



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 27 OF 2013
(FORMERLY KISII HCCRC NO. 39 OF 2010)

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMSON OTIENO ODOYO ACCUSED

JUDGMENT

1. **SAMSON OTIENO ODOYO**, the accused, is charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information were that on 9th May 2010 at South Kanyajuok Sub-location, he murdered **TOM MBUYA MAYIECHA** (“the deceased”). The accused pleaded not guilty to the charge and a trial ensued. The prosecution called a total of 7 witnesses.
2. The prosecution case was that on 9th May 2010 at about 6.00pm, the deceased’s wife, Margaret Akello Omollo (PW 1) went with her husband, the deceased, and her son, Felix Odhiambo Omollo (PW 2) to the home of the accused. The accused was a relative of the PW 1’s first husband who was deceased. They suspected that the accused had taken a 15 ½ litre container of *chang’aa* from their home so they proceeded to his home, which was not very far, to ask him about it.
3. PW 1 testified that when they reached the accused’s house they were met at the door by the accused. The deceased asked the accused to return the *chang’aa*. When the accused heard this, he went back into the house and came out with a wooden rod with which he hit PW 1 on the right thumb and the deceased on the chest. PW 1 testified that she ran away after she saw what happened. PW 2, who was present, also testified that when they arrived at the accused’s house, both PW 1 and the deceased spoke to the accused who came back with wooden rod with which he tried to hit PW 2 but he she lifted her hand and the rod hit the deceased on the chest causing him to fall. He ran away thereafter towards a nearby sugarcane plantation.
4. After PW 1 went back home, she saw her son, Jack Roger, coming with home with the deceased whom he was supporting. The deceased complained of chest pain. PW 1 did not see any visible injury. PW 2 later went to his mother’s home that night where he found the deceased bed and in pain. As the deceased continued to complain of injury, PW 1 took the deceased to Ongo Dispensary at about 5.00 am on 10th May 2010 but they were referred to Oruba Nursing Home in Migori. The deceased was admitted but he died at 3.00 am on 11th May 2010. After the death of the deceased, she reported the matter to the Assistant Chief David Otieno Onyango (PW 3).

5. PW 3, the Assistant Chief of South Kanyajuok Sub-location testified that PW 1 came to his home to report the death of the deceased at Oruba Nursing Home. He had earlier been informed by a clan elder that the deceased had been assaulted by the accused and he had instructed the elder, George Oloo, to take the deceased to Hospital. PW 3 recalled that on the same day, the accused came to inform him that he had assaulted the deceased and he wanted to know what to do. He took the accused to Kitembe Police Post where he was handed over to the Administration Police. APC Charles Gachoka (PW 7) testified that he was Kitembe when PW 3 came with the accused. He placed the accused until the next day.
6. PW 3 further testified that on 11th May 2010, PW 1 came about 9.00 am to inform him that the deceased had passed away and they proceeded to report the matter to Kamagambo Police Station. They first went to Kitembe AP Post where they collected the accused and proceeded to the Police Station with PW 7. PW 3 and PW 7 went back to the accused's house where they recovered a piece of timber which they returned to the police station.
7. The deceased's body was identified by the deceased's brother, Peter Mogoi Ratemo, PW 4, who attended the post-mortem at the Oruba Nursing Home Mortuary on 19th May 2010. It was conducted by Dr James Oduol Otieno, PW 4, the medical officer at Migori District Hospital. The only injuries noted externally were bruise marks over the anterior part of the chest and on the legs. Internal examination of the chest cavity revealed bleeding on both sides of the thorax with estimated 600ml of blood on the left side and 400ml on the right side. There was about 400ml of blood in the pericardium of the heart. The other internal organs were normal. PW 5 concluded that the cause of death was cardiopulmonary arrest secondary to haemothorax and pericardial haemorrhage due to a chest injury. He opined that the injury was caused by a blunt object.
8. The final prosecution witness was PC David Nyongesa, PW 6, the investigating officer. He recalled that on 11th May 2010, while he was at Kamagambo Police Station, the accused was brought in the company of PW 1, PW 3 and PW 7. They reported how the deceased had been assaulted by the accused. PW 7 also handed over to him the wooden rod which had been recovered from the deceased's home. He proceeded to carry out investigations by recording statements from the witnesses and organising for the post-mortem. He thereafter caused the accused to be charged.
9. The accused elected to give sworn testimony in his defence. He recalled that on 9th May 2010 at about 9.00 pm he was asleep in bed when he heard somebody knock his door. When he opened the door, he felt someone hold him by the collar and then the person hit him on the nose with something. He screamed and went back to his house and as he was rushing inside some people entered the house and started beating and caning him. He took a rod and hit on of them and they all took off running. At the time, he did not know who they were. On the next day he went to the clan elder to report the matter. The clan elder referred him to the Assistant Chief, PW 3. When he went to see PW 3, they both proceeded to Kitembe AP Post where he stayed overnight and was taken to Kamagambo Police Station.
10. The accused denied that anyone talked to him that night. He also denied that he knew the deceased. He stated that he only knew PW 1 as she was married to his deceased grandfather's brother. The accused stated that he was only trying to defend himself when he used the piece of timber and he did not see anyone lying outside his door at the time.
11. In order to secure a conviction for the offence of murder under the provisions of **section 203** and **204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;
 - a. Proof of the fact and the cause of death of the deceased.
 - b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.
 - c. Proof that the unlawful act or omission was committed with malice aforethought as defined by

section 206 of the *Penal Code*.

12.The first two ingredients of the offence were proved by the prosecution. PW 1 confirmed that she took the deceased to Oruba Nursing Home where he passed away. His body was identified by his brother, PW 4, who was present at the post mortem conducted PW 5. PW 5, the doctor who conducted the post-mortem established that the cause of death was excessive bleeding in the heart and chest caused by an injury on the chest inflicted by a blunt object. This finding was consistent with the observations of PW 1 and PW 2 that the deceased was hit on the chest.

13.I therefore find and hold the deceased, Tom Mbuya Mayiencha, the deceased, was killed and that he died as a result of excessive bleeding in the heart and chest caused by an injury inflicted by a blunt object on his chest.

14.PW 1 and PW 2 both testified that they saw the accused inflict the injury on the deceased using a wooden rod. Their testimony is corroborated by the fact that the deceased suffered the injury consistent with what they described. Furthermore, the accused testified that he hit someone who had come to his house. He was well aware he had hit someone and that is why he went to report the matter to the clan elder and then to the Assistant Chief, PW 3 on the very next day. I therefore find and hold that the prosecution proved that the accused hit the deceased and it is this blow that led to his death as I have already held.

15.The final issue is whether the injury was inflicted with malice aforethought. Mr Osoro, learned counsel for the accused, submitted that the accused accepted that he hit someone he did not know when people who came to attack him ran away. He contended that this was case of self-defence. Ms Ongeti, counsel for the State, contended that the prosecution established malice aforethought as PW 1 and PW 2 saw the accused go to his house, come back with a piece of timber with which he used to hit the deceased.

16.The law regarding self-defence is to be found at **section 17** of the *Penal Code* which states as follows;

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.

17.Recently, the Court of Appeal considered the law regarding self defence in **Ahmed Mohammed Omar & 5 others v Republic NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014]eKLR** stated as follows;

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.

18.The Court continued;

Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal

*before us, the trial court rejected the appellants' defence because it applied an objective test. The learned Judge's attention was not drawn to the current position of the English Common Law as regards the defence of self-defence. We believe that had the Judge's attention been drawn to the case of **DPP v Morgan (Supra)** his decision would have been different.*

19. The issue for determination then is whether under the circumstances, the accused believed that his life was in danger to the extent that he was entitled to use force to protect himself. The accused case is that he was asleep when he heard a knock on the door and when he went to open someone held him by the collar and the other people who were with him beat him hence he had to retaliate using a wooden rod. On the other hand PW 1 and PW 2 both testified that they went peacefully in the company of the deceased to the accused house, talked to him and it then he went into his house and came back with a wooden rod which he used to attack the deceased. PW 1 and PW 2 struck me as truthful witnesses and they had no reason to lie about the incident. The accused version of events is not supported by the evidence. If indeed he had been attacked by persons unknown to him, he would have reported the matter to the clan elder or to PW 3 but his own report to the clan elder and PW 3 was that he had assaulted the deceased. In his report to PW 3 he did not allude to the fact that a group of unknown people barged into his house and assaulted him. I also find that his testimony lacks credibility because he denied knowing the deceased yet when he went to see the clan elder and PW 3, he told them he had assaulted the deceased.

20. I find that the accused was not under any threat of any harm or injury and as such the act of inflicting the injury on the deceased was not in self-defence. It was an act that was directed on the deceased's chest with such force as to cause internal injury. The accused could only have been intended to cause the death of or to do grievous harm to the deceased. I therefore find that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

21. As a result I find the accused **SAMSON OTIENO ODOYO** guilty of the murder of the **TOM MAYIECHA** and I therefore convict him.

DATED and DELIVERED at HOMA BAY this 12th day of February 2015

D.S. MAJANJA

JUDGE

Mr Osoro instructed by Osoro and Company Advocates for the accused.

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