



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 44 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH ONYANGO OCHIENG.....ACCUSED**

**JUDGMENT**

1. The accused **JOSEPH ONYANGO OCHIENG** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on the 18<sup>th</sup> day of May, 2014 at Dandora Phase IV in Njiru District of Nairobi County murdered one **BENSON OLUOCH NYAMBUTE**.

2. He pleaded not guilty and to prove its case against him the prosecution called a total of eight (8) witnesses and when put on his defence the accused gave sworn defence and called no witness.

**PROSECUTION CASE**

3. **PW1 STEPHEN OMONDI ASETO** testified that he was with the deceased in his house on 18/5/2014 who said he wanted to introduce him to certain lady whom he pushed into the house but the lady declined to talk to them and went away only to later on come back with her brother in law who mediated on the issue. On their way out the said lady knocked down the deceased water bucket and the deceased followed her outside and beat her up. Shortly thereafter the accused came into the house of the deceased and inquired of him armed with a panga and knife and they restrained him from attacking the deceased. The deceased then left the house too and they heard him scream that he had been killed and rushed back into the house bleeding. He was rushed to the hospital where he was pronounced dead on arrival.

4. It was his evidence that at that time there was adequate lighting which enabled him to see the accused. He stated that upon the death of the deceased a mob came and beat up the accused and recovered a knife holder which was given to the police. **PW2 SAMMY LOGUONGA** a caretaker of the building confirmed having received a report of the fight that lead to the death of the deceased and reported to the landlady and the police at Dandora and further confirmed that at about 2.00 p.m. there came a mob into the plot.

5. **PW3 MARTIN ONYANGO OKEYO** stated that he was living with the deceased in the same building and responded to the noise coming from the 1<sup>st</sup> floor where he went thereto and saw blood stains. Upon the death of the deceased they reported to the police station and later identified the body of the deceased for post mortem. **PW4 ENOCK DOLLA ONYANGO** stated that he was called by PW5 and went to the house of the deceased where he found blood stains everywhere. **PW5 JUSTUS OKIRO OKEYO** corroborated the evidence of PW1 and stated that he saw the deceased pulling the accused

towards his house while the same was attempting to escape.

**6. PW6 DR PETER NDEGWA** performed post mortem examination on the body of the deceased and formed opinion that the cause of death was exsanguinations due to abdominal and chest injuries due to stab wound. **PW7 PC FRED NYANKURU** received the accused at the police station who had been taken there by a mob who accused him of stabbing the deceased and hid in the neighbours house and re-arrested the same. **PW8 INSPECTOR JEREMIAH ONGANGA** stated that the accused had serious injuries when booked at the police cell and that he took the same to the hospital and then visited the scene and recorded statements from witnesses.

7. It was PW7's evidence that from his investigation he gathered that the deceased had a love affair with Esther Achieng which relationship ended in the year 2014. It was his evidence that the accused was a boda boda operator while the deceased was a matatu driver and that they did not know each other. The wife of the accused reported to him that the deceased wanted a love affair with her and that on the material day the deceased was beating the said Esther and the deceased got to know that it was the same person who wanted his wife and a fight ensued between them. He formed the opinion that the motive for the killing was an alleged or intended love affair between the deceased and the wife of the accused.

## **DEFENCE CASE**

8. In his defence the accused stated on oath that on 16/5/2014 he got to his house at 8.30 p.m. and met one person being beaten by three people. He separated them and stopped the fight. He said the fight was between one Otieno and the deceased who wanted to befriend one Esther and he suggested that they take Ben the deceased to the AP Camp. He suddenly felt being cut on the head from behind. He then entered Ben's house to find out why he had cut him since he is the one who was behind him. He did not find Ben so he left for his room only to meet with the deceased holding an iron bar which he wanted to hit him with causing him to use the only weapon he had to defend himself. He then proceeded to his house leaving one Otieno holding the deceased. At 11 p.m. a mob came to the plot armed with pangas and clubs he then entered into his neighbours house for protection. He was subsequently arrested by the mob and taken to the police station and thereafter charged.

## **SUBMISSIONS**

9. At the close of the defence case it was submitted by the prosecution that the evidence of the defence had not shaken the prosecution case and that the accused was placed in physical contact with the deceased with intention to cause harm to the same. On behalf of the defence it was submitted that the accused defence was not challenged and that he was a victim of an assault where he was almost killed. It was submitted that the accused had intention to harm the deceased which resulted into his death.

## **ANALYSIS AND DETERMINATION**

10. To sustain a conviction on a charge of murder the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence under **Section 203** of Penal Code:-

**a. *The fact and the cause of death.***

**b. *That the said death was caused by unlawful act or omission or commission on the part of the accused person.***

**c. *That the said unlawful act was caused by malice aforethought.***

11. The fact and cause of death of the deceased is not in dispute. The fact of the death was confirmed by PW1 STEPHEN OMONDI ASETO, PW3 MARTIN ONYANGO OKEYO, PW4 ERICK DOLLA ONYANGO, PW5 JUSTUS OKIRO OKEYI while PW6 DR PETER NDEGWA confirmed the cause of death as exsanguination due to abdominal and chest injuries. I therefore find and hold that the prosecution proved beyond any reasonable doubt the first ingredients of the offence.

12. On whether the said death was caused by unlawful act on the part of the accused, PW1 and PW4 both who were living with the deceased on the material date placed the accused person at the scene of the incidence herein. PW5 responded to the cry of the deceased and when he went out he saw the deceased who was bleeding pulling the accused towards his house. PW1 was able to recognize the accused when he went into the deceased house asking for the same and when the deceased responded he went outside and met the accused armed with a panga and a knife and shortly thereafter heard the deceased shout that he had been killed. This evidence was corroborated by that of PW2 the caretaker of the building and PW8 the investigating officer.

13. The accused in his defence admitted that he was in physical contract with the deceased but stated that it was in the process of separating him for one Otieno and his wife Esther who was beating him when he was suddenly attacked from behind. However this evidence is contradicted in material particulars by all prosecution witnesses including PW7 who rearrested the accused who confirmed that the same had injuries on the face which was caused by the mob that arrested him. It is therefore clear that the accused defence did not displace the prosecution case against the same. There is no evidence placed before the court by any prosecution witness to show that the deceased was armed at anytime. There is further no evidence on the alleged fight between the deceased and anybody at the flat on the material day. I therefore find and hold that the said unlawful act was caused by the accused person and that the prosecution had proved the second ingredient of the offence beyond any reasonable doubt.

14. On whether the said unlawful act was caused by malice aforethought on the part of the accused person, it must be noted that malice aforethought is defined in Section 206 of the Penal Code as follows:-

***“Malice aforethought shall be deemed to be established by evidence proving any or more of the following circumstances:-***

**a. An intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not.**

**b. Knowledge that the act or omission causing the death will probably cause the death of grievous harm to some person whether that person is the person actually killed or not although such knowledge is accompanied by indifferent whether death or grievous bodily harm is caused or not by a wish that it may not be caused.**

**c. An intention to commit a felony.**

**d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

15. From the injuries sustained by the deceased it is clear that the accused intended and indeed succeeded in causing the grievous harm to the deceased from which he died. From the evidence of PW8 the investigation officer it is clear that the deceased had been reported by the accused wife to had attempted to seduce her and this had provided the accused with the motive to attack the deceased on the material day.

16. Having taken into account the defence as tendered by the accused it is clear that the injuries sustained by the accused were caused by the mob that responded to the alarm raised upon the death of the deceased as confirmed by the prosecution witnesses including the arresting officer and not by the deceased as alleged by the accused in his defence. I am therefore satisfied and find that the prosecution has proved beyond any reasonable doubt that the death of the deceased was caused by unlawful act on the part of the accused with malice aforethought and therefore find the same guilty and accordingly convict him of the murder of **BENSON OLUOCH NYAMBUTE** on 18<sup>th</sup> May, 2014 and it is hereby ordered.

**DATED, SIGNED and DELIVERED at Nairobi this 13<sup>th</sup> day of December, 2017**

.....

**J. WAKIAGA**

**JUDGE**

***In the presence of:-***

*Mr. Meroka for the State*

*Miss Odembo for Saenyi for the Accused*

*Accused present*

*Court clerk Tabitha*