



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 27 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

STANSLAUS ORENGA.....ACCUSED

JUDGMENT

1. **STANSLAUS ORENGA** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that on the 15th day of September, 2014 at **Buyofu Market**, Buyofu Sub location in **BUSIA** County, with others not before court murdered **SANGARA OTIATO**.

2. On 15th September 2014, at about 7pm Ann Buluma went from her restaurant to a shop to purchase some flour. She met the deceased who was her relative. The deceased held her by the neck and placed a knife on her chest. She screamed. The deceased stabbed her and robbed her of her mobile phone and Kshs. 400/=. She fell down and he ran away. She informed the people who went to rescue her what had befallen her and the deceased was arrested.

3. Apparently the deceased had been beaten by a mob for when the accused and others took him to the police, the latter declined to receive him and asked that he be taken to hospital first. It is alleged that instead of being taken to hospital, he was subjected to mob lynching. The accused is alleged to have participated in beating him.

4. The accused in his defence contended that at about 9.30 p.m while at his home he received a report of a man who had stabbed and robbed a woman. He advised that he be taken to the police. He was however informed that the police lacked sufficient strength and had advised that he be informed so that he could take the prisoner to the police in his capacity as the area village elder. He therefore proceeded to the scene and arrived there at about 10.30pm. He found a big crowd and the deceased was lying dead. He denied any involvement in the death.

5. The issues for determination are as follows:

- a) Whether the accused was involved in beating the deceased; and if so,
- b) Whether the action amounted to murder.

6. The undisputed fact of this case is that the deceased was arrested after he had robbed **Ann Buluma (PW4)** and stabbed her. This was in the evidence of Ann. She testified that when the deceased whom she recognized was in the process of robbing her, she screamed and the deceased ran away. The time was about 7 pm.

7. **Emmanuel Dickson Mwima (PW1)** is a motor cycle taxi (commonly known as boda boda) rider. In his evidence he contended that at about 6pm, on 15th September 2014, at about 6 pm the accused who found him at Buyofu market asked him to take his wife who had been stabbed to hospital. He took both the accused and his wife to Khasoko Hospital where she was treated and discharged. He returned them to Buyofu market and they parted ways. Later at about 9 pm the accused called him to take the person who had assaulted his wife to Khasoko Police station.

8. When he (**PW1**) arrived at Homeland bar where the deceased was, the accused ordered one Fredrick to tie the deceased with a rope. He was placed on the motor cycle and together with the accused they took the deceased to Khasoko Police station. The police however declined to receive the deceased and ordered that he be taken for treatment for he had been beaten by members of the public in the course of his arrest.

9. The version of **Emmanuel Dickson Mwima (PW1)** contradicts that of **Joseph Zakayo Mugeni (PW2)**. The latter informed the court that the deceased was arrested in his bar known as Homeland at about 9pm. The arrest was effected by Solomon, Fredrick and Daddy. The deceased was taken outside where these people assaulted him. He later saw the deceased placed on a motor cycle and he was sandwiched

between Dickson and the accused. After closing his bar at about 10 pm, he found the deceased being beaten by a mob at the Buyofu junction.

10. From the evidence of these two witnesses, we can make the following conclusions:

a) That after the arrest of the deceased, he was assaulted outside Homeland bar.

b) That **Emmanuel Dickson Mwima (PW1)** did not disclose this evidence to the court. He only attempted to do so during cross examination when he implicated Wilson, Daddy and Fredrick. In his evidence in chief, he said the deceased had been beaten by members of public. It was during cross examination that he implicated the accused of beating the deceased before he was taken to the police. He alleged that he found the accused hitting the deceased using stones. Why did this witness keep these facts away from the court until he was prodded during cross examination? The answer to this question cannot be discerned from the evidence on record. The court of appeal in the case of **NDUNGU KIMANYI vs. REPUBLIC [1979] KLR 283**, (MADAN, MILLER and POTTER JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

Am therefore unable to hold **PW1** as a reliable witness.

11. The contention by **PW1** that the accused participated in beating the deceased outside Homeland bar was not supported by any other evidence on record.

12. It was the testimony of **Emmanuel Dickson Mwima (PW1)** that when they took the deceased to Khasoko Police station, they were ordered to take him for treatment for he had been injured. On their way back, the accused ordered him to take the deceased to Buyofu Market where he was attacked. Again two versions emerge of what transpired.

13. The first is by **Emmanuel Dickson Mwima (PW1)**. He testified that before they reached Buyofu market, the accused told the deceased to prepare for his death. At Sunflower junction, the accused instructed him to stop the motor cycle so that the deceased could alight. He complied. He left for Homeland bar and on returning after about 5 minutes, he found the accused using stones to hit the deceased. Fredrick then held the deceased by the neck and he died as he watched. They then proceeded to Mugatsi Administration Camp to report the death.

14. The second version is by **Joseph Zakayo Mugeni (PW2)**. This witness said he closed Homeland Bar at 10 pm. He found a crowd at Buyofu junction beating the deceased. The incident was at a lit place and he was about 3 meters from where the deceased was assaulted.

15. There was no attempt by the prosecution to reconcile these two contradictory statements. That of **PW1** identified the accused and Fredrick as the people who fatally attacked the deceased and never talked of any other person who was present at the scene during this second instance. On the other hand the evidence of **PW2** identified a mob as the culprit and he never testified to have seen the accused at the scene.

16. The evidence of **Wilberforce Bernard Narasa Otsiula (PW6)** was that after the deceased was arrested for robbing and stabbing a woman, the accused in his capacity as a village elder was asked to escort him to the police. The deceased was placed on a boda boda after he had been tied with a rope. His evidence was silent on the issue of being beaten prior to being taken to the police.

17. In his defence the accused contended that when he was called to escort the deceased to the police station, he found a big crowd. The deceased was already dead when he arrived there. He denied that he participated in killing the deceased.

18. It has emerged from the evidence on record that prior to his death the deceased had robbed and stabbed **Ann Buluma (PW4)**. What is also clear is that he was attacked by a mob. The prosecution however failed to prove to the required standards whether the accused was part of the mob and that he participated in lynching the deceased. Consequently, I find that the case against the accused has not been proved. I accordingly acquit him and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 15th day of March, 2018

KIARIE WAWERU KIARIE

JUDGE