



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT SIAYA

H.C.R.C. NO. 4 OF 2017

(MURDER)

(CORAM: J.A. MAKAU – J.)

REPUBLICPROSECUTION

VERSUS

- 1. ZAKARI ODONGO NYAMULO.....1ST ACCUSED**
- 2. JUSTO ODUOR MAUJE.....2ND ACCUSED**
- 3. MICHAEL ODONGO.....3RD ACCUSED**
- 4. AMBROSE OTIENO ODHIAMBO.....4TH ACCUSED**
- 5. EDWINE OTIENO OOKO.....5TH ACCUSED**

JUDGMENT

1. **ZAKARI ODONGO NYAMULO** (1ST Accused), **JUSTO ODUOL MAUJE** (2ND Accused), **MICHAEL ODONGO OLERO** (3rd Accused), **AMBROSE OTIENO ODHIAMBO** (4th Accused) and **EDWINE OTIENO OOKO** (5th Accused) face a charge of **Murder contrary to 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya**. The particulars of the offence are that on the 21st day of January, 2017 at around 2000 hrs at Sirembe Market, Sirembe Sub-Location in Gem Sub-County within Siaya County jointly with others not before Court murdered one **JOSEPH OWINO ODUOR**.

2. On the charge being read and explained to the Accused on 20.3.2017 all the Accused pleaded not guilty to the charge and the case was scheduled down for hearing.

3. The Prosecution called 11 witnesses in support of the charge and upon each of the Accused being put on their defence, they each opted to give unsworn statement and called no witnesses.

4. The Prosecution's case is that, PW1 Moses Odhiambo, Onyango and PW2 Omondi Wilfred, were in the company of the deceased and others on 21.1.2017 when at around 5.30 p.m. they went to Sirembe Market at Bomet Hotel for drink, leaving the bar at around 6.45p.m. That the deceased did some

shopping and proceeded to a butchery, bought some meat and while at the shop, where the deceased met a young man, one Amollo, and a girl, where the deceased told the young man if he had done his shopping he should leave holding the young man and pulling him towards him, that a fight arose between the two forcing PW1 and others to separate the two. The deceased then left. PW1 and his team to take meat home. PW1 and his team proceeded to a Disco-Matanga from where at around 10.00 p.m. it was announced that Joseph Owino, the deceased had been killed.

5. That the deceased on his way home was attacked by a mob which included Boda Boda riders, who were using sticks to assault the deceased. The Prosecution's case is that the deceased passed on at the scene of the attack. That postmortem on the deceased's body was carried out and Doctor Onyango opined the cause of death was due to intra-cerebral hematoma due to severe head injury as a result of blunt trauma to the head from mob justice. That after investigation the Accused were arrested and charged with this offence.

6. That upon the accused being put on their defence each of the accused opted to give in sworn statement and called one witness. Each of the accused denied commission of the offence and gave a defence of alibi.

7. The Accused is facing a charge of murder. The Prosecution in a murder case has to adduce evidence to prove that the Accused caused the death of the deceased with malice aforethought. The Prosecution must show 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 person charged knew that his actions causing death would probably cause death or do grievous harm.

8. **Section 206 of the Penal Code** defines malice aforethought as follows: -

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) 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;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

9. For the Prosecution to prove a charge of murder, it has to prove the following ingredients: -

(a) Death of the deceased and cause of death.

(b) That the accused caused the death through an unlawful act or omission.

(c) 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?

10. PW1 and PW2 in their evidence stated that on 21.1.2017 at around 6.45 p.m., they parted with the deceased who told them he was to his home as they proceeded to a Disco-Matanga. That at around 10.00 p.m. Kabosi, brought a report of the death of the deceased. PW3, PW4, PW5 and PW6 testified they found the deceased lying on the ground as he was being beaten by a crowd of about 10 people. PW7

testified that he went to the scene after 10.00 p.m. with the brother to the deceased and his wife and found the deceased lying on the ground already dead. They awaited for Police from Yala Police Station who came and collected the deceased's body and took it to Yala Sub-County Hospital Mortuary. PW8, No. 50358 PC Wilson Kipson, proceeded to the scene after he received the report on 21.1.2017 at around 10.25 p.m. in company of Cpl. Boniface Wanjala and found the deceased already dead. They noted the deceased had injuries to the head. They were joined by the in-charge of their station. PW10 No. 86640, P.C. Douglas Wamalwa, from scenes of crime Department, who received photographs of the deceased's body together with other photographs, Produced photographs of enlarged photographs taken at the scene of the crime as photo Nos. 1 – 9 together with certificate of the photograph prints dated 26th July, 2017.

11. PW5, Dr. Belinda Omondi, who carried out postmortem examination of the deceased's body, after identification by PW6 and another, produced the postmortem report as exhibit P2 dated 28.1.2017. Her evidence corroborates the evidence of PW6, PW7, PW8 and PW10 who testified they saw the deceased's body before and after it had been picked by Police. PW6 and another witnessed the postmortem examination being carried out on the deceased's body by PW5. I therefore find the death of the deceased and the cause of death of the deceased was proved as per postmortem Report exhibit P2.

(b) Who caused the death of the deceased?

12. PW1 and PW2's evidence is that on 21.1.2017 at around 6.45 p.m. at "**Anyango General Shop**" at Sirembe Market, the deceased picked a fight with one Amollo, who is not one of the Accused persons. PW1 and PW2 separated the two before they left them. PW3, Arthur Dianga Olwande at around 8.00 p.m. on 21.1.2017 in company of George Otieno (PW4) on their way home they heard someone screaming for help and proceeded to the scene, where there were motorbikes with hazards lights on and from a distance of 5 metres to where the incident occurred they were able to see someone being beaten by many people numbering about 10, noted the person was being beaten using sticks, and as the crowd was hostile they left.

13. PW3, testified he was able to recognize with the aid of motor bike lights and their hazards, Odongo Olero (3rd Accused), Nyamulo (1st Accused) and Justo (2nd Accused) and Thiwa (5th Accused) who are his village- mates and who he had known for 20 years. PW3 also took part in the identification parade and identified Nyamulo (2nd Accused) Odongo Olero (4th Accused), Thiwa (4th Accused)

14. PW4, George Otieno Ochieng, testified that at 8.00 p.m. near Sirembe Secondary School one rider called Amollo passed him and PW3, while armed with rungu and stopped 100 metres after passing them and he heard screams of someone being beaten. That on arrival at the scene they found Onyango Oriki armed with a rungu with others as he told PW3 and PW4 he did not want anyone passing there. PW4, moved 4 metres and stopped to watch what was happening with the aid of motorbike lights, as at the place where the person was being beaten was dark. He testified he saw Mzee Otendo, Odongo Nyamulo, Odongo Olero and others he could recognize, beating someone before he left. PW4 testified that he had known the people he mentioned for a long time as his neighbours. PW4 in the identification parade identified Odongo Nyamulo (1st Accused), the 2nd Accused, Odongo Olero (3rd Accused) and 5th Accused Thiwa.

15. PW6, Ezekiel Onunga Ombogo, testified on 21.1.2017 at around 8.00 p.m., he heard screams of someone, as if, he was being beaten and on arrival saw a crowd of people of 20 – 30 and another crowd of 8 – 10 people. The first group of 20 – 30 was watching what the group of 8 – 10 people were doing. He testified it was dark night but he started watching as a motorbike came from Siaya side towards Kodiaga with its full lights on and was forced to stop. PW6, was able to see and recognize the people who were beating the person as the light were directed on the people who were beating the person. The lights were ahead of PW6. He was about 20 feet. He testified he was able to identify 3 people namely:- Odongo Nyamulo (1st Accused), Otis Jane and Ambrose (4th Accused), that Odongo Nyamulo was armed with a rungu which he was using to beat the person lying on the ground, Otis Jane had a stick and that Ambrose also had a stick. That the motorbike light were switched off after a short while. PW6 took part in the identification parade and identified Odongo Nyamulo (1st Accused) Odongo Olero (3rd Accused), who he

stated he did not see at the scene, Justo (2nd Accused), who he did not see at the scene, Edwine the (5th Accused), who he did not see at the scene.

16. PW9, conducted identification parades for five (5) suspects of murder. The witness produced identification parade forms as exhibit P 1 (a) – (f) in which the 1st, 2nd, 3rd, 4th and 5th Accused were identified by witnesses who already knew them. I find such an identification parade was an exercise in futility as the witnesses knew the suspects and there was no need of the Prosecution conducting an identification parade as it had no probative value to the Prosecution's case.

17. The Prosecution's case revolves on evidence of identification and recognition. The basic principle to be considered when dealing with the issue of identification or recognition has been set down in several cases. In the **HC CRA No 104 of 2013 (Meru) Lokorio Aldo V. Republic** this Court quoted with approval from the case of **Robert Gitau vs. Republic Criminal Appeal No. 63 of 1990 (Nakuru)** where the Court of Appeal stated as follows:

“It was held in Abdullah Bin Wendo and Another V R 1953 Volume KXX 166 and Cleophas Otieno Wamunga V R. (Criminal Appeal No. 20/89) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witness who testified that they could identify the appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short, was doubtful whether the witnesses could have identified the Appellant's face in the manner described by the witness. We are also doubtful how the witnesses were able to identify the Appellant in the identification parade. In this respect, the Appellant complained that it was easy for him to be picked up because in the parade he was the only one from the cell.”

18. The evidence of identification/recognition in the instant case, was that of PW3, PW4 and PW6, made in dark night.

19. It is crucial to note that according to PW8 No. 50358 PC Wilson Kipson from Siremba Police Station on 21.1.2017 at around 10.25 p.m. one Grey Dhono Ouma and George Atele Onyango reported of the attack of the deceased before PW8 in company of other Police Office and reportees proceeded to the scene. PW11, the investigating officer who took over the matter on 22.1.2017, recorded witnesses statements. In his evidence he did not give the names of the suspects mentioned to him by any of the reports, a few minutes after the murder. None of the reportees save as the names of the suspects prosecution claim PW3, PW4 and PW6 saw. The reportees were PW4 and PW7 who did not give the names or description of the people they purportedly recognized of the scene to the Police. They did not during the hearing of the case account for their failure to give the specific names or description of the assailants nor did the Prosecution explain why it took over 1 ½ months to arrest the Accused who were neighbours to the Prosecution witnesses and who had not been said to have gone underground. In this regard I am guided by the case of **Simiyu & Another V. R (2005) 1 KLR 193** where the Court of Appeal expressed itself on this point as follows:-

“In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused and then by the person or persons to whom the description was given. The omission on part of complainant's to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identify.”

20. I note these witnesses did not give a specific description of the assailants or the names of the attackers immediately they made a report to Police because the circumstances were not favourable for positive recognition or identification. Considering such evidence the Court has to bear in mind the unique circumstances surrounding the identification or recognition. The Court is obliged to and must consider the duration of observation, of the attackers, whether the witnesses could have identified the face or clothing or anything in the manner described, the nature of the light that enabled the witness to identify or recognize the assailants, the intensity or location of the source of light in relation to the point where it was

alleged the attack took place and whether the eye witnesses gave a description or names of the assailants to Police at the earliest opportunity or at all.

21. I have given a careful and cautious consideration to the evidence by PW3, PW4 and PW6 who claimed to have been at the scene of the crime. I have also considered the respective rival submissions by Counsel for the Prosecution and defence and authorities relied upon by the defence Counsel and the Prosecution Counsel. I have noted PW3 evidence is contradicted by evidence of PW4 and PW6 as to the role played by the Accused persons PW3 claimed to have been at the scene. The three Prosecution witnesses PW3, PW4 and PW6 do not agree as to who was at the scene. PW6 testified that he did not see the 2nd, the 3rd and the 5th Accuseds at the scene, whereas PW3 states otherwise. PW4 did not corroborates the evidence of PW3 as to who was at the scene, that they have not agreed on, they were from the scene, the intensity of light and for how long the lights were on. It is testified the light was on for a short while and the attackers had surrounded the person under attack. PW3, PW4 and PW6 did not mention whether within the short interval the lights were on they were able to see the faces of the Accused's, persons, that they noted how far the Accused were from the deceased and for how long they were under their observation. There is clear evidence the motorcycle lights were not on at the time as the owner of the motorbike were forced to switch off their motorbike lights within a short time. It is not clear whether the lights were shone on the Accuseds' faces. PW3, PW4 and PW6 did not state the motorbike headlights were directed to the direction of the attackers. The witnesses admitted that it was a dark night. PW7, stated it was dark and he used his mobile phone light. He did not mention there being any other source of light such as motorbike light by the time he left.

22. Turning to the 1st, the 2nd, the 3rd, the 4th and the 5th Accused unsworn defence of alibi, the 1st Accused (DW1) stated on 21.1.2017 at around 9.00 p.m. on his way through Sirembe Market after picking a customer he found 2 Police Officer, stopped and saw a body lying on the ground, and learned the person was the deceased Joseph, in this case. He asked the Police Officers whether he could photograph the body as he knew the person which he did. He then left with his customer. That after 2 weeks the deceased's brother one Ngala, came to see him wanting to be given the names of the people who attacked the deceased, after telling him he did not know them, he was threatened with being framed with this offence.

23. The 2nd accused (DW2) on his part stated that on 21.1.2017 at around 8.00 p.m. on his way from Sirembe he found a crowd of people along the road who included women and saw someone lying on the ground and thought the person was drunk and as such he did not take much interest. He then proceeded with his passenger to Ndegwa on his motorbike. That the following day when he went to the centre he discovered the person he found lying on the ground was Josse and heard he had been murdered. He stated did not know what caused his death. On 3.3.2017 he was arrested and charged with this offence. He stated the people who identified him knew him.

24. DW3 the 3rd Accused stated that on 21.1.2017 he was at home from 6.00 a.m. ploughing his land from 6.00 a.m. to 10.00 a.m. That from 10.00 a.m. he did not leave his home as rested upto 9.30 p.m. when he went to sleep after supper. That he was arrested on 3.3.2012 identified by the people who knew him at the identification parade. He denied knowing the cause of death of the deceased.

25. The 4th accused (DW4) stated that on 21.1.2017 after closing his business, he left for his home. That he was not at the scene of crime. That on 3.3.2017 he was arrested and he explained where he was on 21.1.2017. He averred he does not know anything as regards this offence. The 5th accused stated on 21.1.2017 as from 5.00 a.m. to 11.00 a.m. he was ploughing after which he rested upto 3.00 p.m., that he then went to Sirembe shopping Centre and left for his home at 6.00 p.m. arriving at home at 8.00 p.m. and after supper he slept. That the following day the deceased's brother Oluoch him the deceased had fought with Omollo but unfortunately he died. That after 1 ½ months he was arrested, thus on 4.3.2017 but was not told the reason for his arrest.

26. In a criminal case an accused person has a right to opt to give sworn defence or unsworn statement or keep quiet being his constitutional right to do so whatever option or mode of defence one opts for, should

not be the basis for Court's decision as Court is required to consider whether the prosecution has proved its case beyond any reasonable doubt. The burden of proof always remain on the Prosecution to prove its case beyond any reasonable doubt, and it is only upon Prosecution discharging its duty, then the burden of proof shifts to the defence.

27. On defence of alibi I am guided by the case of **Charles Anjare Mwamusi v. Republic, Court of Appeal, CRA No. 226 of 2002** whereas the Court expressed itself as follows:-

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable.”

28. In view of the about the accused having raised the defence of alibi, they did not assume the burden of proving that the answer to the charge was true but were only required to introduce into the mind of Court doubt that is not unreasonable that they were not at the scene of murder at the time it occurred. It is I believe and rightly so that it is settled law that the Accused person bears no burden of proving his defence is indeed true or proving his innocence. That once a defence of alibi is given the burden of proof shifts to the Prosecution and it is, in my view sufficient if an alibi introduces into the mind of court a doubt that is not unreasonable.

29. Having evaluated the Prosecution's evidence and the Accused's defence and the circumstances of identification or recognition of the Accused persons, I find that there were no good grounds for positive, reliable and correct identification or recognition. I find that the best identification is by name if someone is known and Police should be given the name of the assailant if known, in the first report but not be given after a period of about 1 ½ months after speculative investigation has taken place.

30. I therefore find and hold the Prosecution failed to prove amongst the crowd which persons caused the deceased's death and actual involvement of the five (5) Accused persons. In view of the circumstances of the commission of the offence and circumstances surrounding the commission of the offence, I find the Prosecution failed to prove the Accused caused the death of the deceased.

(c) Whether malice aforethought is proved?

31. The Prosecution's case is that malice aforethought has been proved. PW1 and PW2 witnessed a confrontation between the deceased and one Amollo on the fateful night between 5 – 6 p.m. and the deceased had to walk home because no Boda Boda, the colleagues of Amollo, were willing to carry him from the stage. That the colleague of Amollo, together with him were seen beating the deceased at the scene of crime as the Accused persons formed that malice to injure the deceased or kill him because of the confrontations he had with Amollo. That from the injuries the deceased had sustained it was submitted by Prosecution that the attackers had, one intention, thus to clear away with the deceased. The submission and evidence by the Prosecution is from the bar. The sub-missions by the Prosecution is not supported by evidence, as no evidence was adduced before the Court, though Amollo, was mentioned by PW3 and PW4 and PW6 as having been seen at the scene, no evidence came forth the Accused persons acted in cohort with the said Amollo, nor evidence also was called to show, the Boda Boda people refused to carry the deceased home, though the attackers were said to be Boda Boda riders. The evidence on record is that the deceased was attacked by a big crowd of 10 people. There is no evidence that the attack had been planned and at any rate, I am not satisfied that the prosecution proved its case to the required standard of proof, that the Accused persons were amongst the attackers. I therefore find that malice aforethought has not been proved against the Accused persons.

32. The upshot is that the Prosecution has failed to prove the charge of murder against the 1st, the 2nd and the 3rd, the 4th and the 5th Accused persons. Accordingly the 1st, the 2nd, the 3rd, the 4th and the 5th Accused persons are acquitted and discharged of the charge of murder and are accordingly set at liberty forthwith unless otherwise lawfully held.

DATED at SIAYA this 20th day of April 2018.

J.A. MAKAU

JUDGE

Delivered in the open Court this 20th day of April, 2018.

In the presence of:

Mr. B.F. Odhiambo for Accused

M/s. Mourine Odumba for State

1st Accused Present

2nd Accused Present

3rd Accused Present

4th Accused Present

5th Accused present

Court Assistants:

1. Laban Odhiambo

2. Brenda Ochieng

J.A. MAKAU

JUDGE