



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT HOMA BAY**  
**CRIMINAL CASE NO. 25 OF 2012**  
**(FORMERLY KISII HCCRC NO. 92 OF 2010)**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**MATHIAS OBUYA ARINGO.....ACCUSED**

**JUDGMENT**

1. **MATHIAS OBUYA ARINGO** (“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 19<sup>th</sup> October 2010 at Disii Village, Komolo Sub-location in Homa Bay County, he murdered **STEPHEN ODHIAMBO OBUYA** (“the deceased”).

2. The accused, who is the father of the deceased, pleaded not guilty and the trial ensued. The prosecution assembled 6 witnesses to prove its case. The case was initially heard by Maina J., but I completed it after complying with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The thrust of the prosecution case was that the accused assaulted his son thereby causing his death.

3. PW 1, Serfina Akoth Okaka, the wife of the accused and mother to the deceased recalled that on 19<sup>th</sup> October 2014 at about 9 pm while she was in her house, the accused came and asked her for food. As the food was not ready, the accused informed her to wake him up when the food was ready. He also asked where the deceased was and she told him that he was at his grandmother’s house. After the accused had left she heard the door being banged and when she went outside and saw the accused going towards his mother’s house carrying a panga and a wooden plank. She then heard the deceased asking, “*father why are you killing me.*” She saw the deceased standing at the door and when he turned his back, the accused hit him behind his head and he fell. She started running towards them screaming but the accused chased her with a panga.

4. She immediately went to the home of Francis Obuya Tumba, PW 2, a clan elder, and reported the incident to him. He accompanied her back to the homestead and found the deceased lying dead in a pool of blood. PW 2 testified that on 19<sup>th</sup> October 2010 at about 10 pm while he was asleep in his house, he heard PW 1 screaming while knocking on her door. When he opened the door it was indeed PW 1 who informed him that her husband, the accused, had beaten the deceased and that she wanted him to confirm whether he was alive. They both went to the accused’s home where they found the deceased lying in a

pool of blood.

5. PW6, Victor Oginga Obura, a son of the accused and brother to the deceased, testified that on the material day at about 9 pm he was reading when he heard a knock at his grandmother's door. He saw the accused and the deceased standing outside the door. He heard the deceased asking accused, "*Why are you beating me at this time and there is nothing we are quarrelling over.*" He saw the accused raise as if to hit something. He then heard the deceased say, "*You have now broken my hand, it is better you kill me without feeling the pain.*" The deceased fell down and did not talk again. PW 6 narrated how he ran and hid as he feared for his life. It then he heard PW 1 screaming but no one came. He later saw some people walking towards where the deceased had fallen but he did not recognize them. PW 6 testified that thereafter he went to the kitchen, cooked food and slept until morning.

6. The next day, 20<sup>th</sup> October 2010, the police came to the accused homestead. PW 5, Sergeant Henry Momanyi, the investigating officer arrived at the accused's homestead at about 10 am. On arrival, he met the accused who told him that he was the one they were looking for. He found the deceased's body lying in a pool of blood. He took statements from various witnesses and arranged for photographs to be taken by another officer, William Amollo Ayunga. The photographs were produced by PW4, Corporal Shem Ondieki Mogaka. PW 5 caused the deceased's body to be taken to Homa Bay District Hospital Mortuary where a post mortem was conducted by Dr Ayoma Ojwang. He arrested the accused and caused him to be charged with murder. He also produced the wooden plank which was used to assault the deceased and a sketch map of the scene as exhibits.

7. PW3, Dr Ayoma Ojwang, testified he carried out an autopsy on the body of the deceased on 22<sup>nd</sup> October 2010. He observed that the deceased body had a lot of blood stains. He stated that the deceased had two deep cut wounds on the left side of the head and that the skull was extensively fractured with some skull bones crushed into pieces. He concluded that the cause of death was a severe head injury.

8. The accused elected to give an unsworn statement in his own defence. He denied killing the deceased. He stated that on the material day he came home drunk and went to sleep. He said that he did not know what was happening because he was drunk. When he woke up on the next day, he was still drunk. He heard commotion and found many people outside his house. He said that he found the deceased lying down outside his mother's house but did not touch him. While sitting outside his house, police came and arrested him. He said that he was drunk and did not understand what had taken place.

9. After the close of the defence case, Mr Ongoso, counsel for the accused, submitted that that the deceased and the accused were engaged in a land dispute and on the material night there was a fight as the deceased was demanding land. He also pointed to the fact that there two people who were seen in the vicinity by PW 6 who were not identified and who could have been witnesses to the offence. He also submitted that both the accused and the deceased were intoxicated at the time of commission of the offence and that the court should take this fact into account in assigning guilt to the accused.

10. Ms Ongeti, counsel for the State, asserted that there was sufficient evidence to support a conviction. She said that the evidence of PW 1 and PW 6 established that the accused had hit the deceased with a wooden plank. She submitted that in light of the evidence the defence of intoxication in terms of **section 13** of the **Penal Code** was not available to the accused.

11. The offence of murder is defined by **section 203** of the **Penal Code** as, "*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*"

12. The three ingredients of murder which the prosecution must establish beyond reasonable doubt under **section 203** as read with **section 206** of the **Penal Code** are:

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.

13. As regards the first issue, the evidence is clear that the deceased met his death as a result of an assault. PW 1, PW 2, PW 6 identified the deceased's body at the accused's homestead. PW 1 also identified the body at Homa Bay District Hospital Mortuary before the autopsy was conducted. The observation and finding by PW 3 the cause of death was severe head injury caused by a heavy blunt object is consistent with the testimony of PW 2 that he found that the deceased had cuts on his head. PW 1 saw the accused with a panga and wooden plank. She saw him hit the deceased while PW 6 saw him hit the accused with a stick. In my view, the description of the head injuries particularly the very deep cut wounds on the deceased's head and the fracture were caused by the panga and wooden plank which the accused was seen carrying by PW 1. I therefore find and hold that Stephen Odhiambo Obuya died as a result of severe head injury caused by a sharp and blunt object.

14. The next question is who caused the injury that led to the death of the deceased. On this issue there is direct evidence implicating the accused. PW 1 and PW 6, who knew both the accused and the deceased, testified that they saw the accused hit the deceased. PW 1's account of the event is fortified by the testimony of PW 2 to whom she reported immediately after the event. Furthermore, there is no evidence that PW 1, as the wife of the accused, had any motivation to lie or that she had a grudge with the accused. PW 6 confirmed that she heard PW 1 screaming. PW 6 stated that he could identify both the accused and the deceased and according to him there was sufficient moonlight which enabled him recognise the voice of his brother and father. The location of the body outside the accused's mother hut confirms the testimony of PW 1 and PW 6 as the place the incident occurred.

15. PW 1 also identified the wooden plank (Exhibit No. 1) which the accused used to hit the deceased. She identified it as one the accused used as a walking stick. PW 6 also stated that he saw the accused use a stick to hit the deceased though he said it was not the one produced in evidence. He also identified the accused from the red sweater he was wearing. The murder weapon was also recovered from the accused and was identified by PW 1 and PW 6 as belonging to the accused as they had seen it in the house before.

16. Mr Ongoso, counsel for the accused, submitted that two strangers who were in the vicinity were not called as witnesses. In cross-examination, PW 1 stated that there may have been a visitor in her mother-in-law's house. PW 6 testified that after the accused had assaulted the deceased, he saw two unidentified people walking where the deceased had fallen. Having accepted the testimony of PW 1 which is clear on how the felonious act was committed, I find the contention that there could have been committed by other people incredible.

17. On the basis of the evidence, I find and hold that the accused assaulted the deceased with a panga and a wooden club which caused deep cuts wounds on his face and head injuries and which resulted in his death.

18. The final issue is whether the prosecution proved malice aforethought. Under **section 206** of the **Penal Code**, malice aforethought is established by evidence proving 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 intention to cause death or to do grievous harm may be deduced from the nature and extent of the injuries sustained by the deceased and the weapon used in the attack.

19. The accused's defence is that on the material night after drinking alcohol at a bar he went home and he did not know what was happening because he was heavily drunk. On the next day, 20th October 2010, he was heard the commotion and when he went to his mother's house, he found his son lying down.

20. The issue of intoxication is dealt with in **section 13** of the **Penal Code** as follows;

*13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.*

*(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged*

at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.  
[Emphasis mine]

21. It is therefore clear that while intoxication is not in itself a defence, it may be taken into account whether in determining whether the accused had a specific intent to cause death or grievous harm. In the case of **Manyara v R [1955]22 EACA 502**, the court noted that, “*It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing the defence rests on him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this on the accused.*” (see also **David Munga Maina v R NYR CA Crim App. No. 202 of 2005 [2006]eKLR**).

22. In determining the whether the accused was intoxicated to the extent that the intent was negated, the court must have regard to all the facts. As to the events, there are two versions, PW 1 testified that the accused came home and asked where the deceased was and although he said he would go to his house to sleep, she stated that when she heard the door being banged, “*I went outside and saw the accused go towards his mother’s house with a panga and a wooden plank. He ordered the house to be opened. Then I heard Stephen saying “father why are you killing me.....”*”

23. PW6 on the other hand testified that the accused and the deceased were drunk and that he heard the deceased ask the accused why he was beating him yet there was nothing they were quarrelling over. At this point, PW6 saw the accused who was standing in front of the flowers at his grandmother’s house lift up a stick and hit the deceased. I reject the testimony of PW 6 on this point as he did not see PW 1 come home with the deceased. Although there may have been drinking and quarrels in the past, on the material day, the testimony of PW 1 is clear that the accused came home after drinking and went to where the deceased was and assaulted him.

24. Although the PW 1 admitted that the accused was drunk, I do not think that this affected his mental state. He spoke to her and that he went armed to the house where the deceased was points to a deliberate act. I therefore discount his defence that he was too drunk to understand what was happening. The nature of the injuries and extent of the injuries show how vicious the assault was and it was only intended to kill the deceased. His calm and collected demeanour the very next day may be as a result of the regret he felt after committing the act and not because he was intoxicated.

25. I am satisfied that the prosecution has proved beyond any reasonable doubt that the deceased died and that he died from severe head injury which was a direct consequence of the accused’s act of hitting him on the head using a wooden plank and panga. I further find that act was committed with malice

aforethought.

26. I therefore find **MATHIAS ABUYA ARINGO** guilty of the murder of the **STEPHEN ODHIAMBO OBUYA** and I accordingly convict him.

**DATED and DELIVERED at HOMA BAY this 7<sup>th</sup> day of November 2014**

**D.S. MAJANJA**

**JUDGE**

Mr Ongoso instructed by Ongoso Ayoma and Company Advocates for the accused.

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