



IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO, O’KUBASU & VISRAM JJA)
CRIMINAL APPEAL NO 609 OF 2010

BETWEEN

ELIAS OCHIENG ONYANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from conviction and judgment of the High Court of Kenya at Kisii (Musinga, J) dated 10th November 2009

in
HCCRC NO 72 of 2004)

JUDGMENT OF THE COURT

ELIAS OCHIENG ONYANGO, the appellant herein, was according to information dated 9th September 2004, arraigned before the High Court of Kenya at Kisii where he was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code.

It was alleged that on the 25th day of June 2004 at Wasio Sub-Location in Migori District within Nyanza Province the appellant murdered **DAVID ONYANGO ONGORO** (the deceased).

The appellant denied the charge and his trial commenced on 24th February 2005 before Bauni J. The trial was conducted with the aid of assessors as the law then provided.

The prosecution called four witnesses. The first witness was Joshua Odera Kiboga (PW1) who testified on how, on the material day, he witnessed the appellant fighting with the deceased. In the course of his evidence in chief Kiboga stated inter alia:-

“I know the deceased David Onyango Ongoro. He was also a kinsman. I recall 25th June 2004 at 7.30 a.m. I was at my home. I heard screams. I ran towards where they were coming from. I found accused fighting with the deceased. I saw accused beating the deceased. They were just the two of them. Accused was beating him using a jembe and a panga. The deceased was not armed. The deceased was on the ground. Accused was hitting him. Before I reached where they were accused ran away. I took the deceased and took him to Samuel Onyango’s home. The deceased told me they were going to prepare a fence between their lands. Accused hit and attacked him. He had a cut wound on his head. He had been cut with a jembe. He also had an injury on the mouth and another on the left side of the head. There were cut wounds. He was bleeding seriously. We gave him first Aid. As we were doing so accused came where we were armed with a panga, spear and bow. Those

who had gathered ran away. Accused was asking for Onyango saying he wanted to finish him. I ran with the deceased. We took him on a bicycle to Stella Nursing Home. We left accused at home still armed.”

The second prosecution witness was Ben Okinyi Otero (PW2) who testified on how, on the material day, he witnessed the incident. In the course of his evidence in chief Otero (PW2) said:-

“I know the accused in the dock – identifies him. He is Elias Ochieng Onyango. He is my uncle. He is from our clan and that is why I call him uncle. I knew the deceased David Ongoro Onyango. He is also from our clan. I recall 25th June, 2004 at 7.30 a.m. At 6.30 a.m. I went to the shamba to plough. The deceased came from the upper side. The accused was working in his shamba. While the deceased was still at a distance, deceased asked accused why he had plucked out the boundary features which were put by the old men. Accused told the deceased that he the deceased was the only child in their house and that day he will not go back to that house. The accused is a stepbrother to deceased- same father, different mothers. The deceased told him he had gone to talk to him as a brother and not to fight. Accused started to abuse him. He started walking towards where the deceased was. I heard a banging noise. We ran there and saw the deceased on the ground. I was with a cousin called Sunday Ochola. He stood up staggering. We raised an alarm. Accused ran away. We tried to help the deceased. We removed him from that place. He could not talk. We tried to give him first aid. He had injuries on the head. He was bleeding seriously. Accused had run to his home. As we were giving first aid to the deceased next to another home accused came back fully armed. Accused had run away carrying a jembe and a panga. When he came the second time he was armed with a spear, bow and arrows and a panga. We ran away with the deceased. Accused when he came he was saying “ where is he, I want to finish him”

We ran away to the road. We took the deceased on a bicycle to Stella hospital. It is the owner of the bicycle who took him to hospital. Kennedy Obiero followed them. I learnt that he was taken to Ojere Hospital. Finally he died.”

It was the evidence of Dr Aggrey Indagiza Akidiva (PW3) that he performed the postmortem examination on the body of the deceased on 5th July, 2004 and that he formed the opinion that the cause of death was due to head injury due to blunt force. Dr. Akidiva (PW3) signed the postmortem form which was produced in evidence as Exhibit 1.

The last witness was Anjelina Nyakwako (PW4) the mother of the deceased who testified on how she was called after the deceased had been rushed to hospital. She did not witness the incident but in the course of her evidence in chief PW4 stated, inter alia:-

“There was a land dispute between the deceased and Elias. It was over my shamba which is in the name of Odera who was a son of my sister. He died.He had only one son who also died. It was accused who was utilizing the land but Odera stopped him. Odera left the land to me.”

When put to his defence the appellant gave unsworn statement in which he said that on the material day he left home at about 6.a.m. for Migori where he was working. When he arrived at Migori at about 8.30 a.m. he went to a certain shop to buy cement but before he got into the shop he was arrested by two police officers who took him to Migori Police Station. He was locked up and told that he had fought his brother. The appellant further stated that PW1 had bought land of his elder brother a transaction to which the appellant had objected to.

After summing up of the case to the two remaining assessors the two returned a verdict of guilty.

The case was fully heard by the late Bauni .J but he, unfortunately, passed away before delivery of the judgment. The file was placed before Musinga, J on 2nd July 2008 when the prosecution and defence counsel agreed that the learned Judge should act on the evidence recorded by Bauni J. and prepare the judgment. Although the learned Judge refers to **section 200(1) (b)** of the Criminal Procedure Code the correct provision must be **section 201(2)** of the Criminal Procedure Code pursuant to Statute Law

(Miscellaneous Amendments) Act no 7 of 2007.

The learned Judge considered the recorded evidence and came to the conclusion that the prosecution had proved its case beyond any reasonable doubt. He accordingly convicted the appellant and sentenced him to death. In the course of his judgment which he delivered on 10th November 2009 the learned Judge said:-

“I have carefully evaluated all the evidence on record. PW1 and PW2 were eye witnesses who testified as to how the accused assaulted the deceased. The offence was committed in broad daylight. The accused was armed with a jembe and a panga. After the deceased was taken to the home of Samwel Onyango, the accused went there armed with a panga, spear, bow and arrows and said that he wanted to finish the deceased. That clearly shows that he was on a mission to kill the deceased. The people who were gathered there had to take away the deceased before the accused could carry out his threats. The deceased was rushed to a hospital but died a few days thereafter from the injuries that had been inflicted upon him by the accused.”

Being aggrieved by both conviction and sentence the appellant, through his advocates, filed this appeal citing the following five grounds of appeal:-

“(1) The learned Judge erred in law and fact in failing to note Material discrepancies in the evidence of the two main prosecution witnesses as follows:-

- a) PW1 claims that he was at the scene while PW2 states that PW1 met them some 30 metres away from the scene while escorting the deceased.
- b) PW1 claims that the deceased talked to him while PW2 states that the Deceased was not talking.
- c) PW1 claims that the Accused ran away and left the jembe behind while PW2 states that the accused ran away with the jembe and a panga.

(2)The Learned Judge erred in law and fact by failing to note that due to the aforesaid discrepancies, the evidence of both PW1 and PW2 remained incorroborated in material particulars.

(3)The Learned Judge erred in law and fact by finding that the Appellant acted with malice aforethought while admitting that the appellant might have been provoked.

(4)The Learned Judge erred in convicting the Appellant of murder when some evidence existed on which he could have convicted the Appellant of a lesser offence.

(5)The conviction is against the weight of the evidence.”

This is the appeal that came up for hearing before us on 16th September, 2011 when Mr C.L. Kasamani appeared for the appellant while Mr B.L. Kivihya (Principal State Counsel) appeared for the State.

On grounds 1 and 2 Mr Kasamani submitted that due to many discrepancies in prosecution evidence it was unsafe to convict the appellant. He further argued that the evidence of PW1 contradicted that of PW2.

On ground 3 Mr Kasamani submitted that there was no evidence of malice aforethought and that there was provocation.

Lastly Mr Kasamani submitted that conviction was against the weight of evidence.

In opposing the appeal Mr Kivihya submitted that the evidence of PW1 and PW2 was consistent

and that there was no dispute that the appellant attacked a defenceless man. Mr Kivihya pointed out that after attacking the deceased the appellant ran away only to come back saying “where is he I want to finish him.” These words, in Mr Kivihya’s view, clearly provided evidence of intention to kill. Finally, Mr Kivihya submitted that the prosecution had proved its case beyond reasonable doubt and he therefore urged us to dismiss this appeal.

We have considered the rival submissions in this appeal and this being a first appeal it is our duty to consider the evidence as a whole and submit it to a fresh and exhaustive examination so that we may come to our own decision on that evidence – see **Patrick & Another vs R [2005] 2 KLR 162.**

It is for the foregoing reason that we set out, in some detail, the evidence of prosecution witnesses. From the trial court’s record there can be no dispute that the deceased was attacked on the material day and that the cause of death was as a result of the injuries sustained during that early morning attack. The issue for determination was whether it was the appellant who inflicted the injuries that led to the death of the deceased. It was the evidence of Kiboga (PW1) that he saw the appellant attack the deceased on the morning of 25th June 2004. We have set out the evidence of this witness and from his testimony it is clear that he saw what happened. There was further evidence of Odero (PW2) who was at the scene and witnessed the incident. And to complete the picture we have the evidence of Nyakwako (PW4) to the effect that there was a land dispute between the deceased and the appellant. While these three witnesses testified that it was the appellant who attacked the deceased, the appellant, in his defence, stated that he was in Migori town. In other words the appellant put forth an alibi as his defence. It was, of course not upon the appellant to prove his alibi but upon the prosecution to dislodge that defence – see **Ssentale vs Uganda [1968] E.A.365.** On the evidence before the trial court it was abundantly clear that the appellant was properly recognized at the scene as the incident took place early in the morning and the appellant was not a stranger to the witnesses. Indeed, the appellant and these three witnesses were members of the same family. The evidence of Nyakwako (PW4) to the effect that there was a land dispute between the deceased and the appellant clearly establishes the reason for the attack. There was further evidence that when the appellant came back to the scene he said that he wanted to “finish him.” That illustrates the intention of the appellant. He attacked the deceased and as the deceased was rushed to the hospital the appellant was still talking of finishing him. And as he so threatened he was fully armed with a panga, spear, bow and arrows. The appellant was, so to speak, armed to the teeth. He clearly intended to kill the deceased and he achieved his objective since the deceased died from the injuries inflicted.

On our own re-evaluation of the recorded evidence we are satisfied that the appellant was convicted on very sound evidence. Indeed, his conviction was inevitable. That being our view of the matter all we can say is that the appellant who was said to be aged 65 years was a vicious man who took law into his own hands and ended up killing a defenseless man.

The upshot of the foregoing is that this appeal is dismissed in its entirety.

Dated and delivered at Kisumu this 2nd day of November, 2011.

R.S.C. OMOLO

.....
JUDGE OF APPEAL

E.O. O’KUBASU

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR