



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL CASE NO. 3 OF 2019[MURDER]**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DANIEL OMONDI OLOO.....ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person herein **DANIEL OMONDI OLOO** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of Information dated 25<sup>th</sup> March 2019 are that on the on 20.7.2018 at Wagwer Village, in Mulunga Sub location, Gem Sub county within Siaya County, jointly with others not before court, he murdered one **GEORGE OTIENO ONYANGO**. The accused pleaded not guilty to the charge and on the 3.6.2019 he was granted bond of Kshs. 500,000 plus one surety of a similar amount or in the alternative a cash bail of Kshs. 100,000.

2. The prosecution called nine witnesses in support of their case and on being placed on his defence, the accused person gave unsworn testimony and called no witness.

**The Prosecution's Case.**

3. **Daniel Otieno Achol** testified as PW1 and stated that he was a photographer from Siremba Sub-Location, North West Location. He testified that that he knew the deceased as they had become acquaintances in the course of his duties. He testified that on 20.7.2018 at about 2 pm he was coming from Siremba going towards Ng'iya and that when he reached the junction of Malonga and Wagwer Primary School, he met three people, two women and a man. He greeted them and **the man told him** that there was a person being assaulted nearby prompting him to cycle harder till he reached a place where he found a man lying on the ground, beaten up. PW1 stated that he saw two people standing beside the assaulted man one of whom was armed with a rungu and a panga. That he identified the person lying down as **George Otieno Onyango** while one of those men standing was **Daniel Omondi Oloo** whom he was familiar with having gone to school with.

4. According to PW1, the accused, Daniel Omondi told him that the person lying on the ground had stolen a cow and that Daniel Omondi was armed with a panga and a rungu. He further testified that he inquired from the accused as to how someone could have stolen a cow in broad daylight after which he called the Assistant Chief on phone and subsequently recorded his statement with the Police. PW1 identified the accused Daniel Omondi before the Court.

5. In cross-examination PW1 stated that he did not see the deceased being assaulted.

6. **Daniel Ooko Onyango** testified as PW2, and stated that he worked as a matatu driver on the Kisumu-Siaya route. He stated that the deceased was his brother and that on the 20.7.2018 at about 3 p.m. he was driving from Kisumu to Siaya when he was called by Peter his other brother and informed that the deceased had been killed. He drove to Siaya then went to the scene near Wagwer Primary School, where he found the deceased lying on the ground and upon inquiring from the people around the scene, he was informed that the accused had beaten the deceased. PW2 testified that he knew the accused as they schooled together and that he found the accused carrying a panga and a rungu. PW2 also stated that the accused had put on gumboots which had blood stains. He stated that police officers arrived and took his brother's body in their vehicle but on reaching the tarmac at Wagwer towards Siaya Mortuary, the Assistant Chief whilst on a motor bicycle told the accused to alight from the police vehicle. He further testified that the deceased's body was taken to the mortuary and that he later went to the morgue and identified the body of the deceased. He testified that he later recorded his statement at Yala Police Station. PW2 identified the Rungu that the accused allegedly had at the scene. He also identified the accused in the dock.

7. In cross-examination, PW2 stated that he recorded his statement with the Police and gave them his phone number. He stated that he did not

see his brother being beaten when he went to the scene but that he found many people some of whom he knew. He testified that his brother Peter Onyango informed him that it was the accused who assaulted the deceased. He also testified that he was told that the deceased was killed because he had attempted to steal the cow belonging to the accused.

**8. John Alindi Ochwodho** testified as PW3 and stated that he was an uncle to the deceased. He recalled that on the 20.7.2018 at around 3 p.m. he received a call from one Daniel Otieno Ochol who informed him that the deceased who was his nephew had been killed at Wagwer. PW3 then went to the scene and found many people gathered around the body of the deceased and when he inquired from them as to what had happened he was directed to the accused Daniel Omondi Oloo who stood nearby a rungu, a panga, a dog and his young son.

9. PW3 further testified that upon inquiry, the accused told him that he had killed a thief who stole his cow and upon inquiry as to why he did not take legal action, the accused told him that he had already killed him. PW3 identified the accused in court.

10. In cross-examination, PW3 stated that he did not witness the deceased being killed and that it was Dola who directed him to the accused who informed him that he (accused) had killed the deceased for stealing his (PW3's) cow.

**11. PW4 Barack Otieno Opondo**, testified that he was the Chief of North West Gem Location. He recalled that on the 20.7.2018 at about 3 p.m. he was in his office meeting Assistant Chiefs when he received a call from Daniel Otieno Ochol that in Malunga Central Sub-Location a suspected cattle thief had been beaten to death.

12. He went to the scene and on arrival he found the naked body of a male person lying on the ground, with bruises on the hands and blood stains and further that blood was on the chest and back side of the deceased. Together with the Assistant Chief, they called the Police from Wagai Administration Police Camp and Akala Police Station who went and picked the body of the deceased. He stated that while at the scene, a group of people had gathered around the deceased and when he inquired on what had happened he was informed that a young boy O went to graze their cattle and found one missing then he raised an alarm and people responded, killing the deceased. PW4 stated that the young boy was a son to the accused Omondi Oloo. He further stated that Omondi Oloo came to the scene after he (PW4) had arrived and though he knew him he did not talk to him as there was a lot of tension. PW4 was not crossexamined.

**13. PW5 Collins Omondi Onyango** the Assistant Chief of Malunga Central South Location, testified that on the 20.7.2018 he had gone to his colleague's office and at 3 p.m. or thereabouts he received information from his village elder Madam Eunice to the effect that someone had been beaten to death prompting him to visit the scene where he found a body of a man lying half naked and a cow tied next to the body which was lying on its back with marks of beatings on the chest and further that he was told the cow belonged to Daniel Omondi who was at the scene. He stated that the accused claimed that his child told him that the cow was missing and that the deceased was found with the stolen cow and that the public beat the deceased. He identified the accused in the dock as Omondi Oloo.

**14. PW6 No. 242150 APC Onesmus Chengwony Ruto** attached to Yala AP Camp testified that in 2018 he was attached to Wagwer AP Camp. He testified that on the 20.7.2018 he was in the Station with his colleagues when the area Assistant Chief called and told him that a person had been killed near Wagwer Primary School. APC Ruto accompanied by Lilly Melly left on a motor cycle to the scene where they found a crowd after which they secured the scene and called the OCS Akala Police Station who went and took the body of the deceased who had been beaten badly and lying on the ground. He further testified that he tried to establish the cause of the death and **was told that the deceased was killed by a mob after stealing a cow.** He later recorded his statement at Yala Police Station.

**15. PW7 Dr. Biko Opidi** Medical Superintendent Siaya County Referral Hospital testified that he carried out the postmortem on the deceased's body and subsequently prepared a report dated 26.7.2018. He testified that the body was identified by Daniel Ooko Ochogo and Maurice Ouma Onyango at 6 p.m. on general observations on the deceased's body, there was no clothing, it was a male of African race between the ages of 30 – 40 in good nutritional status and was well built. Externally, the body had multiple bruises notably; on the right side of the head and neck was 6cm by 4 cm bruise, on the left chest there was a bruise 6 cm. by 6 cm, on the right chest he had 4 cm by 4 cm, on the chest and other multiple bruises and friction burns on the upper limb and back. He testified that the body appeared to have been pulled on a rough ground surface.

16. In the respiratory system, the doctor stated that both lungs were collapsed, that there was haemothorax i.e. blood and air in the space between the lungs and ribs and that there were rib fractures on the 5<sup>th</sup> and 6<sup>th</sup> ribs secondary to blunt trauma. The doctor further found that there was laceration on the superior surface of the liver. He further testified that the deceased suffered occipito skull fracture and scalp injuries on layers of the head and that the deceased suffered an epidural haematoma on the back to the right side of the brain.

17. As a result of his examination, he opined that the cause of death was severe head injury with Respiratory collapse as a result of blunt trauma. He produced the postmortem report dated 26.7.2018 as P.Exhibit 1. There was no cross-examination by the defence counsel.

**18. PW8 CPL Florence Odak No. 229889** based at Yala CIPU HQ at D.Os. Office testified that on the 20.7.2018 at about 3.15 p.m. she was at Sentry when she was called by the Chief of Siremba Location who told her that a person had been beaten by the mob and that there was tension. She left for the scene with two of her colleagues and at for Wagwer Primary School they found the body of a deceased, a cow and the family of the deceased and owner of the cow. She testified that they called the OCS Akala Police Station who came and took away the body whereas the cow was escorted to the Police station but that it was released after 3 days. She further testified that the accused was arrested on instructions of the OCS Akala Police Station. She identified the alleged owner of the cow as Daniel Omondi Oloo, the accused person in the dock. The witness was not cross examined.

**19. PW9 No. 232549 Inspector John Njuguna Warui**, the investigations officer testified that on the 21.8.2019 he recorded the statement of Eunice Achieng on request by IP. Tarus. He also recorded statements of other Officers namely, the area Chief and Assistant Chief. IP Warui testified that the original post-mortem report of the deceased had been misplaced but a relative of the deceased gave him a copy which he took to Siaya hospital for certification by the maker. He further testified that he received a rungu and a club from CPL Phillis and produced it as P. Ex. 2. IP Wani testified that he compiled the file and took it to the Office of Director of Public Prosecutions. He identified the accused in court and stated that he arrested and charged the accused with murder and added that it took time to arrest the accused and charge him

because witnesses turned up after sometime. He stated that the file had been closed.

20. In cross-examination by Mr. Ooro advocate for the accused person, IP Warui testified that he took over investigations from Akala Police Station and recorded the statements almost one year after the incident. He stated that the case was initially mob injustice so it was never followed and that witnesses were brought by the family of the deceased.

21. IP Warui stated that the DPP recommended that the accused be charged and that it was not true that the accused was arrested as the owner of the cow. He further stated that he was told of an alleged stolen cow.

### **Defence Case**

22. Placed on his defence after close of the prosecution's case, the accused **Daniel Omondi Oloo** gave an unsworn statement and stated that he was a carpenter and peasant farmer who resided in West Ward Gem, Malunga sub location, Siaya County. The accused stated that he was aware that he was facing a charge of Murder but denied murdering the deceased George Otieno Onyango. He further stated that on the 20/7/2018 he was at his home after leaving his shamba at 2 pm.

23. Concerning this case, the accused as led by his counsel Mr. Ooro recalled that he took his cows to the field then left them to graze after tying them as he proceeded to his shamba. That when he sent his son to go and water the cows, he heard screams from where his son had gone to water the cows and so he went to check on him but met his son returning home. He stated that his son told him that when he went to water the cows, he met someone who had untied one cow and he (the son ) screamed and people gathered and beat him to death. The accused testified that he went to the scene and confirmed that the deceased had died.

24. The accused denied telling PW3 that he had killed the deceased and stated that what PW3 told the court were lies. He further denied being one of the people who attacked and killed the deceased. He further testified that the police arrived at the scene and talked to people at the scene and that further he was not arrested on the fateful day but in March 2019. The accused reiterated that he never killed the deceased and insisted that the witnesses lied to the court.

### **Submissions**

25. Mr Ooro counsel for the accused person filed brief submissions basically contending that there was no evidence linking the accused person with the offence charged and that the prosecution merely suspected the accused because he was the owner whose cow was stolen by the deceased. Counsel submitted that the evidence available was that the deceased was killed by a mob after the accused person's son raised an alarm on meeting the deceased leaving with the cow that had been left grazing. Mr Ooro urged the court to acquit the accused person.

26. There was no submission by the prosecution counsel.

### **Analysis**

27. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code**, the prosecution is required to prove beyond reasonable doubt the following elements of the offence:

**a. The fact and the cause of death of the deceased.**

**b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - "actus reus."**

**c. That the said unlawful act of omission or commission was committed with malice aforethought - "mens rea."**

28. The fact and the cause of death of the deceased was proved beyond reasonable doubt by the evidence of **PW1,2,3,4,5,6**, and **8** all who testified that they saw the deceased's body lying on the ground. The cause of death was confirmed through the evidence of PW7 Dr Biko Opidi, who carried out the post-mortem on the deceased's body and concluded that the cause of death was severe head injury with respiratory collapse as a result of blunt trauma.

29. The only issue in dispute is whether the said death was caused by unlawful act or omission and whether it was the accused person herein who committed the said unlawful act or omission and with malice aforethought. There was no eye witness called by the prosecution to the alleged murder of the deceased and the only link between the accused and the offence is that he was allegedly the person seen at the place where the deceased lay, holding a panga and a rungu-club and alleging that the deceased had stolen his cow. It follows that the prosecution case is founded on circumstantial evidence.

30. For the prosecution to sustain a conviction on circumstantial evidence, the Court of Appeal in the case of **Sawe v Republic [2003] eKLR** had this to say:

**"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shifts to the party accused."**

31. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion, however strong, to take the place of legal proof for, sometimes, unconsciously, it may happen to be a short step between moral certainty and legal proof.

32. From the above decision in **Sawe v Republic** which is the locus classicus on circumstantial evidence, the court has to judge the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person and if the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the accused the conviction would be justified.

33. In the instant case, none of the prosecution witnesses witnessed the attack on the deceased. PW1 testified that when he arrived at the scene he found the deceased lying on the ground with the accused standing over him whilst armed with a panga and a rungu. PW1 further testified that the accused informed him that the deceased had stolen his cow. PW2 on his part testified that when he went to the scene he found the deceased's body lying on the ground and upon inquiry he was informed that the accused had beaten the deceased. He never told the court the identity of the person who told him that the deceased had been beaten by the accused and albeit he stated that he saw the accused person's gum boots stained with blood, those boots were never produced as exhibits or taken to the Government Chemist for forensic examination. PW3, the deceased's uncle testified that when he confronted the accused at the scene, the accused told him that he had beaten the deceased for stealing his cow. This alleged confession by the accused is inadmissible as it was not taken or given in accordance with the law.

34. The investigators had an opportunity of interviewing the son to the accused person whom the accused claimed told him that the deceased was found with the missing cow but they did not. This person was a competent and compellable witness but he was never called. That leaves a gap in the prosecution case, which gap was never filled by any other evidence.

35. PW4 a Chief from North West Gem who arrived at the scene after the incident had occurred testified that he got information from the crowd at the scene that the deceased was beaten for stealing a cow. He further testified that the accused arrived at the scene after him. PW5 the area Assistant Chief similarly testified that upon inquiring from the crowd he was informed that the deceased was beaten for stealing a cow. APC Ruto and CPL Odak both testified that they inquired from the crowd at the scene and were informed that the deceased was killed by a mob.

36. In his defence, the accused testified that his son informed him that the deceased had been beaten by a mob who suspected him of stealing a cow after the accused's son raised an alarm. He further testified that he went to the scene and saw the deceased's body lying on the ground.

37. Weighing all the above evidence on record from the prosecution witnesses and the accused person, it is my humble view that the deceased was attacked by a mob after the accused's son raised an alarm upon seeing the deceased leaving with the cow belonging to the accused. None of the prosecution witnesses witnessed the incident. I find the evidence of PW1, 2 and 3 not convincing. Their evidence was not corroborated by the other prosecution witnesses. The evidence of Dr. Biko Apidi as to the cause of death in my considered opinion point to a death as a result of an attack by a mob.

38. The concept of mob justice is nothing more than a group of people taking the law into their own hands. There is nothing justice in the unlawful acts committed by a mob. The death of the deceased in my humble view was due to an unlawful act of the mob who responded to the alarm raised by the accused [person's son upon finding the deceased leaving with the cow belonging to the accused person.

39. There is no principle of justice by the majority. The fact that the mob did not premeditate to commit the offence cannot be a good defence. Anyone who is part of the mob is duty bound to arrest the suspect and take him to court.

40. In the instant case, none of the prosecution witnesses place the accused as part of the mob who were found to have unlawfully killed the deceased. Further to this the prosecution, in my considered opinion, failed to adduce evidence that the rungu produced as exhibit 2 was used to assault the deceased. The post-mortem report does not show that the deceased sustained any sharp injuries and therefore the possibility of use of a panga was nil.

41. The prosecution case shows that other than the accused person, there were other persons who equally had the opportunity to unlawfully kill the deceased, and who were not exonerated from suspicion of having committed the offence by the prosecution, so as to leave the evidence pointing unerringly towards guilt of the accused. As such the evidence against the accused only raises grave suspicion against him, and as suspicion, however strong, cannot sustain a conviction in the absence of other evidence linking the accused person to the commission of the offence, (see **Neema Mwandoro Ndurya v Republic [2008] eKLR,** ) I find that the available circumstantial evidence adduced against the accused person falls short of establishing the offence of murder against the accused person beyond reasonable doubt. Accordingly, ***I find the accused person Daniel Omondi Oloo NOT GUILTY of the offence of Murder as charged and discharge him from the Information dated 25<sup>th</sup> March 2019.***

42. Therefore, unless otherwise lawfully held, the accused person **Daniel Omondi Oloo** is hereby set at liberty forthwith.

43. The sureties if any are hereby discharged and the security deposited with the court if any to be released to its owner upon identification and proof.

Orders accordingly.

**Dated, Delivered and Signed at Siaya this 29<sup>th</sup> Day of July, 2020**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Okachi SPPC

Mr Ooro Advocate for the accused

Accused on bond present

CA: Brenda and Modestar