



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 50 OF 2013

BETWEEN

REPUBLIC.....PROSECUTOR

AND

ANTONY OTIENO JUMAACCUSED

JUDGMENT

1. **ANTONY OTIENO JUMA** (“the accused”) 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 21st October 2013 at Ayucha Sub-location, Nyando District within Kisumu County he murdered **GEOFFREY OMONDI ONYONGE** (hereinafter “the deceased”). The prosecution called 8 witnesses while the accused gave sworn testimony.

2. The prosecution case was that the accused attacked the deceased at a disco *matanga* after which he died as a result of the injuries. The fact and cause of death of the deceased is not disputed. Dr David Okeyo (PW 7) produced the post-mortem report prepared by Dr Massawa who conducted the autopsy on the deceased’s body on 24th October 2013 at Kisumu East District Hospital. Although the deceased did not have any visible injuries, internal examination of the head revealed massive bleeding and a skull fracture approximately 10cm on the temporal-parietal region of the skull. He concluded that the cause of death was a severe head injury secondary to massive bleeding secondary to assault.

3. The deceased’s brother, Maxwell Ouma Onyango (PW 2) testified that on the night of 21st October 2013, he went to a *disco matanga* with the deceased and while they were there, he saw the accused, whom he knew as Ford. He told the court that as they were dancing, the accused came with a rungu and hit the deceased twice before he collapsed. He also attacked one Samson Odhiambo (“Samson”) who also collapsed. When the deceased’s father, Erick Ayiecho (PW 1), was informed of the incident, he organised for the deceased to be taken to the hospital but he died on arrival.

4. Other witnesses who were at the funeral also testified. Kevin Otieno Osambo (PW 3) told the court that the accused assaulted Samson with a rungu and when he attempted to run away, he was arrested. In cross-examination, he told the court that the accused was charged with assaulting Samson at the Nyando Law Courts but the charges against him were withdrawn. Joash Ondieki Ogolla (PW 4) recalled that he heard noise at the funeral and when he went to see what happened, he saw Samson on the ground. As he was talking to Samson, a crowd brought the accused. George Otieno Ogolla (PW 5) also testified that he heard screams and when he went to the tent, he found a person, who had been hit, lying down. About 15 minutes, the accused was brought by some people for allegedly beating the person. He took the injured person to the hospital and the accused to the police station.

5. PC Japheth Kuto (PW 6) recalled that on the material night he was on duty at Awasi Police Station when a group of people came with an injured person and a suspect who had allegedly injured the young man. They told him that the another person, who had been injured, had been taken to Nyangoma Hospital. Although he recorded the details of Samson, he did not record the details of the other person who had been taken to hospital. Corporal Kilonzo (PW 8) told the court that the matter was investigated by Chief Inspector Cheruiyot who had retired from the police service.

6. In his sworn defence, the accused told the court that he was at the disco *matanga* on the material night where there were many people. He denied assaulting the deceased or any other person. He testified that between 2.00 – 3.00am a fight broke out in one of the tents and people started running away. As he was running away, a group of people started shouting his name and chasing him. The group caught up with him and frogmarched him back to the funeral where he found PW 4 who asked him what he had done. People began assaulting him. They tied him and took him to the Police Station. The accused also confirmed that he was charged with assaulting Samson but the charge was withdrawn.

7. The key question in this case is whether the accused assaulted the deceased and caused his death. Counsel for the accused submitted that the testimony was contradictory and inconsistent and that the conditions of identification were not conducive to positive identification of the accused given that it was at night, the place was poorly lit and that there were many people present.

8. In ***Cleopas Otieno Wamunga v Republic [1989] KLR 424***, the Court of Appeal sounded a word of caution in matters of identification of suspects at night so as to avoid possible miscarriage of justice through mistaken identity. The Court urged careful examination of evidence in order to minimize risk of error which is possible even in the case of relatives or friends. In ***Anjononi & Others v Republic [1980] KLR 59***, the Court of Appeal noted that the evidence of recognition of a suspect is more assuring and reliable than the identification of a stranger but it must nevertheless be examined because mistakes can also be made.

9. In this case the only testimony implicating the accused is that of PW 2 who testified that he saw the accused hit the deceased twice on the head. The accused was familiar to him and he knew him from a previous encounter. Although he stated that he was able to see the accused clearly, the surrounding evidence particularly the testimony of those at the funeral undermines his account and leaves more questions than answers. PW 3 who told the court he saw the accused assault Samson yet nothing was said of the deceased's assault. PW 4 found Samson had been injured and the accused caught while trying to run away. He said nothing of the deceased. PW 5 also testified about a person who was injured and taken to the hospital while alive and the accused who was taken to the police. He did not mention the deceased and only heard of his death later. It is therefore strange that two people could have been injured at the funeral, where there were many people, yet the witnesses referred to the accused only in reference to Samson and not the deceased.

10. The prosecution case is further undermined by the testimony of PW 5 who recorded the initial report at the police station. He only took down the incident concerning the accused and Samson. He did not take down the details of the other person who was injured. It is not even clear whether he was given the details of the incident concerning the deceased by the other people who were obviously at the funeral and who would have known about the other incident.

11. Then there is the case of Samson who was assaulted by the accused. No explanation was given by prosecution why he was not called as a witness. Could it be that he was involved in a fight and that he why he withdrew the charges against the accused? This would give credence to the accused's defence that a fight broke out at the funeral and he was caught by the other mourners as a suspect in the melee that ensued.

12. Though there is evidence pointing to the accused as a suspect in the murder of the deceased, the totality of all the evidence leaves me to conclude that the prosecution has not proved beyond reasonable doubt that the accused murdered the deceased. I therefore acquit the accused **ANTONY OTIENO JUMA** of the murder of **GEOFFREY OMONDI ONYONGE**.

DATED and DELIVERED at KISUMU this 21st day of September 2017.

D.S. MAJANJA

JUDGE

Mr Achura, Advocate for the accused.

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