



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER CASE NO.53 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

MATHAYO OTIENOACCUSED

J U D G M E N T

1. The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 5th day of September, 2011 at Dienya East Sub-Location, Gem District within Nyanza Province, murdered **DAVID OMONDI OSUGA**.
2. The prosecution called 7 witnesses to establish their case. Its case can be summarised as follows:
3. **PW1 DR. JEAN NGICHBE** produced the postmortem report on behalf of **DR. KENNEDY RAPANDA**. According to the doctor's conclusion there was amputation of right hand at the wrist in one clear cut among other cuts. The cause of death was shock and blood loss.
4. **PW2 ALOYCE ODUOR OBONYO** told the court that on the material day there was a memorial celebration in his home. At around 1 a.m. heard some noise while asleep in his house. He went to the scene and he found a fight between the deceased and the accused. The deceased had fallen down and the accused was still cutting him using a panga. He cut off his left arm and other parts of the body and then he ran away. The village elder was called as well as the deceased's brother. The Assistant Chief came as well who in turn called the police. The deceased was taken to hospital where he died.
5. **PW3 JOHN OLUOCH OBONYO** was also at home when he heard noise at around 1 a.m. When he went out he found the deceased lying down having been severely injured. By then the accused had taken off. The deceased died subsequently at around 6.30 a.m. On cross-examination he conceded that he didn't witness the incident.
6. **PW4 WILLIAM MAGERE OCHOLA** is the brother to the deceased. When he arrived at the scene after being informed by **ODUOR OBONYO** and **JOHN OBONYO** he found the deceased severely injured. They tried taking him to hospital but he died at the scene.
7. **PW5 P.C. PETER IRUNGU** received information at 10 a.m. from the Assistant chief Dienya sub-location. He went to the scene together with the OCS and one **P.C. KIRONG**. They found that the deceased had died and took photographs which he went ahead and produced. On 8/9/11 he re-arrested the accused person who had been brought by Chief Alego South.
8. **PW6 CORPORAL. ERIC ONYANGO** went to the scene of murder on 10/5/11. He witnessed the post-mortem on 13.9.11

9. **PW7 JACOB WAFULA KHAEMBA** was the investigating officer. After confirming that the accused was already in the cells he started his investigation by going to the scene. He was informed of the incident that took place on the night of 1.9.11 when the accused cut the deceased using a panga. He did not however recover the murder weapon.

10. On cross-examination he said that the witnesses recorded their statements after the arrest of the accused.

11. When put on his defence the accused gave unsworn evidence. He admitted being at the scene during the incident. He said that he did not know the name of the home but he found people fighting and he ran to the house. He went to Alego on 7/9/11 to check on his sick sister. He was later arrested from there and taken to Siaya Police Station and subsequently charged. He generally denied the charge.

12. I have perused the entire proceedings together with the defence well reasoned submissions. The state apparently did not file any written submissions. From the facts available, it is not in dispute that the deceased died as a result of the fight that took place that particular night. It is only PW2 who appears to be an eye witness of the actual fight. The rest of the witnesses came thereafter. The evidence therefore available linking the accused to the murder is of a single witness.

13. The Court in **MATANYI VRS REPUBLIC [1986] KLR 198** clearly gave the general imperatives to be taken into account in such a case it stated as follows:

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were different.

2. when testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made.”

14. The court went ahead to state that the nature of light ought to be considered in terms of size and its position relative to the suspect.

PW2's evidence was that:

“.....At the scene Osuga had fallen down Matonya was cutting him with a panga.... He cut off his left arm and the right arm. He cut other parts of the body.”

He went further to state in his evidence in chief that:

“When I came out of my house I found him cutting the deceased. The distance from my house is about 20 meters. The accused comes from a neighbouring village. He is a person I know. I tried asking him to stop. I was able to see him.”

15. During cross examination the witness stated that he went to school with the accused though he was ahead of him. He further stated on cross-examination that:

“I saw him cut the deceased. There was Odhiambo and Otieno at the scene. He used a panga. He was so violent you could not go near him I was about 10 meters from the scene.”

When cross-examined by the court concerning the light he stated that there was a pressure lamp.

16. Is it therefore possible as suggested by the defence counsel that there was a mistaken identity due to the witness not coming out clearly on the source of light? I do not think so. I am persuaded to say so because of the fact that the witness saw the accused cutting the deceased and all the effort to restrain him were futile as he was violent. The time taken between the whole exercise including trying to stop him from further assaulting the deceased in my respectful finding is sufficient to ensure that the witness was in a better position to see what was going on. Again the accused did not deny the fact that he was known by PW2 having gone to the same school albeit different classes.

17. I do find that the pressure lamp available radiated sufficient light for the congregation available during the entire ceremony at night. There was no suggestion by the accused in his unsworn evidence that PW2 was not at the scene. In any event the accused told the court that:

“ On 5.9.11 I was at the scene at the incident. I don't know the name of the home. There was a funeral and I had gone there. I found people fighting and I run to the house. I left the house and went home.”

18. How could he fail to know the owner of the place he was at that night? Although the accused has the legal right to give unsworn testimony, he did not give the prosecution any chance to cross-examine him. I do not find the testimony that he did not know the owners of the home where he was that night plausible.

19. Further although there seemed to be contradictory evidence on when and how the deceased died, it is clear that the deceased's body was taken from the scene by police officers. The cause of death was as a result of the injuries sustained from the attack by the accused.

20. Consequently, I do find that the evidence of PW2 clearly put the accused at the place of the incident. Though PW2 arrived late, and was unable to know how the fight occurred, it is clear that he was able to witness the accused cutting the deceased. The accused's defence was a mere general denial. I do find that the prosecution has established its case against the accused beyond any reasonable doubt and I do convict him accordingly under the provisions of Section 215 of the Criminal Procedure Code.

Dated, signed and delivered this 2nd November, 2015.

H. K. CHEMITEI

J U D G E