



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: T.W. CHERERE-J)

CRIMINAL CASE(MURDER) NO.30 OF 2016

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JULIA ACHIENG JWENGE.....1ST ACCUSED

STEPHEN ODHIAMBO KALUNDA.....2ND ACCUSED

BENSON OKECH ONYANGO.....3RD ACCUSED

JUDGMENT

1. Accused persons herein are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that

On 28th July, 2016 at Kamol Kaila Sub-Location, Seme Sub-County within Kisumu County murdered Ronald Onyango Ogola

PROSECUTION CASE

2. The prosecution called nine (9) witnesses in support of the charge. **PW1 SAMUEL OMONDI OGOLLA**, brother to **Ronald Onyango Ogola (hereinafter referred to as the deceased)** stated that he went to the scene near Siala Primary School where he found the deceased being interrogated by a group of people but left before the attack and did therefore not know the persons that murdered the deceased.

3. **PW2 MAURICE OUMA OGOLLA**, also a brother to the deceased stated that he was summoned to the scene by his brother George Omondi and he arrived to find a large crowd such that he was unable to reach where deceased was being attacked. He stated that he stood on a hill 50 metres away from the crowd from where he saw 9 people including accused 1 beating the deceased. He further stated that accused 2 arrived at the scene after the deceased was beaten and rode his motor cycle over him. He also named Owino Ojuro who he said beat the deceased with a piece of wood; one Kadoli who cut the deceased on the head; one Oyolo who beat deceased with a stone; and Omondi Obuogo and Victor Odhiambo that beat the deceased with a rungu.

4. **PW3 GEORGE OUMA** also a brother to the deceased stated he went to the scene after his child informed him that deceased had been attacked where he found a large crowd. He stated that he saw one Kadoli and Owino Ojuro beat the deceased with a rungu. He stated that he saw accused 1 at the scene but didn't see her beat the deceased. He also stated that he did not see accused 2 and 3 at the scene. He also stated that his brother PW2 was not at the scene of crime and that he first saw him in hospital where the deceased was taken after the attack.

5. **PW4 Mary Auma Juma** stated that she was attracted to the scene by shouts and screams where she found a large crowd. It was her evidence that he saw one Kodudho beat the deceased and one Kadoli cut the deceased with a panga. She stated that she did not see accused 1 at the scene and could not recall if accused 2 there. She however stated that accused 3 was at the scene but did not participate in the attack on the deceased.

6. **PW4 MARY AUMA JUMA** stated that she was attracted to the scene by shouts and screams where she found a large crowd. It was her evidence that he saw one Kodudho beat the deceased and one Kadoli cut the deceased with a panga. She stated that she did not see accused 1 at the scene and could not recall if accused 2 there. She however stated that accused 3 was at the scene but did not participate in the attack on the deceased.

7. **PW5 ELISHA OMONDI AREGO, PW6 PHILIP OCHIENG OGONDI** and **PW8 MARY ATIENO OCHOLLA** teachers at Kaila Primary School stated that they saw a crowd beat the deceased and another lady. They stated that accused persons were at the scene but did not see them participate in attacking the deceased. In cross-examination by Mr. Odeny for accused person, **PW6 PHILIP OCHIENG OGONDI** stated that the person that ran over the deceased with a motor cycle was not accused 2 but another young man who was not before the court.

8. **PW7 CPL THERESIO NYAGA** and **PW9 PC GEOFFREY MUTHAMA** arrived at the scene long after the deceased and another had been beaten and left for dead. They stated that they did not know why accused persons were arrested and charged. With the consent of the defence counsel, **PW9 PC GEOFFREY MUTHAMA** produced the deceased's post-mortem form as **PEXH. 1** which shows that the deceased had multiple bruises over the trunk, cut wound on left leg, multiple wounds on scalp, fracture of left forearm and had dies of severe head injury secondary to assault.

DEFENCE CASE

9. In her sworn defence, 1st accused stated that she passed by the scene of crime at about 12.30 pm but did not take part in attacking the deceased. Her witnesses **ALICE JUMA OKELLO** and **ANNE ACHIENG OUDO** who were at the scene stated that accused 1 did not take part in attacking the deceased.

10. Accused 2 in his sworn defence stated that on the material date, he was riding his motor cycle with his wife and child on board. He stated that he briefly stopped at the scene of but denied that he took part in attacking the deceased. His witness **PAULINE GUDA** stated that he had accompanied accused 2 to take his wife and child to hospital on the material date. She stated that they briefly stopped at the scene of but denied that accused 2 took part in attacking the deceased.

11. The 3rd accused in his sworn defence stated that he was headed home from the market at about 01.00 pm. He stated that he arrived at the scene long after the deceased and another had been attacked and injured.

ANALYSIS AND FINDINGS

12. I have considered the evidence on record. To secure a conviction on the charge of murder, the prosecution has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari vs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

- a) the death of the deceased occurred;*
- b) that the accused committed the unlawful act which caused the death of the deceased; and*
- c) that the accused had malice aforethought.*

(a) The death of the deceased

13. The death of the deceased has been confirmed by the post-mortem form **PEXH.1** which shows that deceased had multiple bruises over the trunk, cut wound on left leg, multiple wounds on scalp, fracture of left forearm and had died of severe head injury secondary to assault.

(b) Proof that accused committed the unlawful act which caused the death of the deceased

14. There's evidence that each of the accused persons were at the scene of crime. The issue in question is whether they were part of the crowd that attacked the deceased as a result of which he sustained injuries that led to his death. To answer this question, I will analyse the prosecution case in respect of each accused as hereunder.

15. Concerning accused 1, **PW2 MAURICE OUMA OGOLLA**, stated that he saw accused 1 and 9 others beating the deceased. **PW3 GEORGE OUMA** stated that he saw accused 1 at the scene but didn't see her beat the deceased. **PW4 MARY AUMA JUMA** stated that she did not see accused 1 at the scene of crime. **PW5 ELISHA OMONDI AREGO, PW6 PHILIP OCHIENG OGONDI** and **PW8 MARY ATIENO OCHOLLA** stated that they saw accused 1 at the scene but did see her participate in attacking the deceased.

16. With reference to accused 2, **PW2 MAURICE OUMA OGOLLA**, stated that he saw that accused 2 arrived ride his motor cycle over the deceased. **PW3 GEORGE OUMA** stated that he did not see accused 2 at the scene of crime. **PW4 MARY AUMA JUMA** stated that she could not recall if accused 2 was at the scene of crime. **PW5 ELISHA OMONDI AREGO, PW6 PHILIP OCHIENG OGONDI** and **PW8 MARY ATIENO OCHOLLA** stated that they saw accused 2 at the scene but did see him participate in attacking the deceased. **PW6 PHILIP OCHIENG OGONDI** further stated that the person that ran over the deceased with a motor cycle was not accused 2 but another young man who was not before the court.

17. In relation to accused 3, **PW2 MAURICE OUMA OGOLLA**, did not tender any evidence against him. **PW3 GEORGE OUMA** stated that he did not see accused 3 at the scene of crime. **PW4 MARY AUMA JUMA** stated that accused 3 was at the scene but did not participate in the attack on the deceased. **PW5 ELISHA OMONDI AREGO, PW6 PHILIP OCHIENG OGONDI** and **PW8 MARY ATIENO OCHOLLA** stated that they saw accused 3 at the scene but did see him participate in attacking the deceased.

18. From the foregoing analysis, it is evident that out of the 7 witnesses who were at the scene of crime and who testified, only **PW2 MAURICE OUMA OGOLLA** stated that he saw accused persons attack the deceased.

19. I have carefully considered the evidence by **PW2 MAURICE OUMA OGOLLA** who is the only witness that implicated the accused persons. His brother **PW3 GEORGE OUMA** who remained at the scene of crime and even accompanied the deceased to hospital stated that he did not see PW2 at the scene and first saw him in hospital.

20. Accused persons denied the offence thereby casting doubt on the uncorroborated evidence by PW2. After considering the totality of the evidence by PW2, I have reached a conclusion that he was either not at the scene of crime or that he gave false evidence against accused persons and his evidence is thus rejected.

21. Consequently; I find that the Prosecution has not proved beyond any reasonable doubt that the three accused persons either jointly or severally committed the unlawful act which caused the death of the deceased which constitutes the '*actus reus*' of the offence.

(c) Proof that the said unlawful act or omission was committed with malice afterthought.

22. The prosecution having failed to prove *actus reus*', it would be futile for this court to delve into the issue of malice aforethought.

23. Finally, I would fail in my duty if I fail to mention that several suspects whose role in the murder was clearly explained by the witnesses were not charged. Owino Ojuro is said to have beat the deceased with a piece of wood; one Kadoli is alleged to have cut the deceased on the head; one Oyolo allegedly beat deceased with a stone; and Omondi Obuogo and Victor Odhiambo allegedly beat the deceased with a rungu. Inspector Kiilu the investigating officer appears to have been on a mission to cover up the murder and that may explain why he did not attend court in spite of the court granting numerous adjournments to avail him an opportunity to testify.

Disposition

24. As a result, I find accused persons **NOT GUILTY** and order that they be set at liberty unless otherwise lawfully held. It is so ordered.

DELIVERED AND SIGNED IN KISUMU THIS 27th DAY OF June, 2019

T.W. CHERERE

JUDGE

Read in open Court in the presence of

| | |
|---------------------|-------------|
| Court Assistant | – Felix |
| Accused 1 | – Present |
| Accused 2 | – Present |
| Accused 3 | – Present |
| For Accused persons | – Mr. Odeny |
| For the State | – Mr. Kakoi |