



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER NO.19 OF 2008

REPUBLICAPPELLANT

VERSUS

WILLIAM OBONDO OCHOLARESPONDENT

J U D G M E N T

1. The accused herein 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 the 19th day of April 2008 at Kakmiye Miriyo village in Nyando District within Nyanza Province murdered George Otieno Sombe.

2. The prosecution called 10 witnesses to establish their case. It's case can be summarised as follows:

3. **PW1 Senior Sgt Benjamin Kubumba** a police officer after receiving the information went to the scene with one Cpl. Kilonzo. He saw some bloodstains at the home where he later learned that it belonged to the deceased person. They then saw a wheelbarrow with bloodstains on it. They followed the bloodstains which led them to a sugar plantation where they found the deceased's body and with the assistance of the villagers present they put the body in the police vehicle and took it to the mortuary. He began his investigation where he found that it was the accused who had stabbed the deceased. He also produced the wheelbarrow as an exhibit.

4. **PW2 Joshua Odoyo Opere** is the Chief Onjiko Location. He learnt of the incident at around 10 p.m. on the material day. In the morning he went to the scene and found the police having taken the body. He found the accused person who was arrested at a sugarcane plantation. He called the police who came and picked him.

5. **PW3 Angelos Achieng Maguru** told the court that on the material day he was with the deceased at the accused's homestead where they were taking changaa. In the process a fight ensued between the deceased and the accused. The accused then took a knife from his clothes and stabbed the deceased on the ribs. When he saw it he ran away from the scene. He was however arrested and locked for 3 weeks as a suspect but later released.

6. **PW4 Dickson Akeyo Akeyo** is the Chairman of Community policing at Onjiko Location. He received a report from Joshua Abondo concerning the incident. They went to the scene with the police and they traced the blood- stains from the accused's house to the sugar plantation where they found the deceased's body. This was about 3 km from the accused's house.

7. **PW5 Michael Onditi Aende** is the deceased's brother. He received the news at around 10 p.m. He and others went to the scene in the morning where they saw bloodstains leading to a sugar plantation. They also saw wheelbarrow marks leading to a nearby Ngere river and all the way to the sugar

plantation. They then found the body and loaded it to the police land-rover.

8. PW6 Vincent Odhiambo Omogo told the court that the deceased came to his house on 18th April 2008 at around 5.30 p.m. to look for his cow. He was drunk. He then escorted him to the accused's house where he decided to disturb people. He left the scene and went back home. He was later arrested on 19th April 2008 but released. He said that the quarrel between the deceased and the accused was over some money.

9. PW7 Patrick Oluoch Aende participated in apprehending the accused who had run inside a sugarcane plantation. He said on cross-examination that he is the one who tied the accused's hands when he was arrested.

10. PW8 Lucas Wakoyo Ochola is the brother to the accused and the deceased was his neighbour. He reported to the village elder as soon as he heard the information.

11. PW9 Julius Omuto Ochieng was among the team that discovered the deceased's body in a sugarcane plantation which according to him was not very far from the accused's house.

12. PW10 Dr. Ochola Okal Ephrahim produced the postmortem report.

13. When put on his defence the accused gave sworn evidence denying the charge. He told the court that on the material day he went to church at 7.30 a.m. and came back at 10 a.m. The area Chief then came after

about 15 minutes and demanded to know why he sold alcohol to school children. He was then taken to the police station and locked in. He was not told why he was in the cells. The police then told him that

people were complaining that he had fought with someone. He went with the police to his home where he showed them the knife he had which the witnesses had alleged that he used to stab the deceased.

14. He went further to tell the court that he stayed in the cells for over one month before being brought to court. He denied that he was "Abongo" the person who had fought with the deceased. He said that nothing

was recovered from his house. He said that on 29th April he was at the police station with the chief and that it's not true that he was at home as alleged by PW7.

15. On cross-examination he denied that the deceased went to his home. He denied doing the business of selling changaa but he admitted that he has a shop selling wine and spirits.

16. DW2 Cpl. Julius Kosgei produced the O.B. for 14/2/08 on behalf of the accused person.

ANALYSIS AND DETERMINATION

17. Having perused the entire proceedings as well as the submissions by the state, the issue to determine herein is whether it was indeed the accused who assaulted the deceased and therefore caused his death. The prosecution witnesses from their evidence seemed to suggest so. I find that there is sufficient evidence by PW3 and PW6 that the deceased was at the accused's house at the material time.

18. PW3 Mr. Magwara clearly explained how the deceased fought with the accused. He said:

".....Abongo started asking Sombe, the deceased for money. I don't know how much he owned. Sombe and Abongo argued over money. Abongo kept asking for his money. Money was for changaa Sombe had consumed. I do not know when it was consumed. Then a fight ensued. Abongo removed a knife from his clothes. He threatened the deceased and then stabbed him. He

stabbed him on the side of the ribs. The drinking was being sold at Abongo's home outside his house”

19. On cross-examination the said witness continued and maintained his stand on how the accused fought and stabbed the deceased.

PW5 Vincent Odhiambo Omogo told the court that:

“.....Otieno Sombe came to my house to see his cow which was in my house. He came at around 5.30 p.m. He was drunk. He told me to escort him. We went with him upto a drinking den –

somebody's house – William Abongo Ochola. He was drunk, he started to disturb people. I feared the noise. I was sober. I decided to leave him there and I went home.”

20. From the two witnesses I find that contrary to the accused defence the deceased was actually in his home and I do not buy the accused's line of defence that he did not see the deceased that day.

21. Further the evidence of other witnesses including the police traced the bloodstains from the accused's house all the way to Ngere river and the sugarcane plantation. The wheelbarrow tyre marks were also clearly visible. Further, all the witnesses apparently seemed to be either related and or neighbours and it cannot be said that there was mistaken identity.

22. The evidence of PW3 concerning the assault of the deceased by the accused is worth reproducing here. At cross-examination he said:

“I heard accused ask for his money. I do not know how much it was. He removed the knife from his clothes. The knife was removed before the fight. Yes deceased fought and put the accused down and

sat on him, took a seat to hit the accused. Sombe had a seat which he used to shield himself from the knife. I ran away when the accused stabbed the deceased.”

23. From the above evidence it appears that the deceased owed the accused person some money and in the cause of demanding the same the accused pulled out a knife and stabbed the deceased.

24. Although PW3 testified that the 2 fought, on the some breath however it was the accused who pulled out the knife before they fought and consequently stabbed the deceased. In the premises I easily conclude that there was malice aforethought on the part of the accused person.

Malice aforethought has been defined by Section 206 of the Penal code as:

“1(a) An intention to cause the death of or to do grievous harm to any person or 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.”

25. The idea of arming himself with a knife, (although the knife was not traced) sufficiently suggest that he had planned to harm the deceased.

26. Although the doctor did not orally submit the cause of deceased's death, the postmortem form clearly shows that the cause of death was due to the stab wound. In any case the defence did not object to the production of the said report.

27. As earlier stated I don't think the accused's defence oust the prosecution case. His defence merely dwelt on his relationship with the area chief and a dispute in respect to his license and selling of wines and spirit to school children. He further denied that he was the "Abongo" spoken about by the prosecution witnesses. The accused however did not lead any evidence to deny that he was not the "Abongo" who assaulted the deceased. Neither did his alibi sufficiently oust the evidence of the prosecution witnesses who clearly testified that he was at the scene at the material time.

28. Of great significance however is the way the deceased's body was traced. It was clear from the prosecution evidence that the blood stains emanated from the accused compound all the way to the sugarcane plantation. Infact the wheelbarrow which was produced by PW1 was found at the deceased's compound. Although there was an argument whether or not the bloodstains found belonged to the deceased, as there was no scientific proof, I easily conclude that the circumstances obtaining at that moment clearly pointed to the fact that it was the said wheelbarrow that was used to transport the deceased's body to the sugarcane plantation.

29. In the premises I find that the accused fought the deceased and stabbed him after he failed to pay his debt. He then proceeded to conceal the body by taking it to the sugarcane plantation. Although there was no direct eye witnesses who saw him ferry the body using a wheelbarrow, the assault took place in his house and PW3 clearly saw it. His defence did not in any way oust the prosecution case. I do find that the prosecution proved its case against the accused beyond any shadow of doubt and I consequently proceed to convict him under the provision of Section 215 of the Criminal Procedure Code.

Dated, signed and delivered this 15th July, 2015

H. K. CHEMITEI

J U D G E