



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL CASE NO. 7 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JACK OCHUO OTIATO.....ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person herein **JACK OCHUO OTIATO** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the Information dated 12<sup>th</sup> March 2018 are that on the on the 18<sup>th</sup> day of February, 2018 at Sinaga Village, Marenya Sub Location, Gem Sub County within Siaya County he unlawfully murdered one **Isaac Andrew Odhiambo**. The accused took plea on 30<sup>th</sup> July 2018 and pleaded not guilty to the Information. The prosecution called six witnesses to establish a prima facie case against the accused person. Placed on his defence, the accused gave sworn testimony and denied the offence.

**The Prosecution's Case**

2. **PW1 Shem Atieno Maganda** the deceased's father testified that the deceased was his last born son. He recalled that on the night of 17/2/2018 towards 18/2/2018 while he was sleeping in his house he heard sounds of motor bicycles and when he got out, he saw 2 people going to his deceased's son's house. PW1 got out with a torch and as he was getting into the deceased's house, he met 2 people whom he did not know at the door, leaving. He testified that there was a lit lantern in the deceased's house. Upon entering into the deceased's house, he heard him crying so he moved into the deceased's bedroom where he saw blood coming from him and upon inquiring as to what had befallen him, the deceased told his father that he had been beaten by some people known to him. PW1 testified that the deceased mentioned 2 of his attackers however he couldn't remember the names as it had been a long time since the deceased's revelation. [court observed that the witness was aged]

3. He further stated that the deceased had a wife who was away in Siaya on the day of the attack while he stayed in the homestead with three wives. However on that night he slept in his house alone, in his separate room and he did not speak to the deceased's mother. PW1 further testified that when he went to check on the deceased in the morning, he found his head dressed in a bandage and upon inquiry the deceased told him that his friends Opha and another one had taken him to hospital for treatment. He stated that at around 10am, Opha returned and escorted the deceased to the hospital for treatment. It was PW1's testimony that the deceased was crying saying that even if he died, he had been beaten by the people. PW1 who is an aged man testified that he could not recall the names of his son's attackers neither could he tell who they were.

4. In cross-examination PW1 stated that he had never seen the three people who attacked the deceased as the deceased had many friends who used to visit him. He further testified that Opha did not tell him the time he took the deceased to hospital. He also testified that when he went to see the deceased for the first time, the deceased did not have a bandage on his head and that Opha was alone when he came.

5. **PW2 Tom Okwaro Atieno** a brother to the deceased and a Medical Laboratory Technician at Siaya County Referral Hospital testified that on the 1/3/2018 he identified the body of the deceased Isaac Odhiambo and witnessed the deceased's postmortem.

6. **PW3, Charles Mark Okose** testified that on the 17/12/2017 at 7.00 pm whilst in Lugari in Kakamega County, he received a phone call from a friend Dan Onoka who told him that the deceased, his best friend, had been attacked and assaulted on 16/12/2017 and now the deceased could not talk.

7. PW3 testified that he telephoned the deceased who could not speak properly and was stammering so he spoke to the deceased's wife inquiring into the nature of injuries suffered by the deceased at the time. PW3 testified that he then spoke to the deceased and inquired from him on who had attacked him and that the deceased responded by naming his attackers, 'Nyati', the nickname of the accused herein Jack Ochoo, Chere and Abwao.

8. PW3 testified that he knew Nyati whom he described as a member of a gang called '32 brothers.' He further testified that on the 18/12/2017 when he went to see the deceased he escorted the deceased to hospital at Sagam but they were referred to "Russia" [Jaramogi Oginga Oginga Teaching and Referral] Hospital Kisumu on 19/12/2017 where a CT scan was done on the deceased's head and it was found that the deceased had a depressed skull as a result of a hit on the head which affected his speech.
9. PW3 further testified that he then took the deceased to Sinaga Police Post where the deceased recorded his statement and was subsequently issued with a P3 form which was taken to Yala Hospital. He testified that on the 25/12/2017 after a number of missed opportunities, he in the company of the deceased and an informer managed to locate "Nyati" at Sagam Primary School where they confronted him and subsequently led him to Sinaga Police Station.
10. In cross-examination PW3 stated that the deceased died on 18/2/2018. He further stated that the deceased lived one kilometer from Sagam Primary School and that the deceased joined PW3 at the school after he left hospital on the 25/12/2018.
11. PW3 further stated that the deceased mentioned names of the people who assaulted him with 'Nyati' being one of them. He stated that he was informed that Chere lived in Nairobi and Abwao also escaped and that although the accused also escaped, they traced him as he kept hiding from the police who were looking for him. PW3 also stated that the deceased was injured badly and had revealed to him that he was assaulted at a place where there was a funeral by assailants who used stones. He testified that the deceased told him that 'Nyati' was in a group which was using stones, and bricks.
12. PW3 denied that the deceased's group and Nyati's group were fighting and stated that the deceased was a community policing person who was part of a group providing security when they were attacked by Nyati's group.
13. **PW4 Michael Odera Atieno**, a neighbour to the deceased testified that on the 18/2/2018 he was at home when he received information that the deceased had been assaulted. He testified that he went to see the deceased and found him bandaged on the head having arrived from hospital. PW4 further testified that he interrogated the deceased who informed him that he had been assaulted at night after 2.00 am on his way home from a disco matanga (funeral dance) which was nearby.
14. PW4 further testified that he subsequently called the police in charge at Sinaga Police Post, Sgt Kibor and informed him of what the deceased who was seriously injured had told him. He further stated that the deceased continued with treatment but after 2 - 3 weeks, he died from the serious injuries he had sustained.
15. In cross-examination, PW4 testified that he received information of the deceased's assault from an in-law of the deceased, Claris Ahenda. He further stated that the deceased did not tell him the person who assaulted him because he was in pain.
16. **PW5 No. 236490 Inspector Martin Bor** testified that on the 18/12/2017 he was at the police post when he received a report from the deceased who reported that on the night of 16 & 17/12/2017 at 00.30 hours he was coming from a disco matanga when he met 5 people with pangas, rungas and stones who stopped him. PW5 testified that the deceased reported that he had a torch so he spotted them and identified them as people from his area with whom they had been together at the funeral.
17. Inspector Bor further testified that the deceased reported that his attackers stoned him and he got injured on the head, fell down unconscious and after 10 minutes he regained consciousness and went to his home. The deceased further reported that he was in the company of another person who ran to the disco matanga and reported to the mourners of what had happened to him.
18. Inspector Bor then issued the deceased with a P3 form on 18/12/2017 and referred him to Yala Hospital where it was filled. PW5 further testified that on the 27/12/2017, the accused was taken to the police post by members of the public who told him that the accused was the one who assaulted the deceased.
19. PW5 stated that he charged the accused with the offence of grievous harm in Siaya court vide Siaya PM's Cr. 623/2017 but that later on the 18/2/2018 at 11.00 am while at Sinaga Police Post, he received a call from Area Assistant Chief Michael Atieno who told him that the deceased had passed on in his house and the body was taken to Sagam mortuary. PW5 sent his officers to confirm the death and witness the postmortem carried out by Dr. Odinga who confirmed that the deceased died as a result of the injuries he had sustained earlier. He further testified that as the accused was still in remand, his earlier case was withdrawn and the accused later charged with murder. He produced the charge sheet for grievous harm in Siaya Principal Magistrate's' Court Criminal Case No 623 of 2017 as P Exhibit 1 and the signed witness statement recorded by the deceased at the police station when he reported the assault on 27<sup>th</sup> December, 2017 as P Exhibit 3.
20. In cross-examination, PW5 stated that he was the original Investigating Officer in the assault case as well as the present case. He stated that the deceased died at home, about one month after he was assaulted. He stated that the deceased was treated and discharged in December 2017 and that he did not know whether the deceased got a scan done on his head. PW5 stated that the deceased told him that he identified three of the five people that he met armed and that he knew and identified 'Nyati' the accused and two others who are still at large.
21. PW5 further testified that the deceased recorded his statement at the police station but that despite having difficulties in his speech, the deceased told him what happened. He further stated that the deceased was mobile and he reported the assault on 18/12/2017. He further stated that he issued the deceased with a P3 Form and subsequently recorded his statement on 27/12/2017. PW5 stated that he was alone with the deceased when he recorded his statement in his office. He also stated that the deceased died on 18/2/2018 which was about two months after the assault.
22. **PW6 Dr. Collins Oginga** carried out postmortem on the body of the deceased. As a result, he found that there was a depression of the temporal area of the deceased right scalp. Dr. Oginga further testified that internal examination of the deceased revealed a depressed skull fracture on the left temporal area as well as bleeding in the brain over the left side of the brain leading him to conclude that the deceased's death was due to severe brain injury after skull fracture following blunt force injury on the head. He produced the post mortem report dated

27<sup>th</sup> February 2018 as Pexhibit 4.

23. In cross-examination, Dr. Oginga stated that he used to work at Siaya County Referral Hospital but that he was currently stationed at Madiany and further that he had not been stationed at Sagam Community Hospital despite the fact that the deceased's postmortem was conducted at Sagam Community Hospital. He further stated that the depressed injury was deeper than the rest of the head and that the injury could have been caused by a club, a stone or a piece of wood or from a road traffic accident.

### **Defence Case**

24. In his defence, the accused gave a sworn statement to the effect that on the 25/12/2017 Christmas Day there was a disco at Sagam at 9.00 am which he attended and got drunk. He testified that he wanted to dance when two youths came and tied his hands and took him to Sinaga Police station where the deceased confronted him and informed him that someone had hit him with a stone on 18/12/2017.

25. The accused testified that the deceased wore a cap and further spoke to him well. He further stated that he was taken to Yala then to court where he was charged with assault and when he subsequently attended court for a mention he was informed that the complainant had died so he was charged with Murder. The accused testified that the prosecution witnesses who testified in this case lied to court and that he never assaulted the deceased.

26. In cross-examination the accused stated that on the 25/12/2017 at 9.00 am he went to a disco where two youths went and arrested him. He stated that he knew 'Iso' when he was arrested and was in the cells. It was the accused's testimony in cross-examination that he became aware of the name 'Iso' when a cell mate told him that 'Iso' was hit with a stone.

27. The accused further stated that he never reported that he was assaulted by the two youths and that further his name was Jack Ochuo Otiato and that he had never heard of the names 'Nyati', 'Abwao' and 'Chere'. He further stated that at first he was charged with grievous harm after the deceased had recoded a statement with police claiming he had assaulted him.

28. The accused further stated that he had never disagreed with the deceased and that one would pay Kshs. 50 as fare from the deceased's home to his home. The accused denied knowing the family of the deceased but acknowledged that he knew the village where the deceased hailed from.

29. The accused also stated that he did not know the names of the two boys who went to arrest him and beat him as they removed him from the venue of the disco in the school. He further testified that he was the one who was assaulted by the 2 youths who arrested him but that he was never taken to hospital for treatment and further that he lost his techno phone as well as Kshs. 750/=. The accused further stated that the deceased was present when he was being assaulted. He closed his case without calling any witness.

### **Submissions**

30. At the close of the defence case, Mr. Ochanyo Advocate holding brief for Mr. Korongo counsel for the accused person submitted orally that the deceased in his statement in the grievous harm charge was not clear on who had assaulted him, further, that the identification by the deceased should be disregarded by this court since the deceased lost consciousness after being assaulted as alleged in his statement hence it was possible that he was traumatised and therefore he could not recognize his attackers.

31. Counsel further submitted that it would appear that the deceased died due to negligence since he had been recovering after being discharged from Sagam Community Hospital when he suddenly died hence the death was not due to the assault as alleged. Counsel urged the court to acquit the accused person of the offence of murder as charged.

32. The prosecution led by Mr Okachi did not submit and relied on evidence adduced on record.

### **Analysis and Determination**

33. From the evidence adduced by the prosecution and the defence proffered by the accused person, the issue for determination is whether the prosecution have proved beyond reasonable doubt all elements of the charge of murder to warrant a conviction of the accused person.

34. The offence of murder is defined under section 203 of the Penal Code as follows:

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***

35. Therefore, to prove the charge of murder, the prosecution must prove beyond reasonable doubt the following three ingredients; it must prove the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

36. The fact and cause of death of the deceased Isaac Andrew Odhiambo is not in dispute. All the witnesses confirmed that the deceased had been severely assaulted and was undergoing treatment when he died about two months later on 18/2/2018. PW1 testified that after Opha took the deceased to hospital, the deceased returned home with a bandaged head. PW3 Charles Okose the deceased's best friend testified that the deceased's wife told him that the deceased had severe head injuries. PW4 a neighbour of the deceased testified that when he visited the deceased upon his return from the hospital he saw the deceased's head was bandaged. The description of the injuries was consistent with the findings of Dr Oginga who examined the deceased's body which revealed a depressed skull fracture on the left temporal area as well as bleeding in the brain over the left side of the brain leading him to conclude that the deceased's death was due to severe brain injury after skull

fracture following blunt force injury on the head. Accordingly, I find that the prosecution proved beyond reasonable doubt that there was death of Isaac Andrew Odhiambo.

37. The other issue for determination is whether the death of the deceased was caused by an unlawful act or omission and whether it was the accused herein who caused the said unlawful death or omission of the deceased.

38. The evidence adduced by the prosecution witnesses and the statement recorded by the deceased with the police when he complained of an assault leading to the arrest of the accused herein and his subsequent arraignment for grievous harm show that the deceased was attacked by some youths known to him while he was on his way and that he was hit with a stone. Hitting one with a stone on the head as was in this case was an unlawful act. It was that injury sustained by the deceased when he was hit on the head that according to the post-mortem report, led to his death. Accordingly, I find that the death of the deceased was caused by an unlawful act.

39. On whether the prosecution had proved beyond reasonable doubt that it was the accused person who caused the death of the deceased through an unlawful act, there is no eye witness to the unlawful killing of the deceased. The evidence adduced in support of the charge of murder against the accused person herein is largely circumstantial. The evidence implicating the accused directly are the statements made by the deceased to PW 1 his father, PW3 his best friend and PW5 Inspector Bor who recorded the deceased's statement. PW1, the deceased's father, a man of advanced age, could not remember the names of his son's attackers as detailed by his son after finding the deceased injured. However both PW3 and PW5 testified that the deceased revealed to them that he was attacked by Nyati, the nickname of Jack Ochuo the accused herein, Chere and Abwao.

40. Section 33(a) of the Evidence Act (Chapter 80 of the Laws of Kenya) permits the admission of statements made by the deceased regarding the cause of death as an exception to the general rule against admissibility of indirect or hearsay evidence. In **Philip Nzaka Watu v Republic Criminal Appeal No. 29 of 2015 [2016] eKLR**, the Court of Appeal, while accepting that such statements are admissible, observed as follows:

***“Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe ....”***

41. PW5 Inspector Bor testified that the deceased recorded a statement with him stating that on the night of 16 & 17/12/2017 at 00.30 hours the deceased was from a *disco matanga* when he met 5 people with pangas and rungas and stones who attacked him. The deceased told Inspector Bor that he had a torch which he shone on his attackers and identified his attackers as 'Nyati' the accused and 2 others. From the said statement recorded by the deceased on 27<sup>th</sup> December 2017 which statement was produced as an exhibit, the deceased stated that on his way home from a night vigil funeral within Sagam village he met a group of five men armed with pangas, stones and torches and that when he reached near them the group spotted the deceased and they put off the torches and the deceased heard one of them shouting the name of "Nyati, they are the ones." That one of them hit the deceased with a stone on the left hand and again he was hit with a stone on the head and he fell down and became unconscious and his colleague ran away. He regained consciousness after about twenty minutes and went home. That he identified **Nyati, Abwao and Jere**. On arriving home his friends who heard of what had happened to him went and visited him and they took him to Sagam Community Hospital where he was treated and discharged.

42. On 18<sup>th</sup> December he went and reported to Sinaga Police post and he was referred to Yala Level Four Hospital where he was treated and referred to Kisumu for scanning. On 27<sup>th</sup> December 2017 he was issued with a P3 form which was filled by a doctor and he returned it to the police and recorded his statement. The P3 form was produced as exhibit 3 by the investigating officer. The P3 form shows that the deceased reported to have been assaulted by someone well known to him.

43. The importance of recorded statements was stated in **Tekerali s/o Korongozi & 4 Others v R [1952] 19 EACA 259** as follows:

***“We have had reason before to commend on the fact, particularly in cases tried in Tanganyika, that evidence of the first complaint made to a person in authority has not been adduced. Such statements are admissible under Section 157 of the Indian Evidence Act which applies in the Territory. Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [come] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”***

44. Under **section 33(a)** of the **Evidence Act**, a statement made by a deceased person relating to his cause of death is admissible in evidence:

***“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. 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.”***

45. In this case, the deceased told his father and his best friend and recorded a statement at Sinaga Police Post to the effect that he was attacked by 5 people out of which the deceased identified 3 namely; **Nyati, jere /Chere and Abwao**. Three witnesses, that is, Shem Maganda, Charles Mark Okose and Inspector Bor all testified that they each talked to the deceased before he died, inquiring who had assaulted him, and that the deceased responded to each that it was **Nyati, Chere and Abwao**. PW1 however being of advanced age could not remember his son's assailants name. PW3 maintained that "Nyati" was an alias name for the accused. The deceased came from the same village with the

accused and he was the vigilante therefore was familiar with the accused's alias name. iam persuaded that the deceased was referring to the accused as the person who was in the company of the five men and three of them were known to him. The five men in my humble view had a common intention of harming the deceased that is why there was a shout by one of them calling out the accused by his nickname 'Nyati' and who acted in concert in assaulting Him on his hand and hit his head with a stone. The deceased recorded in his statement that he heard one of them call out Nyati and tell the rest that '*THEY ARE THE ONES.*'

46. Section 33 of the Evidence Act provides for instances when statements made by the Deceased person are admissible. These instances under Section 33(a) include:

***“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.” (Emphasis added)***

47. Thus, a statement may be admitted even when the maker is not in expectation of imminent death.

48. The deceased went further and lodged a complaint to the police leading to the arrest of the accused person and as at the time when the deceased died, the accused had been charged with the offence of grievous harm. The dying declaration having been consistently repeated to several witnesses, and it being clear that the accused was identified as the person who in the company of others assaulted the deceased on the material night, as the accused and deceased were well known to each other and had been at the funeral disco together, I find no possibility of mistaken identity of the deceased's assailants. In my humble view, the dying declaration was sufficiently corroborated and is therefore safe to rely upon.

49. This Court is aware that, generally, it is unsafe to base a conviction solely on the Dying Declaration of a deceased person unless there is satisfactory corroboration. However, the Court has found that the Deceased implicated the Accused in Statements made separately to more than two different people. There is no evidence that the Deceased was mistaken as to who assaulted him. That strengthens the weight I place on the Dying Declarations.

50. As regards the accused's denial defence, the evidence by the accused avoided the happenings of the night that the incident occurred. Moreover, the alibi defence was discounted by the dying declarations made by the deceased to the 3 witnesses who gave similar accounts of the said declarations. In the circumstances, the alibi defence is hereby found to be a lie and rejected. In the end, I find and hold that the prosecution proved beyond reasonable doubt that it was the accused in the company of other persons who attacked the deceased and hit him with a stone on the head thereby causing him fatal injuries as the postmortem report shows that the cause of death was associated with or was as a result of the injuries sustained on the head occasioned by a blunt object.

51. On whether the accused had malice aforethought, from the evidence of the doctor who performed the post mortem examination, the deceased suffered several severe head injuries caused by a blunt object. The injuries included a depressed skull fracture on the left temporal area as well as bleeding in the brain over the left side of the brain. **Section 206(b)** of the **Penal Code** provides:

***“206. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances***

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***(a) .....***

***(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.”***

52. In **Daniel Muthee vs Republic [2007] eKLR**, the Court addressed the issue of malice aforethought as follows:

***“When the appellant set upon the deceased and cut her with a panga several times and proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code.”***

53. In the circumstances of the present case, the deceased was hit on his hand as shown by the injuries on the P3 form and was hit with a stone on his head leading to skull fracture and brain Injury. The injuries were severe. However, the prosecution did not establish malice aforethought on the part of the accused person.

54. The prosecution did not investigate the theory that the accused was one among a gang of youths who could have been a security risk in the area and were terrorizing the vigilante groups. For that reason, I find that it was not proved beyond reasonable doubt that the accused had malice aforethought when he in the company of others attacked and injured the deceased leaving him for dead. I find and hold that the prosecution has therefore not proved the charge of murder against accused person. I find the accused person Not Guilty of the offence of Murder as charged.

55. However, as the killing of the deceased was unlawful, I invoke the provisions of section 179 of the Criminal Procedure Code and find the accused person guilty of the offence of Manslaughter and convict him accordingly pursuant to the provisions of section 202 as read with section 205 of the Criminal Procedure Code.

56. Sentence to be meted out after presentence report and mitigation on 23/9/2020.

Orders accordingly.

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

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. Ngetich, Prosecution Counsel H/b for Mr. Okachi Senior Principal Prosecution Counsel for the State

Mr. Ooro h/b for Mr. Ochanyo, h/b for Mr. Korongo Advocate for the Accused person

Accused present virtually in Prison via Microsoft Teams

CA: Brenda and Ishmael