

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 65 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

VINCENT OMONDI OBONYO.....1ST ACCUSED

JOHN OCHIENG ONYANGO.....2ND ACCUSED

JUDGMENT

The accused **Vincent Omondi Obonyo** (the 1st accused) is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 16th September 2012 at Ramula Sub-location within Kisumu County he, jointly with others who have since been acquitted murdered **David Omondi Oloo**. He pleaded not guilty to the charge.

Briefly the prosecution's case is that the deceased was among a group of villagers who had gone to the home of one Alloys to mourn the death of a relative. According to Alex Ngere (PW4) at around 2am the accused and his accomplices confronted the deceased while he was on the floor dancing. They tried to take away a stick that he was carrying. A scuffle ensued and the accused person drew a panga and cut the deceased from the mouth to left ear. Alex Ngere (PW4) called the father of the deceased (PW1) who rushed him to Ahero District Hospital. He was unfortunately pronounced dead upon arrival. Fredrick Opiyo Mbala (PW5) testified that the genesis of the whole incident was that the deceased disapproved the accused's relationship with his sister. After the incident the accused and his co-accused fled but they were subsequently arrested. According to Peter Gathuri (PW3) a Police Constable from Ombeyi Police Station some exhibits were recovered but he could not find them when he took over the file after the officer who investigated the case died.

A Post mortem report produced by (PW3) as the Doctor who performed the post mortem could not be procured due to a nationwide doctor's strike, confirmed the injury described by PW4 and opined the cause of death as (a) Intracranial haemorrhage due to penetrative head injury and (b) hypovolemic shock secondary to penetrative neck injury (sectional jugular vein).

In his defence the accused testified that on the material night he in fact went to the home of Alloys but only upon being asked by his father, who was already there, to take him a jacket and gumboots. He stated that he found his father addressing the visitors and as he was waiting for him to finish he heard a scuffle at the gate. He went there to separate those who were involved. That is when his father went and took the jacket and gumboots and told him to go home to sleep. He dutifully did so. The next day he went to the farm to guard their rice field and remained there until his brother went to relieve him. On arrival home their village elder told him he was needed at the police station. While admitting that the deceased was killed at his grandfather's home he denied that this happened while he (accused) was on the dancing floor and contended that him and his father had long left for home. He produced a statement in which the father of the deceased allegedly stated that his son was killed by one Ndege (EXBD. 1) and another by police officer Phillip Ng'eno to the effect that a pair of white blood stained shorts and a panga were recovered from the house of the said Ndege (EXBD.2). He urged this Court to find that he did not kill the deceased and acquit him. His brother Benard Onyango Obonyo (DW1) supported his evidence in all material particulars.

The issue for determination is whether the death of the deceased arose from an unlawful act of the accused person and whether it was of malice aforethought.

The deceased was among a group of villagers who had visited the home of a fellow villager who was bereaved. He was on the floor dancing when he was attacked.

He was carrying a stick or a whip as one of the witnesses, Alex Ngere (PW4), described it. According to Alex Ngere (PW4) the assailants tried to take the stick away. The court also heard that the assailants were also displeased with him because his sister was having a love affair with a man from their village. Fredrick Opiyo Mbala (PW5) testified that he went into the house at the point when one person accused the deceased of making too much noise. Thirty minutes later while he was inside the house he heard the deceased shouting for help and saying he was being killed. Alex Ngere (PW4) who was still outside and who was just a few meters from the dancing floor stated that he saw all what happened; That it was the accused person who upon drawing a panga from his trousers cut the deceased on the head – from the mouth to the ear. I am satisfied that this witness positively identified the 1st accused as the assailant. Apart from Alex Ngere (PW4) Fredrick Opiyo Mbala (PW5) confirmed that the 1st accused was at the funeral. On being cross-examined by Mr. Nyanga, Learned Advocate for the accused, he stated:-

“I know the 1st accused. He was not dancing. He was just standing. I did not see them quarreling. I was in the house when within two minutes I heard Mzee crying”

The evidence of both Ngere (PW4) and Opiyo (PW5) places the 1st accused at the scene of murder. These two witnesses testified that there was electricity at the scene and that they knew the 1st accused well. I am satisfied that the circumstances were very conducive for a positive identification. The 1st accused's allegation that he was nowhere near the scene is therefore not convincing at all. As for the two statements he tendered in evidence none of them comes to his aid. Edward Oloo Buodo (PW1) the deceased's father does not say it was Denge who cut

his son. He states that it is the people who woke him up who told him Denge cut his son. He himself was not at the scene and these two people were not called as witnesses. What they told the deceased's father is hearsay and could not even have been admitted in evidence. It is also instructive that the statement is not signed. As for the one by PC Phillip Ngeno the same is clear as to where the murder weapon and blood stained shorts were found. Be that as it may this is a statement that was not made under oath and it does not hold the same weight as the sworn testimony of Ngere (PW3) who is an eye witness. The panga and shorts may have been found in the house of another man but there is cogent evidence that it is the accused who inflicted the injury that caused the death of the deceased. The upshot is that I am satisfied beyond reasonable doubt that the 1st accused cut the deceased. The deceased's death resulted from that cut and I can therefore safely conclude that the death of the deceased arose from an unlawful act of the deceased. His two co-accuseds are noted not to have participated in the attack and were therefore acquitted by this Court.

Was there malice aforethought? The 1st accused drew a panga from his trouser which means that he had planned to do what he did. It was not spontaneous. Secondly the injury he inflicted upon the deceased was so severe – a deep cut from the mouth to the left ear – to have been inflicted accidentally. Clearly there was an intention to either kill the deceased or to cause him grievous harm. Save for the matter of the deceased's sister having a boyfriend from the village which in my view does not amount to provocation there is no other documented reason for the attack.

I am satisfied that the charge against the 1st accused person has been proved beyond reasonable doubt. I find him guilty of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

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

E. N. MAINA