



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL CASE NO. 15 OF 2015**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**DAVID OJIAMBO NYANGUESO ALIAS CHANGO.....ACCUSED**

**JUDGMENT**

**DAVID OJIAMBO NYANGUESO ALIAS CHANGO** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that on the 20<sup>th</sup> day of March, 2015 at **BUMENYA** village, **ODIADO** location of **BUSIA** County, jointly murdered **LIVINGSTONE OJIAMBO ONYANGO**.

On the material day, there was an overnight vigil after the body of the brother of the accused had been brought home in preparation for the burial.

The accused disagreed with the deceased and Fredrick Oduori Bwire. He ordered the two to leave the home. As they were leaving, he pursued them and started to beat them. The deceased fell down after he was hit and did not stand up again. He passed away at the scene.

The accused in his defence contended that at about 3 a.m while he was seated near the coffin of his late brother, he was informed of a person who was lying next to a rubbish pit. He went where the person was lying before proceeding to the village elder to report the matter. He denied any involvement in the death.

The issues for determination are as follows:

1. Whether or not the accused was involved in the death of the deceased; and
2. If he was, whether it amounted to murder.

**FREDRICK ODUORI BWIRE** (PW2) testified that after the accused had insulted him, he (accused) ordered him and the deceased to leave the home. They were keeping vigil after the demise of Obote, the brother of the accused. He however did not tell the court the cause of their disagreement. As they left the home, he walked in front of the deceased. The accused followed them and attacked the deceased using kicks and fists. The deceased fell down and the accused directed his wrath at him. He ran away screaming. By the time he ran away, the deceased had not risen up from where he fell.

At about 4 a.m, **INVIOLATA OPIYO OGAMA** (PW3) testified that she was woken by some noises. She was sleeping outside the home of the late **VINCENT OBOTE**. It was **FREDRICK ODUORI BWIRE** who was screaming. He asked **CHANGO**, whom she identified as the accused, why he was

beating him. As she was leaving she found the body of the deceased in this case. Where the body was lying, was the direction she had heard the quarrel.

**WYCLIFFE BWIRE OMOLO** (PW4) told the court that he was also woken up by the cries of **FREDERICK** who said that he was being beaten.

Like **INVIOLATA**, he was also sleeping outside the house of the deceased **VINCENT**. He then heard the accused state angrily that he did not want anyone to interfere with the mourning of his brother.

On his part the accused contended that **WYCLIFFE BWIRE OMOLO** (PW4) went and informed him of a person who was sleeping at a rubbish pit. He went and confirmed the report and proceeded to report to the village elder. **CORNELIA ANNAH** (DW2) said that the accused after the report by **WYCLIFFE** did not go to check on the person. She testified that it was **FREDRICK BWIRE** who killed the deceased herein. She however did not elaborate.

The evidence on record adequately establish that the accused was involved in beating up the deceased. It was the beating that caused him to fall and subsequently die.

In the case of **REPUBLIC vs. ANDREW MUECHE OMWENGA [2009] eKLR D. K. MARAGA J.** (as he then was) held:

*There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.*

The medical evidence by **DR. WILBERFORCE OJIAMBO LUSAMBA** (PW1) was that the deceased died due to fracture to cervical 1 and cervical 2. He opined that this could be as a result of hanging, blow to the head or accident. There was no other evidence of injuries.

From the evidence on record, the prosecution did not establish malice aforethought. The accused did not arm himself with any weapon in the attack on the deceased.

The evidence on record does not therefore establish the offence of murder. I therefore reduce the charge from that of murder to manslaughter. I accordingly convict him of the lesser offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED and SIGNED at BUSIA this 18<sup>th</sup> day of October, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**