



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 74 OF 2011

BETWEEN

REPUBLIC.....PROSECUTOR

AND

CHRISPINE ODHIAMBO ONYAHA.....ACCUSED

JUDGMENT

1. **CHRISPINE ODHIAMBO ONYAHA** (“the accused”) is charged with the murder of **JOSEPH OTIENO AWOOR** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information are that on 29th November 2011 at Yala Old Market in Siaya District, Siaya County he, jointly with others not before court, murdered the deceased. The prosecution case was grounded on circumstantial evidence and was that the accused assaulted the deceased and dumped his body in River Yala. The prosecution called a total of 11 witnesses while the accused made an unsworn statement and called one witness.

2. The deceased’s wife, Moreen Achieng Otieno (PW 1), testified that on 29th November 2011, at about 4.00pm, her husband left home for Yala Old Market to charge his phone but never returned. After 4 days, she decided to report his disappearance at Yala Police Station. On 5th December 2011, she received information from a lady friend that the body of her husband had been found floating in River Yala. The body was retrieved in the presence of Corporal Francis Thurania (PW 10) and taken to Yala Hospital Mortuary. After the deceased’s body was identified by PW 1 and Francis Okoth Okoth (PW 8), Dr Asava, who conducted the post mortem, concluded that the cause of death was an injury to the head due to blunt force injury. The post mortem form was produced on his behalf by Dr Okelo (PW 6).

3. After the cause of the deceased’s death was established, evidence began to emerge that the deceased was seen at Yala Old Market on the night he disappeared. A guard at Lucy Bar on the night the deceased disappeared, George Otieno Awino (PW 2), recalled that at about 10.30pm, he heard commotion outside the neighbouring bar. When he went to find out what was going on, he found the accused, the deceased and another person called Ouma engaged in a fight over a lady. A waiter came out of the bar and separated them and went back to the bar with the deceased. In cross-examination, PW 2 did not recall seeing any of the people with weapons.

4. Another watchman, Michael Otieno Akombo (PW 3), witnessed the fight between the deceased, the accused and Ouma. He testified that at about 10.30pm, he heard noise and someone shouting, “*Why are you beating me*”. When he went to check, he saw the accused fighting with the deceased. He told the court that Ouma had a stick while the accused did not have any weapon. In cross-examination, PW 3 told the court that he heard Ouma say that he can kill somebody. He also recalled that a waiter came from the

bar and told Ouma to leave the deceased alone. PW 3 further testified that the accused's wife then came and took him away as he was drunk but after a while, the accused wife came back in a car in the company of another man looking for him.

5. Magrine Akinyi Odera (PW 4) testified that she was in the deceased's company but could not recall what happened as she got too drunk and lost consciousness. Michael Ayira Odera (PW 5) testified that on the material day, the deceased came into the bar with PW 4. He also recalled seeing the accused drunk at about 9.00pm with another person while going home.

6. A waiter at the bar, Boniface Agutu (PW 7), testified that he served the accused and his friends that night. He told the court that the deceased came in first and was later joined by PW 4. PW 5 also joined them a while later. At about 7.30pm, Edwin Omulo came in and sat in different table and ordered drinks. At about 9.00pm as the deceased rose to leave, the accused and Ouma confronted the him about PW 4. Commotion ensued and his landlord and Omulo pushed the accused and Ouma out of the bar. The deceased returned to the bar but later left saying that he was going to watch football. PW 7 locked up the bar and went to sleep. He later heard that the deceased had been killed.

7. The investigating officer, Chief Inspector Michael Were (PW 11), testified that PW 1 reported that her husband went missing on 2nd December 2011 and on 6th December 2011, she returned to the station and reported that her husband's body had been found floating in Yala River. The case was first treated as drowning but after further investigations and post mortem report, it became obvious that the deceased had been murdered. PW 11 took statements of various persons who saw the deceased that day. He told the court that PW 1 informed the police that it was the accused who told her that the deceased had been killed. Based on the evidence he arrested the accused Edwin Omulo and charged them with the murder.

8. In his sworn defence, the accused (DW 1) opted to give an unsworn statement where he denied any involvement in the deceased's death. He stated that on the material night he passed by the bar and saw the deceased fighting with other men over PW 4. Although PW 4 was his relative, he decided not to intervene as the men had crude weapons with them. He left the place and went home to his wife where he narrated what had happened, his wife left to go and call their Uncle Luka and they returned together. The accused told his uncle what had transpired and the uncle later left following which he went to sleep.

9. The accused's wife, Violet Bulimo (DW2), testified that on the material day, her husband returned home at around 6:00pm. He later left the house saying that he was going to his uncle Luka's house to get his bicycle. He stayed there for too long so that DW 2 decided to go and look for him. At the uncle's house, he was told that the accused had left and the uncle offered to take her back home in his car as it was raining. On arrival at her home she found the accused in the house.

10. In a murder trial the prosecution bears the onus of proving the case against the accused beyond reasonable doubt. As the cause of death is not disputed, the prosecution must prove that the accused before the court is the person who caused that death with malice aforethought. Since the prosecution case was grounded on the circumstantial evidence, it is important to recall the general principle stated by the East Africa Court of Appeal in ***Rex v Kipkering Arap Koskei and Another* [1949] 16 EACA 135** that:

In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses other than that of his guilt.

This holding in law was amplified and explained in the case of ***Sawe v R* [2003] KLR 364** where it was also held that circumstantial evidence can be the basis of a conviction only if there is no other co-existing circumstances weakening the chain of circumstances relied on.

11. The prosecution clearly established that the deceased died as a result of blunt force trauma on the head. However, none of the prosecution witnesses saw who administered the fatal blow. PW 2 and PW 3 testified that they saw the accused fighting with the deceased outside the bar. Apart from the accused, both witnesses named Ouma as the third person involved in the fight. While PW 2 did not see any of

them with a weapon, PW 3 recalled that he saw Ouma with the stick. When PW 11 was cross-examined, he stated that Edwin Omulo, who also participated in the scuffle, was initially charged but the charges against him were withdrawn. The testimony of PW 2 and PW 3 is that after the scuffle, the deceased went back into the bar. PW 6 told the court that the deceased left the bar at about 9.30pm to go and watch a football match. None of the witnesses saw the deceased thereafter or put the accused in presence of the deceased after he left the bar and went to watch a football match.

12. Since, the deceased was ostensibly normal when he was last seen leaving the bar, to implicate the accused, the prosecution had to prove that apart from the scuffle, the accused is the one who assaulted the deceased and dumped his body in the river. On this issue, there is a possibility that the assault would have been caused by Ouma or Edwin Omulo or by any of them or either of them jointly with or without the accused or indeed any other person. Neither of Ouma or Omulo were called as witnesses and nor was an explanation given as to why they were not called. Further, a witness from bar where he went to watch football would have been useful to testify under what circumstances the deceased left the bar.

13. **Section 143** of the *Evidence Act* does not require the prosecution to call all or any witnesses. It states that, “*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact.*” Although it is not necessary for the prosecution to call all or any number of witnesses to prove its case, in *Bukenya and Others v Uganda [1972] EA 549*, the Court held that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. Any of the three persons named had a motive to assault the deceased and as I have stated there is no evidence putting the accused and the deceased together after he left the bar.

14. All this evidence is insufficient to close the cycle of circumstantial evidence. Although there is grave suspicion that the accused could have been involved in committing the felonious act, the evidence against him falls far short of that required to convict him. I therefore acquit the accused **CHRISPINE ODHIAMBO ONYAHA** on the charge of murder of **JOSEPH OTIENO AWUOR**.

15. The sureties are hereby discharged.

DATED and DELIVERED at KISUMU this 24th day of April 2017.

D.S. MAJANJA

JUDGE

Mr Odeny, Advocate for the accused.

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