

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 35 OF 2014

REPUBLIC PROSECUTOR

VERSUS

ISAAC OMONDI OTIENO ACCUSED

JUDGMENT

The accused is charged with the murder of **Errick Odhiambo Otieno** on 19th April 2014 Contrary to Section 203 as read with Section 204 of the Penal Code.

He pleaded not guilty.

The Court heard that on the material day the accused person entered his mother's house armed with a panga. His brother Erick, the deceased, was in the house. As their mother Esther Atieno (PW1) did not want trouble she told Erick, deceased, to go into the bedroom. She then snatched the panga from the accused and hid it in the bedroom. After that she went outside as there was moonlight. It is then that the accused got the panga from the bedroom and slashed Erick on the hand and nose. He followed Erick outside and continued cutting him even after he fell. According to Esther (PW1) Erick died where he fell and by the time Dalmas Opondo (PW2) responded to her screams the accused was leaving with a panga in his hand. Erick, deceased, was lying in a maize field with cuts on the nose, elbow and neck which was almost decapitated.

The accused in a sworn statement told this Court that the deceased was his brother but denied he murdered him. He stated that on the material day he was at Kisian Center where he was staying but not at Kombewa where the murder is alleged to have taken place. He further stated that there was no grudge between him and Erick and stated that what his mother told this Court is not true. He also stated that Dalmas (PW2) was his neighbour against who he held no grudge.

The Court heard both Mr. Abande, Advocate for the accused and Miss Chelangat, Prosecution Counsel in summing up.

I agree that the evidence adduced falls short of the standard to prove the charge against the accused person. The two witnesses called were mother and uncle to the deceased and the accused. Their evidence was clouded by their evidence of the accused's bad character. Such evidence is inadmissible under Section 57(1) of the Evidence Act. The evidence was not directly relevant to the issue before Court and only goes to show that they could indeed have been biased against him. This rendered them untrustworthy witnesses and their evidence unreliable. To make matters worse the prosecution did not call the investigating officer who as an independent witness would have been subjective and shed light on really what transpired that night. Whereas it was held in **Reuben Nderitu V. Republic [2009]eKLR** that it is not mandatory to call the investigating officer I find that in this case where we had witnesses who spoke so ill of the accused, it was crucial for him to attend and confirm whether what these two witnesses allege is what was unearthed by his investigations. The cause of death was also not established as despite several adjournments the prosecution did not call the doctor who performed the post mortem. There was therefore no evidence to confirm that the deceased was in fact assaulted in the manner alleged by these two witnesses let alone that his death was as a result of those injuries. Whereas the alibi raised by the accused is not convincing there is no evidence to warrant this Court to convict him for this offence.

Accordingly I find him not guilty and acquit him of the charge

Signed, dated and delivered at Kisumu this 31st day of May 2017

E. N. MAINA

JUDGE

In the presence of:

Muia for the State

Abande for the Accused Person

Court Assistant – Serah Sidera

Accused person