



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: TUNOI, O'KUBASU & GITHINJI, JJ.A.)**

CRIMINAL APPEAL 238 OF 2003

BETWEEN

RICHARD OGINGA OKWANY

PATRICK ALISI OKWANY APPELLANTS

AND

REPUBLIC RESPONDENT

*(Appeal from conviction and sentence of the High Court of Kenya at
Kisumu (Tanui J) dated 6th August, 2003*

in

H.C.CR.C. NO. 9 OF 2001)

JUDGMENT OF THE COURT

The appellants *Richard Oginga Okwany* and *Patrick Alisi Okwany* were jointly convicted of murder by the High Court of Kenya at Kisumu (Tanui J) on 6th June, 2003 and sentenced to death. According to the information filed by the Attorney General, the appellants on the 11th day of October, 2001 at Ngunya Sub-location in Siaya District of the Nyanza Province of Kenya jointly murdered *William Obonyo Opondo*, the deceased.

It is clear from the evidence on record that a land boundary dispute was the cause of the quarrel which culminated in the death of the deceased. Opondo Okwany, one of the three accused persons, who died in custody before trial, was a cousin to the appellants. His land abutted on that of the deceased and it appears that the boundary between their respective pieces of land was unsettled.

Veronica Adaya (PW6) is the wife of Alloys Wanjir (PW5) the Assistant Chief of Ngunya Sub-location in Central Ugenya, Siaya District. PW6 testified that she was at home in the morning of the fateful day when Opondo Okwany went to their home and demanded to see PW5 because the deceased had uprooted his maize crop. Opondo carried with him some maize stalks and a rungu which he had allegedly snatched from the deceased. He told PW6 that there had been a quarrel between him and the deceased and he wanted PW5 to be given the report. As PW5 was said not to be at home PW6 promised to give him the report when he returned.

PW5 returned home at 2.00 p.m. and on receipt of the report he left for the homes of the deceased and Opondo. But before he reached there he heard screams emanating from that direction to the effect that the appellants and Opondo had killed the deceased. On arrival at the scene he found the deceased lying down dead with a spear wound on the left side of the chest. Several houses on the compound of the appellant Oginga had been burnt down.

Josephine Obonyo (PW3) and Patricia Odongo (PW4) were the wives of the deceased. They had accompanied the deceased to the shamba on the fateful day. PW3 testified:

“In the morning we went together to the shamba. My husband was tilling a shamba which was next to the one I was tilling. Oginga came and asked him why was he tilling the land. My husband told him that the matter should be sorted out by elders. He went away and came back with a spear”.

PW4 testified:

“The deceased was my husband. On 11.10.2000 at 2 pm I had gone to plant maize with my son George. When I reached the land I found Oginga, Alisi and Opondo. They told me to plant but I should know that their mother will die. They told me they wanted to kill my husband and that if they did not kill him, they would kill George. They started chasing my son. Oginga was armed with spear. Opondo was with panga and Alisi with jembe.

George ran to the home of the village elder and I followed then as I screamed. My husband was walking towards village elder’s house. I saw Oginga hide in the toilet. When my husband reached there pushing his bicycle he was speared on the chest. The bicycle fell down and Lucas Odhiambo took the bicycle to go and report the matter to police”.

When put to his defence the appellant Oginga admitted that there was a confrontation between him and the deceased. The deceased chased him into a bush wherein he took cover and ambushed him. A struggle ensued and the deceased lost grip of the spear he (the deceased) was carrying and he fell on it. He told the trial court: ***“He (deceased) was then speared by the same weapon on the ribs”.***

The appellant Alisi denied having anything to do with the death of the deceased. From the evidence on record there can be no dispute whatsoever that the deceased died as a result of the injuries received by him pursuant to an altercation following a land boundary dispute between him and the two appellants and their deceased brother. The postmortem report conducted on the body of the deceased, William Obonyo Opondo, the cause of his death was severe cardiac injury and trauma occasioned by a sharp object. The injuries penetrated deep and perforated the chest wall. It is inconceivable from the nature of the injuries that they could be compatible with those inflicted by a self-fall on the spear. The injuries are indeed consonant with the spear having been thrown with great force. No other person apart from the appellants and their deceased brother took part in the altercation leading to the killing of the deceased. Moreover, there is evidence on record that the appellants were armed with lethal weapons, Oginga with a spear and Alisi with a panga.

The learned trial Judge held that it could be inferred from their actions that the appellants had an intention to act in concert so as to prevent the deceased and his family from encroaching on the disputed land. The learned Judge further concluded that the killing was not on the spur of the moment but had been planned and well executed. The appellants through their counsel Mr. Onsongo have advanced before us various grounds of appeal allegedly faulting the learned trial Judge on a variety of issues but mainly factual. We do not think that they are of any significance to merit our discussion nor will they have any bearing on the decision we will reach after our full consideration of the evidence.

In our view, the learned trial Judge does not appear to have appreciated that, as was forcibly argued by Mr. Onsongo before us, the facts of the case clearly raised an issue of provocation. The deceased, his wives and son had gone to cultivate on a disputed portion of land. It was resisted by the appellants and an attempt was made through Opondo Okwany to report the incident to the authorities. There was an uprooting of crops and there is evidence that during the incident the deceased was armed with a rungu. In view of these, there was an issue of provocation which ought to have been put to the assessors and considered by the learned Judge himself.

It is trite that it is not open to a Court of Appeal to speculate on what conclusion would have been reached by the assessors and the learned trial Judge had they considered the issue of provocation. See **Bullard v R** (1) [1957] 3 W.L.R. 656 at 659.

In the case of **Wafula s/o Waminira v R** [1957] E.A. 498, the predecessor of this Court held:

“The omission of the judge to direct himself and the assessors on the issue of provocation was a serious misdirection, and the conviction of murder could not stand”.

We have carefully considered the entire evidence tendered during trial. We think that the conviction for murder cannot be sustained. In view of the foregoing, we allow this appeal, quash the convictions of murder and set aside the sentences of death passed on the appellants. We find the appellants guilty of manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict them accordingly. Taking into account all the circumstances of the case, we sentence each appellant to ten (10) years imprisonment and order that the sentences should run from the date they were convicted of murder by the High Court i.e. on 6th June, 2003. It is so ordered.

Dated and delivered at Kisumu this 24th day of June, 2005.

P. K. TUNOI

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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