



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 9 OF 2014

BETWEEN

REPUBLICPROSECUTOR

AND

OTIENO EVANS ODUORACCUSED

JUDGMENT

1. According to the information brought to this Court on 3rd March 2014, **EVANS OTIENO ODUOR** (“the accused”) is alleged to have murdered **ERIC OCHIENG OLUOCH** (“the deceased”) on 1st March 2014 at Mbita Township, Mbita District within Homa Bay County.
2. The prosecution’s case was that the accused was part of a mob that descended on and beat the deceased on the material day at Onungo Stadium, Mbita on the allegation that he had stolen a motorbike. The deceased was severely injured and died in hospital. The accused pleaded not guilty and the matter proceeded for trial with the prosecution calling 11 witnesses. The accused elected to give sworn testimony but did not call any witnesses.
3. The fact of death as an ingredient of murder is not in dispute. AP Sergeant Daniel Amolo Onduru (PW 4) recalled that on the morning of 1st March 2014 he received a phone call from a member of public that someone was being beaten by members of the public at Onungo Stadium. Together with other officers, he rushed to the scene and found people beating the deceased who was lying down with his hand tied with a sisal rope. The assailants ran away when they saw the officers. He testified that he heard people say that the deceased had stolen a Bajaj Boxer motorbike registration number KMCP 922P (“the motorbike”) belonging to Kevin Ochieng’ Polo. Since the deceased was weak, they assisted him walk to Mbita Police Station.
4. The investigating officer, Corporal Edwin Nyongesa (PW 10) confirmed receiving a call from PW 4 informing him that a person suspected to have stolen a motorbike was being beaten and that they had rescued him and were heading to the station. When PW 10 arrived at the Police Station he met PW 4 and the deceased. The deceased had bruises on his hand, legs and head while his hands were tied with a rope. As he was in great pain, PW 10 rushed him to Mbita District Hospital for treatment. The deceased however succumbed to death late that afternoon.
5. PW 10 arranged for a post mortem to be done on the deceased’s body on 6th March 2014 at Homa Bay District Hospital by Dr Ayoma Ojwang after the body was identified by Sammy Odhiambo Owuor (PW 7). Since Dr Ojwang had passed away during the trial, the post-mortem form was produced by Dr Nicodemus Odundo (PW 9) under **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***.

PW 9 confirmed that he had worked under Dr Ojwang and was familiar with his handwriting and signature. Dr Ojwang recorded his observations as follows;

The body is already peeling off. No cuts on the body. Bruises present all over his body. No fractures of the bones. There was bleeding onto the scalp at the occipital region. There was bilateral chest bleed in both chest cavities. No rib fractures.

Dr Ojwang certified the cause of death as haemothorax and violent trauma from mob.

6. From the testimony of PW 4, PW 9 and PW 10, I have no doubt that the deceased died and he died from trauma inflicted by a mob of people as evidenced by the bruises on his body. Having established the fact and cause of death, the next issue is whether the accused is the person who inflicted those injuries.

7. The circumstances leading to the incident are largely not in dispute. The prosecution led evidence of the deceased's movements on the night and morning prior to his death. On 28th February 2014, at around 9.00 pm at Mbita, Kevin Ochieng' Pollo ("Kevin"), a motorbike rider met Caroline Adhiambo (PW 5) at a disco within Mbita. From there they for PW 5's house where they arrived at about 10.00pm. Kevin parked his motorbike outside the house. A while later, Kevin came out of the house and found the motorbike missing. At that time, the accused was sitting in a Probox vehicle parked within the compound. PW 5 and Kevin asked the accused whether he had seen who had taken the motorbike. The accused told them that the deceased had taken the motorbike. From the description that the accused gave, PW 5 recognised the deceased as her boyfriend. The accused, PW 5 and Kevin proceeded to the deceased's house but did not find him there. They came back to PW 5's house at about 1.00am.

8. At about 5.00am, Kevin woke the accused up and told him that he had gone to see the deceased but that the deceased denied taking the motorbike. Kevin requested the accused to take him back to the deceased's home so that he could confirm that he had taken the motorbike. They both went to the deceased's home and found him. When the accused confronted the deceased, he admitted that he had taken the motorbike. He agreed to take them to where the motorbike was.

9. Kevin, the accused and the deceased then proceeded to Mbita Bus Stage. Kennedy Omondi Oyugi (PW 1) and Kennedy Odhiambo Nyangor (PW 2) recalled that when the accused arrived in the vehicle, he told them that one of the people in the vehicle had stolen the motorbike. PW 1 told them to report the matter to the Chairman of Motorbike riders. He entered the motor vehicle and they went to the Onungo Stadium. With the accused driving, Kevin, the deceased, PW 1 and PW 2 went back to PW 5's home and they all proceeded to Onungo Stadium where they found the motorbike. Thereafter they went to report the matter to the Chairman of Motorbike riders at Rusinga.

10. Erick Omondi Ojwang' (PW 3), the Chairman of the Motorbike riders, recalled that on the morning of 1st March 2014, he was visited by the accused, Kevin, PW 1 and PW 2 with the deceased at the back of the vehicle. PW 3 testified that he was informed that the deceased had stolen Kevin's motorbike. When he questioned him, the deceased told him that the accused was sleeping with his girlfriend, PW 5, so he took the motorbike to punish him. PW 3 directed the group to go to his office at Bus Stage so that he could deal with the matter. They all went back to the Bus Stage and upon arrival, PW 1, PW 2 and PW 5 left to go about their own business while the accused and the deceased remained.

11. When PW 3 arrived at his office, he did not find anyone. He was informed that the deceased had been taken to Onungo Stadium where the motorbike was. He went there and found many people including the accused beating the deceased who had been tied with a sisal rope. The motorbike was next to the fence of the Stadium. PW 3 testified that the accused was beating the suspect on the buttocks and back. He told him to stop but he went on beating. When he saw that things were getting out of hand, he decided to go to the police station but he met police officers coming as they had received information. PW 3 recalled that when they arrived, the crowd dispersed and the police took away the suspect.

12. James Nyanchio Nyabuto (PW 6) confirmed that he had employed the accused to drive his Toyota Probox and that on the night of 28th February 2014, he had allowed the accused to sleep in the vehicle so

that he could assist him the next morning. On the next morning at about 5.00am, he gave the accused the car keys so that he could proceed to the Bus Stage. When he went to the Bus Stage at about 9.00am, he found the vehicle but did not find the accused. When he asked around, he was informed that the accused had gone to the Stadium which was not very far. When he arrived at the Stadium, he found many people surrounding a man sitting on the ground. He was told that the man had stolen a motorbike which was nearby. He looked for the accused, found him and took his car keys. He could not recall whether the accused was carrying anything.

13. The accused elected to give sworn testimony. He denied beating the deceased. He confirmed the events of the night of 28th February 2014 and the morning of 1st March 2014 respectively. The point of departure is that when the group returned from PW 3's home at Rusinga, there was a crowd at the Bus Stage, shouting, "*Thief, thief*" as they entered the Bus Stage. He recalled that people began gathering and asking for the thief as he was parking the vehicle. When he parked the vehicle, the group opened the vehicle and flushed everyone out. He pleaded with them not to damage the vehicle so they moved away. In the meantime, he decided to clean the vehicle while waiting for the owner who had not arrived. He decided to go and look for him. As he passed by the Stadium, he found a group of people including PW 3. He testified that he asked PW 3 whether he had seen PW 6, PW 3 threatened him with certain consequences. He then saw PW 6 talking to an AP Officer. The officer told him to proceed to the Police Station. The accused testified that the deceased was brought to the police station while he was waiting there.

14. The prosecution's case is that the accused was part of the mob that inflicted the injuries that led to the deceased's death. In order to find the accused guilty of murder, the prosecution had to prove that the accused together with the mob of people shared a common intention to kill or to cause grievous bodily harm (see generally *Augustino Orete & Others v Uganda* [1966]EA 430 and *Dracaki s/o Afia & Another v R* [1963]EA 363 and *Peter Gachoki Njuku & Another v R* NYR CA Crim. App. No. 115 of 2002 [2002]eKLR).

15. **Section 21** of the *Penal Code (Chapter 63 of the Laws of Kenya)* defines common intention as arising:-

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

16. In *Wanjiro d/o Wamerio v R*, 22 EACA 521, the Court elucidated the meaning of the common intention as follows;

Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.

Further, in *Njoroge v Republic* [1983] KLR 197 at p. 204, the Court of Appeal stated as follows;

If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.

17. It is not in dispute that the accused was with the deceased from the material morning and was with him until the group arrived at the Bus Stage after leaving the PW 3's home. The testimony of PW 3 and PW 6 put him at the Bus Stage where the deceased was assaulted. Whether the accused participated in the mob that beat the deceased leading to his demise turns on the testimony of one witness, PW 3. PW 3 testified that he saw the accused beat the deceased with a piece of timber on the back and buttocks. His testimony on this point was not shaken on cross-examination. Although the accused, in his defence,

suggested that there was a grudge between him and PW 3, I reject this suggestion. PW 3 was the Chairman of the Motorbike riders and when the accused and others went to report to him about the theft of the motorbike, there was nothing to suggest that there was bad blood between them or there was a reason for PW 3 to frame him.

18. There is however, a glaring break in the chain of the prosecution's evidence from the time the accused left the Bus Stage to the time he was seen by PW 3 at the Stadium beating the deceased. At what point did the accused join the mob at the Stadium from the Bus stage? Nonetheless, the evidence including the accused's own testimony that he was present at the scene of crime at the Stadium where the deceased was being beaten up is solid. More importantly, the accused's participation in the mob has been confirmed by the unassailed testimony of PW 3 who saw the accused beat the deceased with a piece of timber.

19. The other important issue is whether there was in fact a premeditated plan by the accused together with the mob to carry out the fatal attack on the deceased. On this, I am guided by the decision of the Court of Appeal decision in ***Dickson Mwangi Munene & Another v Republic* NRB CA Criminal Appeal No. 314 of 2011[2014] eKLR** where it was stated;

[56] [C]ommon intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In Dracaku s/o Afia v R [1963] E.A.363 where "there was no evidence of any agreement formed by the appellants prior to the attack made by each" it was held that "that is not necessary if an intention to act in concert can be inferred from their actions" like "where a number of persons took part in beating a thief.

20. The presence of the mob and the fact that that the deceased suffered violent trauma in the form of multiple injuries is confirmed by the post-mortem report. I therefore find that the accused engaged in an unlawful act that led to the death of the deceased, even if such death may not have been intended or anticipated by the accused. Although there is no evidence of an initial pre-meditated agreement or joint purpose to kill, the same can rightly be inferred from the mob action of lynching the deceased in which the accused took part in. Death or grievous bodily harm was a probable consequence of the mob's actions in terms of **section 206** of the **Penal Code**. I thus find that malice aforethought as an ingredient for murder is established.

21. I therefore find the accused **EVANS OTIENO ODUOR** guilty of the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code** and I convict him accordingly.

SIGNED and DATED at KISUMU this 24th day of June 2016.

D.S. MAJANJA

JUDGE

DATED and DELIVERED at HOMA BAY this 28th day of June 2016

H.A. OMONDI

JUDGE

Mr Osoro instructed by Osoro and Company Advocates for the accused.

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