



**REPUBLIC OF KENYA**

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

**HCCRC NO. 36 OF 2015**

**PROSECUTION.....REPUBLIC**

**VERSUS**

**JACOB O. OMOLLO.....ACCUSED**

**JUDGMENT**

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars in the Information are that on the 24<sup>th</sup> day of June 2015 at Kochogo South Location, Nyando Sub-County within Kisumu County he murdered **Paul Okoth Okul**.

He pleaded not guilty to the charge.

Briefly the facts of this case are that on the material day at about 4PM while the deceased and his brothers John Odhiambo Okul (**PW2**) and David Owili Okul (**PW3**) were herding cattle at the border of Kochogo and Nyakach when they were attacked by a group of about ten to twenty people who were armed with crude weapons. PW2 and PW3 managed to flee but the deceased was not lucky as he was physically challenged. The assailants beat him with pangas and clubs. After the attackers had left PW2 and PW3 took the deceased home on a motor cycle. Later that night his wife (**PW1**) took him to hospital where an X-ray was taken and he was then discharged home with medicine. However when they returned home his condition deteriorated. He was rushed to hospital again but unfortunately he died. A postmortem conducted on his body indicates the cause of death as respiratory failure secondary to blunt chest trauma. PW2 and PW3 as well as Isaac Otieno Awuor (**PW5**) and Moses Onyango Kamwona (**PW6**) testified that the accused was among the attackers and that he caught the deceased and threw him to the ground. They testified that he too was armed. As the incident had been reported to the police he was arrested and charged with this offence.

In his defence the accused person raised an alibi that at the time he is alleged to have committed this offence he was at the Constituency CDF Office waiting for his salary. He called Geoffrey Odhiambo Bolo (**DW2**) and Josephat Ondiek Asewe (**DW3**) who both confirmed that they were together until around 4PM when they dispersed and each went their own way. The accused testified that after receiving his salary and parting company with his colleagues he went to Katito where he shopped and paid off his debts before setting off for his home arriving there at 7PM. He narrated how that night he received a call from an unknown person who threatened to shoot him for allegedly cutting his cattle. He also stated that in the days following he went about his life as usual until he was informed he was wanted for murder. He denied that he killed the deceased and contended that he was not at the scene where the deceased was beaten.

The issues for determination are whether the accused by an unlawful act caused the death of the deceased and if he did it was of malice aforethought.

Having heard and considered evidence from the prosecution witnesses there is no doubt that the accused died as a result of the injuries he sustained when he was beaten by "people of Nyakach" on 24th June 2015. The attack occurred while he was grazing cattle with his brothers. Boundary dispute or not it was unlawful for the assailants to mete out violence against the deceased. The lawful thing would have been to report the matter to the police or to obtain a restraining order from the courts. I am therefore satisfied that the deceased met his death as a result of an unlawful act. I am also satisfied that whoever killed him did it of malice aforethought. All the witnesses testified that the attack was carried out by a large group of people and that they were armed with pangas, clubs and spears. This is evidence of people who either had intention to kill or to cause grievous harm to their victim. According to PW5 they had sat behind a bush in wait. Malice aforethought is defined in Section 206 of the Penal Code as any of the following:-

**“an intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(a) 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.**

**(b) an intent to commit a felony.**

**(c) an intention by the act or omission to facilitate the flight or escape from custody of any person who was committed or attempted to commit a felony”**

I am satisfied that Sub-section (a) and (b) have been established beyond reasonable doubt in this case. What remains however is whether the accused person was positively identified as the person or being among those who killed the deceased.

The prosecution witnesses PW2, PW3, PW5 and PW6 testified that they saw the accused person. PW5 even stated that the accused passed by the place he was seated as the cattle grazed, and spoke to him. PW6 also alleged to have seen the accused at close quarters as the attackers ran towards him. On the other hand the accused person raised an alibi. The law is that once an accused person raises an alibi defence it is upon the prosecution to dislodge it. In this case there is evidence that even prior to the accused being charged he recorded a statement in which he denied the offence and stated he was somewhere else at the time the offence was committed. The Investigating Officer **PW4** admitted that the accused even gave details of where he was just as he testified in this case. The Investigating Officer when asked by Counsel for the accused if he visited those places in order to dislodge the appeal his answer was that he did not do so as he saw no reason for it. He failed as an investigating officer. It is always upon the prosecution to dislodge an alibi and he should have investigated the matter further. That notwithstanding having heard evidence from both sides I find the alibi defence weak. According to the two defence witnesses they were with the accused person until about 4PM. To be specific Geoffrey (**DW2**) stated that their salaries were paid at 3.30PM and that they parted ways after thirty minutes. Josephat (**DW3**) confirmed that he finished paying salaries at about 4PM. The document produced by the accused only shows he was paid but does not state the time he was paid. It is therefore noteworthy that none of the two witnesses allege to have accompanied the accused person to wherever he says he went. The attack occurred at about the time the accused left his colleagues. It was in broad daylight and the prosecution witnesses all knew the accused person. He even spoke to one of them (PW5) and said he was going to meet people who were in the bush. According to PW5 those people were armed with crude weapons, which I am satisfied were used to assault the deceased. His alibi is weak in the face of this very cogent evidence from the prosecution witnesses. I am satisfied that the charge against him has been proved beyond reasonable doubt. I find him guilty of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**Signed, dated and delivered at Kisumu this 27<sup>th</sup> day of February 2018**

**E. N. MAINA**

**JUDGE**