



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CRIMINAL CASE NO. 77 OF 2012

BETWEEN

PROSECUTOR.....REPUBLIC

AND

MORRIS OTIENO OJWANG.....1ST ACCUSED

FRANCIS CHWEYA MASIA.....2ND ACCUSED

JUDGMENT

1. On 3rd November 2012, this court was informed that **Morris Otieno Ojwang** and **Francis Chweya Masia** jointly with others not before the court murdered **Daniel Otieno Ouma** (“the deceased”) on 1st December 2015 at Got Nyabondo Sub-Location, Kajulu East Location, Kisumu County. They pleaded not guilty and the trial proceeded a pace before Chemitei J. I took over conduct of the trial after complying with **section 200** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. The prosecution calling 4 witnesses while both accused gave sworn testimony.

2. On 30th December 2012, the deceased's brother, Philip Odhiambo Ouma (PW 1) was at Kisumu when he was called and told that his brother was being assaulted at Got Nyabondo. When he arrived there at about 2.00pm, he found his brother being assaulted by the two accused and another person. He tried to intervene but was threatened by them. He rushed to Nyabondo AP Post and reported the incident.

3. APC Henry Mutai (PW 2) received PW 1's report and they went back to the scene on a motorbike. As they went there, they met a crowd heading to the AP Post carrying the deceased who was seriously injured. PW 2 pleaded with the mob to take him to hospital. PW1 then took the deceased to Banja Dispensary where he was given first aid and then to Jaramogi Teaching and Referral Hospital. By the time they arrived, the deceased had died and his body was taken to the mortuary.

4. On the next day, PW 1 went to Kondele Police Station to report the incident and the deceased's death. His report was received by the investigating officer, Corporal Samwel Sang (PW 4). PW 4 confirmed that PW 1 mentioned the names of the accused and acting on the information, he organized for the accused to be arrested. The accused were arrested in their respective homes at Got Nyabondo. He organised for a postmortem of the deceased's body which was done by Dr Ocholla. The post mortem form was produced by Dr. Eddy Odhiambo Owuor (PW 3) under the provisions of **section 77** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. The significant finding is that the deceased had a cut wound on his right leg, deep cut wound at the back of his head, two fractures on the lower and upper limb, fracture of the ribs on

the right side of the chest wall. He concluded that the cause of death was a serious head injury leading to blunt trauma to the head.

5. After the close of the prosecution case, I put the accused on their defence. The first accused, DW 1, told the court that he knew the deceased. He told the court that on the morning of 30th November 2012, he was woken up barking dogs. When he went to look outside through his window, he saw the deceased make off with the super-drum. He raised alarm and other villagers came but by that time the deceased had taken off. Later in the morning, he went to report the incident at Got Nyabondo AP Post.

6. At about midday, PW 1 heard people screaming near Got Nyabondo Primary School. When he made his way there, he found the deceased had been assaulted by a large group of people as he was seated next to PW 2. The crowd wanted to beat the deceased. At about 3.00 p.m., PW 1 arrived on a motorbike and whereupon PW 2 handed the deceased over to PW 1. He went home thereafter.

7. DW 2 denied that he was involved in the incident as he was in his shamba which is about 2 kilometers away at the Nandi-Kisumu border. He had gone there in the morning and came back home at about 3.00 pm only to be arrested on 1st December 2012.

8. The fact and cause of the deceased's death was established by the prosecution. The deceased was assaulted by various blunt and sharp objects as is confirmed by the nature of injuries sustained. The injuries are consistent with the fact that he was injured by several people. I accept the evidence of PW 3 that the deceased ultimately died from a serious head injury.

9. The issue in dispute is whether the accused inflicted the injuries on the deceased. The prosecution led direct testimony of PW 1 who stated that he saw the accused assault the deceased at the shopping centre. Counsel for the accused, Mr. Onyango, submitted that while the testimony of one witness is sufficient to support a conviction, the court has a duty to examine the testimony carefully because PW 1 was the deceased's brother and he may have been emotionally invested in the matter by blaming the accused for his brother's death.

10. PW 1 was clear that when he arrived, at the scene at 2 pm, he met the accused assaulting the deceased. DW 1 was using a jembe stick while DW 2 was using a frame to assault the deceased. A third assailant had a panga. He told the court that three assailants were alone at the scene near the corner of a shop and he did not see other people present. When pressed in cross-examination he stated that there were no people and no gathering.

11. This position stands in stark contrast to the testimony of PW 2 who testified that PW 1 reported to him that the deceased was being beaten by a mob. In fact when he headed to the scene, a mob of 30 people had gathered and were bringing the deceased to the AP Post. In cross-examination, he stated that PW 1 reported that his brother was about to be killed by a mob. According to PW 4, the deceased was assaulted by members of the public. He also stated that according to the statement recorded by PW 2, he found 30 people assaulting the deceased.

12. I find that there are two contradictory strands of evidence from the prosecution evidence. The first is that the deceased was beaten by three assailants and that he was being beaten by the mob. Why would PW 1 testify that he found the deceased being beaten by 3 assailants yet in his first report PW 2 states that the deceased was assaulted by a mob?

13. In my view, the evidence is not watertight to justify conviction as the prosecution has not proved beyond reasonable doubt that the accused assaulted the deceased alone or that they were part of the mob.

14. I therefore acquit the accused, **MORRIS OTIENO OJWANG** and **FRANCIS CHWEYA MASIA**. They are set free unless otherwise lawfully held. Their sureties are also discharged.

DATED and DELIVERED at KISUMU this 28th day of February 2017.

D.S. MAJANJA

JUDGE

Mr Onyango instructed by Onyango, Olel and Ingutiah Advocates for the accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.