



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 24 OF 2014

REPUBLIC PROSECUTOR

VERSUS

SILAS OUMA ONDUMBE ACCUSED

JUDGMENT

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 20th March 2014 at Achego Sub-location in Muhoroni District in Kisumu County he murdered **Joseph Ngeso Obonyo**.

He pleaded not guilty.

Dickson Mchana (PW4) a Consultant Pathologist who performed a post mortem on the deceased on 24th March 2014 gave conclusive evidence that the deceased died as a result of blood loss due to a cut wound on his left ankle. The case against the accused revolves around a dying declaration allegedly made by the deceased. The Court heard that on the material day the deceased accompanied his brother Johannes Omondi (PW1) to the accused's house where they partook of some chang'aa before going their separate ways with the accused intimating he was going to tend to his sugarcane seedlings. At about 3PM going to 4PM a woman whose name was given as Dorina Orina called James Ouma (PW2) and some other men who were herding cattle and told them to go quickly as someone was cutting the deceased on the leg. She pointed them to where he was and because he was also whimpering they were able to locate him. He had a cut on the right ankle and so they carried him to the road so he could be taken to hospital. When they asked him who had cut him he said it was Sila – now the accused in this case. Johannes (PW1) who had been with the deceased at the chang'aa den was one of the people who accompanied him to Chemeli Hospital. He too alleges that the deceased told him that it was the accused who cut him. Collins Awiti (PW5) testified that he had an encounter with the deceased on that day; he had gone to greet him and Joseph Omondi (PW6) as they dug trenches to plant sugar. He then left them. At about 3PM he and Moses the accused's brother went to chase away some monkeys from the farm. As they did so he heard someone calling their dog; it was the accused who was taking a bath in the river. Much later as he was returning to his house he heard a crowd shouting that Sila had killed someone. He went to the scene and found people surrounding the deceased who had a cut on the left leg. He asked the deceased what had happened and the deceased told him Sila had cut him. By then Sila was no longer at the river. Joseph Omondi Nyangware (PW6) who was the last person seen with the deceased by Collins Awiti (PW5) told the Court that he too did not witness the assault but that he heard the deceased say Sila cut him.

The accused made an unsworn statement and called his mother as a witness. He vehemently denied the offence but conceded that earlier he encountered the deceased and his brother John Onyango Oluoch (PW1) and that the three of them went to his home where the deceased and his brother drank some chang'aa. He stated that after that the two brothers (cousins) left and he went to collect his phone which

was charging somewhere. He later joined a congregation at Miracle and Faith Church. When he finally went home his mother asked him to accompany him to the scene as it was being alleged he had killed the deceased. At the scene he shook the deceased but he could not talk. Some women said the deceased could have taken too much alcohol. He was taken to hospital but did not survive. He stated that he went about his chores for the remainder of the day only to be arrested at 5AM the next day.

His mother (DW1) testified that when they went to the scene she observed that the deceased had a cut on the leg and that a woman called Dorina said he had cut himself.

This Court then heard closing submissions from Mr. Anyul, Advocate for the accused and Mr. Muia, the Prosecution Counsel.

Having considered the evidence before me I have no doubt in my mind that the deceased died as a result of the cut on his left ankle. If there was any doubt it was dissipated by the evidence of Pathologist Dickson Mchana (PW4) who performed an autopsy on the body on 24th March 2014. The Pathologist's evidence obviously did not say who inflicted the cut and none of the witnesses, allege to have seen the person who did. It was only James Ouma (PW2) who alluded to a woman called Dorina Orina as having witnessed the incident. That woman was however not called to testify. This Court is therefore only left with the evidence of the dying declaration. Whereas a dying declaration can form the basis for a conviction it is my finding that the evidence of the dying declaration was in this case shaky and cannot form the basis of a conviction. If I may say so the evidence of the witnesses as to the dying declaration did not add up. When for instance John Omondi Onyango (PW1) testified the first time he only narrated how he identified the body for post mortem purposes. When he was recalled he testified that he went out to drink chang'aa with the deceased who was his cousin brother but after that they went separate ways. He stated that the deceased had asked him to buy cigarettes for him but when he took the cigarettes he did not find the deceased. He stated that he later stumbled on the deceased lying in a pool of water and that the deceased told him Sila meaning the accused had cut him. He also stated that when he raised the alarm Morris and Absolom who lived nearby went to the scene. This is in sharp contradiction with the evidence of James Ouma (PW2) who alleges to have been herding cattle with the said Morris and Absolom who said that the three of them went to the scene upon being told by a woman called Dorina Orina to rush there as somebody was cutting Sila. Even more instructive is that whereas these two witnesses allege that the deceased told them the accused had cut him this is not what they told the police. What came out in cross-examination is that they told the police that the deceased was unconscious when they arrived at the scene. In his own words Johannes (PW1) told the Court -

“It is true that by the time I reached where the deceased was he was already unconscious.”

This was echoed by Collins Awiti Odingo (PW5) who admitted telling the police -

“I then asked Joseph who had cut him but he was unable to talk. I thought may be from the bleeding he was drunk.”

As for Joseph Omondi Nyangware (PW6) in cross-examination he admitted to telling the police that he did not himself hear the deceased say the accused cut him but that it was the people he found at the scene who did. If the deceased was unconscious and could not talk then it is impossible that he said who killed him.

Further the testimonies of all these witnesses sharply contradicted their statements to the police hence creating an impression that they were not being truthful. I am not able to find their evidence reliable. Contrary to Mr. Muia's submission, testimonies of the witnesses was so shaky that the Court is left with doubt as to whether there was a dying declaration at all. The Court also heard that the deceased had drunk chang'aa and had thereafter gone to work on his shamba. There is a possibility therefore that he cut himself hence lending credence to the accused's statement that it is not he who did it. The accused telling his mother that the deceased was at the river is no proof of his guilt as word had already spread in the village and it was no secret. It is my finding that in the absence of direct or even circumstantial evidence that the accused inflicted that cut upon the deceased and in the absence of evidence to support the dying

declaration this Court cannot conclude that the death of the deceased arose from an unlawful act of the accused let alone that it was with of malice aforethought. In the premises I agree with Mr. Anyul, Advocate that this case has not been proved beyond reasonable doubt. Accordingly I find the accused not guilty of the charge and acquit him. He should be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered at Kisumu this 30th day of May 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Muia for the State

Mr. Anyul for the Accused person

Court Assistant – Serah Sidera

Accused Person