



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 11 OF 2013

BETWEEN

REPUBLIC.....PROSECUTOR

AND

ROBAT LOBOLO KUYA.....1ST ACCUSED

WILLIAM OMONDI ONYWERO.....2ND ACCUSED

ANDERSON ARNOLD ODHIAMBO.....3RD ACCUSED

JUDGMENT

1. The accused, **ROBAT LOBOLO KUYA (DW 1)**, **WILLIAM OMONDI ONYWERO (DW 2)** and **ANDERSON ARNOLD ODHIAMBO (DW 3)** are charged with the offence of murder contrary to **section 203 and 204 of the Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the information are that they jointly with others not before the court murdered **HABIL ODUOR NYAGUDI** (“the deceased”) on the night of 14th and 15th January 2013 at Kambajo area, Bondo District within Siaya County.

2. The prosecution’s case was based on circumstantial evidence. It is not in doubt that the deceased’s body was found along the Usenge-Bondo road as confirmed by his mother Monica Atieno Okello (PW 4). She recalled that she had met him at the market and gave him some money on the evening of 14th January 2013 but he did not return home that night. When she was informed that his body was lying on the road in the morning, she proceeded there and noticed that he appeared to have been stabbed on the chest and eye and his legs were broken.

3. The fact and cause of death were confirmed by the post-mortem report prepared by Dr Collins Otieno Oginga who conducted the post-mortem on the deceased’s body on 21st January 2013 at the Bondo District Hospital Mortuary. The report was produced by Dr Ahomo Okech (PW 7). The key observations were that the deceased had a fracture of both humerus, fracture on the lower third of the right tibio-fibula bones, a fracture of the left femur, a sharp penetrating object injury on left haemothorax and a bruise over the right eye. Internal examination revealed a severe intrathoracic injury and a deep penetrating injury to the right lung. There was also severe intra-abdominal haemorrhage. Dr Oginga concluded that the deceased died from respiratory failure due to lung injury due to penetrating chest injury with associated severe bleeding. PW 7 stated that the injuries were also consistent with a road traffic accident.

4. The prosecution case was that the accused jointly assaulted the deceased at Foroso Bar at Kambajo Centre after he had refused to pay his bill after drinking. Both DW 2 and DW 3 were working at the bar

while DW1 was a security guard at Kambajo Shopping Centre. The deceased's brother, Alvin Odhiambo (PW 1), testified that he was with the deceased at Foroso Bar between 8.30pm and 9.00pm on the night of 14th January 2013. The deceased bought him drinks then told him to leave and go home. He only learnt of the deceased's death on the next morning.

5. APC Benson Muhia (PW 3) recalled that just after midnight on 15th January 2017, DW 2 came to report at Maranda AP Post that two people, the deceased and one Kevin had come to drink and that they had refused to pay the bill. DW 2 told PW 3 that he wanted to take the deceased's bicycle as security but the deceased refused and threatened to kill him in a scuffle that ensued. DW 1, who was nearby, intervened and DW 2 decided to come and report the matter. PW 3 recorded the incident and told him to report back during the day. PW 5 recalled that DW 2 had been brought by DW 1 on a motor bike.

6. The other witness, Grace Atieno Okello (PW 8) was a waitress at Foroso Bar. She testified that on the material night before she left the bar to prepare supper, 3 people had come and she served them. She also told the court that on the next morning, DW 3 told her to clean what looked the drops of blood before police officers arrived.

7. Based on this evidence, the police decided to prosecute the accused for murder because according to the investigating officer, Chief Inspector Kirwa Tarus (PW 9), the deceased had fought with the accused at the bar and DW 3 had told PW 8 to clear the blood, which was likely the deceased's, at Foroso Bar.

8. The accused all gave sworn evidence. They told the Court that the deceased was among a group of people who had come to drink at the Bar. He left for a while and then came back and refused to pay. Though DW 2 and DW 3 deny that there was a quarrel, DW 1 recalled that he witnessed an argument between DW 2, DW 3 and the deceased. All accused agree that the deceased left while DW 2 went to report at Maranda AP Post.

9. This is a case founded on circumstantial evidence and the law on this point is clear that the prosecution must foreclose all avenues of doubt to sustain a conviction. The Court of Appeal in **Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR)**, observed that:

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.

10. There is grave suspicion that the accused were involved in the murder based on the fact that the accused and deceased had a quarrel but whether they assaulted the deceased is open to doubt. First, there is evidence that the accused left with other people who could have been involved in the murder. Notably, when DW 2 went to report the incident to PW 3 he mentioned a person by the name Kevin who was present. Kevin was not called as a witness nor account given for the failure to investigate him or call him as a witness. The court is therefore entitled to make an adverse inference against the prosecution.

11. Second, the deceased died some distance, about ½ kilometre from the bar, along the road. Whether he was killed or whether he died as a result of a road accident as admitted by the doctor is an open question. Third, the so called evidence of blood at the scene cannot be relied upon to implicate the accused. No forensic tests were done to establish that it was in fact blood and that it was the deceased's blood.

12. Flowing from the conclusions I have reached above, I have no option but to acquit **ROBAT LOBOLO KUYA, WILLIAM OMONDI ONYWERO** and **ANDERSON ARNOLD ODHIAMBO**. They are set free unless otherwise lawfully held. The sureties herein are discharged.

DATED and DELIVERED at KISUMU this 17th day of November 2017.

D.S. MAJANJA

JUDGE

Mr Maube, Advocate for the 1st accused.

Mr Abande, Advocate for the 2nd and 3rd accused.

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