

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

HIGH CRIMINAL CASE NO. 36 OF 2013

STATEAPPELANT

VERSUS

NICHOLAS ODHIAMBO ODANGA1st RESPONDENT

OKOTH HERMAN BUNDE2nd RESPONDENT

RULING

NICHOLAS ODHIAMBO ODANGA and **OKOTH HAMMAN BUNDE** (the 1st and 2nd accused herein) were charged with murder contrary to Section 203 as read with 204 of the Penal Code, the particulars being that on 27th March 2013 at Koindo Village in Kokech Location of RACHUONYO SOUTH District, in Homa Bay County they jointly with others not before court murdered **GEORGE OMONDI TINDI**.

The accused were arraigned in court on 3rd April 2013 but the court was not sitting and plea was eventually taken on 15/5/2013 and the matter was listed for hearing on 16/09/2013. However the matter did not proceed to hearing and that date was converted to hearing of bail application which in any event was not argued until 18/09/2013.

Thereafter the matter was set for hearing on 01/10/13 but on that day a fresh charge sheet was introduced amending the charges and on request by the prosecution that witnesses had not been bonded as there wasn't sufficient time to do so, and the DCIO handling the case had also been transferred, the case was adjourned to 29/01/2014.

On 29th January, 2014 the prosecution indicated it was ready to proceed with three witnesses and hearing was scheduled for 2:00 p.m.

However, at 3:00 p.m the State Counsel learnt that the Judge was not sitting and the matter was mentioned before the Deputy Registrar who gave a hearing date for 31st March, 2014.

On 31st March 2014 the State Counsel informed the Court that she was expecting three witnesses who were on the way, but the Judge adjourned the matter saying there was no guarantee that the witnesses would arrive before midday and the she was going to Kisii High Court for two Judge appeals. A fresh hearing date was given for 12th May 2014 when prosecution indicated that one witness was present, but one accused person was absent and the matter was adjourned to 21st July 2014 for hearing when the prosecution informed the court that the witnesses were not bonded.

A fresh hearing date was given for 7th October, 2014 when one witness Rose Apiyo Omondi (wife to the deceased) testified as PW1 describing how **she witnessed the assault** on her husband until he breathed his last. It was her evidence that the 1st accused is an in-law and they attacked the deceased saying he was a thief. She was the only eye witness who testified.

The matter was then adjourned to 10/03/15 for further hearing but no witnesses turned up for and a fresh

date was given for 20/05/15. When again no witness turned up and another date was given for 15/07/15 with orders that summons issue to the witnesses. No witness turned up on 15/07/15 or 10/11/15 and the next witness testified on 07/03/16 in person of **JOEL OWENGA YONGE (PW2)**, the Assistant Chief of Kowino Sub-location. He did not witness the incident and only received a report that the deceased had been beaten to death by a mob.

The matter was then adjourned as there were no other witnesses present on that day. Subsequently hearing dates were fixed for **25/05/16, 27/05/16, 14/06/16, 21/06/16, 25/7/16, 07/09/16, 20/09/16** – but on all those dates no witnesses turned up. The court having given a last adjournment for 20th September, 2016, finally declined any further adjournments and the case was closed with only the evidence of the PW1 as the eye witness.

There was no medical evidence presented to confirm that the deceased was assaulted and that he died from the injuries sustained as a result of the breathing. To ask the accused to make their defence would be chasing after the wind as there is insufficient evidence due to lack of witnesses who eternally forced to attend court. The accused have no case to answer and make a finding of **NOT GUILTY** under Section 306 (1) Criminal Procedure Code.

The accused should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at HOMABAY this day 31st day of October, 2016

H. OMONDI

JUDGE