



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 39 OF 2014**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**VICTOR OCHIENG ..... ACCUSED**

**JUDGMENT**

1. **VICTOR OCHIENG** (“the accused”) was charged with the offence of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on the 26<sup>th</sup> day of April 2014 at Karapul village in Siaya District within Siaya County, the accused, jointly with others not before court murdered **PETER ONYANGO ODODA** (hereinafter “the deceased”). The prosecution case was that the deceased was beaten by a mob of people, including the accused person, on suspicion that he had stolen a cow. The prosecution marshalled 6 witnesses while the accused gave sworn testimony.

2. On 26<sup>th</sup> April 2014 at about 3.00pm, Dan Afwoka Ayoo (PW 2) had gone to visit Roseline Adhiambo Oketch (PW 4) to inquire about her stolen cow. PW 2 testified that while still at PW 4’s home, three motorbikes arrived. One of the motorbikes carried the accused and the deceased and as soon as they alighted, the accused together with the other persons began beating the deceased whose hands were tied at his back using metal rods and sticks. When PW 2 inquired why they were beating the deceased, the accused informed him that PW 4 had paid them Kshs. 5,000/- to kill the accused. As they were beating the deceased, they demanded to know where PW 4’s cow was. At about that time the deceased’s step-father, Richard Were (PW 1) came but he could not stop the mob from assaulting the deceased.

3. PW 2 rushed to call his brother, Peter Oduor Obongo (PW 3) from a neighbouring home. PW 3 testified that he was working at a neighbouring home when he heard people shouting after some motorbikes arrived. He recalled that PW 2 came to call him and when he arrived at the scene, he found the deceased sitting on the ground with his hands tied behind his back and blood oozing from his head. PW 3 further testified that when he arrived no one was beating the deceased. He recalled that the accused did not have any weapons and prevented anybody from beating the deceased.

4. At about the same time, PW 1 recalled that he was at home when he heard a person shouting, “*Why are you killing me*” in the neighbouring homestead. He rushed there and found the accused, in the company of about 30 people, assaulting the deceased with metal rod and sticks. PW 1 asked the accused why the deceased was being assaulted. He was told that the accused had stolen some cows and that the mob had been paid Kshs. 1,000/- to kill him. PW 1 added that the accused carried fuel and wanted to burn to the accused. When he tried to stop them, the mob threatened to kill him too. PW 1 later took the

deceased to Siaya District Hospital after the mob had left.

5. PW 4 testified that at the material time she was at her home preparing food when a group of about 10 people came to her compound riding motorbikes. Among the people she identified was the deceased, who was her brother-in-law, and the accused. They started beating the deceased while accusing him of having stolen cows. They later dragged the deceased to his father's gate and continued beating him. On cross examination, PW 4 denied the allegation that she had paid the mob to kill the deceased. She also stated that the accused did not carry any weapons or sticks.

6. Dr Willis Ochieng (PW 5), who performed an autopsy on the deceased's body, testified that the deceased's head was swollen with multiple lacerations and the left temporal bone had a linear fracture. He also noted that the deceased's gall bladder was ruptured leading to bile fluid in the peritoneal cavity. PW 5 formed the opinion that the cause of death was cardiorespiratory arrest resulting from increased intracranial pressure due severe head injury.

7. The investigating Officer, PC Thomas Mulagoli (PW 6) recorded the witness statements and established that the deceased was killed by mob. However, he was only able to arrest the accused who was identified by the witnesses.

8. In his sworn testimony, the accused opted to give a sworn statement. He denied any involvement in the deceased's death. He stated that on the material date, he was at his place of work in Siaya town when received information that there was an incident at his home area. He immediately left and on reaching his village, he found the deceased being assaulted by a mob. He tried to stop the mob but failed. After the mob left, he assisted in taking the deceased to hospital. The accused did not call any witnesses.

9. At the close of the defence case, Mr K'Ouko, counsel for the accused, submitted that the prosecution did not prove its case against the accused beyond reasonable doubt. He contended that the prosecution did not prove that the accused was involved in the death of the deceased. He submitted that the prosecution had failed to establish that it is the accused who administered the fatal blow. Counsel submitted that there was evidence on record that the accused tried to stop the mob from assaulting the deceased.

10. To prove murder the prosecution must establish three key ingredients beyond reasonable doubt: first, the prosecution must prove the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and, third, that the accused committed the unlawful act with *malice aforethought*.

11. The testimony of PW 1, PW 2, PW 3 and PW 4 established that the deceased was assaulted by a mob. He was later taken to hospital where he was pronounced dead. The post-mortem conducted by PW 5 prosecution confirmed that the deceased sustained multiple injuries consistent with assault by several persons. I therefore find and hold that the deceased died and that he died from a severe head injury resulting from an assault.

12. The key issue in this case is whether the accused was part of the mob that assaulted the deceased. PW 2 and PW 4 were together when the accused and deceased arrived at PW 4's home. They both saw the accused beat the deceased on the head while interrogating him about the stolen cow. On arrival at the scene, PW 1 found the accused beating the deceased. Although the testimony of PW 3 seems to support the accused's position that he was trying to restrain the mob from beating the deceased, I hold that this evidence is not exculpatory as he came to the scene after he was called by PW 2 and the beatings had ceased.

13. Considering the testimony of PW 2 and PW 4, who saw the accused and the deceased arrive at PW 4's homestead on a motorbike, I reject the accused defence that he came to PW 4's homestead on his own volition to assist the deceased who was being beaten. It was not suggested to PW 2 and PW 4 in cross-examination that the accused arrived alone to save the deceased as he contended. Both witnesses were certain that the accused assaulted the deceased. I also discount the fact that this would be a case of mistaken identity as the incident took place in broad daylight. Further all direct witnesses testified that the

accused was a person who was well known to them as he lived in the neighbourhood. In addition, it was not even suggested that the witnesses had a grudge with the accused. I therefore find and hold that prosecution proved that the accused assaulted the deceased. The evidence is corroborated by the autopsy report by PW 5 which shows that the cause of death was because of severe head injuries. Not only did the accused admit that he was at the scene, the three direct witnesses implicated him.

14. Defence counsel submitted that the prosecution did not prove that the accused administered the fatal blow. In law, this is not necessary as the Court of Appeal observed in ***Njoroge v Republic [1983]KLR 197***:

*If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavour to effect the common object of the assembly.*

15. As such so long as the accused participated in beating the deceased in association with others he is considered to have shared a common intention to kill the deceased and he is thus guilty notwithstanding that he did not strike the fatal blow. Moreover, as I have stated elsewhere, I have discounted the possibility that the accused withdrew from the common intention or tried to stop the beating. All the direct evidence points to him beating the accused.

16. In determining the question of malice aforethought, the court is entitled to consider factors such as the part of the body that was targeted, the type of weapon used, if any, and the type of injuries inflicted upon the deceased (see ***Rex v Tubere s/o Ochen [1945] 12 EACA 63***). In this case, severe injuries were inflicted on the deceased's head pointing to the fact that the assault was intended to cause grievous injury if not death. These injuries were consistent with the unlawful killing of the deceased actuated by malice aforethought within the meaning of **Section 206(a)** of the ***Penal Code***.

17. I am satisfied that prosecution has proved that on the material day, the accused was part of a mob that arrived at PW 4's home with the deceased who was suspected to have stolen PW 4's cow. They started beating the deceased in order to force him to disclose the whereabouts of the cow thereby inflicting severe injuries including head injuries from which he died. Although there is evidence to suggest that PW 4 paid the mob to beat the deceased, she denied this fact and disassociated herself from the incident. Although this fact supplies the motive for the accused's action, it is not decisive as the elements of the offence of murder have been proved by direct testimony. It is unfortunate that the accused was the only one of the vigilante group that decided to take the law in their own hands who was identified.

18. I therefore find **VICTOR OCHIENG** guilty of the murder of **PETER ONYANGO ODODA** and I convict him accordingly.

**DATED and DELIVERED at KISUMU this 27<sup>th</sup> day of February 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr K'Ouko, Advocate for the accused.

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