



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 18 OF 2014

BETWEEN

REPUBLIC PROSECUTOR

AND

GEOFFREY OMONDI ONYANGO ACCUSED

JUDGMENT

1. The accused, **GEOFFREY OMONDI ONYANGO**, was charged with the offence of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on 15th May 2013 at North Kowe Sub-Location, Kisumu West Sub-County within Kisumu County he murdered **LEONARD AGAI AWITI** (hereinafter “the deceased”). The prosecution called 8 witnesses while the accused gave sworn testimony.

2. On 6th February 2014, Peter Onyango Owino (PW 1) and his friend Maurice Otieno (PW 2) met at about 11.00am and decided to go and drink chang’aa at the home of Grace Aluoch (PW 3), who was referred to as *Nyakolenyo*. As they were going, they met the accused and deceased who were also going in the same direction. They all met PW 3 who served them with chang’aa. Everybody was in good spirits and according to PW 1, the accused and deceased toasted each other before they drank from the same glass. According to PW 1 and PW 2, the accused and deceased left while they continued to drink. When PW 1 and PW 2 left PW 3’s place at about 3.00pm, they both testified that they saw both the accused and deceased fighting. They separated them and they stopped fighting. PW 1 told the court by the time he left, the fighting had stopped. He further stated that the accused and deceased were fighting with their fists. PW 2 said he saw them fighting but since he was drunk he could not see clearly.

3. PW 3 confirmed that the accused and deceased bought chang’aa which they drank. After she served them, she left to go to the river to fetch water but when she returned they had left. In a while, she heard people screaming and when she went where the screams were coming from, she found the accused beating the deceased with his bare hands. The deceased was bleeding from his nose. She told the deceased, who appeared drunk, to go home. She told that court that the deceased left staggering.

4. On the next day, word spread in the area that the deceased body had been found in an open field. The Assistant Chief of South Kowe Sub-Location, George Ochieng Ajuoga (PW 6) received a call at about 7.00am informing him that a body had been found. PW 6 alerted the police who proceeded to the scene. The deceased’s brother, Jacob Ameso (PW 4), received a call informing him of the death. He proceeded to the scene where he found the deceased’s body hidden in a bush within a shamba. When he viewed the body, he saw a cut at the back of the head. Nicholas Adika Ameso (PW 5), who was also in the vicinity, viewed the body and observed that the deceased had cuts on the back of his head.

5. One of the police officers who arrived at the scene was the investigating officer, Corporal Nelson Kiplagat (PW 7), who went to the scene. He found the deceased lying on the ploughed land with a cut on the head and right upper hand and bruises on the chest and back. He removed the body and took it to Jaramogi Odinga Oginga Teaching and Referral Hospital. He started conducting investigations which led him to discover that on the previous day, PW 1 and PW 2 had been drinking at PW 3 home and had seen the accused and deceased fighting. He went to the accused's homestead but he was nowhere to be found and was only arrested on 24th February 2014 at Nyahera, Kisumu.

6. The post-mortem was done by Dr Matilda Wendo on 13th February 2014 after the body was identified by PW 5. She observed that the deceased had a cut wound on the right forearm, elbow and on the left, right and back side of the head. Internal examination of the head revealed extensive bleeding at the back and left side of the head. She concluded that the cause of death was as a result of a severe head injury secondary to assault. Dr Nelly Wanjala (PW 8), produced the post-mortem form.

7. In his sworn defence, the accused told the court that the deceased was his friend and on the material day they drank at PW 3 home. He recalled that they got so drunk and after they parted ways, he could not remember what happened. He told the court that during that time he had come home to construct his house from his place of work at Bar Union. He told the court that on 7th February 2014, he returned to work early in the morning from where he was arrested.

8. The prosecution established that the cause of death was severe head injury secondary to assault. The witnesses who observed the deceased's body, PW 4, PW 5 and PW 7 stated that they saw cut wounds on the deceased's head which were confirmed when the post-mortem was done. The witnesses who saw the accused fight with the deceased, that is, PW 1, PW 2 and PW 3 all stated that they saw the accused and deceased fight with bare hands and that the accused did not have any weapon. In any case, both the accused and deceased had been drinking with PW 1 and PW 2 and there is no indication that the accused had any weapon. Although the accused was the last person to be seen with the deceased, no one saw him cut the deceased.

9. PW 1, PW 2 and PW 3 put the time of the fight at about 4.00pm. PW 3 told the court that she saw the deceased leaving and staggering home. The prosecution did not account for the accused whereabouts from that time until the morning. His defence that he left home for work is at least plausible. PW 1, PW 2 and PW 3 supported the accused's contention that the deceased was his friend and hence there was no motive for him to kill the deceased in the manner he died. On the hand, it is only possible that after they were both inebriated, they fought and parted way only for the deceased to be killed later that night.

10. Anything could have happened between the time the accused and deceased parted and the next morning when the deceased's body was found. It is possible that the deceased was murdered by unknown persons that night while on his way home. Even though there may be suspicion that the accused committed the act, the evidence is insufficient to outweigh the suspicion leading me to conclude that the prosecution had failed to prove its case beyond reasonable doubt.

11. The accused **GEOFFREY OMONDI ONYANGO** is acquitted of the murder of **LEONARD AGAI AWITI**. He is set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 23rd day of May 2017.

D.S. MAJANJA

JUDGE

Mr K'Owinoh, Advocate for the accused.

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