



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**

**HCCRC NO. 34 OF 2015**

**(CORAM: J.A. MAKAU – J.)**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**TOBIAS OTIENO NDIEGE.....ACCUSED**

**JUDGMENT**

1. **TOBIAS OTIENO DIEGE** is charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on 16<sup>th</sup> day of September, 2012 at Omia Diere sub-Location in Rarieda District within Siaya County murdered **SAMUEL A DERA ODILA**

2. The prosecution called five (5) witnesses whereas the accused testified on oath and called no witness.

3. The deceased herein **SAMUEL ADERA ODILA** was a neighbour to the accused. PW1, Joseph Achar Odundo testified that on 27<sup>th</sup> September 2012, he identified the body of the deceased Samuel Adera Odila to the Doctor at Bondo District Hospital Mortuary for Postmortem Report to be conducted. He stated that Dr. Collins Otieno Oginga conducted the postmortem on the deceased and that he gave a copy of the postmortem report which he identified as MFI – P1.

4. PW2, Dr. Collins Otieno Oginga, testified that on 27.9.2012 he carried out a postmortem on the body of Samuel Adera Odilo at Bondo Sub-District Hospital Mortuary at the request of Aram Police Station. He observed there were normal postmortem changes, thus rigour mortis had set in, he observed no changes on external appearance except obvious pallour, on respiratory system he noted a deformed chest cavity with hemorrhage lungs, on digestive system he noted viscerel injury of the spleen with intra-abdominal bleeding. As a result of the examination he formed the opinion that the cause of death was Respiratory failure with intra-abdominal hemorrhage probably from blunt force injury.

5. PW2, on being cross-examined testified that there were no external injuries on the deceased's body and specially at the chest nor were there any bruises nor was there a point to show point of physical force or physical point of impact. He stated it was not necessary to have external point of impact adding that both the spleen and lungs were damaged. He testified that he could not tell whether there was disease causing the bleeding. He added there are many other causes which could cause the lungs to bleed and he did not rule that out. On chest deformed, he stated it could have been a pre-existing deformity and went on to say it could have existed even since birth of the deceased, as on one side of the chest was smaller than the

other. He concluded by stating that he did not determine the cause of death adding he cannot say with certainty, the cause of injury was external force and that he cannot tell what caused the death of the deceased. He admitted the spleen can bleed because of other causes and that he did not rule that out.

6. PW3, No. 90899 P.C. Sammy Kimanzi testified that on 25<sup>th</sup> August 2012 while on duty at Aram Police Station at 10.00 a.m. the deceased Samuel Adera Odila reported to him a case of assault, complaining he had been assaulted and abused by the accused on 24.8.2012. PW3 recorded the complaint in the O.B. and issued a P3 form to the complainant. The deceased complained to PW3 that he had been slapped severally by the accused and pushed to the ground. The deceased returned the P3 form on 29.8.2012 and recorded his statement on 30.8.2012 at 6.00 a.m. That PW3 in company of Cpl. Osako proceeded to the house of the accused and arrested him. He was booked in the O.B. on the same day at 7.30 a.m. and transferred to Aram Police Station and handed the accused to P.C. Jaokim Sioma. PW3 was later after a month informed that the deceased passed on. PW3 identified the accused in the dock as the person that he had arrested.

7. During cross-examination PW3 testified that the deceased mentioned to him of being assaulted by the accused who had tethered his livestock on the deceased's land and the deceased untied the livestock and took them 100 metres away. That the accused on finding the deceased, a quarrel arose leading to the accused slapping the deceased both sides of the cheek with his palm and pushing the deceased down three times, but PW3 stated he did not carry out covering Report. PW3 on being shown investigation diary made by himself dated 2.8.2012 at 9.40 hours, he admitted that the report stated there was only slaps but not slaps using a panga.

8. PW3 on being re-examined he stated the deceased told him he was slapped strangled by neck and pushed down three times.

9. PW4, Collins Omondi Akwayi, a Clinical Officer attached at Abidha Health Centre in March 2012 and who left in January 2016 testified, that he treated a patient and completed a P3 form for the patient who later died. He identified an Out-patient Booklet of a patient who had been treated at Abidha Health Centre one Samuel Adera Odilo, Out-patient No. 2900/2012 whose date of treatment as stated was not clear but the year was 2012. The patient was complaining of headache and general body pain with blurred vision claiming that he had been assaulted. On examination the patient was in pain with blood pressure 120/80 mm, respiratory was normal, pulps normal, with lacerations on both hands. The chest was tender on touch and on examination the chest was clear. PW4 was of the opinion the patient might have been suffering from malaria with soft tissue injury. PW4, observed the only abnormal findings was the temperature was at 36.2<sup>0</sup> c. He send for the P3 form to be filled. He further examined the chest of the deceased which was tender and noted no fracture. He filled the P3 form on 27.8.2012. He produced the P3 form as exhibit P2 (a) and Treatment Book as exhibit P2 (b).

10. During Cross-examination, PW4 stated, the date of treatment Book exhibit P 2 (a) is not 28<sup>th</sup> August 2012, stating that he is the author of the Treatment Book. PW4 was not able to give the exact date of the Treatment Book and on being pressed further he kept quiet. PW4, testified on examination of the deceased, he ruled out injuries to the deceased's chest and treated the deceased, who had Malaria as he had no internal injuries that would have justified treatment. He stated the injuries were only on hands which PW4 stated he noted in the P3 form.

11. PW5, No. 92193 PC Jowaquine Sioma, the investigating Officer in this case testified that on 30.8.2012 while at Aram Police Station he received the accused herein from P.C. Kimanzi (PW3) and Cpl Osako both from Asembo Police Base and was also handed over the statement of the deceased by P.C. Kimanzi and the P3 form. That after going through the P3 form and the statement by the deceased he proceeded to charge the accused with the offence of assault causing actual bodily harm before Bondo Law Courts vide Court file No. 647 of 2012. That later on 20<sup>th</sup> September 2012 he received a further report from one Peter Ogila that the deceased had died while undergoing treatment at Bondo Sub-District Hospital. PW5 arranged for Postmortem which was conducted on 27.9.2012 by Dr. Collins Oginga (PW2), at Bondo Sub-District Hospital Mortuary in presence of PW5 and the relatives of the deceased. PW5 then noted the scene of the incident. PW5, testified the person he received at the Station is the

accused (**pointing at the accused at the dock**). That after Postmortem PW5, recorded statements of the remaining witness and, compiled the file based on the assembled evidence and forwarded the file to DCIO, Bondo Police Station, for onward transmission to State Counsel, Kisumu for the purposes of getting directions. He was subsequently directed to charge the accused with this offence.

12. During cross-examination of PW5, he testified that he based his investigation on diary dated 2.8.2012 and he never got in touch with the complainant but met him for the first time at Bondo Law Courts on 31.8.2012. He stated the basis of charging the accused was due to documents brought to him. He stated he carried out investigation as the deceased complained of having been slapped by the accused on undisclosed part of the body. PW5, stated he did not go to the scene to establish or verify the object used to cause injury to the deceased. He also testified that he did establish what caused the death of the deceased nor did he see the doctor to explain what would have caused the deceased's injuries. He stated the eye witnesses refused to be witnesses.

13. The accused upon being put on his defence he opted to give sworn defence and called no witness. The accused DW1, Tobias Otieno Diege, denied the charge and stated that he did not assault the deceased herein. He testified that on 24.8.2012 at around 7.00 a.m. he tethered his livestock at a common field where he used to tether them and went away. He told his children to go and untether the livestock incase he is late. That at 12 noon the accused went to check on his livestock and found that they were not at the place he had tethered them. He searched for them and found them with Samuel Adera Odilo, the deceased, who told him that he had found the livestock tethered on his shamba. The accused then took away his livestock. That after one week thus on 30.8.2012 he saw the deceased in company of two Police Officers at his compound. He went to check on them and after greeting them, the deceased stated mission accomplished after which the accused was arrested by PW3 and another Police officer and taken to Asembo Bay Police Base. That on the way he heard one of the Police Officer talking in Luo, saying the accused had assaulted someone. That on arrival at Police base he was placed in cells and later he was charged with an offence of assault. He stated that he never assaulted the deceased herein when he found Samuel Adera Odilo with his livestock as they did not exchange any bitter words nor did they fight. He testified that he read from the statement Samuel Adera Odilo died on 29<sup>th</sup> September 2012 but he does not know what caused his death and that he does not know why he was blamed for the death of the deceased. He further stated he does not know why he was charged with this offence as he did not commit the offence.

14. During Cross-examination DW1 testified the field where he tethered his livestock is about 300 metres from his home, whereas the deceased home is 3 kilometres away. He stated there are many neighbours around the area. That he found his livestock 100 metres from where he had tethered them with the deceased. DW1, stated he never beat anyone on the material date. He stated when he was arrested he was not told the reason of his arrest. He stated on his part he had no grudge with the deceased but did not know whether the deceased had as grudge with him. He stated when he found Samuel Adera Odilo with his livestock he was not angry with him nor did they fight.

15. I will now turn to examine what constitutes an offence of murder? **Section 203 of the Penal Code** defines hereunder as follows:-

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

It is clear from the definition of murder that to prove a charge of murder, the prosecution has a duty to establish the following ingredients:-

***(i) Death of the deceased and the cause of that death.***

***(ii) That the accused caused the death through an unlawful act or omission.***

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

16. Whether death of the deceased and cause of the death was proved by the prosecution? The postmortem was carried out on the body of the deceased by Dr. Collins Oginga (PW2) on 27<sup>th</sup> September 2012 in presence of PW1 and PW5. PW1 testified that he identified the body of the deceased to Dr. Collins Oginga who carried out postmortem on the body and he was given a copy of the postmortem Report. PW5 stated he arranged for the postmortem which was conducted on 27.9.2012 by Dr. Collins Oginga in his presence and presence of the relatives of the deceased who included Joseph Achara Odondo (PW1). The doctor's evidence PW2, corroborated the evidence of PW1 and PW5. In order to establish the cause of death even in such obvious situations, it is mandatory to give material evidence. In the case of **Ndungu V R [1965] KLR 487** the Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial unless the cause of death is too obvious. The court stated as follows:

***“... Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced ....”***

17. In the instant case, the postmortem Report by Dr. Collins Oginga (PW2) was produced as exhibit P1 which stated the cause of death was due to respiratory failure with intra-abdominal hemorrhage probably from blunt surface injury. I therefore find that the prosecution proved death of the deceased and the cause of death.

18. I now turn to the second issue on who caused the death of the deceased herein? The accused herein denied having caused the death of the deceased. In this case no single witness was called to state he or she witnessed the commission of the offence. PW5, stated the eye witnesses rejected to be witnesses. He did not state that he recorded any evidence from the alleged eye witnesses nor did he give the names of the purported eye witnesses, nor did the prosecution apply for the eye witnesses to be summoned to come and give evidence, if they were known or existed. DW1 in his evidence stated he found the deceased with his livestock at 12 noon and on being cross-examined he said where he had tethered his livestock they were missing, and there were many neighbouring homes, however no further evidence was adduced by the prosecution witnesses that any person witnessed the incident or heard any arguments between the accused and the deceased. PW2, Dr. Collins Oginga, in the postmortem Report exhibit P1 noted that he did not observe any external injuries and that on the respiratory system he indicated the deceased had a deformed chest cavity with hemorrhagic lungs and on digestive system he found a visceral injury of the spleen with intra-abdominal bleeding. On cross-examination, PW2, stated there were no external injuries to the body of the deceased and especially the chest and there was no point to show point of physical force nor physical point of impact. He stated he could not tell whether there was a disease causing the bleeding and as such that there are other causes which can cause lungs to bleed and he did not rule out other causes. On deformity of chest, PW2, stated it could have been a deformity that pre-existed since birth as one side of the deceased chest cavity was smaller than the other. PW2 did not determine its cause, adding he could not say with certainty the cause of the injury was external force. He admitted that he cannot tell what caused the death of the deceased. He stated the spleen can bleed because of other causes which he did not rule out.

19. PW3, stated on 25.8.2012 he received the complainant at Asembo Bay Police Patrol Base, complaining of assault by the accused on 24.8.2012. He recorded his statement and issued the complainant, now, deceased, with a P3 form. The deceased told PW3 he had been slapped severally and pushed to the ground. On cross-examination PW3, stated a quarrel ensued when accused found the deceased having untied his livestock from where he had tethered them leading to the accused slapping the deceased on both cheeks with his palm and pushing him down three times, however, on being shown the investigation diary which PW3 had recorded, he admitted the complainant complained of being slapped. PW3, did not identify, nor produce the statement he purportedly recorded from the deceased and in which he claimed he had given it to PW5. PW3 on being re-examined he stated the complainant told him he was slapped, strangled by neck and pushed down. PW3 contradicted himself as to what the complainant told him in his evidence in chief during cross-examination. PW4, a Clinical Officer, who immediately attended to the deceased after the alleged assault stated that he completed the out-patient Booklet for the deceased and completed the P3 form (exhibits P 2 (b) and 2 (a) respectively. The patient was

complaining of headache and general body pains with blurred vision claiming to have been assaulted. He only observed of laceration on both hands, chest tender on touch. On examination he stated the chest was clear and formed the impression the patient might have had malaria with soft tissue injury. The patient had no fracture, PW4 ruled out injuries to the complainant's, (deceased) chest, save he had Malaria and that he had no internal injuries that would have justified treatment nor physical trauma or injuries to show that he had thoroughly been beaten save injuries on his hands.

20. The injuries the deceased complained of to PW3 and PW4 are totally inconsistent. PW3, did not mention of head injuries noted by PW4 when he was attending to the deceased. PW4 did not observe any physical trauma or injuries to justify conclusion that the deceased had been thoroughly beaten. The deceased incidentally did not explain to PW3 of having had injuries nor, to PW4 of injuries to his chest or abdomen. Prosecution exhibit P2(a) and 2 (b) do not establish any injuries to the chest or abdomen of the deceased. The injuries noted by PW4 and PW2 are inconsistent. The postmortem Report confirmed that the deceased died from injuries inconsistent with evidence of PW4. PW3's testimony is materially inconsistent with evidence of PW4, that the deceased had been slapped strangled and pushed down as PW4 only observed laceration of the deceased hands and, no other injuries. He stated the deceased was suffering from Malaria. PW2, in his evidence did not rule out of other causes causing the deceased's death. He said that at first he could not tell what caused the death of the deceased as he did not rule out other causes which could cause a spleen and lungs to bleed. I therefore find and hold that the prosecution did prove to the required standard that the deceased death was caused by unlawful act or commission of the accused and not by any other causes as the doctor did not rule out diseases being the cause of Respiratory failure with intra-abdominal hemorrhage.

21. Whether the accused had malice aforethought? **Section 206 of the Penal Code** defines Malice aforethought in the following terms:-

***“206. Malice aforethought shall be deemed to be established by Malice aforethought. 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.”***

22. In the case of **R V Andrew Muecho Omwanga Criminal Case No. 11 of 2008, Maraga – J**, as he then was, stated thus:-

***“Whether a conviction results will depend further on the accused's state of mind at the time of the alleged and referred to the latin maxim .. actus non facit reum,nise mens sit rea-the act itself does not constitute guilt unless done with a guilty mind.”***

The prosecution always has the burden to prove that the accused person herein had intention to cause the death of or to do grievous harm to any person and that he had knowledge that his act or commission would probably cause death either to the intended person or other, and that he had the intent to commit a felony or that he had intention by the act or omission. The prosecution did not call a single witness to demonstrate that there had been bad blood between the deceased and the accused nor is there tangible evidence from any witness to prove the existence of disagreement between the accused and the deceased that could lead to the motive behind killing of the deceased. The accused in his defence denied having

assaulted the deceased and denied there having been a quarrel between him and the deceased at the material time. The prosecution did not call any witness nor is there circumstantial evidence in support of the charge. PW3 evidence is that the accused slapped the deceased severally and pushed him down three times. He however contradicted himself during cross-examination and re-examination. PW4 and PW2 contradicted PW3's evidence on the injuries sustained by the deceased and thus the cause of death. PW5 who had purportedly received statement recorded by the deceased on his alleged assault, did not produce the same. There is no prove that the accused indeed assaulted the deceased and I cannot in view of such insufficient, contradictory and inconsistent evidence find that the accused assaulted the deceased and intended to do harm to the deceased, by allegedly beating him and that the alleged action endangered the life of the deceased and specially when PW2 in his evidence could not rule out other causes of the deceased's death. I find that Malice aforethought has not been proved.

**23. The upshot is that the prosecution has failed to prove the charge against the accused to the required standard of proof of beyond reasonable doubt. Accordingly I find the accused not guilty of the offence of murder of SAMUEL ADERA ODILA and I accordingly acquit him. The accused is set at liberty forthwith unless otherwise lawfully held.**

**DATED AND SIGNED AT SIAYA THIS 1ST DAY OF DECEMBER, 2016.**

**J.A. MAKAU**

**JUDGE**

**Delivered This 1<sup>ST</sup> Day of December, 2016.**

**In Open Court in the Presence of:**

**Appellant present.**

**M/s. Odumba for State.**

**Mr. S.M. Onyango for Accused**

**Accused-Present**

**C.A.1. K. Odhiambo**

**2. L. Atika**

**J. A. MAKAU**

**JUDGE**