



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Criminal Appeal 355 of 2006

DAVID OMBOTO SERENGETI APPELLANT

AND

REPUBLIC RESPONDENT

***(Appeal from a conviction and sentence of the High Court of Kenya
at Kisii (Bauni, J) dated 9th November, 2006***

In

H.C. Cr. C. No. 86 of 2003)

JUDGMENT OF THE COURT

David Omboto Serengeti, the appellant herein, was tried before the late Mr. Justice Kaburu Bauni sitting with the aid of assessors on an information which charged him with murder contrary to section 203 as read with section 204 of the Penal Code. At the end of the trial, the learned trial Judge summed up the case to the two assessors remaining at the end of the trial. The two assessors returned a unanimous verdict that the appellant was guilty of the charge of murder. By his judgment dated and delivered on 9th November, 2006, the learned Judge also found the appellant guilty as charged and duly sentenced him to death. The appellant now appeals to this Court against the conviction and sentence.

The particulars contained in the information on which the appellant was convicted were that on 20th day of July, 2003 at Amabuko sub location in Kisii Central District, the appellant murdered Alfred Morema, Morema the deceased hereinafter.

The story put before the learned Judge and the assessors was that on 20th July, 2003 at about 3.00 pm., the deceased was in the company of John Nyairo Maiso (PW1) and Rodgers Paul Maiko (PW2). The three were from a local shopping centre where John had gone to buy a razor blade. They were walking to their respective homes. As the three walked along they were discussing the affairs of a local primary school. They met the appellant walking in the opposite direction and the appellant for some reason thought that the deceased had been talking about him. The appellant told the deceased he would teach him (deceased) a lesson for talking about him. The appellant confronted the deceased, produced a knife and made an effort at stabbing the deceased. The deceased attempted to retreat but in the process fell down on his

back. When the appellant was making another effort at stabbing the deceased the second witness Rodgers intervened using his stick and the appellant turned on Rodgers. It was the evidence of John that while the deceased was lying down on his back, the appellant:-

“---stepped on his stomach, and then escaped. Morema started to say he was dying. We took him to the road and went to call his wife. She took him to Keroka Health Centre. I did not accompany them. Next day I learnt he was transferred to Kisii General Hospital. On 2nd August, 2003 I heard he had died. I came to Kisii police station and recorded my statement. We were not related with the deceased.”

The second witness Rodgers put his story thus:-

“----- Suddenly accused removed a knife from his body. Deceased started to retreat as accused was removing the knife. The deceased fell down. Accused wanted to stab him. I rushed there. I had a stick which I raised. Accused turned towards me. Accused stepped on the deceased on the stomach twice. He used his heel. The deceased told me he had killed him. Accused returned his knife in the pocket and rushed away. The deceased was groaning that he was dying. He could not walk. We took him to the main road. His wife was called. She got a vehicle and took him to Keroka Dispensary. Next day I was informed that he was referred to Kisii District Hospital. I went there after 2 – 3 days to see him. I was informed he had been operated on. I could not talk to him. Later he died.”

The deceased's wife was Penina Kerubo Morema. She gave evidence as PW3 and the substance of her evidence was that the appellant was her cousin, and then went on to narrate how she was informed about the attack on her late husband, how she went to him and found him seriously injured but still conscious, how she took him to Keroka Dispensary and eventually to Kisii District Hospital where he was admitted. The deceased was at that hospital for about five days during which he was operated on. Her husband eventually died.

The prosecution called Dr. Ezekiel Ogando Zoga (PW7) who was then attached to Kisii Hospital. He performed the post mortem on the body of the deceased on 5th August, 2003. Externally, he found a surgical scar on the anterior abdomen. There was contusion on the right lumbar stomach. Internally, he found faecal matter in the abdominal cavity. The small gut was decomposed and there was surgical repair which had been done on the small gut. There was some pus in the abdominal cavity. The Doctor formed the opinion that the cause of death was cardio pulmonary arrest due to injury on the gut which led to infection due to trauma. The Doctor produced the post-mortem report.

What we have before us was that the appellant “stepped on” the stomach of the deceased either once or twice. That is clear from the evidence of the two eye witnesses John and Rodgers who had been with the deceased and who swore that they saw the appellant do so. Penina (PW3) found her husband in a serious state shortly after the first two witnesses gave her information about the attack. In his unsworn statement the appellant appears to have been saying that he was never at the place where the deceased was attacked. He did not say where he was at the time of the attack as he only stated where he was and what he was doing there at the time of his arrest on 28th July, 2003. In the face of the very clear evidence of John and Rodgers, the appellant's alibi, if indeed he ever raised that defence, was for rejection and was rightly rejected by the learned Judge and the assessors. We are satisfied, as the learned Judge and the assessors were, that the appellant attacked the deceased, at first with a knife but when Rodgers thwarted his attempt at stabbing the deceased the appellant instead “stepped on” the deceased's stomach as the latter lay on the ground on his back. The deceased himself immediately realized he had been seriously injured and stated so.

The medical evidence on record, however, is not conclusive as to what exactly happened when the appellant “stepped on” the stomach of the deceased. We note with concern that the prosecution did not find it necessary to call the doctor who had carried out the operation on the deceased to state what he found when he operated on the deceased. We take it that the operation had been carried out to repair some damage in the stomach of the deceased but what that damage was is not exactly clear from the prosecution evidence. Was it the “stepping on the stomach” that caused the rotting of the small gut? At

the time the operation was being done, had the small gut become rotten so that it could not have been repaired? These questions could have been clarified if the doctor or doctors who had performed the operation had been called to testify for the prosecution. The failure to call the doctor or doctors who actually operated on the deceased left these gaps in the evidence of the prosecution. The learned trial Judge did not at all direct his attention to these issues; he equally failed to point them out to the assessors. We do not know if the Judge or the assessors would have come to the same conclusion that it was the “*stepping on the stomach*” which directly resulted in the death of the deceased. We must give the benefit of doubt on these issues to the appellant.

But the appellant clearly occasioned grave injury upon the deceased by *stepping on his stomach*. The offence of causing grievous bodily harm under **section 234** of the Penal Code is an offence minor and cognate to that of murder and while we allow the appellant’s appeal as regards the conviction for murder and the sentence of death, we shall substitute for the conviction for murder under **section 203** of the Penal Code, a conviction for causing grievous bodily harm to the deceased under **section 234** of the Penal Code. Accordingly we set aside the conviction for murder and also the sentence of death and substitute therefor a conviction under **section 234** of the Penal Code. We sentence the appellant to fifteen years imprisonment to run from 9th November, 2006 when the appellant was convicted and sentenced by the High Court. Those shall be our orders in the appeal.

Dated and delivered at Kisumu this 27th day of March, 2009.

R. S.C. OMOLO

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.