



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRC NO. 10 OF 2014**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**RODGERS OMONDI OCHIENG.....1ST ACCUSED**

**MAURICE OCHIENG HAYANGA.....2ND ACCUSED**

**JUDGMENT**

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

The Information states that on the 20th day of January 2014 at Ngunya Sub-location, Ugunja District within Siaya County they murdered **Peter Juma Odira**.

They both pleaded not guilty to the charge.

Briefly the prosecution's case is that on 18th December 2013 at around 7.30PM Nancy Awino Ogumbo (PW1), a neighbour of the deceased, Sara Atieno (PW2), a sister in-law of the deceased and Pilister Oloch, the deceased's mother and Celine Achieng (PW5) were in their separate houses, when they heard the deceased shouting for help. He was outside his mother's door and was urging her to open, shouting that he was being killed. Nancy Awino Ogumbo (PW1) and Sara Atieno (PW2) got out of their respective houses and ran to the scene which was outside the house of the deceased's mother (PW4). According to the deceased's mother (PW4) she heard a knock on the door but fearing that it was one Ochieng who wanted to pick a fight with her because their children had fought earlier she declined to open. However when she heard her neighbour Nancy (PW1) and daughter in-law Sarah (PW2) outside and saw some light because Sarah (PW2) was carrying a delight (solar lamp) she opened. According to Nancy (PW1) and Sara (PW2) when they arrived at the scene they found the accused persons who are father and son together with other members of their family beating the deceased. The accused persons were armed with a panga and rungu each while the 1st accused's wife had a jembe stick and her other children stones. When Sarah (PW2) shouted "Jennifer why are you killing Juma together with your children" the said Jennifer told her husband and children they could leave as their job was done. After they had left Nancy (PW1), Sarah (PW2) and the deceased's mother (PW4) moved closer to the deceased who was lying on the ground and saw he had bled a lot. With the help of her other son – Charles – the deceased's mother (PW4) got a boda boda which rushed the deceased to a nearby hospital. He had suffered injuries on the head and on the belly. The next day he was transferred to Russia (Jaramogi Oginga Odinga Teaching & Referral Hospital) where he was treated and discharged. One month later on 24th January 2014 to be exact he succumbed to the injuries. The assault on the deceased had been reported to the police on 18th December 2013 and apparently the accused persons had been charged with assault.

According to a post mortem tendered by Dr. Grace Mugure Mbogo (PW3) of Jaramogi Oginga Odinga Teaching & Referral Hospital the deceased died on 20th January 2014 while undergoing treatment at the hospital and the cause of death was opined as severe head injury due to blunt force secondary to assault. The doctor who performed the post mortem noted that the deceased had sustained a left parietal depressed fracture and epidural haematoma.

The mother of the deceased testified that the deceased attracted the wrath of the accused persons after going to their local Agriculture Office to seek an assessment of his crops which their cattle had destroyed and for which he sought compensation. He had also allegedly reported the matter to their Chief and the 1st accused is alleged to have retorted that he knew the nature of compensation he would give the deceased.

When this Court put the accused persons on their defence Maurice Ochieng (the 2nd accused in the consolidated charge) was the first to testify. He stated that he is a mason and sells tiles at Siaya; that on 18th December 2013 he was at work at Ambira Sub-district Hospital and did not go home until 7.45pm. On arrival he slept without knowing anything. He stated that the deceased was his cousin and denied that he saw him on that day. He also denied that they had differences and stated that the deceased used to brew illicit liquor and suspected that he (the 2nd accused) he had told on him to the area District Officer. This suspicion arose because he (the 2nd accused) used to take the District Officer's children to school. The deceased had allegedly told him that much while they were alone. He contended that those might be the differences which Nancy Awino (PW1) and Sarah Otieno (PW2) who he referred to as the deceased's sister in-law were talking about. He contended that they lied to this Court more so as the doctor who did the post mortem did not find any cuts on the deceased's body. He stated

that on 28th October 2013 the deceased had had an accident with a motor cycle which he used to distribute the illicit liquor and had hit his head on the edge of a culvert and when he went to hospital the doctors were on strike. He alleged to have personally witnessed that accident. He contended that the deceased used to say that he felt like his head was going to explode and that the left side of his body was numb. The 2nd accused further testified that when he was arrested on 14th January 2014 the deceased went to the police station and upon him asking the deceased if there were differences between them the deceased replied there were none. He produced a charge sheet dated 16th January 2014 in which he and his son, co-accused, were charged with assaulting the deceased. He stated that the Information that the deceased was killed on 16th January 2014 is not true as he and his son were in custody in Siaya Prison and maintained that even were the date to be amended it would still not be true as he did not kill the deceased.

Rodgers Omondi Ochieng (1st Accused ) in the consolidated Information stated that before being arrested (he has been in custody since the trial started) he was a painter. He testified that on the day it is alleged he killed the deceased he was in prison custody in Siaya for alleged assault and that on 18th December 2013 he was at a center called Sega working. He stated that the deceased was his father's cousin with whom he had no differences. He denied that he fought the deceased as alleged and stated that on that day he returned home from work at 8pm and since people were asleep he did not wake them up. He told the Court that he grew up seeing the deceased in the village and that he had heard the deceased was involved in an accident

with his motor cycle and had been arrested. Although the deceased had gone to hospital at the time the doctors were on strike. He stated that he knew the prosecution witnesses and that they were all related. He wondered how it was possible that they were the only ones in the village who claim to have witnessed the murder. He contended their testimonies were false.

Mr. K'Opot for the 2nd accused and Miss Aron for the 1st accused as well as Mr. Muia, Prosecution Counsel submitted orally in summing up. These submissions have been considered fully alongside the evidence by both sides.

The issue for determination is whether the accused persons of malice aforethought caused the death of the deceased by an unlawful act.

After carefully considering the evidence on record I am satisfied that the prosecution has proved beyond all reasonable doubt that the death of the deceased arose from the unlawful act of the accused persons. There was not one but three eye witnesses to the crime. Nancy Awino Ogunbo (PW1), Sara Atieno (PW2) and Celine Achieng Odhiambo (PW3) were attracted to the scene by noise at the house of the deceased's mother. Each of them narrated how they found the deceased knocking on his mother's door. They testified that they saw the 2nd accused and his entire family – his wife and children including the 1st accused – assaulting the deceased. They testified that they saw Ochieng (the 2nd accused) hit the deceased with a club (rungu) before Rodgers (the 1st accused) cut him with a panga. They stated that Ochieng (the 2nd accused) hit him again with a jembe handle. At that juncture the deceased fell down and Rodgers (the 1st accused) hit him on the head with a stone. The deceased cried out asking the 2nd accused why he and his children were killing him. Sarah Atieno (PW2) carried a delight solar lamp and the scene was therefore well illuminated. The Court heard that there was moonlight too. I am satisfied therefore that the circumstances were conducive to a positive identification of the assailants. These three witnesses knew the accused persons as they were neighbours and theirs was not only visual identification but also recognition. It may well be that the three of them were related to the deceased but this Court is satisfied that their evidence was reliable. This Court found each one of them credible and truthful. Each narrated what they saw. Indeed the deceased's mother (PW4) was honest to say that she did not see the people who attacked her son. Yes she heard the knock on her door but she thought it was "Ochieng" coming to attack her and so did not open. She only came out when she saw light from the lamp her daughter in-law (PW2) had carried. By then the attackers had left. She however testified that while she was inside the house she heard her son crying out "Ochieng, why are you killing me with your children". She also heard Jennifer the wife of the 2nd accused telling her family they could leave as their job was done. Her evidence corroborates that of the other three eye witnesses. She knew the accused persons for a considerable period of time as they were neighbours and so readily recognized Jennifer's voice. The post mortem report opined that the cause of death was severe head injury due to blunt force secondary to assault. This is consistent with the evidence of the eye witnesses – that they saw the two accused persons assaulting the deceased and that one of them hit him on the head. I am not persuaded that there were any contradictions in the evidence of the prosecution witnesses that would cast doubt on the guilt of the accused persons. The three eye witnesses and the mother of the deceased placed the accused persons at the scene. To the contrary the evidence of the accused persons was in regard to to where they were during the day. It does not raise an alibi- that they could not have been at the scene at the time it is alleged they committed the offence as they were elsewhere. Both stated they were in their houses at the material time but that has been negated by the evidence of the eye witnesses who as I have stated saw and recognized them. The 2nd accused's allegation that the deceased had sustained the head injury in a motor cycle accident was not proven yet it was denied by PW2 when it was put to her during cross-examination. The claim that the deceased suspected the 2nd accused was behind his arrest for brewing illicit liquor is also immaterial since the deceased himself was not a witness in this case and is therefore incapable of fabricating evidence for that reason. On the other hand there is evidence that the accused persons had a motive to kill the deceased. He had reported them to the area Chief for destroying his crops. An assessment had been done and when asked to compensate the deceased the accused persons said they would repay him in another way. The deceased's mother (PW4) attested to this. To them the beating they gave the deceased was "their other way" of compensating him. Although he was taken to hospital and was treated one month later he succumbed to the injuries. The weapons they used to inflict those injuries and the fact that they concentrated their assault on his head is clear testimony that they had an intention either to kill him or to do him grievous harm. Malice aforethought has therefore been established beyond reasonable doubt.

As I stated earlier it is not surprising that the witnesses who gave evidence are related to the deceased. This is because this incident occurred at night at the home of the deceased. It is expected that most of the people who came out of their houses were relatives of the deceased and indeed the Court heard that much. Had the incident occurred in a public place during the day then that issue would have been material. Moreover it is the credibility of the witnesses that matter but not their kinship to the deceased. In this case I found the witnesses truthful and their testimonies credible. The fact that the investigating officer did not testify does not cast a shadow of doubt in this case. More often than not all the investigating officer comes to tell the Court is that he went to the scene, the culprits were arrested and that he recorded the statements of the witnesses. It is the testimonies of those who witnessed the incident that is most crucial and this case we have cogent evidence from the eye witnesses.

The post mortem was clear that the cause of death was severe head injury due to blunt force secondary to assault. The post mortem reports makes no mention of internal bleeding being the cause of death as Mr. K'Opot, Learned Advocate for the 2nd accused, submits. The fact that there was no dying declaration is not fatal as there is evidence of eye witnesses to link the accused persons to the murder. The charge against

the accused persons has been proved beyond reasonable doubt.

This Court recognizes that there was a confusion as to the position of the accused persons in the Information and the place they took in the dock. This was however cured by the fact that the witnesses referred to them by name. Both accused persons were represented by Counsel and that confusion did not occasion them any prejudice. As for variance in regard to the date in the Information and that in the evidence it is my finding that the same is curable under Section 214 of the Criminal Procedure Code. The witnesses were clear that deceased was assaulted on 18th December 2013 but died on 27th January 2014.

I find the accused persons guilty of Murder Contrary to Section 203 of the Penal Code as read with Section 204 of the Penal Code and convict them accordingly.

**Signed, dated and delivered at Kisumu this 27th day of July 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Miss Neto for the 1st Accused Person holding brief for Mr. K'Opot

Miss Neto for the 2nd Accused Person holding brief for Miss Aron

Miss Chelangat for ODPP

Accused persons

Aura/Evon Interpreter(s)

COURT: Judgment delivered.

**E. N. MAINA**

**JUDGE**

MISS NETO: Give us another date for mitigation.

COURT: Sentencing on 31/7/2017 when we expect the advocates to be present for mitigation.

Accused persons having been convicted shall remain in custody.

**E. N. MAINA**

**JUDGE**

**27/7/2017**

31/7/2017

Coram: E. N. Maina J

Miss Osoro for State

Miss Aron for 1st Accused

Mr. Aoko (HB) for K'Opot for Accused 2

Both accused persons

Evon – Interpreter

INTERPRETATION: English/Dholuo

MISS OSORO: Accused persons may be treated as first offenders as we do not have their records.

**E. N. MAINA**

**JUDGE**

MISS ARON: For the 1st accused I urge the court to be lenient.

**E. N. MAINA**

**JUDGE**

MR. AOKO: 2nd accused a first offender, father and husband. He is bread winner. He is very remorseful. We urge you to be lenient.

**E. N. MAINA**

**JUDGE**

COURT: The court notes that the accused persons are first offenders and are remorseful. However the offence carries a mandatory death sentence. Accordingly this court sentences the accused persons to death as by law provided. Right of Appeal to the Court of Appeal is explained.

**E. N. MAINA**

**JUDGE**

**31/7/2017**