



IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 31 OF 2012

(FORMERLY KISII HCCRC NO. 121 OF 2011)

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNETH OMONDI OYWAYA ACCUSED

JUDGMENT

1. **KENNETH OMONDI OYWAYA** (“the accused”) was charged with the offence of 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 offence were that on 22nd December 2011 at Kobuya Village, Rachuonyo North District in Homa Bay County, he murdered **CYNTHIA ACHIENG OYWAYA** (“the deceased”).
2. The accused is the step brother of the deceased and the prosecution case is that the accused was left at home with the children while his parents went to the market. When returned, they found that the deceased had been killed and the accused was nowhere to be found. The prosecution called 7 witnesses to prove that it is the accused who committed the murder. The trial commenced before Maina J., and was completed by upon compliance with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.
3. PW 1, Lazaro Oywaya Ogweno, testified that the accused was his son by his deceased first wife. He lived with his third wife, Milicent and their three children; Cynthia Achieng, Paul Odhiambo and Jane Adhiambo. At the time of her death, Cynthia was 9 years old. PW 1 recalled that on 22nd December 2011 at around 9 am, he left home with his wife to buy fish at Chuoye Beach. He left the accused at home with the three children. He returned from the market with his wife at about noon on the same day and as he entered the house he found the deceased had been cut with a panga on the neck, head and the shoulder. Apart from his son Paul Odhiambo, there was nobody else in the house and the accused was nowhere to be seen. He saw a panga lying in the house which he had never seen before. On 24th December 2011 he was called to Simbiri Hospital by the police where he identified the body of the deceased and a post mortem was done by Dr Ogolla.
4. Moris Onyango Oywayo, PW 2, a blood brother of the accused testified that on 24th December 2011 he was summoned to Simbiri Hospital in Rachuonyo where he identified the deceased’s body before the post-mortem was conducted by Dr Peter Ogolla.

5. Dr Peter Ogolla, PW 3, the Medical Officer of Health for Rachuonyo South District conducted the postmortem on the deceased's body at Simbiri Hospital on 24th December 2011. He estimated that the deceased was about 9 years old. He observed several cuts on the body; one long cut wound that extended from the left neck which was about 18 cms long, another cut on the upper part of the back that was 8 cms long which extended to the bone and a third cut wound on the left shoulder extending and fracturing the bone of the left upper arm. He noted that the major vessels of the neck had been severed and that there was a fracture of the bone of the left skull. When he opened the skull he found that the same cut had caused a laceration of the brain and there was bleeding in the brain cavity. He concluded that the cause of death was severe head injury and hemorrhage and that a lot of force was required to cut the bone through to the skull and cause laceration of the brain tissue. He produced the postmortem report which he signed.
6. PW 4, Damianus Oywaya Osano, the Assistant Chief, recalled that on 22nd December 2011 his wife informed him that Cynthia Achieng, daughter of Oywaya, had been killed. He proceeded to the scene and when he arrived there at about noon, he found a lot of people in the homestead. He found the deceased's body lying in front of the house. He observed that the deceased had been cut with a sharp object and that there was a panga with some bloodstains there. He called Kendu Police Station. Thereafter police officers came and collected the body.
7. PW 5, PC Hanafi Hamza, was at the material time based at the Rachuonyo CID performing investigation duties. He recalled that on 25th December 2011, he was called by the DCIO, Chief Inspector Ayub Bakari to go and arrest the accused who was at Katito which is about 32 km from Kendu Bay, Rachuonyo where the murder took place. He proceeded to Katito with PC Miheso where they arrested the accused after he had been apprehended by relatives and the public.
8. PW 6, Acting Chief Inspector Muema Nzuki, testified that at the material time he serving at Kendu Bay Police Station when he was asked by Chief Inspector Ayub Bakari accompany him to the murder scene. They proceed to Nyakwere Village where they found PW 4. They proceeded to a house where they found the body of a young female lying outside. PW 6 observed that the body had a cut on the neck and head and there was a lot of blood on the ground. The body was identified as that of Cynthia Achieng. They did not find the accused. They organized for collection of the body and took it to Simbiri District Hospital where a post mortem was conducted. In cross-examination, he stated that he knew the accused as he used to pass by the police station and greet them.
9. The final prosecution witness, PW 7, Dr Joseph Egala Jumba, a Deputy Director of Medical Services at Kisii Level 5 Hospital testified that he is a trained and experienced psychiatrist. He examined the accused twice. The first time he examined the accused was on 5th January 2012. A summary of his findings were that he was well nourished and sober, he had a normal range of mood and normal speech. He was well oriented in time, space and person while his concentration was normal. His memory was good for recent and past events and he had an adequate level of knowledge. The doctor further testified that although the accused had normal flow of thought he had paranoid delusions. He believed that Philemon Abongo, a former Commissioner of Police, was his father. He believed his face had changed and that he had killed Satan. The doctor concluded that the accused was not having any insight and that he was unwell or had paranoid schizophrenia. He recorded his findings in a medical report which he produced in evidence.
10. The second time PW 7 examined the accused was on 30th August 2012 when he was brought in the company of police officers. He observed that the accused was of good nutritional status. His speech was low but audible and he spoke in a monotone. He conducted a cognitive assessment and found that the accused was well oriented in time, space and person. He was able to recount events both past and present and his judgment was good and so was his ability to think in abstract terms. He had a normal flow of thought. The doctor concluded in the report dated 30th August 2012 that the accused was fit to stand trial.

11. After the prosecution case closed, the accused was put on his defence. He elected to make an unsworn statement. He stated that on 22nd December 2011 at about 5.00pm, he had gone fishing at Komet Beach at Nyandiwa. He stated that the village is called *Nyamgondo woud Obare*. He had been staying there alone for a long time and he would only come home for two days. He stated that he did not know how he came to court. He said that he had taken *omena* to Katito to sell when people there started asking him whether he knew what he had done. They started beating him until he became unconscious. He did not know how he came to court.
12. In order to prove 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 which is the *actus reus* of the offence.
 - c. Proof that the unlawful act or omission was committed with malice aforethought as defined in **section 206** of the **Penal Code**.
13. The first two elements of murder requiring proof were easily proved by the prosecution. It is not in doubt that the deceased was found dead by PW 1 at his home. This fact was confirmed by PW 4 who came to PW 1 homestead and found the body. PW 2 also identified the body at the Simbiri Hospital before the post-mortem was performed by PW 3. PW 1, PW 4 and PW 7 who all saw the deceased body in situ at PW 1's homestead confirmed that the deceased had deep cut wounds on the head and neck and there was a lot of blood. These observations were confirmed by findings of PW 3 who conducted the post-mortem. He observed three deep cut wounds on the head and neck which resulted in loss of blood. He concluded that the deceased died as a result of cardiopulmonary arrest due to severe head injury and hemorrhage in the skull. I therefore find and hold that the Cynthia Achieng', the deceased, died as a result of an assault with a sharp object on the head.
14. The next issue is whether the accused committed the act which caused death. While there was no direct evidence of who committed the act, the evidence of PW 1 is that the accused was the one left home with his siblings and when he returned, he found the deceased dead and the accused nowhere to be seen. The accused could have been the only one to have committed the offence. He is the only one who was left with the children. The other children were too young to commit such a vicious act on their sister. As he was the only adult who had been left at home on the material date, he could not explain what had happened. His act of disappearing after the incident confirms that he had a guilty conscience.
15. The prosecution did not call the other available witnesses, that is, Millicent or Paul Odhiambo, a brother of the accused who was present at the time the offence was committed. I am aware that under **section 143** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** states that, "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact." In **Bukenya and Others v Uganda [1972] EA 549**, the Court held that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. PW 1 testified that his wife disappeared after she recorded her statement with the police. In my view, both witnesses would only reinforce the prosecution case and I find no reason to draw an adverse inference.
16. In his unsworn statement, the accused stated that on 22nd December 2012 he was in Nyandiwa at 5.00 pm. He did not give an account of where he was in the morning of that day when the deceased was murdered. His statement has no value whatsoever in light of the clear testimony of PW 1 who left him at home with the children.
17. I therefore find and hold that it is the accused who committed the act which led to the death of the deceased. My finding is further buttressed by the fact that on 26th January 2012 when called upon to plead, the accused stated that, "It is true, but it was not my plan to do so." Once again on 4th

December 2012 when called upon to plead, the accused stated, “*I did it accidentally and it was not my plan.*”

18. The final issue for consideration is whether the act was committed with malice aforethought. **Section 206(a)** of the **Penal Code** states as follows;

Malice aforethought shall be deemed to be established by 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;*

The injuries inflicted on the deceased were vicious and aimed at the head and neck and were intended to cause grievous harm or death. In the circumstances I find that there malice aforethought was proved. However, in their submissions both counsel for the accused and for the State submitted that there was evidence of insanity which the court should consider.

19. Despite proof of malice aforethought, the defence of insanity may negative such an intention. The defence is to be found at **section 12** of the **Penal Code** which states as follows;

12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or more of the effects above mentioned in reference to the act or omission.

20. It is a cardinal principle of law that the burden proof of guilt of accused person lies on the prosecution, and that an accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities. To establish the defence of insanity, the court must clearly be satisfied that when the accused committed the act of which he is indicted, when he committed the offence he was;

(a) suffering from a disease affecting his mind and

(b) through such disease he was incapable of

(i) understanding what he was doing or

(ii) of knowing that he ought not to kill the deceased person.

21. To prove these two ingredients it is necessary to examine the entire evidence. The accused underwent two medical examinations. In the first report dated 5th January 2012, PW 7 concluded that the accused was suffering from paranoid delusions and was mentally unstable and he may have been suffering from schizophrenia. He concluded that he was not fit to stand trial. On 30th August 2012, PW 7 concluded that he was fit to stand trial.

22. The witnesses also alluded to certain incidents. When cross-examined PW 1, the accused’s father, stated that the accused had made some threats against them and that he went to Kendu Bay Police Station and reported that he had killed someone yet he had not killed anyone. He stated that this report was made prior to killing his sister. PW 4, the assistant chief, also testified he knew that the accused was mentally disturbed. He recalled that one day he reported to him that he wanted him to arrest his family members without any reason.

23. In the case of **Tadeo Oyee s/o Duru v R [1959] E.A. 407**, the East Africa Court of Appeal held that the word “disease” is **section 12** of the **Penal Code** is not necessarily a disease of the mind in

the narrow sense. It held that a high grade *mental deficiency may be a disease affecting the mind* and that the trial court took too restricted a view of the word “*disease.*”

24.I accept the evidence of Dr Jumba that the accused may have been suffering from paranoid delusions or schizophrenia. Taking into account the strange behaviour witnessed by PW 1 and PW 4, I find that there did exist a probability that at the time of the killing, the accused, was suffering from a disease of his mind which would have caused him to commit the act. I also note that during the proceedings the accused exhibited strange behavior.

25.As I have found that the accused committed the act that led to the death of the deceased, I make a special finding under **section 166 (1)** of the ***Criminal Procedure Code*** to the effect that the accused committed the act of killing but was insane at the time. Pursuant to **section 166(2)** of the ***Criminal Procedure Code***, I order that the accused be detained in prison custody at the pleasure of His Excellency the President.

DATED and DELIVERED at HOMA BAY this 7th day of November 2014

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.