



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL CASE NO. 10 OF 2016**

**(CORAM:**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**NICKANOR OKACH OLUOCH.....1<sup>ST</sup> ACCUSED**

**MELVIN ISMAEL OMONDI.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. **NICKANOR OKACH OLUOCH** (*herein the 1<sup>st</sup> Accused*) and **MELVIN ISMAIL OMONDI** (*herein the 2<sup>nd</sup> Accused*) are charged with an offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya**. The particulars of the charge are that on the 30<sup>th</sup> day of April, 2016 at Ukuk Village, East Uhlo Location, Ugunja Sub-County within Siaya County murdered **TOM STATUS OTIENO**.

2. The Prosecution was led by M/s. Mourine Odumba, while the defence was conducted by Mr. Ariho, learned Advocate. The Prosecution called a total of 6 witnesses, whereas each of the Accused testified on oath and called one witness.

3. The Prosecution's case is that on 30<sup>th</sup> April 2016, at around 2.30 a.m. PW1 Florence Onyango, was called by Mama Apondi Oluoch, telling her to go and see the Status Tom, who was grazing on her farm. PW1 was called in her capacity as Chairman of Ten (10) Households (*Nyumba Kumi*). PW1 proceeded to the scene with Mama Apondi Oluoch, where she found about 10 cows at site but she did not find Tom. That later she found him lying on the ground within the same farm. She asked him what had happened to him and he told her he had been assaulted by some people without mentioning any particular person. She used torch light to observe him and noted he had a cut on the head. He asked PW1 to remove him from where he was laying. Melvin Oluoch Oluoch and PW1 took him to another site, where they left him as PW1, Melvin and Hellen proceeded to Sigomere Police Station and returned back to the scene with Police. PW1 got Tom's mother mobile number from Tom and called her telling her to arrange to take him to the hospital.

4. The deceased was thereafter taken to Sigomere Hospital by his mother, wife and his son from where he was transferred to Kisumu Hospital.

5. PW2, Jackline Atieno Otiemo, evidence is that on 30.4.2016 at around 3.00 a.m. her husband went out to plough with bulls in their farm near Sigomere Centre but did not know with whom he had gone to plough. That at around 5.00 a.m. her mother-in-law Jane Otiemo awakened her, telling her she received a call from Nyar Alego, Florence Onyango that Tom had been cut and was in bad condition asking them to rush to the scene and take him to the hospital. PW2 with others proceeded to the scene, found the deceased lying beside the road, with several cuts on the head, hands and legs. He talked to Richard asking him to give him some water after which Police came and told them to take the deceased to the hospital. They took him to Sigomere from where he was referred to Siaya County Referral Hospital. PW2, Richard and Melvis took the deceased to the hospital and on the way to Siaya Hospital he told PW1 and Richard that Melvis was the first person to start beating him, followed by Nickanor. The deceased was treated at Siaya for 2 days and on the 3<sup>rd</sup> day he was transferred to Kisumu (Russia) Hospital and passed on, on the 4<sup>th</sup> day. PW2 testified she identified the deceased's body for postmortem examination, of the body of her husband, Tom Status Otiemo. PW2 testified she knows Melvis and Nickanor who are her relatives being her cousins.

6. PW3 Jane Alice Anyango's, evidence is that on 30.4.2016, while asleep she received a call from Florence Auma (PW1) telling her, Tom was lying on the grass of Nickanor and she should join her to take Tom to the hospital, PW3 did not go to the scene. PW3 testified she later talked to Tom while at the hospital and he told her the first person to attack him was Melvin and the second person was "small". PW3 further testified the deceased died on 8.5.2016 as he was undergoing treatment at Kisumu Hospital. PW3 identified small as the 1<sup>st</sup> Accused

7. PW4, Christine Akello's evidence, is that on 30.4.2016 at around 5.00 a.m. PW3 called her to go and see her son who had been assaulted while grazing in the field. PW4 went alone and confirmed that Tom had been assaulted and left for her home. She later saw Tom being

taken to the hospital.

8. PW5, No. 66883 Cpl. Benson Lwambi's evidence, is that on 30.4.2016 at 4.20 a.m. a report was made by Hellen Ongudi Oluoch, Melvin Omondi (2<sup>nd</sup> Accused) and Florence Onyango (PW1), that they found Tom Status (deceased) grazing his livestock at their shamba without their consent and as they wanted to arrest him, he resisted and he injured Melvin Omondi with an iron bar on his left hand. That they reported the person was left at the scene. PW5 and another Officer proceeded to the scene and found Tom Status lying on the ground bleeding and unconscious. They organized to have him rushed to Sigomere Health Centre for treatment. PW5 drew a sketch plan and proceeded back to the Station. He recorded statements, then proceeded to the hospital to check on Tom Status but found he had been referred to Siaya County Referral Hospital, where he was admitted in serious conditions. He was on 3.5.2016 transferred to Kisumu Hospital, for further treatment and on 8.5.2016 he passed on. That on 9.5.2015 PW5 in company of PW2 proceeded to Kisumu Hospital to identify the deceased body for postmortem examination. That after investigation PW5 preferred the charge of murder against the two Accused persons. PW5 produced extract of the Report, O.B. 30.4.2016 as exhibit P1 (a) and follow up Report as exhibit P1 (b).

9. PW6, Dr. Rukia Aksam, testified that on 9.5.2016 she carried out post-mortem examination at 2.00 p.m. on the body of Tom Status Otieno, after PW2 and PW5 identified the body to her. According to PW6 the external appearance of the body was as follows:

**“Head left depressed skull fracture of the parietal region with brain abscess and subdural Hematoma.**

**The Doctor opined the cause of death was due to:**

**“severe head injury due to left depressed skull fracture of parietal bone with brain abscess and subdural Hematoma and severe septicemia 2<sup>o</sup> Assault.”**

The Doctor produced the postmortem Report as exhibit P2.

10. When the Accused were called upon to defend themselves, each of the Accused opted to give sworn defence and opted each to call one witness.

11. The first Accused (DW1) testified that on 30.4.2016 while asleep at around 12 midnight, the 2<sup>nd</sup> Accused knocked his door, opened and the 2<sup>nd</sup> Accused told him he had seen some lights from the lower part of their shamba. That the two decided to go and check what was the lights about, and about 3 metres to the place, where the light was coming from, the light was switched off, and they heard a sound of something being thrown at them. They retreated screaming for help and on the way back home they met their mother (DW3). They then decided to go to the scene and check what was happening. On arrival they found many people and the deceased injured. They together with their mother (DW3) decided to report to a member of Mji Kumi (PW1) with whom they returned to the scene, checked on the injured person and decided to report the matter to Sigomere Police Station, after which they returned to the scene. Police came later and requested the person, be taken to Sigomere Health Centre, where he was given first aid before being referred to Siaya County Referral Hospital.

12. The Accused persons, their witnesses DW3, DW4 and DW5 testified they talked to the deceased and enquired who assaulted him to which he stated the people who assaulted him were many, it was dark and he did not know them. They denied having heard the deceased mention the assailants and denied reporting, that they tried to arrest the deceased and caused his injuries as alleged in the O.B. extract exhibit P. 1 (a) and follow up Report P.1. (b). The Accused stated that they only participated in taking the deceased to the hospital and they were never involved in assaulting him. They denied having committed the offence and urged the court to acquit them.

13. Upon close of the defence case, both Mr. Ariho, learned Advocate, for the 1<sup>st</sup> Accused and Mr. Ken Omollo, learned Advocate, for the 2<sup>nd</sup> Accused and M/s. Mourine Odumba, learned State Counsel, and made their respective submissions.

14. The defence Counsel, urged that the Prosecution has not proved the charge of murder against the Accused persons, beyond reasonable doubt, that no single eye witness was called to confirm the assault and causing injury to the deceased. That the evidence of PW2 purportedly connecting the Accused with the death of the deceased lacked corroboration. That no single witness who was with PW2, when the deceased mentioned the Accused names was called. That though the deceased could talk in presence of a member of Mji Kumi (PW1) and Police Officers none of them heard the deceased mentioning the Accused persons as his assailants nor did PW2 record in her statement to the Police the mentioning of the Accused persons or the O.B. extract, the Counsel urged the contents of the O.B. extract is disputed in material facts, that the Accused were not placed at the scene of the of the incident. He urged the extract is of no evidential value as it does not pass the test of the **Evidence Act**, referring to **Section 25A of the Evidence Act**. He further urged the maker of the statement was not called and that it was recorded by a constable, who is not authorized to record a confession. The Counsel further urged the evidence of PW1 on issue of land dispute and grudge between the deceased family and the Accused, was not specific, as no evidence was adduced by any Prosecution witness from the family of the deceased.

15. M/s. M. Odumba, learned State Counsel, urged that the Prosecution proved their case beyond reasonable doubt, urging the death of the deceased, its cause, who caused the death and malice aforethought were proved to the required standard of proof. She urged though there was no direct evidence or eye witness, the O.B. extract exhibit P1 (a) and 1 (b) were produced without an objection. That PW2 talked of receipt of dying declaration from her late husband implicating the two accused persons. That on malice aforethought the State Counsel urged PW5 talked of land dispute which was not challenged, pointing out that the State proved malice aforethought.

16. The Accused is facing a charge of murder. In proving a charge of murder, the Prosecution has to adduce evidence to prove that the accused caused the death of the deceased with malice aforethought. The Prosecution must establish that the accused had formed the necessary malice aforethought to either cause death or do grievous harm to the deceased. Malice aforethought is also proved if it is shown that the accused knew that his actions causing death would probably cause death or do grievous harm.

17. To prove a charge of murder, the Prosecution has a duty to establish the following ingredients: -

**i. Death of the deceased and its cause.**

**ii. That the accused caused the death of the deceased through unlawful act or omission.**

**iii. That the accused possessed an intention to cause harm/kill or had malice aforethought.**

**a. Whether the Prosecution has proved the death of the deceased and its cause?**

18. There is no dispute in this case that the deceased died after the assault. PW2 testified that on 30/4/2016, they took the deceased to Sigomere Health Centre, from where he was referred to Siaya County Referral Hospital from where he was again referred to Kisumu Hospital on the 3<sup>rd</sup> day and on the 4<sup>th</sup> day he died. That PW2 in company of Police Officer identified the deceased body to the Doctor for Postmortem examination on 8.5.2016. PW5 testified that on 9.5.2016 in company of PW2 they identified the deceased's body for Postmortem examination. PW6 Dr. Rukia Aksam corroborated the evidence of PW2 and PW5, in that the deceased's body was identified to her before she carried out Postmortem examination. She produced the Postmortem Report as exhibit P.2. she opined the case of death to have been caused by severe head injury due to depressed skull fracture of parietal bone with brain abscess and subdural hematoma and severe septicemia due to assault. I therefore find the death of the deceased and cause of death proved beyond reasonable doubt.

**b. Who caused the death of the deceased?**

19. In the instant case there is no eye witness but the Prosecution relies on the O.B. extract exhibit P. 1 (a) and (b) and the purported dying declaration by the deceased to PW2, the wife of the deceased. The Accused denied, the contents of the O.B. extract exhibit P 1 (a) and 1 (b), however they admitted that they made a report to the Police but only to the extent that they found the deceased having been injured within their farm and not as PW5 stated as per produced extract of the O.B.

20. I have very carefully considered the O.B. extract produced by No.66883 Cpl. Benson Lwambi of Sigomere Police Station. PW5 did not state that he was the maker of the O.B. extract exhibit P 1 (a) and P 1 (b). The Prosecution urged the same should be treated as a confession, however this cannot be so, as the Report to Police Station is not a confession at all but is an information of an alleged commission of an offence. In the instant case the report was made to a Police Constable who is not allowed to take confession in a criminal matter.

**21. Section 25 A of the Evidence Act provides:**

**“25A. (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.”**

22. In view of the above the O.B. extract exhibit P 1 (a) and 1 (b) is not admissible as an admission of commission of an offence by any of the two Accused persons. Accused did not confirm or admit the commission of the offence by virtue of the alleged extract. The alleged confession is not admissible for having not been made before an authorized officer. Further the producer of the same was not its maker nor was the extract certified as a true copy of the original. I find it does not meet the threshold for its admission as a confession from the Accused persons.

23. I now turn to the proposed dying declaration made by the deceased to PW2, Richard and PW3.

24. On a dying declaration in the case of **Shadrack Mbaabu Kinyua V in Criminal Appeal No. 163 of 2011 (Nyeri)**, the Court of Appeal stated thus: -

**“.....The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7<sup>th</sup> Edition of Field on Evidence has repeatedly been cited with approval.....it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R-V-Eligu s/o Odel and Another (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused..... But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is a satisfactory corroboration. ”**

25. In the instant case there is undisputed evidence from both the Prosecution and the accused at scene of attack and on the way to the hospital the deceased was able to talk. That at the scene of the attack there were many people including the Accused and their witnesses. PW2 admitted at the scene of attack she did not talk to the deceased. The Accused talked to the deceased and they heard their witnesses talk to the deceased, who stated he did not recognize his attackers. He told DW4 and DW5 so, amongst other witnesses. That on the way to Siaya County Referral Hospital the deceased was with PW2 and Richard when according to PW2 he told them he was attacked by the Accused persons. PW3 stated when she went to see the deceased at Siaya Hospital and while alone, with the deceased, he told her he was attacked by the Accused persons herein.

26. PW2 and PW3 on being cross-examined on the issue of the deceased dying declaration, they admitted they did not recorded the same in their statements to the Police. PW2 stated:

**“In my statement dated 8.5.2016. I told Police all I know. In my statement I did not record what my husband told me. I did not give the names of the people. I told this court my husband told me and Mr. Richard my brother-in-law. I told the Police the truth. I rely on the statement I made to the Police.”**

PW3 on her part stated the deceased told her some words which she forgot to tell the words to the Police.

27. In the instant case, the attack on the deceased occurred during a dark night. The conditions were no favourable for positive recognition as attested by all witnesses who gave evidence. PW2 and PW3 evidence is not credible as it is not corroborated by anyone else Richard who is said by PW2 to have been present when the dying declaration was made was not called as a witness nor the driver who drove them. The two witnesses admitted they did not give the Police the names given by the deceased in their statements as having been mentioned in the deceased dying declaration. I doubt the evidence of PW2 and PW3. I find the same to be incredible. I find that it would be unsafe to base a conviction solely on the dying declaration of the deceased person made in absence of the Accused, and not subject to cross-examination unless there is a satisfactory corroboration which is lacking. I believe DW4 and DW5 that the deceased was unable, when his mind was fresh and in presence of the Accused, to name them as his assailants, simply because the conditions at the time of his attack were not favourable for positive identification or recognition and that he did not recognize nor identify his attackers.

28. I find the Prosecution failed to prove beyond reasonable doubt the persons who assaulted and caused the deceased's death. I find the Prosecution did not adduce sufficient evidence to connect the Accused persons with the death of the deceased.

**c. Whether malice aforethought has been proved against the Accused persons?**

29. The Prosecution urges the deceased and the Accused had grudge due to land dispute and as such they had sufficient reasons to cause the deceased's death. The Accused and their witnesses DW3, DW4 and DW5 denied having land dispute and grudge with the deceased. PW2, wife to the deceased admitted that there was no grudge between her late husband and the Accused and that the accused showed good gesture by taking the deceased to the hospital. From the Prosecution witnesses save PW5, no one else talked of existence of any grudge or existence of any land dispute. PW5 did not produce any evidence to show the existence of any grudge between the families. His evidence was a mere allegation without any basis and I reject the same. I find the Prosecution failed to prove any grudge between the deceased and the Accused person. The Prosecution failed to prove malice aforethought or produce evidence that the Accused had planned to cause the death of the deceased. Malice aforethought is therefore not proved.

30. The Upshot is that the Prosecution has failed to prove the charge of murder against the 1<sup>st</sup> and the 2<sup>nd</sup> Accused. Accordingly I find the 1<sup>st</sup> and the 2<sup>nd</sup> accused not guilty of Murder of Tom Status Otieno as charged. I accordingly acquit the 1<sup>st</sup> and the 2<sup>nd</sup> Accused of Murder as charged and set them at liberty forthwith unless otherwise lawfully held.

**DATED at SIAYA this 20<sup>th</sup> day of APRIL, 2018**

**J. A. MAKAU**

**JUDGE**

Delivered in open Court

In the presence of:

M/s. M. Odumba for State

Mr. Ariho for 1<sup>st</sup> Accused

Mr. K. Omollo for 2<sup>nd</sup> Appellant

Court Assistant:

1. Laban Odhiambo

2. Leonidah Atika

J. A. MAKAU

JUDGE