REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
CORAM: OMOLO, GITHINJI & DEVERELL, JJ.A.
CRIMINAL APPEAL 115 OF 2005
BETWEEN
CALEB OJWANDO OCHINDO ……. APPELLANT
AND
REPUBLIC ……. RESPONDENT
(Appeal from a conviction and sentence of the High Court of Kenya at Kakamega (Mr. Justice Waweru) dated 4th April, 2005
in
H.C.CR.C. NO. 10 OF 2001)
****

JUDGMENT OF THE COURT

Though this is a first appeal to the Court, the only point which was argued before us by Mr. Onsongo, learned counsel for the appellant was whether, in the circumstances of this case, the appellant, Caleb Ojwando Ochindo was guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code or whether he was guilty of the lesser offence of manslaughter under section 202 as read with section 205 of the Code. Following upon his trial before Waweru, J sitting with the aid of assessors, the appellant was convicted of the offence of murder on an information that stated in its particulars that on 14th June, 2000 at about 5 pm in Kisendo area, Muhaka sub-location, Kisa West location in Butere/Mumias District, Western Province, the appellant murdered Doris Amurono Ochindo. Doris, hereinafter the deceased, was the mother of the appellant.

The prosecution's case against the appellant, as narrated by John Ojwando Anganga (PW1) and Agnes Munala (PW3) was that on 14th June, 2000 the appellant and the deceased were in their maize shamba. PW3 was at the home of the deceased, which was close to the maize shamba. The time was 5 pm. PW3 heard the deceased saying in Luhya language:-

> "Wajameni Ugwayo ananiuwa" which meant
> "Ugwayo is killing me".

PW3 ran to where she thought the deceased was and on arriving she did not see the deceased. She stated in her evidence:-

> *"But I saw the accused in the maize plantation. He was standing. He was holding an axe. I stood away from him. He did not come to where I was. I was near the edge of the shamba, but inside the maize plantation. I then saw Doris lying down near the Accused. I did not speak to the Accused. He did not speak to me. I did not go to where Doris was, as I feared the Accused might beat me. I then left and ran to the home of another uncle called Jotham Ojwando. I then told him what I had*

seen."

Jotham Ojwando (PW1) takes up the story:-

> *"I recall the 14th June, 2000 at about 5 pm I was at my home in Kisendo village, resting. I then saw one young girl aged about 12 years approaching my house. She appeared to be fearful. I recognised her. She was called AGNES MUNALA. She was the grand daughter of the deceased.*
>
> *I called her to me. She came. I asked her what the matter was. She said in Luhya:-*
> *'Uncle they are killing my grand mother'*
> *I asked her who were killing her grand mother.*
> *She gave me the name of Caleb. She then led me to the maize field in the shamba of the deceased about the distance from here to the G. K. Prison, Kakamega (about 300 metres), from my home. From a place within the maize plants I heard some groaning noise. I traced the noise to a sack in the maize plantation. It appeared there was somebody in that sack. I approached the sack. I then saw the accused standing next to the sack. He was holding an axe. He tried to lift the sack. I then screamed. I was then about 3 metres away from him. The maize growing in that shamba was then about 4 ft tall. I am 5 foot (sic) 8 inches tall. The maize was planted in a scattered pattern, not in rows.*
>
> *After I screamed, the accused fled, leaving behind the axe and the sack. I chased after him while still screaming. I was armed with a walking stick. He outran me and disappeared ……."*

A summary of the evidence of these two witnesses was that PW3 heard the deceased screaming that the appellant was killing her, that PW3 ran to where the deceased was screaming from, saw her lying down and the appellant was standing over or by her holding an axe. The appellant did not explain anything even to PW3 who was a young girl and who could not have attacked him. PW3 then ran to the home of PW1 and reported to PW1 what she had seen. On running to the shamba, PW1 found when the deceased had been put in a sack though she was still groaning in pain. The appellant was by the sack and was holding an axe. When PW1 screamed for help, the appellant ran away leaving behind the axe and the body of the deceased still in the sack. Before running away, the appellant did not make any attempt to explain to PW1 what had happened.

Of course, neither PW1 nor PW3 actually saw the appellant hit the deceased with the axe. But the prosecution was asking the Judge and the assessors to draw the inference from the circumstances narrated by PW1 and PW3 that it was the appellant who had hit the deceased with an axe and then placed her body in the sack.

When asked to speak in his defence with regard to these circumstances the appellant told the learned trial Judge and the assessors in a sworn statement that the deceased called him to the shamba to split firewood for her, that he was using the axe to split the firewood and that in the process of doing so, the axe head came out of the

handle, flew away from him and hit the deceased. According to the appellant the whole incident was an unfortunate accident and he ran away from the scene because those who arrived at the scene were bent on lynching him without giving him the chance to explain what had happened. He ran to a police station and explained to them what ha happened.

It is on the basis of this explanation that Mr. Onsongo submitted before us that as the whole incident was an unfortunate accident all that the appellant can and should have been convicted of was manslaughter and cited to us the case of KINYUA V REPUBLIC [2003] KLR 294 where this Court held that:-

> ***"In view of what the appellant said in his charge and caution statement that he accidentally cut the deceased and as there was no evidence in rebuttal, the appellant ought to have been given the benefit of doubt."***

We agree with Mr. Onsongo that the appellant's sworn defence was that he killed the deceased accidentally when the axe head "flew" off the handle and hit the deceased at the back of the head, thus killing her. We are not quite certain as to how that could have happened, but unlike in KINYUA's case, the prosecution here led evidence through PW1 and PW3, which we have set out verbatim in this judgment. PW1 heard the deceased crying out that the appellant was killing her and when she went to the scene, she found the deceased lying down and the appellant was standing over her or by her and was holding an axe. It was not suggested to PW3 that when she arrived at the scene she found the appellant holding only the handle of the axe. Again the appellant never attempted to explain to PW3 what had happened and she did not ask PW3 to go and get help. PW3 was a young girl and could not have attacked the appellant all by herself. There was then no one else at the scene for the person who arrived at the scene after PW3 was PW1 who had been summoned by PW3.

The evidence of PW1 was that when he arrived at the scene the deceased had already been trussed in a sack and the appellant still holding the axe attempted to lift the sack. PW1 also screamed and it was the screams of PW1 which brought Apollo Onyango Wangukwa (PW2) to the scene of the incident. PW2 met PW1 and PW1 said he was chasing the appellant who had killed the deceased. PW2 proceeded to the place where the deceased was, saw a sack with something inside it and saw a lot of blood flowing from inside the sack. PW2 left the scene and went to call the police.

In the face of this evidence, we do not agree that the appellant accidentally killed the deceased. The evidence of PW1 and PW3 which was accepted by the learned trial Judge and the two remaining assessors showed that the deceased cried out that the appellant was killing her, that PW1 on going to the scene found the appellant standing over the fallen deceased holding an axe. PW3 summoned PW1 and by the time PW1 arrived at the scene the appellant had put the body of the deceased in a sack and was obviously attempting to dispose of it. He still had the axe. Although the police did not collect either the axe or the sack the evidence regarding the sack was too overwhelming to have been invented by the witnesses. Sgt Pius Sifuna Musanyi (PW5) explained that he did not collect the sack because witnesses had interfered with it but we do not see that that was a valid reason for not collecting it and producing it in court during the trial. But as we have said the evidence regarding the body of the deceased being placed inside a sack was overwhelming and we do not think that the villagers could have made it up. The appellant did not say why he had carried a sack with him if he had merely gone to help his mother split firewood. As to the axe the appellant himself agreed the deceased was killed as a result of the axe hitting her at the back of her head.

Like the learned trial Judge and the assessors, we are satisfied that for some unknown reason the appellant attacked his mother with an axe and killed her. Mr.

Onsongo submitted that no malice aforethought was proved. We disagree. In hitting his mother with an axe at the back of the head, the appellant, like any reasonable person, must be taken to have known that he would either do very grievous harm to her, or kill her in the process. The mother died because of the injury so inflicted and that constituted malice aforethought under section 206 (b) of the Penal Code. Though no reason was shown as to why the appellant killed his mother, we are satisfied the charge of murder was proved against him beyond any reasonable doubt and his appeal against conviction and sentence must fail. Mr. Musau, learned counsel for the Republic, supported the conviction and sentence. The appellant's appeal as to conviction and sentence fails and we order that the appeal be and is hereby dismissed.

Dated and delivered at Kisumu this 2nd day of December, 2005.

R.S.C. OMOLO
……
JUDGE OF APPEAL
E. M. GITHINJI
……
JUDGE OF APPEAL
W. S. DEVERELL
……..
JUDGE OF APPEAL
I certify that this is a true
copy of the original. **DEPUTY REGISTRAR**