



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: GICHERU, SHAH & KEIWUA J.J.A)**

**CRIMINAL APPEAL NO.49 OF 2002**

**BETWEEN**

**MAURICE OGWEL ONYANGO..... ISTAPPELLANT**

**PATRICE NYAPARA ONYANGO ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT OF THE COURT**

The appellants, Maurice Ogwel Onyango and Patrice Nyapara Onyango, were, on an information dated 28th October, 1999, charged with the offence of murder contrary to section 203 of the Penal Code as read with section 204 thereof. On 10th January, 1999 at about 6.00 p.m. Francis Ayot Ojwang (PW1) who is related to both the appellants was at his home when he heard noises from the road adjacent to his house. He saw the two appellants hitting Atieno Okombo (hereinafter referred as "the deceased") with sisal leaves. When Ojwang inquired into the cause of the beatings he was told to mind his own business as the appellants were allegedly chastising the deceased who had taken their brother's property, namely, a blanket and some household items, whilst the brother was in prison. His pleas to the appellants to stop the beating fell on deaf ears. He saw them both striking the deceased on various parts of her body. This witness learnt, next day, that the deceased had died. The body of the deceased was still lying, the next morning, by the road side but about a kilometre away from the scene of the beating. According to him the deceased had scratches on the chest and the leg and she had whip marks. The dress was torn and the body was almost naked. The deceased was the wife of his nephew. During cross-examination Ojwang stated that the first appellant was dragging the deceased along the ground whilst beating her. When other persons started coming to the place of beating the appellants disappeared into a nearby bush and started throwing stones at the crowd.

Sabaanos Ogeda (PW3) found the appellants with the deceased at about 8.00 p.m. on 10th January, 1999. He found them dragging the deceased on the ground who was pleading "why are you killing me painfully." He raised alarm. Others came. One of them had a lit lamp. When others came the appellants fled into the bush. He saw the deceased's body the next day where he first found her being beaten. According to Ogeda the deceased had whip-marks on her body and her dress was torn. In cross-examination this witness maintained his version of events.

The postmortem examination of the deceased's body was carried out by Dr. Johnstone Atura Wandieri (PW5). He found that the deceased had bruises on her forehead, there was swelling on the abdomen and bruises on the trunk. There were clots of blood in the abdomen and the abdomen aorta was ruptured. This witness put the cause of death as "cardiorespiratory arrest due to massive haemorrhage from a ruptured

abdominal aorta."

On the evidence before him the learned Judge (Wambilliyangah, J.) had no difficulty in concluding that the prosecution case was proved beyond reasonable doubt and convicted the appellants of the offence as charged. That conviction and sentence has provoked this appeal. Mr. Menezes who appeared for both the appellants argued, gallantly, that the learned Judge ought to have considered that the appellants, in killing the deceased, had no malice aforethought and that the facts disclosed the lesser offence of manslaughter. There can be no doubt that the appellants mercilessly beat up the deceased which caused her death. The cause of death as propounded by Dr. Wandieri shows that the beatings the deceased received were severe enough to rupture the abdominal aorta. That cannot be described as reasonable chastisement, if indeed the appellants were entitled to take such action, which they were not. The deceased, if she did so at all, was only taking her incarcerated husband's property and that factor gives no cause whatsoever to the appellants to beat up the deceased.

Malice afterthought is deemed to be established when evidence shows that the victim was grievously hurt. Section 206 of the Penal Code reads (where material): "206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) an intention to cause 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)\_\_\_\_. (d)\_\_\_\_." Mr. Menezes urged that the mere fact of beatings did not show malice aforethought. If it was a mere fact of beating without more Mr. Menezes' argument may stand. However in this particular case the beatings were severe and without regard to the consequences.

Reliance by Mr. Menezes on the case of *Bukenya and Others vs. Uganda* [1972] E.A. 549 is misplaced. Malice aforethought was defined differently by Ugandan Penal Code Section 186. The definition does not include causing grievous harm. It only talks of intention to kill and/or knowledge that the act or omission will probably cause the death of some person. All in all we see no merit in this appeal. It is dismissed.

**Dated and delivered at Kisumu this 21st day of June, 2002.**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**M. OLE KEIWUA**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR