



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**Criminal Appeal 26 of 2011**

**CHARLES ONYANGO OKOTH .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM UKWALA SRM'S  
COURT BY: E.K. MWAITA SRM**

**IN CRIMINAL CASE NO.192 OF 2010.]**

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**J U D G E M E N T**

The Appellant **CHARLES ONYANGO** was charged with the Offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. He was found guilty and convicted to Life Imprisonment. He was aggrieved by the judgment and preferred this appeal based on the following grounds; the sentenced was harsh, the prosecution evidence was contradictory, the court failed to comply with Section 50(4) of the Constitution, Section 19 of the Oaths and Statutory Declaration, and 329 of the C.P.C.

The particulars of the case were that on the 20<sup>th</sup> of April, 2010 at Simur Kondiek Sub-Location in Ugenya District within Nyanza Province the appellant unlawfully killed **PAUL OTIENO AGUO**.

As the 1<sup>st</sup> appellate court I have the duty to re-consider the evidence, examine and analyse the same so as to arrive at an independent opinion.

**PW1 VINCENT OTIENO** a form 2 student at Humwend Secondary School recalled the 20<sup>th</sup> April, 2010 while he was at the farm with his grandfather when they uprooted bananas that the appellant had planted on their farm and planted them on the appellant's farm, when the appellant arrived shouting, chased the two out of the farm and speared the deceased on the chest. They later reported the matter to the Assistant Chief.

**PW2 JOHN ONYANGO ODHIAMBO** – Assistant Chief of Simur Sub-Location recalled that on 20/4/10 at about 11 a.m. he received the report of the deceased's death from the wife of the deceased. The appellant later arrived carrying a blood-stained panga and informed the witness that he had quarreled with the deceased,. The witness escorted the appellant to Ukwala Police Station. He later visited the scene with

the investigating officer where they found the deceased lying on the ground and where they recovered a spear. They later took the dead body to Busia District Hospital. In cross-examination he stated that before the incident he had advised the parties to involve a surveyor to identify the boundaries in question.

**PW3 THOMAS OCHIENG AGOLLA**, son to the deceased. He identified the body on 28/4/2010 for purposes of postmortem.

**PW4** a child of 13 years gave an unsworn statement. He recalled that on 20/4/10 at about 10 a.m. as he was on the farm with the deceased, while there they dug and uprooted some banana planted on the land of the deceased, the deceased came with a panga and spear and stabbed the deceased on the left side of the chest.

**PW5 DR. CHARLES KISILU** of Busia District Hospital. He conducted post-mortem on the deceased and filled the post-mortem report. He observed:

- **body had a stab wound 4cm(L) x ½ cm (W) on the left side of chest, 4 cm below the nipple.**
- **fractured rib; blood and fluid on the left lung;**
- **blood clot;**
- **descending aorta had blood;**
- **He gave cause of death as cardio-pulmonary arrest due to internal bleeding caused by trauma from a sharp object.**

**PW6 I/P MOSES MASINDE** of Ukwala Police Station. He did the investigations. He recalled receiving information of murder from Assistant Chief of Simur Kondiek Sub-Location on 20/4/10 at 11.15 a.m. He also visited the scene of crime interrogated the appellant and later charged him with the offence.

At the close of the prosecution case the appellant was put on his defence he gave an unsworn statement stating that he acted in self defence after he was confronted.

I have considered the evidence as set out above. The appellant does not deny stabbing the deceased he however plead provocation and self defence.

The prosecution case is that the deceased, PW1 & PW4 aged 17 & 13 respectively were working on their farm on the material day when they came across banana planted on their farm by the appellant. They moved the same and planted on the appellant's side. The appellant's wife saw them and called out to the appellant who came out with a spear, chased the deceased and his grandchildren and stabbed the deceased aged 70 on his left side of the chest.

It is my view that there having been an admission by the appellant that he stabbed the deceased with a spear and a confirmation that the deceased died there is no issue therefore as to whether the appellant committed the offence or not. The issue left for consideration is whether the life imprisonment imposed upon the appellant was an appropriate sentence. There seem to be an agreement, between the appellant and the prosecution that the sentence was excessive although the defence of provocation and self defence were not supported by the prosecution.

I also do agree with the trial court that the evidence on record does not support the defence of self-defence. The deceased was old and there is no evidence that he attacked the appellant to merit the allegation of self defence. However I am convinced that the appellant was provoked. There is evidence of boundary dispute between the parties. It was not clear however whether the same was resolved but it is clear that the deceased and his grandchildren uprooted the crops allegedly planted by the appellant and planted on another site. Land issues are immotive no doubt, the actions of the deceased, PW1 & PW4 must have provoked the appellant who in turn reacted out of anger. I find that the appellant did indeed act

in anger but that on the other hand is not a justification to take away the life of another. The fact that provocation is evident means that he ought not to get the ultimate punishment nevertheless he ought to be punished for his deeds. In this regard I will substitute the sentence of life imprisonment by reducing the same and jailing the appellant for a period of 15 years from the date of judgment in the lower court, the 3<sup>rd</sup> of February, 2011.

**Dated and delivered this 6<sup>th</sup> day of July 2012**

**ALI-ARONI**  
**J U D G E**

**In the presence of:**

.....**State counsel**

.....**Appellant in person**