



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 19 OF 2012**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOHN OTIENO OPUNDO .....1<sup>ST</sup> ACCUSED**

**WALTER ODHIAMBO ORINDI.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused, **JOHN OPUNDO (DW 1)** and **WALTER ODHIAMBO ORINDI (DW 2)**, were charged with the murder of **ALFRED JUMA OSIEKO** contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. According to the information, they murdered the deceased on 11<sup>th</sup> March 2012 at North Ratta Sub-location, Kisumu West District, Kisumu County. They pleaded not guilty and the prosecution marshalled 4 witnesses while the accused gave unsworn statements.

2. There is no doubt that the deceased died and that he died as a result of a depressed fracture on the left parietal part of the skull according to the post mortem done on the deceased's body by Dr. Okumu on 14<sup>th</sup> March 2012 at the New Nyanza Provincial General Hospital. The main issue in this case is whether the accused killed the deceased.

3. Two witnesses were called to implicate the accused. Caroline Achieng (PW 2) recounted how she was at home on 11<sup>th</sup> March 2012 and while seated at her doorstep she saw some people fighting about 20 metres away. She knew DW 1 as he was a relative and the deceased by appearance only. She testified that the two were fighting with their bare hands but that DW 1 beat the deceased who fell to the ground. At that moment, she saw George Huko Huko (PW 3) come and separate them and they left. She testified that the deceased's wife came and assisted him and left with him on a motorbike.

4. PW 3 told the court he was passing near a certain home when he met the deceased with his wife standing with both accused at about 1.00 pm on 11<sup>th</sup> March 2012. When he returned a while later he found the deceased being assaulted by DW 2.

5. Earlier that morning, Abigael Florence Onyango (PW 1) met the deceased, whom she did not know by name, in her house. Just as she welcomed him, DW 1, whom she did not know at the time, arrived with a young man whom she did not know. The deceased and accused exchanged words suggesting that the deceased had arrived in the village and DW 1 wanted something from him. As she wanted to go to church, she told them to leave. On her way to church, she passed by the deceased's home and told his

wife that she had seen him and he appeared drunk and that she should look for him. When she left church that evening, she met the deceased and his wife along the way. He was being held by his wife and when she asked them what had happened, neither of them responded. She told the court that she did not notice any injuries on the deceased.

6. When put on their defence, both accused elected to make unsworn statements. They both denied assaulting the accused.

7. In light of this evidence, Mr. Lore, counsel for the accused, submitted that the prosecution did not prove that the deceased was assaulted by both accused and even if he was, the prosecution did not prove who inflicted the fatal injuries.

8. The incident took place in broad daylight but the evidence of PW 2 is that DW 1 and deceased were fighting while the testimony of PW 3 is that DW 2 is the one who beat the deceased. In the absence of any other evidence, the time frame from the evidence for PW 2 and PW 3 cannot be reconciled. PW 2 says she saw PW 3 when DW 1 was fighting with the deceased yet PW 2 stated that at that time he saw DW 1, DW 2 and the deceased and that it is DW 2 who slapped the deceased while DW 1 did not do anything. From the post-mortem report, the deceased only sustained one injury on the head leaving the question who struck the fatal blow. The inference from the testimony of PW 2 and PW 3 is that either of the accused could have struck the fatal blow that led to the deceased's death. In order to implicate both accused, the prosecution had to establish common intention and in the absence of common intention, it is difficult to implicate either accused.

9. The issue of common intention is dealt with by **section 21** of the **Penal Code** which states as follows;

*When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*

The East Africa Court of Appeal in **Wanjiro d/o Wamerio and Another v Regina [1955] 22 EACA 521** defined common intention as follows;

*Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.*

10. Apart from the fact that the evidence did not establish who struck the fatal blow, PW 2 and PW 3 did not shed any light what the fight or altercation was about. Although, the prosecution suggested that there may have been an issue between the accused and deceased, the evidence shows that PW 1 identified DW 1 earlier that morning as the person who met the deceased. DW 2 was not identified as being with the deceased earlier on that day. There was no evidence of a concerted plan by DW 1 and DW 2 to assault the deceased and indeed no connection was established to link the two of them.

11. In the circumstances, I cannot say who assaulted the deceased and whether they acted with a common intention. I therefore find that the prosecution failed to prove its case. I acquit the accused, **JOHN OTIENO OPUNDO** and **WALTER ODHIAMBO ORINDI**. They are set free unless otherwise lawfully held.

**DATED and DELIVERED at KISUMU this 27<sup>th</sup> day of July 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Lore, Advocates for the accused.

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