



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 42 OF 2015

(MURDER)

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....PROSECUTION

VERSIS

STEPHEN ODHIAMBO ODHIAMBO.....1ST ACCUSED

FREDRICK OTIENO NYOMA.....2ND ACCUSED

STEPHEN ONYANGO MLOM..... 3RD ACCUSED

JUDGMENT

1. **STEPHEN ODHIAMBO ODHIAMBO**, (the 1st Accused), **FREDRICK OTIENO NYOMA** (the 2nd Accused), **STEPHEN ONYANGO MLOM** (the 3rd Accused) jointly faces a charge of **Murder contrary to section 203 as read with section 204 of the Penal Code (cap 63) Laws of Kenya**. The particulars of the offence are that on the 8th day of February, 2014 at Kowinga village, Ugenya sub-county within Siaya County, jointly with others no before court murdered one **GEORGE OTIENO OBIERO**.

2. On 17.09.2014 the charge was read and explained to the Accused in Kiswahili language which they understood by Hon. Justice H.K. Chemitai – J., seated at Kisumu High Court, and which charge the Accused denied and a plea of not guilty was accordingly entered. The case was subsequently transferred to Siaya High Court on 29.9.2015 for hearing and determination.

3. The Prosecution called a total number of six (6) witnesses whereas the Accused upon being put on their defence gave sworn defence and called no witnesses.

4. The Prosecution's case is that on the night of 7th/8th August February 2014, there was a Disco-Matanga, while the community was preparing for the funeral of Victor Omondi, (deceased). That there were many people in attendance. That a fight broke up involving about 5 youths who included the Accused persons, as they were beating the deceased George Otieno Obiero and who subsequently died on 11th February 2014, that the Postmortem Report revealed the cause of death was due to extensive brain injury secondary to assault.

5. The Accused upon being put on their defence each one of them gave a sworn defence denying that they assaulted the deceased. The 1st Accused admitted he was at the scene assisting in carrying out certain duties when he saw one Juma Antony push the deceased to the ground, and went and separated the two as the two were drunk. That he left for his home at 1.00 a.m. of 8.2.2014. The 2nd Accused denied having assaulted the deceased but admitted he was at the funeral assisting in slaughtering two cows behind the homestead, where he remained from 7.00 p.m. upto 1.00 a.m. of 8.2.2014, that after slaughtering the two cows he was given a piece of meat and he left for his home. He denied fighting the deceased on 7.2.2014 or seeing him. The 3rd Accused denied the charge and stated as from 8.00 p.m. of 7.2.2014, he was at the home of Peter Rapary, digging a grave with 7 others. That they finished the grave preparing at 3.00 on 8.2.2014. That he saw the deceased drunk who they denied digging the grave as he was drunk. He denied having been invited in a fight with the deceased.

6. In a charge of murder, for the Prosecution to prove the charge, it has to prove the following ingredients:-

(a) Death of the deceased and the 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?

7. PW2 Jane Adhiambo Otieno, wife to the deceased, testified her husband died on 10th February, 2014, that she reported to the area Assistant Chief and his body was collected by Police Officers from Ukwala and taken to Busia Hospital Mortuary. PW3 testified on 10th February 2014 he heard screams from Kilo's home, proceeded there and confirmed the deceased herein was dead. That the Police from Siaya Police Station came to the scene and collected the deceased's body. PW4, testified on 10th February, 2014, he heard screams that George Otieno Obiero had died, went to the home and found the deceased laid on the ground dead. He accompanied the Police and took the deceased's body to Busia Mortuary. PW6, Doctor Hillary Kiplangat, produced the Postmortem Report by Dr. Patson Kibuta which corroborated the evidence of PW3 and PW4, as regards the deceased injuries as per the witness's evidence and he opined the cause of death as per exhibit P1, was due to possibly extensive brain injury secondary to assault. In view of the evidence adduced by PW2, PW3, PW4 and PW6, I am satisfied that the Postmortem proved death of the deceased and the cause of death to the required standard of proof.

(b) Who caused the death of the deceased?

8. The Accused persons denied having been involved in a fight with the deceased during the fight of 7th/8th February 2014. The 1st and 2nd Accused denied seeing the deceased at the scene, whereas the 3rd Accused though admitting seeing the deceased, denied witnessing or being involved in any fight. The Accused denied having acted jointly in assaulting the deceased or at all and further stated though at the scene of burial, they were busy assisting the family of the deceased on different duties. PW1 and PW2 were not at the scene and did not witness any incident involving the deceased and the Accused persons. PW2, stated it was the deceased who after returning from the funeral, who told her he was assault by five people who included the three Accused persons,

9. PW3 and PW4 who were at the scene stated that at the scene, there was a generator which was on and was providing sufficient light. PW3, stated there was a fighting involving 5 people who included the three Accused persons against the deceased. He stated Stephen Odhiambo Odhiambo joined the fighters as a fighter and crushed the person who was being beaten with his leg on the head as he was lying on the ground. PW3 went and grabbed the 1st Accused and reprimanded him. That the 3rd Accused went and bought back the deceased and was involved in assaulting him with others stepping on his head. PW3 stated he saw Stephen Odhiambo alias Ondiek, Onyango Mlom, Otieno Mungu, James Omondi and Mulewa Ooko beating the deceased. He identified the 2nd Accused Stephen Odhiambo Odhiambo, the 2nd Accused Otieno Mungu and the 3rd Accused Onyango Mlom as amongst the people he saw assaulting.

10. PW4 testified the people he saw attacking the deceased included 1st Accused, 2nd Accused and 3rd Accused as well as James Omondi and Mulere Ooko. This people PW4 and PW3 claimed they saw them assaulting the deceased, are the same people PW2 claimed her husband mentioned to her as his assailants. None of the Accused stated PW3 and PW4 had any grudge with them. I find no reason why PW3 and PW4 would frame any of the Accused. I further find that PW3 and PW4 were not mistaken to the identity of the assailants of the deceased as the Accused are people well known to the PW3 and PW4 by their appearances and names being fellow villagers for a long time and that at the material time there was sufficient light from the generator and the fight took place from a close range from where PW4 and PW3 were and it was a fight that took a while. The injuries sustained by the deceased were several on the head as per PW3 and PW4. The cause of death was as per exhibit P1 by PW6 was due to possibly extensive brain injury due to assault which I find consistent to what PW3 and PW4 stated they saw the Accused do to the deceased.

11. Having considered the Accused's defence, I find that the evidence by PW3 and PW4, placed he Accused at the Centre of the fight, that they actively participated in and in which they jointly and severally assaulted the deceased The Accused defences of having not participated in the fight and being engaged in other activities within the scene is not supported by any other independent evidence. The evidence of PW3 and PW4 dislodged the Accused defences. I find the evidence of PW3 and PW4 credible and I believe that they saw the Accused persons take part in the fight. I am therefore satisfied the deceased injuries which resulted to his death were inflicted upon him by the Accused persons and others who were jointly and severally involved in a fight at the Disco- Matanga.

(c) Whether malice aforethought is proved?

12. According to the evidence of PW3 and PW4 there was a fight at the Disco-Matanga. PW4 testified youths were fighting. PW4 saw deceased and Juma Antony who were dancing fall down and saw five people attack the deceased PW5, the investigating Officer testified that he gathered that the five suspects had organized to beat the deceased and found there was provocation, but did not avail the persons who purportedly told him of the plan to beat the deceased as a witness nor did he elaborate on there being provocation. The evidence on the alleged organization and provocation is scanty but from the evidence on record from PW3 and PW4, it appears the fight occurred spontaneously and it had not been planned at all. It cannot be ruled out that there was no provocation, and as I have pointed out no evidence on provocation, has been adduced. The fight was involving a number of people including the Accused persons, and how the fight started it cannot be said the three Accused persons and others sat down and planned to fight the deceased, for what reason and achieve what purpose. I therefore find that the Accused persons had not planned to cause the death of the deceased nor can it be said the killing of the deceased was pre-meditated. The deceased should be noted after the fight he did not report to the Police nor did he bother to go to the hospital nor did he die, immediately but after about 5 days. I therefore find that the Prosecution did not prove murder but manslaughter. I accordingly reduce the charge from that of **murder to manslaughter contrary to section 202 as read with Section 205 of the Penal Code.**

13. **Having come to the conclusion that I have, I find the 1st Accused, the 2nd and the 3rd Accused persons guilty of manslaughter contrary to section 202 as read with Section 205 of the Penal Code.**

DATED at SIAYA this 19th APRIL, 2018.

J. A. MAKAU

JUDGE

Delivered in the open Court

In the presence of:

Mr. Ochieng for Accused:

M/s. Odumba for State

Court Assistants:

1. Laban Odhiambo

2. Brenda Ochieng

J. A. MAKAU

JUDGE