



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

CRIMINAL APPEAL 187 OF 2006

THOMAS OKOTH ODEDE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from a conviction and sentence of the High Court of Kenya at Kisumu (Wambilyanga, J.)
dated 28th September, 2001*

in

H.C.CR.C. NO. 16 OF 1998)

JUDGMENT OF THE COURT

The appellant, **Thomas Okoth Odede**, was charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. It was alleged that on 1st November, 1997 at Wangaya Sub-Location in Nyangoma Location within Kisumu District of Nyanza Province he murdered **Jared Odhiambo Owuor**. On 26th October, 1998 the appellant was arraigned in the High Court at Kisumu and he pleaded not guilty to that charge. After a full hearing in which the learned Judge (Wambilyanga J.) was assisted by assessors, the appellant was convicted as charged and sentenced to suffer death in accordance with the law. In convicting the appellant the learned Judge stated inter alia:-

“For me I believed the evidence of PW4 (and to some extent as already indicated that of PW1). The evidence of these witnesses totally excluded any aggression and provocation on the part of deceased before he was fatally assaulted. They said that the accused struck the deceased when the deceased was probably eating a mango and did not put up any act of self defence. There was medical evidence (Exhibit P2) on the accused. It depicted him as mentally normal. He had no injuries. A normal man desires the natural consequences of his acts. So when he struck the unsuspecting deceased he certainly intended to kill the man who had allegedly been backbiting him. I reject the defence and find him guilty of murder as charged.”

The appellant felt aggrieved by the conviction and subsequent death sentence hence this appeal which is brought on the following five grounds of appeal:-

“1. The learned trial judge erred by convicting the appellant on evidence of PW1 and PW4 which was

contradictory.

- 2. The learned trial judge erred in law by not finding that the cause of death was accidental and hence malice aforethought was not established.*
- 3. The learned trial judge erred by not finding that the appellant was drunk and hence his conduct was not culpable.*
- 4. The learned trial judge erred by failing to appreciate that the appellant was provoked by the respondent (sic) and hence his conviction was not safe.*
- 5. The learned trial judge erred by failing to appreciate that the appellant acted in self defence and hence should not have been convicted.”*

The facts of this case may be briefly stated. On the 1st of November 1997 at about 2:00 p.m. **Eunice Achieng Obala (PW1)** was at her house when she was visited by **Omolo** and **Odhiambo (deceased)**. She received the two guests who then sat behind the kitchen. Shortly thereafter the appellant arrived and joined the two guests. It was the evidence of Eunice that the appellant was carrying a panga. There was a commotion where the three men were and on going out of her house, Eunice found the deceased on the ground while the appellant was running away. In the course of her evidence in chief, Eunice testified inter alia:-

“I shouted and people came. Odhiambo had been cut with a panga on the left neck. He was dead. I screamed for help. All that time Omolo had also run away and informed Odhiambo’s family members. I did not know what caused Okoth to kill Odhiambo.”

The other witness who was at the scene of the alleged offence was **Musa Otieno Dimo (PW4)** who testified that on 1st November, 1997 at about midday he was with the deceased when they sat under a mango tree at the home of PW1. In the course of his evidence in chief, Dimo stated, inter alia:-

“Okoth the accused came to the place where we were. He sat on a hand cart with the deceased. The accused alleged that the deceased had been backbiting him.

The deceased denied it. Then Okoth the accused went home. After five minutes he came back. He appeared to have a weapon hidden in his shirt. He sat with us. We continued chatting (sic). Then he cut the deceased and the deceased fell off the hand cart. The accused then started to flee away. I was also to flee for a while. Then I came back and observed the deceased who was severely cut on the left side of the neck. I then rushed to call his family. I found his brother who came with me to the scene. The accused was armed with a panga when he ran away from the scene.”

This incident was reported to the police and as a result **Inspector Bethaas Kaaria (PW5)** proceeded to the scene. He found the body of the deceased under a mango tree. The body was taken to the mortuary where post mortem examination was conducted by **Dr. Charles Okal (PW6)** who formed the opinion that the cause of death was hemorrhagic shock due to severed carotid and jugular veins. In the course of his evidence, **Dr. Okal** stated inter alia:-

“There was a severed left carotid artery and jugular veins at the level of cervical 3 vertebrae. Further examination revealed sheered off fracture of the 2nd and 3rd vertebrae. My opinion as to the cause of death was hemorrhagic shock due to severed carotid and jugular veins. A sharp object was used to inflict the injuries. Death was almost instantaneous. A lot of energy was needed to inflict these injuries. I filled and signed this report and I now produce it as Exhibit P1.”

When called upon to defend himself, the appellant elected to give unsworn statement in which he stated inter alia:-

“I had a panga and a rungu to bring the animals to our home. I then saw my friend Jared Odhiambo

Owuor sitting down in my grandfather's boma. He called me and I went to him. He was drinking pombe. I joined him. We drunk together. The panga was on the ground. Suddenly he picked the panga and slapped me on the head with it. Then the panga dropped down. I asked him why he was hitting me? He did not reply. He looked drunk. He picked the said panga again and moved closer to me. He intended to strike me with it but the panga dropped down from his hand. Then I picked that panga and tried to slap him with it. Then the panga slipped and cut him on the neck. Then he fell down. He died on the spot."

The learned Judge summed up the evidence and the law to the three assessors and each assessor was of the opinion that the appellant was guilty as charged.

The above is what was before the superior court. When the appeal came up for hearing before us Mr. Onyiso, the learned counsel for the appellant, submitted that the evidence of *PW1* and *PW4* was contradictory which means one of them was telling lies. It was further submitted that malice aforethought was not established since it was not clear what caused the appellant to kill the deceased. Mr. Onyiso contended that both the appellant and the deceased were drunk and that there was provocation. Finally, it was submitted that the appellant acted in self defence.

Mr. Musau, the learned Senior Principal Counsel, in asking us to dismiss this appeal submitted that the evidence of *PW1* and *PW4* put the appellant at the scene of crime and that *PW4* witnessed the actual act of killing in broad daylight. It was Mr. Musau's contention that malice aforethought had been established in terms of **section 206** of the Penal Code. He further submitted that the defence of provocation was not available to the appellant nor was self-defence.

This being a first appeal, it is our duty to reconsider the evidence, evaluate it and draw our own conclusions. As it was stated in ***OKENO V. R.*** [1972] E.A. 32 at p.36:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.* [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E.A. 424."

In the present case, there was evidence that the incident took place in broad daylight on 1st November, 1997. The key witnesses were *PW1* and *PW4*. It was the evidence of ***Dimo*** (*PW4*) that he was with both the appellant and the deceased. He saw the appellant cut the deceased. ***Eunice*** (*PW1*) was inside the house and on hearing a commotion outside she came out and saw the appellant running away while the deceased had fallen down. The incident was witnessed by ***Dimo*** (*PW4*) whose evidence in chief we have reproduced elsewhere in this judgment. We have considered Mr. Onyiso's submission to the effect that *PW1* and *PW4* contradicted each other but we find no merit in that submission. It is to be remembered that *PW1* was inside the house while *PW4* was outside at the scene of crime.

The second ground of appeal was that malice aforethought was not established. Malice aforethought is defined by **section 206** of the Penal Code which provides:-

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- (a) 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;***
- (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;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

In the present case, the evidence disclosed that the appellant had hidden a panga when he came to the scene. When the appellant struck the deceased he certainly intended to either kill the deceased or cause him grievous harm. The evidence of the doctor who performed post mortem examination was that a lot of energy was needed to inflict the injuries sustained by the deceased. Taking all the foregoing into account, there can be no doubt that malice aforethought was established in terms of **section 206 (b)** of the Penal Code. As a reasonable man the appellant must have known or ought to have known that cutting the deceased on the neck with a lot of force would probably kill or cause very grievous harm to him.

Mr. Onyiso raised the issue of provocation and self-defence. On careful consideration, the evidence has not revealed any evidence of provocation or self defence. What would have provoked the appellant into getting a panga and striking the deceased? The appellant in his unsworn statement never raised the issue of provocation. Indeed, according to the appellant he merely slapped the deceased and for some unexplained reasons the deceased was cut by the panga! Clearly, the issue of provocation and self defence does not arise in this appeal.

A feeble attempt was made to suggest that the appellant was drunk when he committed the offence. **Section 13** of the Penal Code provides:-

“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 relating to insanity shall apply.”

Considering the foregoing can it be seriously argued that the defence of intoxication was available to the appellant? We certainly do not think this defence was available.

We have, we think, considered all the issues raised by Mr. Onyiso on behalf of the appellant and in the end have come to the conclusion that the appellant was convicted on very sound evidence. His conviction was inevitable. Accordingly we order that this appeal be and is hereby dismissed.

Dated and delivered at Kisumu this 1st day of December, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR