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Court:	High Court at Homabay
Case Action:	Judgment
Judge:	David Amilcar Shikomera Majanja
Citation:	Republic v Benard Oliech Ooko [2014] eKLR
Advocates:	Mr Osoro instructed by Osoro and Company Advocates for the accused. Ms Ongeti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	-
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Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL CASE NO. 34 OF 2011**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BENARD OLIECH OOKO ..... ACCUSED**

**JUDGMENT**

1. This court was informed on 20<sup>th</sup> November 2012, that **BENARD OLIECH OOKO** (“the accused”) had with murdered **PATRICK LUMUMBA OYOO** (“the deceased”) on 11<sup>th</sup> November 2012 at Oyando Village, Kokoth Kataa Location of Rachuonyo North District within Homa Bay County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.

2. The accused pleaded guilty and the trial commenced before Maina J., but was completed under **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The prosecution case was that the accused, a nephew of the deceased, had a fight with the deceased and as a result he injured the deceased which resulted in his death. This fight occurred against the background of a dispute between the family of the accused and the deceased. The prosecution lined up 7 witnesses to prove its case and it was as follows.

3. On 5<sup>th</sup> November 2012, Peter Olong Omollo, PW 3, the Assistant Chief of Kokoth B Sub-location, testified that Tom Oliech Ooko (PW 4) called him and asked him to assist in a problem that had arisen between him and his brother, the deceased. PW 4 is also the father of the accused. PW 3 did not go but he sent a clan elder to go there and report back to him. The report he received from the elder was that the deceased was cutting trees in the compound and removing sheets from the roof of the kitchen.

4. On 7<sup>th</sup> November 2012, the Chief of Kokoth Location, Peter Ogwang’ Juma, PW 2, recalled that that PW 4 came to see him in the morning between 8 am and 10 am. He came to report that his brother, the deceased had destroyed trees at the home. He sent for deceased to come so that he could sort out the dispute but the deceased did not come. He told PW 4 to report the matter to the Police. He testified that

PW 4 came back and told him that he had made a report to the police and that he had been told to come back with a witness. On the next day, 8<sup>th</sup> November 2012, he was informed that the deceased had been beaten. He instructed his assistant chief to go and find out what happened and make a report to him. He reported the matter to his superior's including the District Officer ("DO").

5. On 8<sup>th</sup> November 2012, PW 3 testified that he received a call from the acting DO Chief Dan Ojjo, who told him that some people had assaulted the deceased and that he should go to the scene and report to him. He went to the deceased's home where he found the deceased and his second wife, Margaret Agola. He found the deceased lying on the floor in his house in serious pain but alive. The deceased told him that he had been assaulted by his brother's son, Ken Oliech and Benard Oliech. Both his hands were broken and he had an injury on his head. He advised Tom to take him to hospital and they took him to Homa Bay Hospital using a motor bike.

6. PW 4, Tom Oluoch Auko, a teacher and the father of the accused and the deceased's elder brother, testified that he recalled that on 5<sup>th</sup> November 2012 he received information that the deceased was damaging the roof of his mother's kitchen. He reported the matter to PW 2. On 9<sup>th</sup> November 2012 he passed by his mother's house to see how she was doing before going to school. He went to see the deceased, who was a divorcee and who used to live alone within their mother's compound. He found that he was sick but he did not see any injuries. He nevertheless organized for him to be taken to hospital by calling the accused and directing him to take the deceased to hospital. He visited the deceased while he was in hospital and on 11<sup>th</sup> November 2012, when the accused came to change and collect money for medication, the deceased passed away in hospital.

7. PW 7, Kennedy Otieno Oliech, the accused brother recalled that a week prior to the death of the deceased, they were digging for Murrum at the deceased's home which they needed to build a house for his grandfather and the deceased came and told them to stop digging. He said he would talk to his father and they immediately left. He recalled that a few days before his uncle's death, PW 4 called him to go to the deceased's home where PW 4 and the deceased were present. He testified that the deceased was sick. They agreed that the deceased should be taken to hospital. The accused came and they agreed that he should take the deceased to hospital. He testified that the deceased was talking and that he stated that he had a stomach ache. He denied that the deceased and the accused fought or that there was a problem of inheritance of land within the family.

8. PW 6, Cecilia Migaye Muga, was the step sister to the deceased, testified that when the deceased

died he was buried on his parcel of land. She denied that she saw the deceased while he was in hospital.

9. PW 8, Dr Ayoma Ojwang, the Deputy Director of Medical Services in Homa Bay County and at the material time medical superintendent at Homa Bay District Hospital carried out the autopsy on the body of the deceased on 21<sup>st</sup> November 2012. It was identified by PW 1, Martin Agola Ogada, a cousin to the deceased. He observed that the deceased had multiple bruises all over the body but they were concentrated on the head and right upper limb. The ulna and radius bones were fractured at the mid shaft. When he opened the body, the major findings were in the abdomen and skull. In the abdomen, there was intestinal obstruction in the form of ileo-ileal knotting at the terminal end which is the knotting of the small intestines. There was no bleeding in the abdominal cavity.

10. Although there was no skull fracture, there was a lot of bleeding into the brain and hemorrhage on the skull. As a result, he formed the opinion that the cause of death was intestinal obstruction and head injury. He testified that the injuries on the body would have been caused by a blunt object.

11. The investigating officer, PW 5, PC Hanafi Hamza, a CID Officer was at the material time based at Rachuonyo CID recalled the he was instructed on 19<sup>th</sup> November 2012 to investigate the case. At the time he was shown the accused and PW 7 from whom he recorded statements. He decided to charge the accused with murder. He also took statements from the other witnesses and arranged for the postmortem to be conducted on 21<sup>st</sup> November 2012.

12. After the close of the prosecution case, the accused was put on his defence and he elected to make a sworn statement. He stated that he comes from Onyando Village, Karachuonyo. His work was cutting timber with a power saw. He testified that on 8<sup>th</sup> November 2012, he worked from 8.00 am until 5.30 pm. On 12<sup>th</sup> November 2012, he went to my place of work. The following morning his father, PW 4, called him and told to go where come to the deceased's home. When he went there he found the deceased sick. PW 4 asked me to take the deceased to the hospital. He went home, changed his clothes and went back to the deceased home. He took the motorbike which PW 4 had and together with his father they proceeded to Homa Bay District Hospital. The deceased was admitted. He remained behind taking care of the deceased. The accused further testified that the doctor asked me whether the deceased had been using HIV drugs before as he was suffering from HIV. Since he did not have the deceased's card, he decided to go home and collect it as the doctor told him that he could not start treatment without the card. As he could not reach his family members by phone to bring the card, he

decided to go home. When he reached home, his father had gone to school so he proceeded there so that he could be given money to go back to hospital. As he did not get the card early enough on that day, he slept home that night. On the following morning before he could go to hospital, he received a phone call that his uncle had died.

13. The accused stated that he was later arrested and charged with murder of Patrick Lumumba Ooko. He denied that he murdered the deceased as it is him who took the deceased to Hospital and that he never fought with the deceased.

14. After the close of the prosecution case, Mr Osoro, counsel for the accused, submitted that the prosecution failed to prove the case against the accused as no one saw the accused assault or kill the deceased and the fact that the accused is the one who took care of the deceased in hospital negated any evidence of bad blood in the family.

15. Ms Ongeti submitted that the evidence and the accused's on testimony placed the accused at the scene of the incident. That the head injuries which resulted in death were caused by a blunt object and evidence of the fight points to the accused as the person who caused the deceased's death.

16. In order to prove the offence of murder under the provisions of **section 203** and **204** of the **Penal Code**, the prosecution must prove beyond reasonable doubt the following ingredients;

- a. Proof of the fact and the cause of death of the deceased.
- b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission which is the *actus reus* of the offence.
- c. Proof that the unlawful act or omission was committed with malice aforethought as defined in **section 206** of the **Penal Code**.

17. The fact that the deceased died is not in dispute. The prosecution witnesses and the accused confirm that the deceased died in hospital after while undergoing treatment after he was admitted at the Homa Bay District Hospital on 8<sup>th</sup> November 2012. His body was identified by PW 1 before the post-mortem was performed.

18. According to the PW 8, the cause of death of the deceased was two-fold; intestinal obstruction and a head injury. What is clear is that the external injuries, that is the multiple bruises over the upper part of the body and the head and the fracture of the ulna and radius of right arm must have been inflicted by a person using a blunt injury. These are the injuries which PW 3 noticed when he visited the deceased at his home on 8<sup>th</sup> November 2012. I therefore find and hold that the injuries inflicted by on the deceased head caused his death.

19. The next is issue is who caused the deceased's death. The evidence on this issue is basically circumstantial. There is evidence that there was a family dispute within the family regarding the conduct of the deceased. PW 2 and PW 3 testified that PW 4 he made about complaints about the deceased to them. When PW 3 was sent by the DO to investigate the assault reported to him, he found the deceased in house on 8<sup>th</sup> November 2012. PW 3 testified that the deceased told him that he had been assaulted by the sons of PW 4, the accused and PW 7. He observed that he had head injuries and his hands were broken. He advised PW 4 to take him to hospital.

20. The statement implicating the accused as the person who assaulted the deceased is admissible in accordance with **section 33(a)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which provides as follows: -

*33. Statements, written or oral, of admissible facts made by a person who is dead, .....are themselves admissible in the following cases –*

*a. when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;*

21. The Court of Appeal in **Choge v Republic [1985] KLR 1**, citing the case of **Pius Jasanga s/o Akumu v R [1954] 21 EACA 331** dealt extensively with the issue of admissibility of dying declaration under **section 33(a)** of the **Evidence Act** and it stated as follows;

*In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.*

*In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian Evidence Act. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (**R v Muyovya bin Msuma [1939] 6 EACA 128**. See also **R v Premanda [1925] 52 Cal 987**).*

*The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7<sup>th</sup> Edition of Field on Evidence has repeatedly been cited with approval:*

*The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed ... The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (**Ramazani bin Mirandu [1934] 1 EACA 107; R v Okulu s/o Eloku [1938] 5 EACA 39; R v Muyovya bin Msuma (supra)**). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).*

*It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (**R v Eligu s/o Odel and another [1943] 10 EACA 9; Re Guruswani [1940] Mad 158**, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in **R v Eligu s/o Odel and Epongu s/o Ewunyu [1943] 10 EACA 90**). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (**R v Said Abdulla [1945] 12 EACA 67; R v Mgundulwa s/o Jalo [1946] 13 EACA 169, 171**).*

22. The deceased made this statement to PW 3 when he recognized him. When he was cross-examined, PW 3 maintained that the deceased told him that he was assaulted by PW 4's sons. This statement falls within the definition of a dying declaration under **section 33(a)** of the **Evidence Act**. The only issue is what weight I should attach to it.

23. PW 4 testified that he did not notice any injuries on the deceased. He maintained that his brother was sick. When questioned by the counsel for the prosecution about the state of the deceased on the morning he took him to hospital, he stated that he could not recall seeing the injuries which he had mentioned in his statement to the police. PW 6 also denied that she saw the deceased while he was in hospital although in her statement to the police which she recanted, she recorded that she had seen the deceased. PW 7, the accused brother, also recanted his statement to the police and was declared a hostile witness. His evidence was that the deceased was sick and that there was no problem between the accused and the deceased.

24. The testimonies of PW 4, PW 6 and PW 7 are a complete denial of the injuries inflicted on and sustained by the deceased. The testimony of PW 3 as regards the injuries is however corroborated and confirmed by the medical evidence given PW 8. I would hasten to add that the kind of injuries sustained by the deceased on the head and the broken right arm as so obvious that the testimony of PW 4 and PW 7 on this issue cannot be believed. There was no reason for PW 3 to lie to the court or implicate the accused and his brother as he was an independent witness without any relationship with the deceased and his family apart from the fact that he was the chief of the area. He is the kind of person whom the deceased would tell what happened to him. I therefore find and hold that statement made by the deceased made implicating the accused is credible.

25. As a result of my finding above, I also reject that accused's testimony that he did not assault the deceased. PW 2 and PW 3 confirmed that there was a dispute in the family which was reported by PW 4. I hold that the intention of PW 4, PW 6 and PW 7 was to protect and cover-up for the accused who committed the felonious act. In my view, the decision by PW 4 instructing the accused to take the deceased to hospital was contrived to cover up the assault which was inflicted on the deceased by the accused. It is incredible that PW 4, PW 7 and the accused would be so concerned about the deceased sickness yet they did not notice such obvious injuries that the deceased has sustained on his head and his broken arm when he was taken to hospital.

26. In ***Ndurya v R* [2008] KLR 135**, the Court of Appeal held that before convicting someone on the basis of circumstantial evidence, the court has to be sure there are no other co-existing circumstances which would weaken or destroy the inference of guilt (see also ***Sawe v Republic* [2003] KLR 364** and ***R v Kipkering arap Koske and Another* 16 EACA 135**). Despite the statement made by deceased to the PW 3 that he was assaulted by the accused and PW 7, only one of the brothers was charged with murder. PW 5 testified that he took statements from the both the accused and his brother before he decided to charge the accused. The statement PW 7 subsequently recanted in his testimony is that his brother is the one who fought with the deceased hence he was not charged. The failure to charge the

accused's brother's PW 7 was therefore clearly explained. All the evidence points to the accused as the person who committed the felonious act.

27. Finally, it is clear that the multiple bruises concentrated on the head and right upper limb demonstrate malice aforethought. These injuries inflicted by a blunt object which resulted in a fracture and bleeding on the head could only have been intended to cause the death of or do grievous harm to the deceased within the meaning of **section 206(a)** of the **Penal Code**. It does not matter there that the deceased could have died from intestinal knotting as opined by PW 8. In my view, it is sufficient that one of the causes of death was proved to have been caused by the accused and I have outline above, the accused is the inflicted the blow that caused death.

28. I also find that that given the position of the fracture on the mid-shaft of the right arm is evidence that it is likely that the deceased was trying to block a blow to his head which led to his arm being fractured. Ultimately the blow landed on his dead causing him to die.

29. On the basis of the entire evidence, I therefore find **BERNARD OLIECH OOKO** guilty of the murder of **PATRICK LUMUMBA OOKO** and I accordingly convict him.

**DATED and DELIVERED at HOMA BAY this 18<sup>th</sup> day of December 2014**

**D.S. MAJANJA**

**JUDGE**

Mr Osoro instructed by Osoro and Company Advocates for the accused.

Ms Ongeti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.



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