



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 65 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

PAUL OWINO MNALA.....ACCUSED

JUDGMENT

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

It is alleged that on 14th December 2013 at Dunga in Kisumu East District within Kisumu County, jointly with others not before Court he murdered **Solomon Omondi** Alias **Robert Ouko**, deceased.

He pleaded not guilty to the charge. At the ensuing trial the prosecution called seven witnesses while the accused gave sworn testimony but did not call witnesses.

Briefly the prosecution's case is that on the evening of 14th December 2013 the deceased together with his friends among them Jones Aulo Otieno (PW1) met at a small pub known as one One Spot. At about 10PM when they parted to go home Jones Aulo (PW1) gave a lift to the deceased and two other friends Chris and Ochieng Ojuago. After dropping Ochieng Ojuago at his home Jones (PW1) proceeded to the deceased's house to drop him. When the deceased alighted from the car he noticed someone standing behind the car and demanded to know what he was doing there. A scuffle ensued and Jones (PW1) alighted to see what was happening. The deceased wanted the young man to tell him where he was from. The man led them to a house opposite the road. He knocked the door and when it was opened five men came out.

It was then that an argument arose. Jones (PW1) persuaded the deceased to leave and they did, the deceased going towards his house and Jones (PW1) and the man who had remained in the car going to their respective homes. The deceased did not however reach his house. According to his wife Benta Akinyi Otieno (PW3) she heard someone saying they were being beaten. She went outside and saw the deceased being beaten by people she identified as Noah Steve, Nandi and Owino, the accused in this case. She screamed and neighbours came out. All the while the assailants were saying "Baba Ashley we are killing you today". During the assault which continued until 1AM, Nandi, one of the assailants hit him on the head with a bottle. He did not make it to the hospital and was pronounced dead on arrival at Jalaram Hospital. The body was taken to Star Mortuary. The next morning at about 6.25AM the deceased's wife (PW3) reported the matter to Kisumu Police Station. Gerald Njuguna (PW5) a Police Constable attached to Kisumu Police Station testified that he was among the officers who went to the scene, upon receiving the report and learnt that Owino, one of the suspects had been seen in a boat going to Lake Victoria. They pursued him and brought him back. He was subsequently charged with this offence.

A Post mortem conducted by Dr. Dickson Muchana (PW7) revealed that the deceased's cause of death was severe head injury secondary to blunt force trauma following an assault. The post mortem report was produced in evidence (EXB.1).

The accused testified that he hailed from Dunga and was a fisherman before his arrest. He stated he did not know what happened on the material day as he was in the lake fishing with Omondi his fellow fisherman. They started fishing at 4AM but at 6AM they were arrested and taken to the police station. He was later charged with this offence. He does not know what happened to Omondi. He stated that he knew the deceased in this case and that the deceased died at the home of his (accused's) uncle Obala about 500 meters from his own home. He contended that he knew nothing about this charge and also that he did not know the wife of the deceased (PW3) or her neighbour Millicent Atieno (PW4) perhaps because there were many rental houses in that area. He also denied that he fled to the lake.

The issue for determination is whether the death of the deceased was as a result of an unlawful act of the accused and if so whether it was of malice aforethought.

Jones Aulo (PW1) testified that on the fateful night when he dropped the deceased at his home a young man stood at the back of the car and the deceased demanded to know who he (the young man) was. The young man led them (Jones (PW1) and the deceased) to his home. There an argument arose and when it escalated into a near fight Jones (PW1) pulled the deceased away. He, PW1 got into his car as the deceased walked towards his house. We do, however, have evidence that the deceased did not make it to his house. His wife Benta Akinyi (PW3) told this Court that at around 1AM she heard people shouting "Baba Ashley we are going to kill you" and when she went outside she saw her husband, the deceased, being beaten by people she recognized as she knew them before. Milicent Atieno (PW4), a neighbour, told the Court that like their other neighbours they went outside and found people beating the deceased. They tried to stop the assailants but they would not relent and followed the deceased to his house and pulled him out. Both Benta (PW3) and Milicent (PW4) testified that one of the assailants namely Nandi hit the deceased on the head with a soda bottle. The bottle broke. They identified that bottle as being similar to the one that was exhibited in Court. Both testified that they knew the assailants well and recognized them because there was moonlight. It was their evidence that the accused person was among the assailants. This Court is satisfied that they positively identified him. There was moonlight and they knew him before. The occurrence took a considerably long time from 10PM when Jones (PW1) dropped the deceased to 1AM and this to me was sufficient time for a person to recognize someone they knew. The fact that these two witnesses immediately gave the names of the assailants to the police hence leading to the apprehension of the accused is further testimony of their truthfulness. The accused person admitted that he was arrested in the Lake. He told this Court that the deceased died at the home of his uncle hence corroborating the evidence of the PW3 (the deceased's wife) who stated that the assault of her husband took place in another home. He also stated that he was with another man but that man was released. His evidence that he was in the Lake when the offence was committed pales in the light of the evidence of Benta (PW3) and Milicent (PW4) placing him at the scene of the crime.

The post mortem indicates that the cause of death was severe head injury secondary to blunt force trauma following assault. This is consistent with evidence that Nandi or Nabii, one of the assailants, struck the deceased on the head with a soda bottle. According to Dr. Dickson Muchana (PW7) he performed this autopsy when the body was still fresh – 12 hours since the time of death. The deceased had several injuries the main ones being on the head and chest. It was the Doctor's evidence that the injuries were so severe that even had the deceased reached the hospital nothing could have been done to save him. The accused may not have inflicted the blow that caused the death of the deceased but there is proof beyond reasonable doubt that he was one of the assailants. As I have already stated he was positively recognized by Benta (PW3) and Millicent (PW4) and his alibi is not convincing. The accused was not a spectator but part of the group. The assault was unlawful. The deceased and his friend had retreated to leave the scene when the accused and his accomplices set upon the deceased. Moreover they were more than three and the deceased was alone so whatever the deceased may have done to provoke them they had had time to cool down. Clearly the assailants were intent on killing the deceased. They even said it - "Baba Ashley we are going to kill you". This is evidence of a group of people who had formed a common intention to prosecute an unlawful purpose and the death of the deceased was a consequence of that offence. Section

21 of the Penal Code provides that in the circumstances each of them is deemed to have committed the offence. So whereas the final blow was meted by Nandi or Nabii the accused is deemed to have committed the offence too. The words and conduct of the assailants demonstrate that they had formed an intention to kill the deceased. As I stated they said they were going to kill him, secondly, even when he sought refuge in his house they followed him and pulled him out and continued beating him and thirdly they were more than three and he was alone and unarmed yet they beat him with clubs and a bottle. They definitely knew he would either die or suffer grievous harm. In the premises I find that the charge against the accused person has been proved beyond reasonable doubt. I find the accused guilty of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

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

E. N. MAINA

JUDGE

In the presence of:-

Mr. Muia for the State

Mr. Nyanga for the Accused Person

Accused Person

Court Assistant – Serah Sidera

MR. NYANGA: We seek leniency for the accused person. Accused is sole bread winner of the family. We pray for leniency.

E. N. MAINA

JUDGE

MR. MUIA: He can be treated as a first offender.

E. N. MAINA

JUDGE

COURT: The plea in mitigation has been considered. However as of now there is only one sentence for this offence. Accordingly the accused is sentenced to suffer death as by law provided. Right of Appeal explained.

E. N. MAINA

JUDGE

31/5/2017