



**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL CASE NO. 21 OF 2013**

**(FORMERLY KISII HCCR NO. 68 OF 2010)**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**KENNEDY OGIRE ONGERE ..... ACCUSED**

**JUDGMENT**

1. **KENNEDY OGIRE ONGERE** (“the accused”) is accused of murdering **SOSPETER ANYANGO OTHIM** (“the deceased”) on 21<sup>st</sup> May 2010 at Kanyimach village, South Sakwa Location, Uriri District of Migori County contrary to **Section 202** as read with **Section 203** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. He denied the charges and the prosecution proceeded to prove the case against him by calling 8 witnesses.
2. On the morning of 21<sup>st</sup> May 2010, the deceased’s daughter in law, Nellie Anyango Odoyo (PW 1), was at home where she was residing with her husband, Joseph Odoyo Onyango (PW 3), and his parents, the deceased and Silpa Atieno Anyango (PW 2) in the same homestead. Both PW 1 and PW 2 testified that at about 10.30am, the deceased went outside to herd the animals leaving them in the house having breakfast. They both heard someone screaming outside. PW 2 told PW 1 to go and find out what was happening.
3. PW 1 recalled that she ran towards the gate where the noise was coming from. When she reached the gate she found the accused, whom she knew, cutting the deceased who had fallen to the ground, with a panga. Another person, Otieno Onditi, ran into the sugar plantation when he saw her. When PW 1 saw the accused, she asked him why he was killing the deceased but he walked off. Immediately thereafter, PW 2 came to the scene and asked PW1 to call her husband, PW 3.
4. PW 2 recalled that since she was sick and could not walk quickly, she followed PW 1 towards the gate. She met PW 1 wailing that the accused had killed her father. As she neared the gate she found the deceased lying down and bleeding profusely on the head and shoulder. PW 2 testified that she saw the accused going away carrying a panga. She stated that although she did not see his face, she could identify him as she had known him for a long time and could tell it was him. She started raising alarm causing people to come. In the meantime, PW 1 went to call her husband PW 3. As she did not have a phone, she went to see her friend, Joyce Atieno, to call and inform her husband that the deceased had been injured.
5. On the morning of 21<sup>st</sup> May 2010, PW 3 had gone to plough land with Richard Othim Opondo (PW 4). PW 1’s friend Joyce Atieno called PW 4 who had a phone and spoke to PW 3. She

- informed him that PW 1 had told her that the accused and Joseph Otieno Onditi had injured the deceased. PW 3 and PW 4 quickly went home and found the deceased lying down near the gate of his homestead. His head, neck and the left shoulder had been cut and he was bleeding. Neighbours had already gathered and were crying. They tried to put the deceased on a bicycle but it was not possible so they put him on a wheel barrow and took him next to the road until a vehicle came and took him to Mariwa Health Centre.
6. In the meantime, PW 4 testified that after the deceased had been taken to Mariwa Health Centre, he went to Angaga Police Post to report what had happened. He found the accused at the police post. PW 3 further testified that since personnel at Mariwa could not assist the deceased, they sent for an ambulance which took him to Pastor Machage Hospital at Migori. After a while, the deceased was later transferred to Migori District Hospital where he died on 5<sup>th</sup> July 2010. PW 3 attended the post mortem on 12<sup>th</sup> July 2010.
  7. PW 3 recalled that while the deceased was admitted at Migori District Hospital, he was able to talk and that police officers visited him to take his statement. He was present when the officers took the deceased's statement on 2<sup>nd</sup> July 2010. He testified that the officers asked the deceased what happened and who injured him. The deceased told the police he was herding his cattle near the gate of his homestead when he saw the accused and Otieno Onditi coming from the road. He was shocked when the accused cut him with the panga. The deceased stated that he had a cane which he was using and which the accused took and used to assault him.
  8. A brother to the deceased, William Ogolla Othim (PW 5), testified that on 21<sup>st</sup> May 2010, he received a call from his relative who informed him that the deceased had been assaulted by the accused whom he knew. He was told that the deceased had been cut three times on the neck, head and near the ear. After being called by PW 3, he decided to come to Migori from his place of business at Hola, Tana River. He visited the deceased at Migori District Hospital.
  9. PW 5 testified that the deceased recognised him. He saw the deceased's injuries on the head, neck and another one across the left ear which had been cut off. He stated that the injuries had been stitched. He was present when an officer by the name Kagiri visited the deceased and took his statement. PW 5 confirmed the statement which the police officer recorded. PW 5 testified that the deceased stated that he was cut twice by the accused then someone by the name Joseph Otieno Onditi appeared from the sugar cane plantation and cut him once. PW 5 recalled that the deceased died on 5<sup>th</sup> July 2010. He confirmed that he attended the post-mortem which was conducted on 12<sup>th</sup> July 2010.
  10. The Medical Superintendent at Awendo Sub-District Hospital, Dr Emmanuel Oyier (PW 6), was requested to conduct a post-mortem examination on the deceased's body at Rapcom Mortuary on 12<sup>th</sup> July 2010 after the body was identified by PW 3 and PW 5. The significant observation was that there was a 7cm long healed scar on the left neck below the ear and another one on the back of the neck of about 6cm. The scars had healed and he opined that they could have been more than a week old. He noted that the left lung had collapsed with fibrosis and pleural cavity. The right lung was carbon stained, normal in nature and consistency which occurs as a result of infection of the lung. He further stated that such infection could be through inhalation or a cut wound. He certified the cause of death as cardio-respiratory arrest due to hypoxia as a result of left lung collapse and fibrosis of the left pleural cavity.
  11. PW 6 also conducted a mental assessment of the accused on 15<sup>th</sup> July 2010 at Awendo Sub-district hospital. He examined the accused and formed the view that he was fit to stand trial.
  12. PC Moses Gichuki (PW 7) was the officer commanding Angaga Police Post which is under Awendo police station in 2010. He recalled that on 21<sup>st</sup> May 2010 at about 1.25 pm, the accused came to report that he had been assaulted by the deceased. The accused explained that he had been assaulted near the deceased's home over a Kshs. 20,000/= debt which the deceased owed him. PW

- 7 recorded the report in the Occurrence Book for the day and instructed the accused to go Mariwa Health Centre for treatment. PW 7 testified that the accused had blood all over the body but he did not notice any physical injuries. He further testified that the accused came with a panga which he retained as an exhibit.
13. PW 7 recalled that within a gap of 20 minutes, PW4 came and reported that the deceased had been seriously injured by the accused and was being taken to Mariwa Health Centre. PW 4 explained to him that the accused had assaulted the deceased. He immediately transferred the accused from the room he was in to the cells as a suspect. PW 7 then called the Commanding Officer at Awendo Police Station who sent officers to come and collect the accused. He handed over the accused and the panga.
14. One of the officers who arrived from Awendo Police Station was PC Richard Kagiri (PW 8), the investigating officer. He arrived there at about 8.00pm. He met PW7 who handed over the accused, the Occurrence Book extract, investigation diary and a panga with blood stains. They then went back to Awendo Police Station. PW 8 recalled that at the time, the accused appeared to have been beaten as he had injuries.
15. PW 8 visited the deceased at Pastor Machage Memorial Hospital, Migori but he was in a critical condition and could not talk. He talked to members of the deceased's family who confirmed that there was a land dispute between the accused and the deceased and that in fact there was a case pending before the High Court at Kisii. He took statement of the witnesses, visited the scene of the incident and drew a sketch map. PW 8 explained that according to information, there was another person called Joseph Otieno Onditi who was involved in committing the offence but he was released after the Office of the Director of Prosecutions directed that the accused should be charged alone.
16. PW 8 explained that while the deceased was at Migori District Hospital, he was able to interview him and take his statement in the presence of PW 3 and PW5. He testified that at the time the deceased could talk and that he took down what he said. He was speaking Kiswahili but he recorded the statement in English PW3 and PW5 read the statement over to the deceased and he acknowledged and signed it.
17. PW 8 had initially charged the accused with the offence of assault causing actual harm at the Senior Resident's Magistrates Court at Rongo but after the deceased died on 5<sup>th</sup> July 2010, he preferred a murder charge.
18. After the close of the prosecution's case, the accused elected to give sworn testimony. The accused denied that he murdered the deceased. He confirmed that the deceased was his uncle and that they resided in the same neighbourhood. He recalled that on 21<sup>st</sup> May 2010, he was at home as he was not feeling well. He heard some commotion coming from the sugarcane plantation like people were arguing and one of them calling for help saying that he was being killed. He went straight towards that direction without any weapon and when he reached an open field, he saw someone running away. He found the deceased bleeding as a result of being cut on the left side of his face. He asked the deceased what had happened and the deceased told him that Otieno had "killed" him.
19. The accused further narrated how he called for help by shouting whereupon PW 1 arrived followed by PW 2. He immediately went to Angaga Police Post to report the incident without telling anyone. He found an officer there and reported the incident. He testified that he told the officer that someone had attacked the deceased. The officer told him to wait as he was alone and the other officers were out on duty. As he was waiting PW 4 arrived and went to talk to the officer as he was left sitting outside. After they had talked, the accused was called in and locked in a room. The accused testified that he was beaten so that he could admit that he assaulted the deceased but he insisted that he only came to make a report. Later on he was picked up by other officers and taken to Awendo. The accused stated that he did not have any grudge with the

deceased although he had an issue with PW 2 who had stolen maize from his granary. The accused did not call any witnesses.

20. There are three key ingredients that *must* be present for the offence of murder to be established: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and, third, that the accused committed the act with *malice aforethought*.
21. As regards the cause of death, the evidence points to the fact that the deceased sustained multiple cuts after he was assaulted. This is confirmed by the testimony of PW 1, PW 2, PW 3 and PW 4. Having sustained serious injuries he was taken to Mariwa Health Centre then to Pastor Machage Memorial Hospital and then to Migori District Hospital. Counsel for the accused submitted that there was no evidence that the deceased was admitted from the day he was assaulted until the day he died and that the prosecution did not call the doctor who treated the deceased to prove the cause of death. The testimony of the witnesses particularly PW 3 and PW 5 confirm that he was in hospital the entire time. According to the post-mortem conducted by PW 6, the deceased had injuries consistent with those described by PW 1, PW 2, PW 3 and PW 4 although they had healed and were evidence by healed scars. PW 6 concluded that the deceased died as a result of cardiovascular arrest due to a collapsed lung.
22. Although the deceased did not sustain any injuries to the lungs, he was hospitalised as a result of the injuries sustained during the assault. PW 6 testified that the lung could have collapsed as a result of an infection caused by a cut wound or inhalation. I find and hold that the direct cause of death was the injuries sustained which led to the infection that caused him to die. In other words, he was hospitalised and he died as a result of injuries that were inflicted on him on 21<sup>st</sup> May 2010.
23. I now turn to the issue of who committed the unlawful act that led to the deceased's death. In this respect, counsel for the accused submitted that the accused was not identified as the person who assaulted the deceased. The incident took place in the morning where conditions for identification were favourable. PW 1 and PW 2 saw the accused and he was a person well known to them. Further, the accused admitted in his defence, that he was present when the deceased was assaulted and that he saw PW 1 and PW 2 when he allegedly called for help. I therefore find and hold that it is the accused who assaulted the deceased.
24. The testimony of PW 1 and PW 2 is augmented by the dying declaration made by the deceased in which he implicated the accused. Counsel for the accused submitted that the so called dying declaration should be scrutinised carefully. The statement made by the deceased to PW 8 is a dying declaration and is admissible 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).
25. The deceased made his statement to PW 8 in the presence of PW 3 and PW 5. The accused was a person known to him and he was detailed in his narration of events. In the statement, the deceased explained how the accused found him tethering his animals and assaulted him with a panga. He also stated that Otieno emerged from the nearby sugarcane plantation and also cut him causing him to bleed profusely until he lost consciousness. The statement was consistent with what PW 1 and PW 2 testified that they witnessed. I find that the statement made by the deceased was credible and indeed implicated the accused.
26. In his defence, the accused stated that he found the deceased being beaten and went to report to the Angaga Police Post. His report was taken by PW 7 and recorded in the Occurrence Book. He stated that on that morning, he met the deceased and when he asked him about some money he was owed, a struggle ensued and while the deceased beat him with a rungu, he slashed the deceased with a panga thereby cutting him on the neck and head whereafter he decided to report the matter at the Police Post. I examined the original Occurrence Book and confirmed that it was a

contemporaneous record of the events of the day and could not have been altered by PW 7.

27. The totality of the testimony of PW 1 and PW2, the deceased's statement made to PW 7 in the presence of PW 3 and PW 5, the accused's report made to the police and the accused's own defence leave no doubt that it is the accused who assaulted the deceased with a panga on the morning of 21<sup>st</sup> May 2010.

28. The final issue is whether the unlawful act of assaulting the deceased was done with malice aforethought. When he reported to Angaga Police Post, the accused informed PW 7 that he was in a struggle with the deceased and while the deceased had a rungu, the accused defended himself with a panga and cut the deceased on the neck and head and decided to report to the police. This raises the defence of self-defence: that he acted to defend himself. In **Robert Kinuthia Mungai v Republic [1982-88] 1 KAR 611** the Court of Appeal stated that excessive use of force in defence of a person or property, whether or not there is an element of provocation present may be sufficient for the Court to regard the offence not as murder but as manslaughter. **Section 17** of the **Penal Code** provides:

*17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.*

29. The Common Law position was applied more recently by the Court of Appeal in **Ahmed Mohammed Omar & 5 Others v Republic, NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014]eKLR** where the Court accepted the position in the case of **DPP v Morgan, [1975] 2 ALL ER 347** that the essential element of self-defence is that the accused believed that he was being attacked or in imminent danger of being attacked. The Court stated that;

*The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v Morgan [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP v Morgan (Supra) it was held that:*

*.....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.*

30. On the issue of what actually happened on the morning of 21<sup>st</sup> May 2010, we only have two versions of what transpired. The deceased version is recorded as follows in his statement;

*I clearly remember on 21<sup>st</sup> May 2010 at about 1000hrs, I was in my homestead attending to my livestock ..... Kennedy Ogire who is my immediate neighbour came while in the company of Joseph Otieno Onditi ..... Otieno after a shortwhile disappeared leaving Ogire there ..... Moments after Ogire descended to his only hut near my homestead whereby he entered and came out while armed with a panga. He then descended to where I was while holding the panga by the back as if he was concealing it, He came to my direction whereby he passed by me and I thought he was heading somewhere else, he turned to my back and cut me once on the scalp injuring me severely. Since he had said nothing prior to the assault, I struggled with him since Kennedy is a young and energetic man, he overpowered me and cut me a second time on the neck. As I saw still struggling with him and shouting for help, the other young man known as Otieno emerged from the plantation also with a panga descended to me ..... There I fell down bleeding profusely whereby I could feel my assailants trying to search my pockets which had money and*

*mobile phone. Also I felt one of them holding my hand which had a wrist watch. There and then I lost consciousness .....*

31. Apart from the contemporaneous record of the accused's complaint at Angaga Police Post, the accused in his sworn testimony, denied that he carried a panga and that he only went to assist the deceased who was calling for help after being assaulted by a third party who ran into the sugar cane plantation. The accused's testimony totally denying that he assaulted the deceased is inconsistent with his earlier statement to the police. These statements cast serious doubt on the accused's defence. I reject his sworn testimony that he did not have a weapon as PW 1 clearly saw him cut the deceased while PW 2 saw him walk away carrying a panga. When he went to the Police Post, he had a panga and he reported that he had been attacked and that he fought back. On the other hand, I find the deceased's statement credible and consistent with the testimony of PW 1 and PW 2 that deceased had gone to tend to his cattle when the accused attacked him. The accused found the deceased and went back to get a weapon before assaulting him. The accused's act was deliberate and not in self-defence. His act of reporting to the police was intended to deflect attention from the fact that he had committed the felonious act.
32. The accused slashed the deceased viciously on the head and neck back. These injuries could only have been intended to cause death or grievous harm to the deceased. I therefore find that the prosecution proved malice aforethought beyond reasonable doubt within the meaning of **Section 206(a)** of the *Penal Code*.
33. I am aware of the power of the Director of Public Prosecutions under **Article 157** of the Constitution to direct prosecutions independently but in light of the evidence herein and my findings, I would urge that the decision not to prosecute Joseph Otieno Onditi be reconsidered.
34. Having considered all the evidence, I find the accused **KENNEDY OGIRE ONGERE** guilty of the murder of the **SOSPETER ANYANGO OTHIM** and I therefore convict him.

**DATED and DELIVERED at HOMA BAY this 6<sup>th</sup> day of April 2016**

**D.S. MAJANJA**

**JUDGE**

Mr Ongoso instructed by Ongoso Ayoma and Company Advocates for the accused.

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