



REPUBLIC OF KENYA
IN THE HIGH COURT
AT KISUMU
CRIMINAL CASE NO. 2 OF 2012

BETWEEN

REPUBLIC.....PROSECUTOR

AND

WILLIAM OTIENO ONYONGO.....ACCUSED

RULING

1. On 5th January 2010, this Court was informed that **WILLIAM OTIENO ONYONGO** had murdered **LUCAS OUMA OKETCH** (“the deceased”) on the night of 5th and 6th June 2009 at Nyadorera A Sublocation, Siaya District within Siaya County. The postmortem report prepared by Dr Randa, who conducted the post-mortem on the deceased’s body on 10th June 2009 at Siaya District Hospital Mortuary, certified the cause of death as severe bleeding and head injury stemming from an assault. Dr Randa, on whose behalf Dr Jackton Omoto (PW 4) produced the post-mortem report, noted that the deceased had a deep cut on the front of the neck about 6 cm long and a 2cm wound on the left side of the head. The deceased had multiple skull fractures on the side and back of the head with massive bleeding inside the brain.

2. The deceased’s father, Okech Were Odima (PW 1) recalled that on 6th June 2009 at about 3.00am, he heard people, among them his wife, screaming outside his house that his son had been killed. He woke up and went near his gate where he found the deceased lying down with a cut on the head and neck. He called the area chief, Augustine Omuya Walu (PW 3).

3. PW 3 testified that he had received a call at 3.00am from a Charles Ouma, who had informed him that a man had been killed by unknown people. He immediately informed the police of the incident. He later went to the scene and found the deceased lying with a cut on the neck and head. He found the police already at the scene. They collected the deceased’s body.

4. PW 1 further testified that on 13th November 2009, while he was at home seated next to the deceased grave, the accused arrived with a sheep and placed it near the grave. After asking him forgiveness and saying that he had been led by the devil, the accused left immediately. Maureen Atieno Oduor (PW 2), PW 1’s daughter in law, was at home when the accused brought the sheep to PW 1’s homestead. She heard the accused say he had brought the sheep to ask for forgiveness. He left the sheep behind. PW 1 took the sheep to the police station.

6. Lucia Anyango Owino (PW 5) told the court that on 5th June 2009 at about 3.00pm, she was at home

when the accused came to her home in a huff. She asked him what was wrong and he replied that he would kill or burn the deceased's father's house as he was practicing witchcraft. After he had left, she told one of the children to go and call the deceased. He came over and she told him what the accused had said and told him to report to the police station. She recalled hearing people screaming at about 3.00am on the next morning. She later learnt that the deceased had been killed.

6. The investigating officer, PC Thomas Angaya (PW 6), testified that he was instructed to proceed to Nyadorera Police post to investigate a report of murder by his Deputy Commanding officer. In the company of other officers, he proceeded to the scene and found the deceased lying along a footpath with cut on the head and neck. He told the court that the body was near place where a *Disco Matanga* was taking place. He received information that the accused had made threats to PW 5. He also received information that on 13th November 2009, the accused had taken a ram to the deceased father and tied it to the deceased's grave and when police were called, he ran away until he was arrested on 21st December 2009.

7. At this stage I am only required to decide whether there is sufficient evidence to put the accused on his defence. What amounts to a *prima facie* case has been set out in several cases among them among them ***Ramanlal Trambaklal Bhatt v R* [1957]EA 332**, ***Wibiro alias Musa v R* [1960]EA 184** and ***Anthony Njue Njeru v Republic* NRB CA Crim. App. No. 77 of 2006 [2006]eKLR**). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

8. The prosecution case was based on the circumstantial evidence and it is that the accused issued certain threats and that after the death of the deceased, he brought a sheep to the deceased's homestead and asked for forgiveness from PW 1. From the testimony of PW 5, the threats that the accused made were to the deceased's father and not the deceased. As to the fact of bringing the sheep to the deceased grave, there was no explanation of the significance of this act. PW 1 did not tell the court why the accused wanted forgiveness. In other words, I cannot conclude that the deceased confessed to the offence either by words or by conduct.

9. There was no evidence placing the accused near the scene of the incident on the material morning. PW 6 testified that the deceased body was found near a footpath where there was a *Disco Matanga*. In such a public place where many people had gathered, it is possible that the anyone could have murdered the deceased. Besides, Charles Ouma, who called PW 3 that morning, told him that the deceased had been killed by unknown people. The prosecution did not call any evidence to foreclose this possibility that the no one other than the accused could have committed the felonious act.

10. I find that the words of the accused to PW 1 and his conduct ambiguous and the other evidence connecting the accused to the deceased's murder threadbare. The accused cannot be called upon to answer to a case that amounts to weak tea. Suspicion alone cannot be a substitute for evidence. To call upon the accused to defend himself would amount to relieving the prosecution of its burden to prove its case beyond reasonable doubt by requiring him to fill in the gaps in its case. Even if the accused elected to remain silent, the prosecution case would fail.

11. Under **section 306(1)** of the ***Criminal Procedure Code (Chapter 75 of Laws of Kenya)***, I am required to enter a verdict of not guilty which I hereby do against **WILLIAM OTIENO ONYONGO**. The accused is acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 20th day of December 2016.

D.S. MAJANJA

JUDGE

Mr P. Ochieng, Advocate for the accused.

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