



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 5 OF 2014

BETWEEN

REPUBLIC PROSECUTOR

AND

WYCLIFF OUMA OMOL ACCUSED

JUDGMENT

1. **WYCLIFF OUMA AMOL** (“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 the night of 1st and 2nd January 2014 at Miranga Village, Kisumu West District within Kisumu County he murdered **GEORGE ODHIAMBO** (hereinafter “the deceased”). The prosecution marshalled 9 witnesses while the accused gave sworn testimony and called one witness.

2. 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*.

3. The fact and cause of death was not disputed. The post mortem form prepared by Dr Dixon Mchana on 10th January 2014 was produced by Dr Owen Mang’usu (PW 8) under the provisions of **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Dr Mchana conducted the post-mortem after the body was identified by Lucas Onyango Kola (PW 3). According to the report, the deceased had 6 cut wounds as follows; on the right lower side of the neck transecting the right jugular vein, 3 stab wounds on the front left shoulder but these were not penetrative and a cut on the left upper lip and below the left eye. Internal examination of the head revealed that the neck vessels had been severed. Dr Mchana concluded that the deceased died as a result of external blood loss secondary to sharp force trauma following assault.

4. The circumstances leading to the deceased’s death were as follows. On the evening of 31st December 2013, the accused and deceased were part of a group from Miranga Village who had gone to celebrate the new year at Lasanta Bar at Holo market. After drinking, the group was given a lift in a pick up by one of their neighbours, Jarire Otieno, who had invited them for drinks. It was not disputed that by the time the group was leaving the bar, the deceased was very drunk and had to be assisted onto the vehicle. Jarire dropped them off along the road as he proceeded to his homestead. It is at this juncture, that it is alleged that the accused started fighting with those present causing them to run away. The deceased was found dead at the same place on the next morning. Since the accused was left alone with the deceased the previous night, he was arrested on suspicion that he had murdered the deceased. The case against him was based on circumstantial evidence as none of the people present saw the accused assault the deceased.

5. Linet Atieno (PW 1) recalled that after they arrived at the village, the deceased was too drunk to walk home so her brother, Elvis Matolo (PW 2), assisted to. As they were walking *Otis* also came to assist. PW 1 testified that the accused came from behind and kicked *Otis* who fell. The accused also started fighting with PW 2. PW 1 tried to intervene by shouting at them stop fighting. She pulled PW 2 away and they left together.

6. PW 2 testified that the deceased's trouser started falling as he was assisting him to walk so he asked *Otis* to come and assist. As *Otis* pulled up the deceased's trousers, the accused kicked *Otis* from behind. When *Otis* and the accused started quarrelling, he tried to intervene but was stopped by PW 2. PW 1 and PW 2 left for home leaving the accused, *Otis* and the deceased behind.

7. David Omondi Ouko (PW 4) confirmed that the deceased was drunk by the time they arrived at the village. He testified that when they alighted, *Otis* and PW 2 tried to assist him and as they were doing so, the accused picked a fight. He recalled that PW 2 got hold of the accused while *Otis* ran way. According to him, the accused and PW 2 started wrestling until the PW 1 intervened and told them to stop. When they stopped, the accused turned on him and started beating him. He decided to run away with Mathews Okoth Lando (PW 5) leaving behind the accused and the deceased who was lying on the ground.

8. PW 5 recalled that when they arrived at the village, he immediately went to a neighbour's home to ask for water as he was very thirsty. When he returned, he saw the accused push *Otis* who fell. He further stated that he saw *Otis* with an empty bottle. He decided to go home. In cross-examination, he admitted that he did not see the accused beat the deceased.

9. The accused's sister, Eunice Juma Omolo (PW 7), testified after they were dropped by Jarire, the accused and PW 2 assisted the deceased. She then heard PW 1 asking the accused why he was kicking *Otis* and a fight began between PW 1 and the accused. After a while, PW 1 and the accused were separated whereupon the accused turned and slapped her. She went home crying and told her father what had taken place. She testified that the accused arrived home about 30 minutes later.

10. On that same night, the deceased's father PW 3, recalled that at about 8.30pm, he heard people talking outside. From the voices he identified, PW 1, PW 2 and *Douglas*. Their father asked them where they had left the deceased. After 5 minutes, he heard them passing where they had left the deceased and then return. In the morning he was informed by his brother that the deceased had died. He rushed to the scene and found the deceased with a cut on the neck. He confirmed that there was a boundary dispute between him and the accused's family.

11. After the deceased's body was found, Administration Police Chief Inspector George Otieno Ndire (PW 6) was called after the villagers started demonstrating over insecurity. He went to the scene which he tried to secure. The police, who included Chief Inspector Kisanga (PW 9) of Kombewa Police Station, also arrived at the scene and found the deceased's body along a footpath. He took statements from the witnesses who had been drinking with the deceased the previous night. He also collected pieces of glass which he produced in evidence.

12. When the accused was put on his defence, he elected to give sworn testimony. He confirmed that he was at Lasanta Bar with the deceased and the other witnesses on the material evening. He recalled that as they were drinking *Otis* and the accused disagreed and *Otis* tried to hit the deceased with a bottle but he smashed it on the ground after Jariro intervened. After drinking, they went home with Jarire.

13. The accused testified that when they arrived at the village, the deceased was too drunk so PW 2 assisted in carrying him but as the deceased's trouser was falling, *Otis* assisted him to pull it up. The accused noted that *Otis* had a broken bottle and as he removed it, he thought that *Otis* wanted to assault the deceased so he pushed *Otis* to prevent him from assaulting the deceased. On seeing this, PW 2 got hold of him while PW 1 told him to stop him. The accused testified that he slapped PW 1 and his sister PW 7 whom he told to go home. He told the court that he went home and found PW 7 at home. He stated that he left the deceased with *Otis* and PW 4. He only learnt that the deceased had passed away while he was at work in the morning and when he went to the scene he found people demonstrating. He joined the

demonstration and when the police came, he and the others who had been with the deceased the previous evening, went with the police to record statements. The accused stated that *Otis*, who had been drinking with them and was at the scene, was never arrested.

14. David Omondi Otieno (DW 2) testified that he was with the group at Lasanta Bar that evening and when they arrived at the village, the deceased was drunk and PW 2 tried to assist him walk home. Since he was tired, he proceeded home leaving behind his brother, PW 5. While at home, which was near the scene and close to the road, he heard PW 7 pass by after about 20 minutes with the accused following her shouting and asking her what she was doing outside while she was supposed to be cooking. Thereafter, his brother came home and they went to sleep. He learnt that the deceased had died in the morning. He recalled when the police came, they interviewed him and he gave them the names of all the people present. He recalled that all those who were present came except *Otis* and PW 4 also known as *Obuya*. PW 4 was later arrested but *Otis* was not traced and was never arrested. DW 2 recalled that *Otis* had a bottle when they arrived from Lasanta Bar.

15. Since the case against the accused is grounded on circumstantial evidence, the general principle applicable in considering this kind of evidence was articulated by the Court of Appeal in ***Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR)*** as follows:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

16. The prosecution case was grounded on three strands of evidence which when taken together exclusively point to the accused. First, that the accused was the last person to be seen with the deceased. Second, the accused had been behaving in a hostile manner on that night. Third, the prosecution suggested that the accused carried a bottle which he broke and used to inflict injuries on the deceased.

17. The evidence of PW 1 and PW 2 is that they left the accused, *Otis* and the deceased behind. PW 4 and PW 5 testified that they left the accused and deceased behind. According to PW 4, *Otis* had already run away after being assaulted by the accused. The accused's sister, PW 7 testified that she left after having been assaulted by the accused leaving *Otis*, the accused and deceased. All this evidence points to the accused as the last person to be seen by the deceased. Of the people at the scene, only *Otis* did not give evidence. PW 4 testified that *Otis* ran away when he was assaulted by the accused while the accused states that he left the deceased with PW 4 and *Otis*.

18. The question then is whether the deceased could have been murdered by *Otis*. It was the duty of the prosecution to exclude this possibility in order to leave no doubt that it is only the accused who could have murdered the deceased. **Section 143** of the ***Evidence Act*** does not require the prosecution to call all or any witnesses to prove a fact. It states that, "*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact.*" In ***Bukenya and Others v Uganda [1972] EA 549***, the Court held that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. In this case, the prosecution did not explain why it could not call *Otis* as witness. Neither PW 6 nor PW 9 explained to the court where *Otis* was, whether he could be found and why he was not called as a witness or charged as an accused. The fact that he disappeared from the village after the incident points to a possibility that he could have been the person who attacked the deceased.

19. There is evidence that the deceased's behaviour on that night implicates the accused. The prosecution suggested that the deceased could have been stabbed and cut by a broken bottle. PW 1, PW 2, PW 4 and PW 5 witnessed the accused attack *Otis* while he was assisting PW 2 with the deceased. The accused admitted, in his defence, that he only kicked *Otis* because he suspected that *Otis* wanted to assault the deceased. At this point it is important to note that none of the witnesses saw the accused assault the

deceased. PW 1 recalled that while they were at Lasanta Bar, *Otis*, who was seated next to the deceased had an argument with the deceased and he took a bottle and banged it on the table but was told to stop. Further, the evidence on who left the bar with an empty bottle is ambivalent. PW 4 recalled that the accused and *Otis* left the bar with empty bottles while PW 5 only saw *Otis* with an empty bottle. All this evidence leaves the possibility that either or both the accused and *Otis* could have murdered the deceased.

20. Though there is grave suspicion that the accused may have murdered the deceased, the totality of this evidence is that there is reasonable doubt as to whether there the accused and only the accused murdered the deceased either alone or with another person. The prosecution has failed to prove the case against the accused beyond reasonable doubt.

21. I therefore acquit **WYCLIFF OUMA OMOL** of the murder of **GEORGE ODHIAMBO**. He is discharged from these proceedings.

DATED and DELIVERED at KISUMU this 20th day of November 2017.

D.S. MAJANJA

JUDGE

Ms Kyamazima, Advocate for the accused.

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