



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRC NO. 39 OF 2013**

**PROSECUTOR ..... REPUBLIC**

**VERSUS**

**TONNY OMONDI OWINO ..... ACCUSED**

**RULING**

The accused person is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In the particulars it is alleged that on 5th August 2013 at Mung'ao Sub-location in Ugunja District, Siaya County, he jointly with others not before Court, murdered one George Austine Otieno.

The Prosecution called 5 witnesses three of who allege to have witnessed the murder. The three Isaac Ndege Ouma (PW1), Linet Adhiambo (PW2) and Simon Peter Odhiambo (PW3) narrated how on the material day, as they were going home from a funeral in the company of the deceased they saw some people with torches and sensing danger they all ran in different directions. The deceased was however not lucky as the gumboots he was wearing slowed him down. The assailants caught up with him and struck him one with a panga and the other with a stick. The three witnesses testified that they could see what was happening from their different hideouts and that they in fact identified the accused as one of the attackers. When the attackers left the three witnesses went to the scene and carried the deceased home where he was cleaned up and then taken to a local health facility. The next day he was transferred to Busia District Hospital where he passed on. PW4, Grace Anyango Ngesa, testified that she linked up with her son, the deceased, when he was taken to Busia District and that while there they spoke and he told her that he had been cut by Tony (the accused). PW5 the Investigating Officer also claimed that he recovered a panga from the house of the accused person. That panga was exhibited in Court and was identified by PW1 as the one that the accused had assaulted the deceased with. The panga was produced as exhibit P1.

This is a ruling to determine whether or not the prosecution/state has made out a prima facie case against the accused person sufficiently to warrant him to be put on his defence.

However having considered the evidence in support of the charge I am not satisfied that a reasonable tribunal properly directing its mind would convict on such evidence and for that reason I find that the accused has no case to answer.

The charge against the accused person seems to be based on three issues namely identification, dying declaration and the alleged recovery of the murder weapon in his house.

On identification it is my finding that it is doubtful that these three witnesses identified the attackers or even any of them. It is on record that this attack occurred in the dead of the night, 2AM. All the witnesses

agree that it was dark. Their testimony that there was moonlight is shaky and is not reliable. Indeed one of them PW3 admitted that he could not see the attack properly and that without the light of the torches the attackers had he could not see at all. PW2 also admitted that the only source of light were the torches. According to PW1 the light from these torches was even so bright that it prevented him from seeing. Clearly therefore the lighting was not conducive to a positive identification of the assailants.

Secondly these three witnesses testified that the attack occurred behind a house. When they first saw the torch light they ran in different directions. PW1 hid behind a fence as did PW2 while PW3 hid behind a building. It is not quite clear how they were able to see an attack occurring behind a house while they themselves from their hideouts. It is doubtful that they saw anything and more so since it was dark. Evidence of identification must be watertight and in this case it was not.

As for the dying declaration it was PW4's evidence that the deceased told her, just before he died, that it was Tony who had cut him. Tony is the accused person in this case. If the evidence of this witness was intended to corroborate that of PW1, PW2 and PW3 then it failed. This is because it is highly doubtful that the deceased uttered those words. Why do I say so? It was PW4's own evidence that when she saw her son he was unconscious and he could only talk to himself which I understood to mean that he could only mumble. Indeed when she was cross-examined by Mr. Odongo, Advocate for the accused, she admitted having told the police that her son was in an unstable condition and could neither speak nor take anything.

Regarding the panga the Investigating Officer (PW5) admitted that he was not sure that it was the murder weapon. It neither had blood nor the finger prints of the accused person. Indeed no forensic investigation was carried out in regard to this panga and save for the testimony of PW1 who claims to have identified it as the panga used by the accused during the attack, there is no evidence at all to connect it to the murder. As I have already stated it is a would not be safe to convict the accused person on the evidence of identification of any of the three "eye witnesses". Moreover PW1 did not even tell the Court why he identified the panga in the first place. No evidence was led to show that he had seen that panga properly during the attack.

It will also be noted that because the Doctor who conducted the Post Mortem did not attend to produce the report the cause of death was not established. It would be futile to put the accused person on his defence for the foregoing reasons.

Accordingly this Court finds that he has no case to answer and records a finding of not guilty Under Section 306(1) of the Criminal Procedure Code. The accused should be released forthwith unless otherwise lawfully held.

It is so ordered.

**E. N. MAINA**

**JUDGE**

**28/1/2016**

**Ruling delivered in open Court this 28th January 2016 in presence of:-**

Mr. Siritui for ODPP

Mr. Odongo for the accused

CC: Felix

The accused person