



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL CASE NO. 43 OF 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**FRANCIS FAYA OCHIENG ALIAS ODEDE ..... ACCUSED**

**JUDGMENT**

The accused Francis Faya Ochieng Alias Odede was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that on the 29th November, 2008 at Kipkaren Estate within Uasin Gishu District of the Rift Valley Province murdered M M.

The prosecution called thirteen (13) witnesses.

**PW1**, JC testified that on 29th November, 2008 at 5.00 p.m. she was at home with a lady called Njira who sold alcohol. The accused in company of another went there and bought alcohol. She left for home at 9.00 p.m. At home, she found the deceased and her child had already slept. At about 10.00 or 11.00 p.m. the door was knocked open. The accused entered and asked for his mobile (I presume he was referring to a mobile phone) which he said was with PW1. PW1 said she did not have the alleged mobile phone.

It is then that PW1's husband woke up and the accused cut him with a panga. He also injured PW1 on the neck, shoulder, ears and back. Thereafter, he locked PW1, her husband and the child inside the house. The child was aged 6 years. PW1 asked the child to go out through the window and open the door. She then went to her aunt's place in the company of the child where she received first aid and went to Uasin Gishu Hospital for treatment on the following morning. Prior to PW1 escaping to her aunt's place, her husband ran away leaving her behind in the house with the child.

PW1 further testified that she reported the incident at Yamumbi Police Post. She was issued with a P3 form. After two days she learnt that her husband had died and his body was lying at the Moi Teaching & Referral Hospital.

In cross-examination, PW1 stated that the accused had gone to Njira's house with Augustine and not Onditi. The person she called Francis in her statement was one and the same with Odede. She said that accused was accompanied by Augustine when he went to their house at between 10.00 and 11.00 p.m. The house was dark but she was able to identify them through their voices. She insisted that it was the accused who cut her husband. PW1 further stated that one Pamela, her cousin saw the accused cutting her husband although she was not inside the house. She stated that she only knew the accused about a month before the incident. She could only identify him by appearance

and not the name. She had seen him since October, 2008. However, the accused and the Augustine were not known to the deceased and she did not know if they had a grudge with the deceased.

In re-examination, PW1 stated that there was no electricity lighting in the house but the lights were on outside the house. She said that the attack took about thirty (30) minutes and although she was drunk, she knew what was going on.

**PW2**, Pamela Cheruto testified that on the material date, she was in Angeline Litavi's house where changaa was being sold. Angeline Litavi was also known as Njira. Before entering the house, she met Odede who told her that he had cut PW2's sister and her husband in the words, "*you have done well to come. I have cut your sister and her husband*". Odede then confirmed that PW1 was the person he was referring to as PW2's sister. PW1 was PW2's cousin.

Odede then told PW2 that PW1 had stolen his Ksh. 4,000/=. He also told her that it is Augustine who showed him where PW1's house was and also gave him a panga. When Odede arrived at PW1's house, he just enquired if PW1 had taken his mobile phone and money which PW1 denied.

PW2 testified that PW1 had injuries on her eyes, ears and legs. PW1 told her to lock up her house as she went to report the incident to her mother Magdaline Chebet. PW2 parted ways with the accused on her way to PW1's house. She found her mother had locked the door and was sleeping. She left for her house. On the following day, she informed her mother what had happened and the latter took PW1 to hospital.

PW2 further testified that she did not know the deceased by name. She only knew him as a "*Mkamba*". She was only informed that he had been cut. She identified the accused in court as Odede.

In cross-examination, PW2 stated that she knew that it was the accused who had killed the deceased.

**PW3**, Asha Chelagat Abubakar testified that on the fateful night she was in her house at Kipkaren when she heard dogs barking. She went to the gate and found PW1 there. PW1 had injuries on her ear, leg and back. She told her that she had been attacked by two thugs. She gave her first aid and on the following day she went to hospital for treatment.

In cross-examination, PW3 stated that she was not aware how the deceased was killed. She said that PW1 did not tell her who the two thugs were. But later on she told her it was the accused person and Augustine. She also insisted that the accused told her that he had cut PW1 and her husband. She also said that PW1 spent the fateful night in her house.

**PW4**, B K, aged 8 years testified as the son of PW1. He gave an unsworn statement of evidence. He testified that on the fateful night he was at home with his father. PW1, his mother arrived at about 7.00 p.m. After they had slept, there was a knock at the door and Odede went in and cut his father on the head. The accused also cut his mother on the ears asking her to give him his phone. The accused thereafter went to call Pamela who went to their home to ask her mother if she had the accused's mobile phone but which his mother denied.

PW4 testified that the accused (Odede) shut the door and left. He then got out of their house through the window and saw that the door had been locked with a padlock. He stated that he and his mother went to Japhan mother's house. He said that he knew Odede who he identified in court as the accused person.

In cross-examination, PW4 stated that he was not guided by his mother on what to tell the court. He stated that it was Odede and Austin (Augustine) who entered their one-roomed house. Odede had a panga. He cut his father then his mother. The latter did not shout. He stated that Odede took his father's phone. He also said that Pamela went to their house in the company of Odede and

Austin.

**PW5**, Angeline Lihavi Makani testified that she used to sell alcohol at her house in Kipkarren. She recalled that on 30th November, 2008, the accused and another went there and bought alcohol worth Ksh. 50/=. They left in the company of the deceased's wife J between 4.30 and 5.00 p.m. She testified that on 1st November, 2008 PW1 told her that the accused had cut her husband and he had died.

On cross-examination, PW5 stated that she had seen the deceased previously although she did not know him very well. She reiterated that the two men who went to her house left with PW1.

**PW6**, Kenneth Odede Awino testified that on 29th November, 2008 at about 5.00 p.m. he spotted his in-law, Odede near an alcohol den. He asked him for alcohol and he bought him alcohol which he took with another woman who was near the house.

PW6 said that he then left for his home and thereafter proceeded to Brotherhood bar. At the bar, he found Odede and the same woman whom he bought beer. At 8.30 p.m., he went home leaving behind Odede and the woman.

His further testimony was that at about 11.30 p.m. he heard a knock at his door. He opened the door and saw Odede and another woman. Odede told him that he had lost his phone. He told them he wanted to sleep and they left. On the following day, he left for his rural home in Karachuonyo and returned to Eldoret on 3rd December, 2010. He found his house had been broken into but nothing had been lost. He reported the issue at Yamumbi. He said that he did not know who had killed the deceased although he identified the accused as Odede.

On cross-examination, PW6 stated that he did not know the deceased and the person who killed him.

**PW7**, L R M, testified as the deceased's brother. His testimony was that on 1st December, 2008, he was in Nairobi when he received a call from his brother that his other brother M M M had been killed. On the following day, he travelled to Eldoret. He went to the Moi Teaching & Referral Hospital where he identified the deceased's body to the doctor who conducted the post mortem.

**PW8**, Police Constable Kipchumba Kutto, then serving at Baharini Police Post testified that on 5th February, 2008, he was on night patrol duties with Corporal Ali Mohamed. At about 11.00 p.m., they arrested eight (8) suspects and took them to Eldoret Police Station where they were charged with being drunk and disorderly.

On the following morning, they were informed that one of the suspect, Faya Alias Odede was wanted at Mumbi (Yamumbi) Police Post for the offence of murder. He was collected by an officer from the said Police Post.

On cross-examination, he stated that other suspects identified the accused as being wanted for the offence of murder.

**PW9**, Kitathe Makiti testified that on 30th November, 2008 he received information that the deceased had been beaten by thugs. He went to Moi Teaching & Referral Hospital where he confirmed his death. Thereafter, he identified his body for purposes of a post mortem exercise.

In cross-examination, he said that when he went to Moi Teaching & Referral Hospital, the body had not been removed from the ward. His head was bandaged. The deceased was his cousin.

**PW10**, Corporal Evans Kipsang of the Police Dog Unit testified that on 30th December, 2008 at 1.00 a.m. he was on patrol duties in Eldoret in the company of Sergeant Mohambe and Corporal Wekulo. While at Mwanzo Estate, they met a man lying besides the road. They went to where he

was, talked to him but he did not respond. He had three deep cuts on the head. They took him to Moi Teaching & Referral Hospital. They later learnt that he had died.

**PW11**, Seargent Augustine Kisambi of Kapsoya Police Post testified that on 2nd December, 2008 while at Yamumbi Police Post one Jackline Chepkoech reported that on 30th November, 2008, she was in her house with the deceased when they were attacked by a known person and that the deceased was at Moi Teaching & Referral Hospital.

PW11 was accompanied by P.C. Abraham Abdi to the deceased's house in Kipkarren Estate. There were blood stains on the floor of the house. When PW11 and PC Abraham Abdi interrogated Jackline, she told them that prior to the incident she and the attacker had taken alcohol together at Kipkarren Estate.

PW11 said that he sent PC Abdi to the Moi Teaching & Referral Hospital to check on the injured person. He reported that the deceased had died. The case was thereafter handed over to the Criminal Investigation Department (C.I.D.) for investigations.

On cross-examination, PW11 stated that he saw Odede in court after being shown by the investigating officer. He identified the accused as the Odede he was referring to.

**PW12**, Walter Wekesa Nalyanya, a pathologist conducted the post mortem on the body of the deceased. He testified that, externally, the eyes were pale. There were freshly satured wounds on the skull from the front to the back and on the left side with 10 and 13 stiches respectively. There was a bruise around the left eye, laceration on the forehead, bruise on the left shoulder and multiple abrasions involving both arms. Internally, there was fracture of the skull and general haemorrhage. He formed the opinion that the deceased died of severe head injury due to assault. He also produced the post mortem report as P. Exhibit 1.

**PW13**, P.C Samuel Jumo of C.I.D. Eldoret was the investigating officer. On 3rd December, 2008, he and seargent Juma Mule were instructed by the then DCIO SP Nyale Mungai to go to Mumbi (Yamumbi) Police Post and investigate the case. At the Police Post they were informed by PW11 that the deceased had been attacked at night and was rushed to Moi Teaching & Referral Hospital where he died while undergoing treatment. The deceased had been attacked in the presence of his wife who was also injured. The latter had been treated and discharged. He produced her P3 form as P. Exhibit 2.

According to PW13, eight suspects had been arrested. He interrogated Augustine Ongeka who was said to have been with the accused and the wife of the deceased drinking chang'aa together. He recounted as was reported to him that the three parted ways at around 7.00 p.m. Later the accused alleged that Jackline (PW1) had stolen Ksh. 4,000/= and a phone from him. The accused then told Ongeka to go and confirm that he had taught the deceased and his wife a lesson.

PW13 further testified that he interviewed PW1 who gave an account of what happened on the fateful night. According to PW1, she knew the accused person. As she and her family slept, the accused broke into their house and demanded his money and phone. She denied having them and the accused responded by cutting her. The deceased woke up and the accused also cut him and he fled.

PW13 went on to testify that on 5th December, 2008, there was a police swoop in Eldoret Town in which eight (8) people were arrested for petty offences. While they were in the cell, the accused who was among them, told them that he had killed someone but had not been identified. One of the suspects then reported the information to the OCS. The accused was then held as the murder suspect. PW1 had described him as a man with a mark near the ear. He was charged accordingly after PW1 also identified him.

PW13 also stated that on 11th December, 2008, he went to the hospital to witness the doctor

conducting the post mortem on the body of the deceased.

On cross-examination, he stated that the written statement was shorter than the information he had given in his testimony. He said that no identification parade could be done because the deceased's wife knew the accused.

The accused gave a sworn statement of defence. His defence was that on 29th November, 2008 at about 10.00 a.m., he was called on telephone by his uncle, Kenneth Odede who invited him to his house at Kipkarren. From there they proceeded to Brotherhood Bar where they drunk beers. At about 4.00 p.m., his uncle went to see his sister where he hoped to eat. After 30 minutes, the accused realized that he did not have his mobile phone in his pocket. Upon enquiring from the bar man, he told him that two ladies who his uncle had left behind watching over him had taken his phone. He knew one of the ladies as Jackline Khaemba.

The accused went on to state that since his uncle took too long to return to the bar, he went to his house where he informed him about the lost phone.

He stated that he sat alone while his uncle and the two ladies sat about two metres away. He had hooked the phone around his waist on the belt. He could not recall the time the phone went missing.

He further stated that his uncle accompanied him back to the bar. He was told by the bar man that the two ladies stole the phone. He then told the accused that he knew the home of one of the ladies.

The accused was accompanied by his uncle to Kipkarren bus stop (in Eldoret). The latter left him at the stage as he was too drunk to walk and told him that he had gone to collect the lost phone. After one hour his uncle returned with the information that the lady who had taken the phone had already sold it and used the money from the sale. His uncle returned to the bus stop accompanied by a young man called Augustine Ochieng. Since it was too late to catch a matatu home, they all went to a small bar near the bus stop. The accused did not however drink any more alcohol. Both Augustine and accused's uncle left the bar leaving the accused inside. After some time, Augustine and Odede (Accused's uncle) returned and informed him that they had gone to look for his phone but that where they went, they found a man with whom they fought.

He also testified that at about 9.30 p.m., they all decided to go home. Odede looked for a taxi to take him home. It is at this point he realized that his wallet was also missing and he had no money to pay for the taxi. Odede payed for him.

On 30th November, 2008 his cousin one Meja told him that Odede had told him that his items could not be found. Meja also told him that they could not return to Jackline's house as they had fought with a man there.

The accused also stated that five days after 2nd December, 2008, he got a report that the person his uncle (Odede) and Augustine had fought with had died. At the time, Odede had gone to his rural home in Karachuonyo. That is why Odede and Augustine had fled. He was later informed by his sister Jane Anyango that police had visited her house in the company of a lady looking for him. Two days later he was arrested in Eldoret town for being drunk and disorderly. In the police cells he met Augustine, Jackline, Pamela (PW2), Angeline (PW5) and Tabitha. While under the custody he was picked up by CID officers as a murder suspect. He denied having killed the deceased. He was beaten up by the police after which he admitted (albeit not true) that he had beaten the deceased with sticks. He was remanded in custody for two weeks.

According to the accused, he was charged merely because he could not raise Ksh. 50,000/= bribe that was demanded by the police. He said that his name was Francis Faya Ochieng and not Odede. He denied he went to the accused's house and beat him up.

In cross-examination, the accused said that he also lost Ksh. 4,000/= and that Odede was his cousin. He said that PW6 referred to him as Odede. He said that he was beaten by prison warders in the year 2013.

### **EVALUATION OF EVIDENCE**

The evidence of the thirteen prosecution witnesses was corroborative save for few discrepancies regarding dates. The witnesses appeared to be certain that it is the accused who killed the deceased. The first question that required to be established is the fact of the death of the deceased. The same was confirmed by PW12, Dr. Wekesa who performed the post mortem on deceased's body. He found that the cause of the death of the deceased was consistent with the history which he had received from the police. He found the deceased to have sustained deep cut wounds which caused fractures to the skull as a result of which he bled a lot. This fact is buttressed by evidence of PW1 and 4 who said they saw the deceased being cut. PW11 on the other hand found him lying on the road side with deep cut wounds. Moreso, there is PW7 and 9 who witnessed the post mortem. And so there is no doubt as to the death of the deceased.

So then, is it the accused who caused the death of the deceased by an unlawful act or omission?

Both PW1 and 4 were eye witnesses who saw the accused cut the deceased with a panga. It must be borne in mind that the incident took place at night, in darkness. But again, during the day PW1 had along been drinking with the accused. She had over-interacted with him and so developed an acquaintance. It must be noted that she testified that she identified the accused by his voice. It could therefore not be far-fetched to say that she would know who was talking to her in the night.

Besides, the accused is said to have gone into PW1's house demanding to be given back his mobile phone and money, which PW1 had allegedly stolen from him. This then leaves no doubt that the accused, in demanding for the items was referring to an incident in which he and PW1 were together. And in his sworn defence, he rightfully admitted that he had lost both his mobile phone and Ksh. 4,000/= (the exact figure he was demanding) at a drinking den. This evidence squarely places him at the scene.

Guidelines on voice identification were reiterated by the High Court in Embu in the case of **REPUBLIC -VS- CHARLES MBUGUA KINYUA & 2 OTHERS, CRIMINAL CASE NO. 41 OF 2012** which referred to the case of the Court of Appeal in **MBELE -VS- REPUBLIC (1984) KLR, 626** and **CHOGE -VS- REPUBLIC (1985) KLR 1** and **LIBAMBULA -VS- REPUBLIC (2003) KLR, 683** as follows:-

***“Evidence of voice identification is receivable and admissible in evidence and it can be depending on the circumstances and carry as much weight as visual identification. And in admitting and relying on such evidence necessary care must be taken to ensure the following:***

***(a) The voice that was heard was that of the accused.***

***(b) The witness was familiar with it.***

***(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.”***

In the instant case, I have already noted that PW1 had already developed an acquainttance with the accused, having been drinking all afternoon together. This is a period that was sufficient for PW1 to be able to identify the accused's voice thereafter if he heard it. Furthermore, the words spoken by the accused related to an incident which himself and PW1 had encountered during the day.

It is also not in doubt that, as testified by the accused, he was told the phone had been stolen by two ladies. Although he said he did not go to the house of one of the suspect ladies, it happened

that the house that was attacked was that of Jackline, PW1. And according to PW1, one of the attackers demanded for his mobile phone and money. Apparently, it is only the accused who had been in the company of PW1 and who claimed he had lost such items and attributed their loss to theft by PW1.

So why did the accused kill the deceased?

It is evident that he was angered by the fact that PW1 denied having stolen the money and the mobile phone. He carried a panga with him when he went to PW1's house which is evident that he had pre-meditated that he would do harm in the event that PW1 "*did not return his stolen items*". And so he possessed the malice aforethought (*mens rea*) which was executed as intended – killing the deceased.

And as fate has it, after the accused killed the deceased, he told PW2 he had accomplished his mission. He told her to go and confirm that he had cut his sister and her husband. The deceased unfortunately suffered fatal injuries while PW1 suffered minor injuries.

In my view the accused person's having defence that he was not involved in the deceased death was a mere fallacy – a story that did not add up. He denied having accompanied Augustine and his uncle to the deceased's house. But this line of defence is strongly ousted by PW1's strong evidence. Again, it only emphasizes that indeed there was a fight at the deceased's house which led to his death. And I am convinced that the accused was present during this encounter.

According to the accused he is not known by the name Odede. But all the witnesses who referred to him as Odede identified him in court as the person they called Odede. Moreover, PW1 said that that was another name by which people knew him. In any case, the charge sheet refers to him as Francis Faya Ochieng alias 'Odede'. His own uncle (PW6) too testified that his name was also Odede. Therefore both names refer to one and the same person, and that is the accused person.

May I point out that one of the discrepancies relate to a date given by PW6. It is indicated in the typed proceedings that he said he returned from Karachuonyo on 3/13/2010. The hand written proceedings do however show the date as 3rd December, 2010 and that is the date I have written in this Judgment.

The other error is also the date given by PW10 who testified that he and his colleagues were on patrol in Eldoret on 30th December, 2008. Whereas that date corresponds with what is on the hand written proceedings, it is doubtless that the incident took place in the late hours of 29th November, 2008 and the deceased was collected from the road side a few hours thereafter, which is in the early morning of 30th November, 2008. I believe this error was occasioned inadvertently – probably the Judge who recorded the evidence did not hear clearly what the witness said.

On the whole, having carefully appraised myself with the evidence on record, together with the submissions by the prosecution and the defence, I come to the conclusion that the prosecution has discharged its burden and proved the case beyond all reasonable doubts. I find the accused guilty as charged for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and I convict him accordingly.

**DATED and DELIVERED at ELDORET this 16th day of July, 2014.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Miyianda for the Accused

M/s. Mwaniki for the State