



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER NO. 62 OF 2012

REPUBLICPROSECUTOR

VERSUS

PETER OCHIENG.....ACCUSED

J U D G M E N T

1. The accused person was charged with the Capital Offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 13th day of September 2012 at Sianda B Village in Gem District within Siaya County murdered one **JOSEPH ONYANGO TATU**.

The prosecution called 5 witnesses whose evidence can be summarised as follows”

2. **PW1 SAMUEL ONYANGO OPIYO** the deceased's uncle testified that on the 13th September 2012 at 8 p.m. he was informed of the deceased's illness and that he had been taken to Ramula Health Centre. He was later transferred to Maseno Mission Hospital where he was treated and discharged on 14th September, 2012. He however later succumbed to his injuries and died on 16.9.2012. The said witness on cross-examination said that he was not present when the deceased fought with the accused. He attended the postmortem and identified the deceased's body. He did not know who began the fight.

3. **PW2 GEORGE OKETCH OUMA** said that he was present during the postmortem exercise and he identified the deceased's body. He said that the doctor told him he had been smoking and was alcoholic.

4. **PW3 SGT. RASHID MOHAMED** testified that on 13th September 2012 he received a report from the deceased that he had been assaulted by John Otieno. He advised him to seek medical attention at Ramula Health Centre. He discovered later that the deceased had been referred to Yala level 4 hospital but the relatives decided to take him to Maseno Mission Hospital

According to PW3 the deceased told him that he had been assaulted by his brother. However no independent witness was found to verify this.

5. **PW3 SENIOR SGT. MARTIN KIBOR** testified that on 17-9-2012 he was tasked by the OCS to carry out the investigation relating to the deceased's murder. He went to the homestead where they found the deceased under a shed and the rest had ran away. They removed the body to level 4 hospital for postmortem.

6. **DR. COLLINS OTIENO OGINGA** PW5 testified on behalf of DR. MUTURI who carried out the post-mortem. The cause of death according to the postmortem was blunt force trauma leading to skull fracture and septic meningitis.

7. When put on his defence the accused gave sworn testimony denying the charge. He said that the deceased was his brother. He said that the deceased was sick and they took him to hospital at Ramula. He was treated and later transferred to Maseno. He was later taken home where he died eventually. He denied that he had any fight with him. He said that his father **SAMUEL ONYANGO** told him that the deceased had been hit by an oxen plough when it hit a tree then deflected on him.

8. **DW2 JAIRUS OUKO TATU** the accused's brother testified that the deceased was sick and they took him to the hospital. He was taken to Ramula and later Maseno hospital. He was brought back home but unfortunately he died. He denied that the accused assaulted the deceased. On cross-examination he denied that he went to Yala Police station to record any statement.

ANALYSIS AND DETERMINATION

9. The court has perused the proceedings as well as the written submissions by both the learned state counsel and the defence counsel. For the offence of Murder to be proved 3 critical ingredients have to be satisfied namely

(a) Proof of the fact and the cause of death of the deceased.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the *actus reus* of the offence and;

(c) Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the "*mens rea*" of the offence.

10. The accused herein was charged with the above offence of murder. There is no evidence by any of the witnesses to show that he assaulted the deceased. The only proximate evidence is that of PW3 who told the court what he was informed by the deceased. Unfortunately the deceased is not with us to corroborate what he told PW3.

11. Both accused and his witness DW2 as well as the accused were brothers. Although they both participated in taking the deceased to hospital, none of them was able to say that they saw the deceased being assaulted. The post-mortem report clearly shows that the deceased died as a result of force blunt trauma but clearly no eye witness was available to corroborate this.

12. Was there malice aforethought? I do not see any in the evidence. None of the witness was able to suggest even remotely that the deceased and the accused had any difference. If there was one then the deceased together with those alive including the accused and his brothers kept it to themselves.

13. In the premises I do not find that the prosecution has established sufficient evidence that the accused participated in the murder of his brother. There was no malice aforethought established against the accused.

14. In the premises the accused person is hereby acquitted under the provisions of Section 215 of the Criminal Procedure Code unless lawfully held.

Orders accordingly.

Dated, signed and delivered this 26th day of May 2016.

H. K. CHEMITEI

J U D G E