



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HIGH COURT CRIMINAL CASE NO. 1 OF 2015
(CORAM: J. A. MAKAU – J.)

REPUBLIC PROSECUTOR

VERSUS

MARTIN OLUOCH OKWAKO 1ST ACCUSED

JARED OPONDO OWINO 2ND ACCUSED

CHARLES OCHIENG DHOYE 3RD ACCUSED

JUDGMENT

1. The accused **MARTIN OLUOCH OKWAKO, JARED OPONDO OWINO** and **CHARLES OCHIENG DHOYE** were charged with an offence of **Murder Contrary to Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence is that on 4th day of August 2011, at Ndenga Sub-location, Siaya District within Nyanza Province, jointly with others not before Court murdered Boniface Oundo Oduor.
2. The prosecution called two witnesses and closed their case upon which the defence submitted that the three accused persons have no case to answer. The prosecution counsel left the matter to the Court to decide.
3. The prosecution's evidence is briefly as follows:- PW1, Gilbert Otieno Oduor, stated that on 4.8.2011 whilst on duty at Meru Town he received a telephone call from his brother Raciemo that his elder brother, the deceased herein Boniface Oundo Oduor was found dead at Aboke Market, having been stabbed to death with a knife. That he left for home and arrived on 5.8.2011. He found the deceased had been taken to the mortuary. They then started planning for funeral and also started inquiring from people to know who caused the death of his brother. In the course of his own investigation he received a telephone call from a Boda Boda rider one David Obonyo that on the material night of the death of his brother, as he was riding his motor cycle he bypassed PW1's brother walking along the road with five (5) people and that it was likely he recognized them. PW1 arranged to meet David Obonyo who upon meeting him told him the people he saw were still at Aboke Market. PW1 was being told so in the presence of many people who included George Arida (PW2) and Daniel Arida. PW1 and his family members decided to go and arrest the suspects. PW2 George Owino Arida testified that on 4.8.2011 he was at his home when at around 10:30 a.m. he received a report that the members of public wanted to go and kill the people who were suspected to have killed Boniface Oundo Oduor, his cousin. He rushed to the deceased's home where there was a funeral and found around 20 youths armed with runigus who informed him that they had information of who were with the deceased the previous night and that they had plans to go to avenge the deceased's death. He persuaded them not to go but they refused. PW2 called O.C.S.

Ukwala Police Station and asked him to send Police Officers to Aboke Market who told him he did not have a vehicle. He asked him to send officers using motor cycles as he called for vehicle from Samia District Headquarters. He called the youths who by then were at Aboke Market and warned them against injuring anyone. The youths arrested two suspects and who were transferred to Ukwala Police Station. He named suspects as Martin and Ogutu. He stated Martin is the 2nd accused in the dock who he had not known before and that the other suspect is not amongst the accused persons as he was misidentified. He concluded by stating he does not know how the 1st accused was arrested.

4. The prosecution did not have any other witness to call and stated it could not secure any further witnesses as the key witness was dead and the others including the investigating officer refused to attend Court and give evidence and as such prayed to submit on the evidence. That when this matter came up for submissions the defence counsel had filed written submissions on no case to answer whilst the State Counsel had not done so. The state counsel opted not to make any oral submissions either.

5. **Section 203 of the Penal Code** defines murder as follows:-

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

6. **Section 206 of the Penal Code** defines malice aforethought as follows:-

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

(a) an intention to cause the death 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 death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be cause;

(c) an intent to commit a felony;

(d) an intention by the act or omission facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony”

7. It is apparent in a case of murder the prosecution must prove that the accused person, had the intention to cause the death of or to do grievous harm to any person, that he had the knowledge that his acts or omission could cause death or would probably cause death either to the persons intended or to some other person or that he had the intent to commit a felony.

8. In the instant case the issue for consideration is whether the prosecution's evidence as tendered prove the above ingredients of the offence of murder against all the three accuseds or any of them to warrant any of them being put on his defence. In my view a case to answer should be made where the prosecution evidence can in absence of evidence from the accused explaining otherwise a conviction will result.

9. In the instant case available evidence from PW1 and PW2 is that none of them witnessed the incident leading to the death of the deceased herein. None of them was at the scene of murder and none of them

placed any of the accused at the incident at the scene of murder. Their evidence is not direct or indirect or circumstantial tending to prove the ingredients of the offence of murder. Their evidence is hearsay. That of great significant is that the prosecution did not establish the death of the alleged deceased person or cause of death of the deceased through production of any medical evidence and whether the cause of death had a link with the accused's actions or omissions at all. There is no evidence to show what lead to the arrest and prosecution of the tree accused persons. No murder weapons were produced linking the accused with this offence.

10. Having stated that much, I find that the evidence placed before the Court is insufficient to warrant any of the accused persons being put on his defence. The accused have no case to answer as no *prima facie* case has been established against any of the accused persons. I accordingly find and hold that the three accused persons are not guilty of the offence of murder and they are accordingly acquitted under **Section 306 (1) of the Criminal Procedure Code.**

11. That unless any of the three accused is otherwise lawfully held, each of the accused persons shall be released forthwith from the prison custody.

DATED AT SIAYA THIS 14TH DAY OF JANUARY, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 14TH DAY OF JANUARY, 2016.

In the presence of:

M/s. Odumba for State

M/s. Opondo for Accused

1st Accused: Present

2nd Accused: Present

3rd Accused: Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE