



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 30 OF 2015

(MURDER)

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....PROSECUTION

VERSUS

ERICK ODUOR.....ACCUSED

JUDGEMENT

1. **ERICK ODUOR** faces a charge of Murder contrary to **Section 203 as read with Section 204 of the Penal Code (Chapter 63), Laws of Kenya**. The particulars of the offence are that on the 6th day of November 2014 at Kagilo Sub-location in Gem Sub-county within Siaya County, jointly with others not before Court murdered one **CALLISTO AGINGA OKELLO**.

2. The case commenced on 23rd April 2015 before Hon. Lady Justice E.N. Maina who took plea and accordingly entered a plea of not guilty against the accused before the case was transferred to this court for hearing and determination.

3. The Prosecution called six (6) witnesses in support of the charge whereas the accused upon being put on his defence opted to give sworn statement and called no witness.

4. The Prosecution case is that, PW1 Simon Okoth Obiero, the Assistant Chief of Kagilo sub-location was holding a public baraza on 6/11/2014 at Kagilo Primary School at 2.00 p.m. following receipt of report of stock theft in his sub-location of livestock of Mzee Christopher Nyoga and after he had been given the name of the suspect as Ombim Okello. That in the meeting Ombim Okello named his stepbrother Daniel Ochieng Okello as the person who had informed him of the theft. That in the public baraza, the public demanded to know who the suspect was, resulting into a bitter argument between the two brothers; as the members of public started blaming Ombim Okello forcing PW1 to adjourn the meeting for two weeks.

5. That the members of public left the school compound leaving PW1 behind with some member of public, who needed some assistance. That while there, PW1 heard some people quarrelling outside the school compound, demanding that Ombim Okello tell them the real suspect; as they were pushing him and telling him they would take him to unknown destination unless he told them who the real suspects were. PW1 called APs from DC's office at Gem Nyangweso to rescue the situation. He also decided to move to DC's place and while there he could hear screams as the members of public were beating Ombim Okello but PW1 did not go to the scene as he was scared of the public. That while at DC's place, Boda boda riders brought Ombim Okello and another boy called Otieno and as he was seriously injured, he ordered the Boda boda riders to take the two to the hospital. That at Yala Level IV Hospital, Ombim Okello passed on at around 8:00 pm.

6. PW2, Caroline Adhiambo Aginga, wife to Callisto Aginga Okello alias Ombim Okello evidence is that on 6/11/2014 at around 4p.m. her sister-in-law informed her that she found her husband being assaulted at Nyangweso and asked her to go and rescue her husband. She went to the main road along Wagai-Nyangweso road, found her husband tied with a nylon rope. She found Erick Oduor and Jared Odhiambo Nonga beating her husband while lying on the ground. She screamed and was told by Erick Oduor to keep quiet otherwise he would beat her to death. She then left to report at DC's office where she met PW1 who had gone to call police officers. Her husband was then brought by Boda boda riders, checked on him and found that he was dead. Erick Oduor and others who had brought the deceased, were told to take PW2's husband to Yala Level IV Hospital where he was confirmed dead and taken to the mortuary.

7. The accused upon being put on his defence, he opted to give sworn statement and called no witness. The accused gave a defence of alibi. He admitted he was at the Assistant Chief's Baraza on invitation of the Assistant Chief (PW1) who he claimed had called him, to take him to the meeting using his Boda boda and never participated in the Baraza but left with the Assistant Chief when the meeting became chaotic. He alleges after picking the APs from the APs Camp, he went back to the scene with the Assistant Chief, the APs and found the deceased being assaulted by members of the public. That he together with the APs took the deceased to Yala Hospital where they met the deceased's wife and left her with her husband. He denied assaulting the deceased and urged that the deceased was killed by mob. He denied having

participated in killing of the deceased.

8. Upon close of the defence case, both Mr. Adiso, Learned Advocates for the accused and M/s Maureen Odumba, Learned State Counsel, made their respective submissions. Mr. Adiso for the accused submitted the Prosecution did not prove the case against the accused beyond reasonable doubt; urging that the chaos at the Chief's Baraza forced the Assistant Chief to adjourn the meeting. That evidence of PW2, he urged was not relevant as she was not at the scene of incident. He urged the deceased was killed by mob through mob justice. He urged the accused though at the scene he never took active participation. He urged the court to find the accused not guilty and acquit him.

9. M/s M. Adumba, Learned Prosecution Counsel urged the prosecution proved its case beyond any reasonable doubt; urging the Prosecution proved the death of the deceased, its cause through production of the postmortem report exhibit P1; that the accused, who the witnesses referred to as Soldier, was positively recognized by witnesses as the assailant with 2 others, that there was no mob justice but the accused and 2 others killed the deceased. On malice aforethought, she urged the Prosecution laid sufficient evidence and proved the same. She urged the court to find the accused guilty of murder of the deceased and convict him accordingly.

10. The Prosecution in a murder case must prove that the accused had formed the necessary intention to cause death or grievous harm to the deceased. **Section 206 of the Penal Code**, describes circumstances which constitute the same 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 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 person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be cause;

c. An intent to commit a felony;

d. An intention by the act or omission facilitates the flight or escape from custody of any person who had committed or attempted to commit a felony.”

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

a. Death of the deceased and its cause.

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

c. 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?

12. PW1, PW2, PW3 and PW4 testified that on 6/11/2014, they saw the deceased's body. PW1 testified that he ordered the Boda boda to take the deceased to the Yala Level IV for treatment and at 8.00pm, a villager confirmed to him the deceased had died. PW2, wife of the deceased, testified when the deceased was brought by Boda boda riders to DC's office, she checked on him and found he was dead. That on 7/11/2014 she went to the mortuary and confirmed the deceased was dead. That on 8/11/2014 she identified the deceased's body for postmortem examination. PW3 testified that on 6/11/2014 at around 7.00pm, he heard cries from the deceased's home and learned the deceased had died. PW4 testified that he knows the deceased died on 6/11/2014 being his step-brother. PW5 who carried out the investigation confirmed the deceased died on 6/11/2014. The postmortem on the body of the deceased was carried out by Dr. Collins Oginga on 8/11/2014 after identification of the body by PW2 and others. PW6 produced the postmortem report as exhibit P1 which had been carried out at Yala Level IV Hospital. The doctor's evidence corroborates the evidence of PW1, PW2, PW3, PW4 and PW5 that the deceased died. The death of the deceased is not in dispute. The doctor's postmortem examination report reveal the deceased had suffered the following injuries: -

(a) External Appearance:

- Multiple bruises over the both upper limbs each measuring 10cm x 5cm.

- Multiple bruises over the abdominal flanks measuring 5cm by 8cm.

- No other obvious injury noted.

(b) Respiratory system:

- Haemorrhagic lungs and haemothorax.

(c) Digestive System:

- Torn spleen, ruptured left and right kidneys with intra-abdominal bleeding.

(d) Head:

- Has massive blood clot beneath the parietal skull-scalp bilaterally.

(e) Spinal Column:

- Fractured vertebral column bones 1 and 2 i.e. cervical vertebra 1 and 2.

13. That as a result of the examination, he opined the cause of death was due to: -

Cardio-respiratory failure following severe lung injury coupled with abdominal viscera rupture (kidneys and spleen) with resultant haemorrhage following multiple blunt force injuries.

14. In view of the above, I am satisfied the prosecution proved the death of the deceased and the cause of the death.

(b) Who caused the death of the deceased?

15. The accused denied having caused the death of the deceased. He urged that he was at the scene first because he had been invited by the Assistant Chief (PW1) to take him to the meeting and secondly, when he returned to the scene in company of the two APs and the Assistant Chief (PW1), who had asked him to take him to the APs camp to seek security and save the deceased from mob justice. He denied having been one of the people who killed the deceased urging he did not actively or otherwise participate in assaulting the deceased. He admitted through cross-examination the witnesses who gave evidence knew him and he had no grudge with any of the witnesses.

16. PW1, PW2, PW3 and PW4 in their evidence placed the accused at the scene of the incident and clearly stated the role played by the accused in company of his two accomplices, who are yet to be apprehended and charged. PW2 went to the scene of attack and found Erick Oduor *alias* Soldier, and Jared Odhiambo Nyoga beating the deceased and upon screaming for help, the accused threatened her with death. The two were well known to PW2 since 1994. PW3 saw Omondi and Odhiambo on 6/11/2014 enter the place where PW1 was holding a public baraza carrying an elastic rubber and nylon rope. That the two and soldier, the accused, took the deceased outside the school compound and started beating him for 20 minutes with sticks, demanding he produces the stolen livestock. He later found the deceased being beaten 150 metres from the school gate. PW3 described the person called Solider as the accused, being his neighbor. PW4 testified he saw Soldier, take the deceased and another outside the classroom where PW1, had Chief's Baraza on 6/11/2014, tied them separately with a nylon rope before he was joined by Odhiambo Nyoga and Omondi. That the three took the two to the gate as PW4 followed from a distance. He saw the three beating the deceased and another with sticks; kicking and hitting him with blows for over 20 minutes.

17. PW4 testified it was only the accused and his two accomplices Odhiambo and Omondi, who were assaulting the deceased as the crowd kept their distance watching. He was categorical the members of the public did not participate in beating the deceased, urging they were watching. He was categorical that the crowd did not assault the deceased but he was only being assaulted by three people thus; Omondi, Odhiambo and Soldier, the accused.

18. I have considered the accused's defence of alibi and find that PW1, PW2, PW3 and PW4 placed the accused at the scene of incident. Each clearly stated the role played by the accused. The accused claimed he was invited to the barazas by PW1 who he had carried to the baraza and even left with him to pick APs. PW1 did not mention having come to the meeting with the accused or being taken to Aps camp by the accused. PW2 saw the accused assaulting the deceased and even he threatened her with death if she screamed further for help. PW3 and PW4 saw the accused assaulting the deceased. The accused never challenged the evidence of PW1, PW2, PW3 and PW4 which placed him at the scene nor did he deny he played the role they each stated he did through cross-examination. His defence of alibi was not raised early enough through cross-examination for the prosecution to check it, nevertheless, I find he was placed at the scene of crime. PW4 categorically stated the deceased was being assaulted by the accused and his two accomplices only. I find his defence of alibi to be an afterthought and reject it for those reasons.

19. Having considered the evidence of PW1, PW2, PW3 and PW4, I am satisfied the accused was placed at the scene of incident. The role he played was clearly articulated by each of the prosecution witnesses. I have also considered the evidence by PW5 and PW6 and the injuries sustained by the deceased and find that they are consistent with the evidence of PW2, PW3 and PW4. The evidence by doctor (PW6) corroborates the evidence of PW2, PW3 and PW4, on the injuries the deceased sustained from the beatings.

20. PW5, No. 235602 Inspector Charles Mukaya, the Investigating Officer upon full investigation found that the deceased's death was not caused by mob justice. He submitted his investigation report to ODPP and was later advised to arrest and charge three people namely Erick Oduor *alias* Soldier, the accused; Odhiambo and Omondi with an offence of murder.

21. I have considered the evidence of PW1, PW2, PW3, PW4 and PW5 and I find the evidence on record connects the accused and his two accomplices with the death of the deceased and no other person. I accordingly find that the prosecution has proved beyond reasonable doubt that the accused and his two accomplices Odhiambo and Omondi caused the death of the deceased.

(c) Whether malice aforethought has been proved?

22. PW1 testified he heard people telling the deceased to tell them the real suspect or else they would take him to unknown destination. PW2 found the accused and others beating the deceased and on her attempt to intervene the accused told her to stop screaming for help or else he would beat her to death. PW1, Assistant Chief testified he feared to go for the rescue of the deceased as he feared for his life and decided to

report to DC's camp. PW3 saw the accused and his accomplices carrying elastic rubber and nylon rope which they used to tie the deceased and the other suspects with before starting to assault him with sticks. PW4 evidence corroborates evidence of PW3. He saw the accused tie the deceased's hands with nylon rope, and beating the deceased with sticks for about 20 minutes. The postmortem report corroborates the evidence of PW2, PW3 and PW4 on the deceased's injuries. The nature of injuries are clear that the accused and his accomplices intention were to either cause grievous harm or death to the deceased and that is why the deceased suffered multiple bruises all over the body, suffered ruptured spleen, kidney, swollen testicles and penile organ; blood clot beneath the parietal skull scalp; fractured vertebral column bones 1 and 3 thus cervical vertebra 1 and 2 and haemorrhagic lungs and haemothorax. The accused and his accomplices knew and ought to have known their severe beating of the deceased all over the body with hard weapons would most likely cause death to the deceased.

23. In view of the above, I find the Prosecution has proved that the accused had planned to cause death of the deceased. I find malice aforethought has been established.

24. The upshot is that the accused is convicted of murder of CALLISTO AGINGA OKELLO under Section 203 as read with Section 204 of the Penal Code as charged and I convict him accordingly.

DATED AND SIGNED AT SIAYA THIS 19TH DAY OF APRIL 2018.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the Presence of:

Mr. Adiso: for the Accused

M/s Odumba: for the State

Court Assistants:

1. Laban O. Odhiambo

2. Brenda Ochieng

J.A. MAKAU

JUDGE