



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 1 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

1. ENVIOLATA AKOTSI ONYANGO ALIAS CONSOLATA

2. BENARD OTIENO ONYANGO..... ACCUSED

JUDGMENT

1. **Enviolata Akotsi Onyango** Alias **Consolata** and **Benard Otieno Onyango** are charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the offences are that on the night of 16th and 17th day of December 2014, at **Sikoma** sublocation of **Butula** District in Busia County, jointly with others not before court murdered Christopher **Sieuda Oyiera**.

3. The prosecution contended that the two accused persons and others beat the deceased on 16th December 2014. He was not seen for four days after the alleged incident of beating. His body was later found hanging near his home.

4. Accused one did not tender any evidence. Accused two in his defence contended that the deceased quarreled him for removing some cows from his (deceased's) crops instead of leaving them there so that he could report the issue. He denied involvement in the murder.

5. The issues for determination are:

- a. Whether the deceased committed suicide or was murdered;
- b. If he was murdered, whether either or both accused persons were involved; and
- c. Whether the prosecution has proved its case against the accused to the required standards.

6. The body of the deceased was discovered after four days of an alleged incident of a fight which involved the two accused persons and some other unnamed people whose number we also do not know. According to the evidence of Edwin Otieno Okoth (PW3), he found the body of the deceased tied with a rope at the neck and legs were touching the ground.

7. The medical evidence which was adduced by Dr. Hillary Kiplagat (PW4) on behalf of Dr. Kubuta indicated the following:

- a. Extensive bruises all over the abdomen,
- b. Multiple bruises on the chest,
- c. Bruises at the perineum, the thighs and lower limbs,
- d. Extensive bruises on the head,
- e. Blistering injuries on the upper thighs,

- f. Bleeding through the ears and the nose,
- g. Bruises on the face and eyes were protruding out of the sockets,
- h. Bruises on the neck,
- i. Brain substance was injured and there were blood clots; and
- j. Injury at the base of the skull.

He formed an opinion that the cause of death was severe head injury secondary to battery. The medical evidence ruled out the issue of suicide. I make a finding that the deceased was murdered and there was an attempt to make it look like suicide.

8. The evidence that linked the two accused persons to the death of the deceased is that of Vincent Odongo Wanzala (PW1). This witness gave two contradicting versions of the incident. In his statement to the police, he recorded that he found the two accused persons and others beating the deceased and he separated them. His evidence in court was that he just found a quarrel. This witness was therefore declared a hostile witness.

9. A hostile witness was defined in **Coles v. Coles, (1866) L.R. 1P. &D. 70, 71**(Sir J.P. Wilde) in the following terms:

A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.

And in the case of **Alowo v. Republic [1972] EA** at page 324 the court of Appeal said:

The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.

The court of appeal in the case of Appeal in the case of **Abel Monari Nyanamba & 4 others vs. Republic [1996] eKLR** stated:

The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.

The evidence of Vincent Odongo Wanzala (PW1) being contradictory, will require corroboration before I can base any conviction on it.

10. Alfred Wema Oyiera (PW2) testified that he heard the voice of the deceased at about 7 p.m. on 16th December 2014 asking Otieno to respect him and he was also going to respect him. He said he heard this from a distance of about 150 meters away. He said from the voice he could not read any distress or hostility. He also conceded that there were many people in that village called Otieno. This evidence therefore does not identify which Otieno the deceased was referring to. It cannot be taken as corroboration for the evidence of Vincent Odongo Wanzala (PW1).

11. The defence of the second accused explained his interaction with the deceased on the material day. This defence is plausible.

12. The prosecution has therefore failed to prove its case against the accused persons. It would appear that the investigating officer did not know what he was expected to establish for his approach to the case was very casual. Each accused is therefore acquitted of the offence of murder and set free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 30th day of April, 2019

KIARIE WAWERU KIARIE

JUDGE