



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRC NO. 9 OF 2017**

**PROSECUTOR.....REPUBLIC**

**VERSUS**

**BENARD ONYANGO OGANGO ALIAS “BOSS”.....ACCUSED**

**JUDGMENT**

The accused, **BENARD ONYANGO OGANGO** *Alias* **BOSS**, was charged with the offence of **MURDER** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

1. At the trial, the prosecution called eight (8) witnesses.

**2. PW1, NANCY ACHIENG GOR**, is the wife of the deceased **JAMES WILLIAM GOR**.

3. On the material day she was at the Ahero Market, where she sold vegetables. When she returned home, from the market, she found her husband seated on a chair.

**4. PW1** testified that her husband was bleeding from 3 cuts on his head. She also said that the left hand of her husband was swollen.

5. The deceased informed **PW1** that some neighbours had come to his home, where they assaulted him. When **PW1** sought to know if the deceased could recognize the neighbours who had assaulted him, he said that they were Boss and Omondi.

6. During cross-examination **PW1** said that she did not witness the assault upon her husband. By the time she reached home, the husband had already sustained injuries.

7. However, **PW1** made it clear, during cross-examination, that her husband was not assaulted by a mob. She said so because the deceased told her that he had been assaulted by the 2 neighbours whose names he provided.

8. When she was questioned about the relationship between the accused, (on the one hand) and both her and her husband, **PW1** said that the accused was a good neighbour. She said that neither the deceased nor she, had any disagreements with the accused.

**9. PW2, FBO**, was 9 years old when he testified.

10. He said that at about 6a.m, Boss and Omondi arrived at their family house. Omondi is a son of the deceased.

11. Upon arrival, Omondi and Boss questioned the deceased about where the radio was.

12. According to **PW2**, his dad was assaulted by the 2 named persons.

13. During cross-examination **PW2** said that the accused, who was well-known to him, had arrived at their house at about 5p.m.

14. However, the witness also said that he did not see the dad when he was being assaulted.

15. Later, during re-examination, **PW2** said he saw Boss and Omondi assaulting the deceased.

**16. PW3, QUEEN AKINYI**, is a daughter of the deceased.

17. She testified that on the material day, she was together with her brother **PW2**. They both bathed and then went to sleep.

18. However, they woke up when Boss and Omondi opened the door. Those two then told the deceased to give them the radio.

**19. PW3** testified that the accused used an iron-sheet to hit the deceased.

20. When she was questioned about the radio that her dad was being asked for, **PW3** said that they did not have any radio at their house.

21. As the witness testified that Omondi and the accused entered the house at 7p.m, she was asked how she was able to identify them in the darkness. Her answer was that she could not recall how she identified the accused in the darkness.

**22. PW4, MAUREEN ADHIAMBO OTIENO**, testified that she got back home at about 6.30p.m. Whilst at her house, **PW4** heard some noise and she ran to the place where the said noise was emanating from.

23. She testified that the noise was emanating from a place that was about 20 metres away from her house.

24. When she got to the said place, **PW4** saw 2 people, who were beating up the deceased. She identified the said 2 people as the accused and Eric Omondi Ogango.

**25. PW4** said she recognized the two persons as both of them are from the same home as her. Indeed, she clarified that the accused was the son of her brother-in-law.

26. It was the evidence of **PW4** that the said 2 persons were beating the deceased, using sticks.

27. When asked about how she was able to identify the persons who were assaulting the deceased, **PW4** said that it was not yet dark, and also that she went close to where they were.

**28. PW5, BRIAN OUMA NGESO**, testified that he is “*boda boda*” operator. He ferries passengers using his motor-cycle, and that was how he earns a living.

29. On the material day, it is **PW5** who ferried the wife of the accused from the market to her home. Upon arrival at the home, they found nobody inside. **PW5** said that everyone was behind the home.

**30. PW5** said that the children of the accused went to where their mother had alighted, and they told her that their father was beating Clinton’s father.

**31. PW5** went over, to see what the children had described.

**32. PW5** testified that he saw the accused as he continued beating Clinton’s father. In fact, **PW5** said that he tried to intervene, but the accused threatened to beat him too.

33. During cross-examination, **PW5** said that only 2 people were beating the deceased; whilst other people stood back, just watching what was happening.

**34. PW5** expressly stated that when he reached the scene, it was not yet dark. He explained that he only used the light from the torch in his phone, to be able to see the injuries inflicted upon the deceased.

35. He identified the accused, and added that the accused was a close relative of his; as he called him “*brother*”.

**36. PW5** was categorical that the accused was one of the 2 people who beat up the deceased.

**37. PW6, DR. DICKSON MUCHANA MWALUDINI**, is a Consultant Pathologist. He conducted the autopsy on the body of the deceased.

38. The body had the following injuries;

**a. 3 lacerations on the scalp;**

**b. Extensive bruises and grazes on both upper limbs, on the front of right chest and on the back of the trunk;**

**c. Internally, there was bleeding and bruising with pus-formation in the right lung;**

**d. Infected Spleen; and**

**e. Swollen brain.**

39. He formed the professional opinion that the cause of death was complications of acute lung injury secondary to blunt trauma due to assault.
40. During cross-examination, the doctor said that the lacerations could not have been the cause of death. His view was that the lacerations were very unlikely to have had a bearing on the death of the deceased.
41. He explained that the swelling of the brain of the deceased was a normal phenomenon of injury to the lungs.
- 42. PW7, THOMAS OMONDI GOR**, was a brother to the deceased.
43. On the material day, **PW1** phoned him and told him that the deceased had been beaten. Upon receipt of that message, **PW7** rushed to the home of the deceased.
44. He told the court that the deceased said that those who beat him were **BOSS** and Omondi.
- 45. PW8, CPL NAFTALY KAMAU**, was the Investigating Officer.
46. He testified the deceased reported a case of assault on his person, at the Ahero Police Station. The Complainant cited his 2 assailants as Eric Omondi and Bernard Onyango.
47. The Investigating Officer said that the assault on the deceased begun at his house, where the 2 children of the deceased witnessed it.
- 48. PW8** noted that there was a pool of blood 300 metres away from the home of the deceased; at a place which he described as being the home of Eric Omondi.
49. Although his investigations led him to conclude that both Omondi and the accused had assaulted the deceased, **PW8** testified that the whereabouts of Omondi were unknown.
50. When the accused was put to his defence, he gave sworn testimony.
51. He said that on the material day, he returned home from work, at about 7.30p.m.
52. His testimony was that he found the deceased drunk, making noise along the road. He specified that the deceased was near the home of Eric Omondi.
53. The accused testified that the deceased was shouting about the fact that some people had beaten him.
54. As the accused knew the deceased, he decided to escort him home. He then escorted the deceased until the latter entered his house.
55. It was the evidence of the accused that **PW4** never liked him because he used to drink with her husband.
56. Secondly, **PW4** is alleged to have sworn to teach the accused a lesson, after being admonished.
57. Thirdly, the accused had allegedly stopped **PW4** from selling a cow belonging to the father of the accused.
58. Therefore, the accused talked of several issues which made **PW4** have a disliking for him.
59. But the accused denied having assaulted the deceased.
60. I have analyzed the evidence on record. I have also given careful consideration to the submissions made by the prosecution and also by the accused.
61. The particulars of the offence were that the deceased was assaulted by 2 people; one of whom was the accused.
62. The evidence tendered showed that the other person who is alleged to have assaulted the deceased is one Eric Omondi.
63. The Investigating Officer testified that the said Eric Omondi had not been arraigned in court because he had gone missing.
64. There is proof that **JAMES WILLIAM GOR** is dead.
65. Secondly, there is proof, which was provided by the Pathologist who conducted an autopsy on the body of the deceased, which confirmed that the cause of death was complications of acute lung injury, secondary to blunt trauma due to assault.

66. In a nutshell, the deceased died due to factors attributable to the assault that had been visited upon him.

67. I find that the assault upon the deceased was wrongful and unlawful.

68. Thirdly, I find that the person or persons who assaulted the deceased had malice aforethought. I so find because the degree of the injuries inflicted upon the deceased are a clear testimony of an intention to either cause death or to do grievous harm to the deceased.

69. However, even if the person or persons who assaulted the deceased were indifferent as to whether or not their actions could lead to the death of the deceased, I find that pursuant to the provisions of **Section 206 (b)** of the **Penal Code**, malice aforethought had been proved.

70. The only remaining issue to be resolved is whether or not the prosecution had proved that the accused is one of the two people who had assaulted the deceased.

71. The accused confirmed that he was at the same place where the prosecution witnesses said that the deceased was assaulted. He also confirmed that he was with the deceased at the said place.

72. However, he described himself as a good Samaritan, who only helped the deceased after the latter had already been injured.

73. **PW4** testified that she saw the accused assaulting the deceased. She said that she was able to recognize the accused, as it was not yet dark. Secondly, **PW4** went close to where the accused and Omondi were assaulting the deceased.

74. The accused testified that he did see **PW4** at the scene. But he insisted that the only reason why she testified against him is because there was a grudge between them.

75. However, during cross-examination, the accused did not suggest to **PW4** about the alleged grudge, which had allegedly led **PW4** to testify against him.

76. In my considered opinion, the failure by the accused, to cross-examine **PW4** about the alleged reasons why she had a grudge against him, is a clear indication that the alleged grudge was an afterthought, calculated to try and create doubt about the evidence of **PW4**.

77. I find that the circumstances prevailing at the material time was conducive for positive recognition of the accused.

78. I so find because even the accused testified having seen **PW4** at the scene. Clearly, if he was able to recognize her, that implies that **PW4** was able to recognize him at the time.

79. Furthermore, I find that **PW5** also recognized the accused at the scene. Contrary to the submissions of the accused, **PW5** did not require the light from his phone to be able to see the accused person clearly.

80. **PW5** said that when he got to the scene, it was not yet dark. He saw the accused and one other person, beating the deceased.

81. Thereafter, he utilized the torch-light from his mobile phone to see the injuries that had been inflicted upon the deceased.

82. Both **PW4** and **PW5** recognized the accused. Secondly, both witnesses saw the accused assaulting the deceased.

83. On his part, **PW5** even tried to intervene, however, the accused threatened him. In effect, the witness was not simply a detached eye-witness, he actually tried to intervene in the incident.

84. I find that the accused was not a good Samaritan, whose only involvement was to escort the deceased home, from the place where the deceased had been assaulted. The accused was an active participant in the assault upon the deceased.

85. And because the deceased succumbed to injuries which were secondary to blunt trauma, due to assault, I find the accused Guilty of the offence of Murder. The prosecution proved beyond any reasonable doubt that the accused committed the offence, together with one other person who was not before this court. Therefore, the accused is hereby convicted for having committed the offence of Murder.

**DATED, SIGNED and DELIVERED at KISUMU This 17<sup>th</sup> day of November 2020**

**FRED A. OCHIENG**

**JUDGE**