



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

Criminal Case 18 of 2009

**SAMUEL ODHIAMBO ODONGO alias WESONGA .....ACCUSED**

**AND**

**REPUBLIC .....APPELLANT**

**JUDGMENT**

The accused herein **Samuel Odhiambo Odongo alias Wesonga** 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 12<sup>th</sup> day of March 2009 at Segu Sub Location in North Ugenya Location in Ugenya District within Nyanza Province, murdered **Charles Toro Wolia**.

The prosecution called six (6) witnesses **PW 1 Dr. Moses Otieno Owino** produced the post mortem report on behalf of **Dr. James Kisilu**. The said report exhibit No P1 shows that the cause of death was “**due to loss of blood following injury by a sharp object. Lot of force was applied in inflicting these injuries**”.

It further showed that the deceased sustained deep cut wound on the right shoulder, cut below the chin region, cut at the neck and over the back borne.

**PW2 Rosemary Akoth Tolo** the deceased wife told this court that at around 7:00 a.m. on 12<sup>th</sup> March 2009 she was in her house. The deceased was in a different hut which was close to hers. She said that she heard Charles screaming, “**Wesonga why are you cutting me**”. She rushed to the scene but the accused pushed her and she fell down. It was her testimony that she saw the accused cutting the deceased. She then went to call her brother in law **Vitalis Odhiambo**. The assistant Chief later came and with the assistance of the police the body was taken away. Her testimony further was that the accused ran away with the panga.

**PW3 Vitalis Odhiambo Waria** testified that he heard screams from his brother Toro’s home. **PW2** came running and told him that Wesonga was killing Charles. On arrival he found Charles had already died. The police together with the Chief came and took the body to Busia. He however said that he did not see the accused on the material day.

**PW4 Thaddues Odhiambo Okelo** is the Assistant Chief of Segu Sub Location. He received a

police call at around 7:00 a.m. from one **Michael Ooko** that **Charles Tolo** had been killed in his home. He went to Sega Police Base and in the Company of two (2) police Officers went to the scene.

He observed the injuries the deceased had sustained, which were on the neck. He later found the accused having been arrested by the members of public.

PW5 is the Police officer who rearrested the accused from the members of public.

**PW6 Elijah Macharia** is the investigating officer. He testified of receiving report from Sega Police Patrol Base about somebody who had been arrested after killing somebody. He proceeded to the scene with other officers and collected the body. He saw visible injuries on the body. He told the court of how he carried out the investigation including taking statements from the witnesses and eventually charged the accused with the present offence.

On cross examination the said witness confirmed that apart from PW2 there was no other eye witness.

When he was put on his defence the accused gave sworn testimony. He alleged that on the material day he went to Sigomere market at 5:30 a.m. to buy a cow. When he arrived home he found that Charles had been killed. He was arrested by **Michael Ooko Nyangwa** and **Okumu** allegedly under the instruction of the area Assistant Chief. He was then taken to Sega Police Post.

The accused said that he had a good relationship with his grand father. On cross examination he denied that he had a land dispute with the deceased who was his grand father.

Having heard the prosecution witnesses and the accused testimony together with their respective submissions the duty of this court is to analyse the evidence on record so as to be able to come into a conclusion on whether or not the prosecution proved their case beyond reasonable doubt as required in such capital or criminal case.

It's clear from the evidence of PW2, that she is the only eye witness to the incident. By the time PW3 came according to her the accused person had disappeared from the scene.

PW2 knew the accused very well. She was his grand son. On the material day the deceased was sleeping in the next hut (house) which was 20 paces apart. On cross examination she said:- **“ I saw Wesonga when cutting the deceased in his house. Some 3 -4 paces from where I was”**.

Earlier on in her evidence in Chief she had testified of how she responded to the alarm raised by the deceased and that upon inquiry the accused pushed her and she fell down. She said:- **“Then I heard Charles screaming Wesonga, why are you cutting me”. I came out of my hut loudly asking what was happening. As I got near Mzee's hut Wesonga pushed me and I felt down. Wesonga who was in Mzee's house pushed me as I tried to enter the house..... Then Wesonga used a panga to cut Charles the deceased on the neck, right shoulder”**.

From her testimony it's clear that the witness saw what transpired. It was morning and consequently the natural light was sufficient to help her identify and recognize the assailant.

Further it's conceded by the accused that his home is about 400-500 metres from the deceased. I am therefore convinced that PW2 was well known to the accused person.

As stated earlier on PW2 was the only eye witness. The rest came after the fact. The evidence of a single witness as is the rule must always be treated with extra caution. There could be a possibility of other factors which may tender it inadmissible or doubtful.

The ingredients of sustaining a murder charge which the prosecution ought to establish include:-

- (a) **The death of the deceased and cause of that death.**
- (b) **That the accused committed the unlawful act which caused the deceased death.**
- (c) **That the accused had malice aforethought (see Rep =vs= Nyambura and 4 others Nairobi HCRC No. 116 / 199 (2001) KLR 355.)**

The first ground above was indeed established by the prosecution. The next issue is to determine whether indeed it was the accused who committed the offence. The accused in his defence raised the element of alibi. He said that on the material day he had gone to buy a cow at Sega market but on coming back he was arrested. This is the far that he went and legally speaking he need not go beyond this explanation. It's always incumbent upon the prosecution to establish their case.

I respectfully do not buy the said alibi. I am convinced from the evidence of PW2 that it's indeed the accused person who assaulted the deceased causing him fatal injuries.

From the testimony of PW2 and even the accused they are people known to each other and in good relationship. I do not see therefore why PW2 would want to frame the accused in this case. I did not find any bad blood between the two.

The next issue to determine whether there was any malice aforethought on the part of the accused person.

Section 206 of the Penal Code Chapter 63 Laws of Kenya states:- **“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances.**

- (a) On intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not.**
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused”.**

PW1, the doctor did produce the post mortem report. He found that the deceased had died as a result of injuries caused by a sharp object. The injuries found by the pathologist are consistent with those explained by PW2.

The panga was not found though. Nevertheless having found that indeed it is the accused who caused the fatal injuries I do conclude that he had malice aforethought. His intention was to cause the death of the deceased or at least cause serious bodily injuries.

An issue was raised by the defence counsel to the effect that the post mortem produced though signed was not dated. I respectfully disagree I have perused the said exhibit and it is clearly shown that the same is dated 16<sup>th</sup> March 2009 which I suppose was the date of carrying out the post mortem.

For the foregoing reasons I do hold that it is the accused person who fatally injured the deceased. No reason at all was laid by the accused in his defence. No apparent reason could be explained why he committed the offence.

As earlier own observed his alibi did not assist his line of defence. PW2 his grandmother clearly saw the heneous acts of the accused.

In the premises I do proceed to convict him accordingly. The prosecution did prove their case beyond any shadow of doubt.

Prior to passing out the sentence I shall proceed to order the accused to offer any mitigation in line with Section 324 and 329 of the Criminal Procedure Act Chapter 75 laws of Kenya.

**Dated, signed and delivered at Kisumu this 4<sup>th</sup> day of July 2012**

**H. K. CHEMITEI  
JUDGE**

**In the presence of:**

Mr. Meroka State Counsel

Onyari Advocate for the applicant

*HKC/ao*