



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 21 OF 2013

BETWEEN

REPUBLIC.....PROSECUTOR

AND

CLEON OTUOMA ONYANGO.....1ST ACCUSED

THOMAS NYANGAGA ONYANGO.....2ND ACCUSED

AYUB OKINYO ONYANGO.....3RD ACCUSED

GEORGE ONYANGO MUGA alias ODOL.....4TH ACCUSED

ANTONY OUMA OJUOK.....5TH ACCUSED

JUDGMENT

1. On 12th March 2013, this court was informed that the accused **Cleon Otuoma Onyango (DW 1), Thomas Nyangaga Onyango (DW 2), Ayub Okinyo Onyango (DW 3), George Onyango Muga alias Adol (DW 4)** and **Anthony Ouma Ojuok (DW 5)** had, jointly with others not before the court, murdered **Peter Otieno Ochola** (“the deceased”). The incident took place on 30th November 2012 at Kolwa Central Location within Kisumu East District of Kisumu County.

2. The prosecution case was that the accused were part of a group of vigilantes that went to seek out the deceased on suspicion that he had stolen. They went to his home, frog marched him outside and thereafter assaulted him causing him to sustain injuries from which he died. The prosecution marshalled 7 witnesses while the accused elected to make unsworn statements in their defence.

3. The facts emerging from the prosecution witnesses were as follows. On 30th November 2012 at about 3.00am, the deceased’s mother, Karen Juma (PW 2), was woken up by barking dogs. When she went out, she heard her neighbour, Onyango calling out his son, DW 2, and telling him to go and get the deceased. She woke up her other children, Bernard Omondi Ochola (PW 3) and Diana Achieng Ochola (PW 4), who also testified that they were woken up by the noise coming from Onyango’s homestead. PW 2 told the court that she went with PW 3 and PW 4 to the deceased’s place where she saw the five accused, who had weapons, break into the deceased’s house and remove him. At that point she decided to leave and report the matter to an elder. She later heard that the deceased had been killed.

4. PW 3 testified that he followed the group to his brother’s home. He saw the accused remove the

deceased from his house while threatening to kill him. Since he was scared, he left to go home. PW 4 recalled that she followed the accused to the deceased's house where she saw the group remove his household goods and set them on fire. She told the court that she saw the accused beating the deceased with weapons while accusing him of having stolen chicken.

5. On the same night, Thomas Ouma Odhiambo (PW 5) was asleep in his house when he heard a loud knock on the door but before he could respond, the door was kicked open. People entered his house, dragged him outside and started assaulting him while accusing him of having stolen a bicycle. As he was being beaten, he saw the assailants beating the deceased. He decided to run away. He later heard that the deceased had been killed. PW 5's father, Sospeter Odhiambo (PW 6) was also woken up by a loud bang on the door. When he went out, he found PW 5's door had been broken. He also found the group of people assaulting the deceased with sticks. The assailants also threatened to beat him up so he decided to run away to a nearby Sugarcane plantation. When he returned at 6.00am, he found that his house had been burnt down. He immediately went to report the incident to the police at Nyamasaria.

6. Corporal Patrick Ndombi (PW 1) recalled that PW 6 came to Nyamasaria Police Base on 30th November 2012 at 6.30am and reported that people had come to his home and accused his son, PW 5 of stealing. PW 6 told him that PW 5, who had been assaulted by the gang, managed to escape but his house was burnt. Together with other officers, he went to the scene where he observed found the burnt house. While at the scene, he was informed that an alleged thief had been killed. The body, which was lying by the road side, was identified as that of the deceased. PW 1 observed that the deceased's hands had been tied and he had multiple injuries on the hands, face and all over the body. The body was taken to Jaramogi Odinga Oginga Teaching and Referral Hospital ("JOOTRH").

7. DW 1, DW 2 and DW 3 are brothers and reside in the same homestead which neighbours that of the deceased. In their respective unsworn statements, they denied assaulting the deceased. Both DW 1 and DW 2 told the court that they were awoken by noise from outside and when they went outside, they found a group of people passing by their house going towards the deceased's home. They heard the group asking PW 2 where the deceased was. DW 1 stated that PW 1 called the deceased and informed him that he was being looked for. DW 1 followed the group as they went to the deceased's place. He saw them remove his household goods and burn them. The gang left thereafter and he went back home. He later heard that the deceased had died in a road accident. DW 2 recalled that he initially went back home but when he heard more noise he went out and found a big fire but did not see the deceased. He met DW 1 and they went back home. DW 3 told the court that he was very tired and drunk when he arrived home on the evening of 29th November 2012. He also heard the noise coming from his neighbour's place on the material morning. When he went out, he saw a lot of people in the deceased's homestead but he decided to go back to sleep.

8. DW 4 told the court that he was also awoken by noise in the neighbourhood. He went out a group of about 200 people burning the deceased's belongings but did not see the deceased. He went back to sleep and it is only while he was at work, that he heard that the deceased had been knocked down by a vehicle. DW 5 stated that although he heard noise on that morning, he lived far and since he was working at Kisumu Airport, he left for work at 5.30am and on his way to work he encountered a group of people saying that a person had been knocked by a vehicle. He did not see the body but proceeded to work and was only arrested months after the incident.

9. To prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, the prosecution must prove the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

10. It is not in dispute that the deceased died. The post mortem on the deceased body was conducted by Dr M. O. Ochola on 5th December 2012. The post mortem form was produced by Dr Nelly Wanjala (PW 7) under the provisions of **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. Dr Ochola observed that the body had generalized bruised all over the body with lacerations on the head and rib fractures on the 4 to 6th right ribs. There was also a fracture on the right parietal bone. He concluded that

the cause of death was severe head injury secondary to road traffic accident.

11. What is in contention is whether the deceased died as a result of a direct and unlawful act of the accused. The prosecution case supported by the doctor who conducted the autopsy concluded that the cause of death was a road traffic accident. This was buttressed by the fact that the deceased's body was found by PW 1 on the roadside. On the other hand, there is the evidence of PW 1 that when he observed the deceased, his hands were bound implying that his death was not accident by a deliberate act.

12. The importance of medical evidence to prove the cause of death cannot be understated. In ***Ndungu v Republic* [1985] KLR 487**, the Court of Appeal observed that:

Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence supporting the cause of death alleged by the prosecution.

13. Despite the fact that the doctor was informed that the deceased had died as a result of being beaten by a mob, he still concluded that the cause of death was a road traffic accident. It was the duty of the prosecution to prove beyond a reasonable doubt that the cause of death that could be attributed to the accused. The prosecution did not make any effort to prove that the deceased's death was not caused by a road accident. Although the evidence points to the fact that the deceased was assaulted and that the injuries on his body are consistent with assault, it is also possible that after the assault the deceased was injured by a vehicle as concluded after the postmortem examination.

14. All this points to the fact that the cause of the deceased's death was not proved beyond reasonable doubt. In the circumstances, I have no option but to acquit the accused. They are set free unless otherwise lawfully held.

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

D.S. MAJANJA

JUDGE

Mr K'owino, Advocate for the 1st, 2nd, 3rd and 4th accused.

Mr Nyamweya, Advocate for the 5th accused.

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