the injuries show that the accused struck the deceased more than once. The viciousness of the assault is evidenced by the skull fracture. All this evidence points to the fact that the accused intended to cause grievous harm or death within the meaning of **section 206(a)** of the **Penal Code**. I therefore find and hold that the prosecution proved that that the accused unlawful act was done with malice aforethought.

14. The prosecution has proved that the offence of murder beyond reasonable doubt and I find the accused, **JOASH FRANCIS ASIENGA OKINDA** guilty of the murder of **JOHN OKETCH ODHIAMBO** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 11th day of May 2017

D.S. MAJANJA

JUDGE

Ms Opondo-Ochanji, Advocate for the accused.

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