

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 58 OF 2013

REPUBLIC PROSECUTOR

VERSUS

WYCLIFFE JEREMIAH OBIRA ACCUSED

RULING

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code the particulars being that on 4th September 2013 in Kisumu Town, jointly with others not before Court he murdered **Hesbon Ochieng Omwaga** – deceased. He pleaded not guilty to the charge and a trial ensued. At this stage this Court is required to determine whether it is satisfied the accused committed the offence so as to put him on his defence – see Section 306(1) of the Criminal Procedure Code.

The star witness in this case Kevin Oluoch Omwadhoo (PW1) testified that the deceased was his brother and that on the material day he was in his house at Mamboleo with a friend called Ronald. They were still awake as the deceased had told him he was visiting. At around midnight the deceased called to say he was at the gate. After about two minutes Kevin (PW1) heard screams at the gate. He stood at the balcony to see what was happening and that is when he saw a motor cyclist riding away and someone lying on the ground. He went to the gate and saw his brother, the deceased lying in a pool of blood. According to him the deceased had two cuts on the back of the head. With the help of neighbours he took him to Avenue Hospital where he was admitted. The following day a man called Oguna called him and asked him to go pick documents belonging to the deceased which were in his possession. The said Oguna allegedly told him that the documents had been given to him by his regular “boda boda” and that his (Kevin's) contact was in a business card that was among them. He went and the man gave him an NHIF, ATM and business cards belonging to the deceased. He reported the matter to Kondele Police Station. In the meantime his brother died at the Jaramogi Oginga Odinga Teaching and Referral Hospital.

On 3rd September 2013 accompanied by police officers he went to a joint called Alkazar and met a Lecturer who claimed that he had a bag belonging to the deceased. He claimed to have got it from his regular “boda boda” who alleged to have picked it somewhere. He gave the Lecturer's name as Oguna. However the Court also heard that on 4th September 2013 a man called Okore took the bag to the police station. According to PC Albert Mbicha (PW4) the said Okore alleged to have received file from the accused to hand it over to Hesbon but by then the said Okore did not know Hesbon was dead. When the said Okore was required to record a statement he said he was in a hurry as he was a lecturer in town and was later for his class. He did however leave his telephone number but PC Albert Mbicha (PW4) did not know if he went back to record the statement. A few days later the accused person was arrested for an unrelated matter. He was subsequently charged with this offence.

A post mortem report produced by Dr. Eddy Omondi Mboya (PW3) indicated that the deceased died as a result of subdural hematoma due to severe head injury. Dr. Eddy Omondi explained this as bleeding under the covering of the brain.

There is no doubt that the death of the deceased arose from an unlawful act. Although PW1 did not actually witness it happening he heard the deceased's scream and upon going to the gate found him lying in a pool of blood. The post mortem confirms that the deceased's death was due to a severe head injury. There is however no evidence to connect the accused person to the death of the deceased. Both PW1 and PW4 referred to one Okore or Oguna as the person who had a bag belonging to the deceased. The said Okore or Oguna is alleged to have said he received or got the bag from his regular boda boda. There was

also talk of somebody having been given the bag by the accused person. It was however not very clear as even the evidence of PW1 and PW4 differed in regard to exactly where they met this lecturer who they variously referred to as Okore and Oguna. Neither this Okore/Oguna nor the “boda boda” alleged to have passed the bag to him were called as witnesses. PW1 and PW4 did not know the accused person. According to PW1 he only saw the accused on two occasions in Court, during this trial and as for PW4 his evidence was that the accused was arrested in connection with another matter altogether but not for this offence. Only Oguna and the boda boda could have shed light on why the accused is before this Court: whether indeed he had any connection to the deceased's bag. It is also noteworthy that the bag and documents PW1 is alleged to have received from Oguna/Okore were not exhibited and produced in evidence. Talk of a bag and documents was not proved and as a whole the evidence of both PW1 and PW4 is just hearsay. The investigations in this case appear to have been done in a hurry and are very sloppy. Oguna and the boda boda were both competent and compellable witnesses who should have been called to testify. That the investigators/police could have taken such a serious matter so casually is disappointing.

In the end I find there is no evidence that the accused committed the offence. Accordingly I acquit him under Section 306(1) of the Criminal Procedure Code. He shall be released forthwith unless otherwise lawfully held.

E. N. MAINA

JUDGE

Ruling signed, dated and delivered in open Court this 25th day of May 2017

In the presence of:-

Miss Chelengat for the State

The accused person (N/A by Advocate)

Serah Sidera – Interpreter

INTERPRETATION: English/Kiswahili