



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL MURDER CASE NO.49 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**POLYCAP MBOYA OTIRA.....ACCUSED**

**JUDGMENT**

[1] **POLYCAP MBOYA** alias **OTIRA**, is accused of murder, contrary to **Section 203** as read with **Section 204** of the **Penal Code**, in that, on the 9<sup>th</sup> July 2014 at Kokweno Oriang location Rachuonyo North District Homa Bay County, jointly with others not before court murdered **Geoffrey Ouko Gaya**.

[2] The facts giving rise to the case for the prosecution are that the deceased who was commonly known as “**DOKTA**” lived with his mother **EMILY AKINYI GAYA** (PW1) and other siblings at Kokweno-Oriany west in Rachuonyo Sub County and on the material date he left home at 6.00 a.m. to fetch water for somebody.

At about 7.00 a.m., the accused and others went looking for him at his home over some items which had gone missing. He (deceased) was suspected of having stolen the items.

[3] On failing to find the deceased at home, the accused and his group left the scene but returned at about 10.00 a.m being a larger group and having found the deceased who had been beaten and bled from his nose, mouth and ears.

The group demanded that the items allegedly stolen by the deceased be returned to them even as they intensified the beatings meted out to the deceased. It was said that the stolen items belonged to the accused and apart from the deceased, other two people including **TEDDY AKOKO (PW3)** were suspected of having stolen the items and beaten up along with the deceased.

[4] The incident was reported to the police by **COLLINGS**

**OMONDI AYIENGA (PW4)**. The assailants dispersed and left the scene when police officers arrived and having seriously injured the deceased and **Teddy (PW3)**. The two were taken by the police to Kendu Bay Health centre where the deceased was pronounced dead on arrival. Teddy was transferred to Homa Bay District Hospital where he was treated and recovered from his injuries.

**PC NANCY KOSKEI (PW5)**, conducted necessary investigations and in the process traced and arrested the accused. The post-mortem report (**P. Exhibit 1**) produced by **DR. PETER OGOLA (PW6)**, indicated that the death of the deceased was caused by severe head injury due to blunt trauma to the head.

[5] The accused was eventually arraigned in court for the murder of the deceased and in his defence, he denied the charge and stated that he operated a video show business at Oriang Trading Centre and was at the show room on the material date watching a football match between Germany and Brazil which ended at about midnight.

Thereafter, he went home leaving his employee to sleep in the premises but on the following morning he was called by one Museveni and informed that his T.V sets and a generator had been stolen. He proceeded to the scene and confirmed the information.

[6] Museveni and a group of people were at the scene but not his (accused’s) employee called Omondi Nyangoro. He (accused) then reported to the police at Kendu Bay and recorded a statement before returning to the scene where he found his employee being held by motor cyclists (boda boda) and being forced to reveal the names of those who had stolen the property. It was then that the names “**Ted**” and “**Ogopa**” were mentioned. These two were traced and beaten up by a mob of people. He (accused) attempted to rescue the two but was also beaten up. He fled from the scene and reported to the police after notifying the area chief. Police officers arrived at the scene and rescued the two suspects from the “**blood thirsty**” mob of boda boda riders. He (accused) later heard that one of the two suspects died from the injuries inflicted on him by the mob. He contended that he never participated in beating the deceased suspect and was implicated for reasons he could not tell.

[7] A person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder (See, **Section 203 Penal Code**).

Malice aforethought would be deemed where a person assaults another with the intention of causing him grievous harm (See, **Section 206 Penal Code**).

Grievous harm as defined in **Section 4** of the **Penal Code** means any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely to injure health ---”

[8] From the evidence adduced by the prosecution and the defence, there was no dispute that the death of the deceased was as a result of the grievous injuries occasioned to him by a group or mob

of people who suspected him and others of having stolen property belonging to the accused. The degree of the injuries sustained by the deceased was a clear indication that the mob intended to cause his death and indeed caused his death as shown in the post-mortem report (**P. Exhibit 1**).

[9] It was evident that the mob of people declared the deceased to be “**guilty as charged**” and meted out their own brand of justice in such a gruesome and primitive manner. They “**mocked**” the existing lawful criminal justice system by their unlawful act of assaulting and causing fatal injuries to the deceased. They ignored the saying of the wise that two wrongs do not make a right. If indeed the deceased stole from them, they could not correct the wrong by committing another wrong of assaulting and fatally injuring the deceased. In so doing, they dared the law and imagined that impunity is a virtue and a social benefit. Woe unto them as the law is never asleep and always catches up with the culprits sooner or later.

[10] Be that as it may, each and every member of the group or mob who participated in assaulting the deceased or aided or abetted the act in any way did commit the murder of the deceased and must be held fully responsible for the consequences of the unlawful act. That is how bad it is for any individual who decides to play judge, jury and executioner or take the law into his own hands.

In the present circumstances, the basic issue for determination is whether the accused was in the mob or group of people who assaulted and fatally injured the deceased.

[11] The defence raised by the accused was a denial and an indication that even though he was the victim of the alleged robbery he did not participate in one way or the other in assaulting the deceased. He also indicated that he almost became a victim of the “**mob justice**” when he attempted to rescue the deceased.

**Maureen Akinyi Tindi (DW1)**, his wife, did not witness the criminal act as it unfolded. She arrived at the scene and found two suspects already apprehended and beaten up before being rescued by the police.

[12] **WILSTON ODHIAMBO OTIENO (DW2)** arrived at the scene and found the two suspects being beaten by boda boda riders before they were rescued by the police. He found the accused at the scene during the beatings but was standing on the sides. He thus implied that the accused was not one of the assailants.

However, the accused was also placed at the scene of the assault by the surviving victim (PW3) and a university student (PW4) but this time, not as a passive bystander but an active participant in the assault of the deceased and the victim (PW3).

[13] The incident occurred in broad daylight. It was not therefore difficult for PW3 and PW4 to see and recognize the accused and the role he played in the entire episode.

It is notable from the evidence of the mother of the deceased (PW1)

and her daughter-in-law Florence (PW2) that the accused was the person who as early as 7.00 a.m. on the material date led a group of people in search of the deceased for allegedly stealing property. They found the deceased elsewhere and brought him home at 10.00 a.m. bleeding and looking beaten up.

[14] Both PW1 and PW2 also placed the accused at the scene or scenes of the offence and also portrayed him as an active participant along with the boda boda riders in the fatal assault of the deceased.

All the aforementioned prosecution witnesses (PW1, 2, 3 and 4) knew the accused as a fellow villager. They never once suggested or indicated in their evidence that they maliciously implicated him for the offence.

Suffice to state that their evidence against the accused and the role he played in the offence was cogent and credible such that the accused’s defence was effectively rebutted and reduced into an afterthought.

Consequently, this court must and hereby finds that the accused was indeed in the mob or group of people who assaulted and fatally injured the deceased. The case against him is thus proved by the prosecution beyond reasonable doubt. He is found guilty as charged and convicted accordingly.

**J.R. KARANJAH**

**JUDGE**

**[Delivered and signed this 23<sup>rd</sup> day of January 2019]**