



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 2 OF 2012

(FORMERLY KISII HCCR CASE NO. 98 & 104 OF 2011)

BETWEEN

REPUBLIC PROSECUTOR

AND

PETER OLANGO OSINGO 1ST ACCUSED

CYPRIAN NYAORI OLOO 2ND ACCUSED

GEORGE ORWA OCHIENG 3RD ACCUSED

RULING

- PETER OLANGO OSINGO, CYPRIAN NYAORI OLOO and GEORGE ORWA OCHIENG** are charged with murder contrary to **section 203** as read with **section 204** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the information are that on 10th October 2011 at Wahongo Village, Usao Sub-location, Gembe East Location in Suba District within Homa Bay County they, jointly with other not before the court, murdered **COLLINS OTIENO NYANGOWA** (“the deceased”).
- The accused pleaded not guilty and the trial proceeded a pace before Maina J., before I completed it under **section 200** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. The prosecution case was that on the night of 10th October 2011, the deceased, a secondary school student, had gone to the Oyosi homestead to pick his girlfriend. When the girl’s brothers saw him, they began assaulting him and the three accused joined the assault. They beat him and left him to stagger to the nearby Thomas Onyango homestead where his family members came to see him. The deceased made some declarations to his relatives in which he implicated the accused persons. The deceased was taken on a wheel barrow to the nearby Usao Dispensary where he succumbed to the injuries and died. The prosecution called 9 witnesses to prove its case.
- The fact and cause of death was confirmed by the testimony of Dr Ayoma Ojwang’ (PW 9) who carried out the postmortem on the deceased’s body on 15th October 2011 after it had been identified by his mother, Doris Odira Nyagowa (PW 1) and his brother, Jared Ochieng’ Nyagowa (PW 4). He observed the body was swollen all over especially the head, upper and lower limbs and multiple bruises and cuts all over the body. He also noted a definite rope mark on both elbow joints. Internal examination of the body revealed internal bleeding in both chest cavities and

massive subcutaneous haemorrhage on both upper limbs. He also observed there was extensive scalp haemotoma formation and bleeding into the brain substance. He concluded and certified the cause of death as a head injury and internal bleeding.

4. I am now required, at the close of the prosecution case, to consider whether the prosecution has made out a prima facie case to warrant the accused being put on their defence for the murder of the deceased. The material evidence presented by the prosecution was as follows.
5. At about 6.00 am on 10th October 2011 Jacinta Onyango (PW 3), the wife of Thomas Onyango, was going to her shamba when met three boys and a girl whom she knew as Tela Oyosi, Jim Abichi, Fred and Akinyi Olima. She asked them what they were doing, one of them answered that they were guarding the deceased whom she knew as Collins, the son of her brother in law. He was lying down with his hands tied. Tela told her that the deceased had been found stealing and had been beaten and that they were taking him to the Assistant Chief but he was refusing to go. The deceased told her he was not refusing to go but that he had been beaten at Oyosi's home and could not walk and that those who had beaten him were still there. As nothing had been recovered from him, she requested the boys to untie the deceased. The boys and girl left while the deceased staggered away as she went to her shamba. PW 3 later heard that the deceased passed away at the dispensary.
6. Doris Odira Nyangowa (PW 1) had eaten dinner with her son, the deceased, on the night of 10th December 2011 and he left at about 9.00pm. On the next day at about 8.00 am, she was informed by Akinyi Olima, that her son, the deceased, was at the home of Thomas Onyango. She went to the Onyango's home and found him lying outside the house with his body swollen. When she asked him what had happened, he informed her that he had been beaten by Tela Oyosi, and Fred at Oyosi's home where he had gone to look for a girl.
7. PW 1 called her son, Charles Odongo Nyagoma (PW 2), as he was going to the lake to fish. He immediately went back home and found that she had gone to Onyango's home. Upon arrival at Onyango's home, he found his brother lying on a bed with a swollen body with multiple cuts and bruises oozing with blood. The deceased told him that he had gone to collect his girlfriend at the Oyosi's home and was beaten at the door by Tela and Fred who began screaming. As they screamed, their mother came and started screaming hence attracting other people who came among them Olango Osingo, Cyprian Abich and one Raburu who beat the deceased.
8. Jared Ochieng Nyagowa (PW 4), a brother of the deceased, also received information that his brother had been injured. He proceeded to the home of Onyango where he found his brother lying on bed. The deceased informed him that he had been beaten at Oyosi's home by Tela Oyosi, Fred, George Orwa Ochieng, Olango and Cyprian. PW 2 and PW 4 organised for the deceased to be taken to Usao Dispensary on a wheelbarrow where he died thereafter.
9. Justus Ochwedo (PW 5), the Chief of Gembe East, recalled that he received a call from PW 4 on 10th October 2011 at about 4.30pm informing him that his brother had been attacked the previous night by people known to him and had been taken to Usao Dispensary where he died. As he could not reach the Assistant Chief on phone immediately, he reported the incident to Mbita Police Station. He later went to the scene and confirmed that there had been a fracas and a boy attacked. The names of Peter Osingo, Cyprian Nyaori and Joel Orwa were mentioned as some of the people involved. Charles Olango Olali (PW 6), a clan elder, testified that on 10th October 2011, he received information from the deceased's brother informing him of the deceased's death. He went to Usao dispensary and viewed the body of the deceased. He stated that he did not see anything unusual on the body. He called the assistant chief.
10. Charles Ngoye Otieno (PW 7), the Assistant Chief of Ngodhe Sub-location, testified that he knew the three accused as persons from the area of his jurisdiction. He recalled that on 10th October 2011 at about midday, he was in his office when two boys who identified themselves as Fred and Tela came to see him. They made a report that on the previous night at around 10 pm, the

deceased came to their house while they were sleeping. The deceased stated that he wanted a gun from their house and as they were not satisfied with the answer they decided to tie him up. A struggle then ensued and during the struggle, their mother and the accused joined. He received their report and asked them where the deceased was. They told him that he had refused to come over. He said he would issue summons for the deceased. Later on PW 6 called him and informed him that a boy had died in someone's home. He rushed to Usao Dispensary and found the deceased there.

11. Sergeant John Kilonzo (PW 8), the investigating officer, testified that by the time he arrived at Usao Village where the incident had occurred, the deceased body was at Usao Dispensary. From his investigation he found that the deceased had gone to pick his girlfriend, Jamila Oyosi and when her brothers saw him, they began to assault him until he was unable to walk. He arrested the accused who were neighbours of the Oyosi family. He testified that the brothers of the Jamila disappeared and could not be found.

12. The central issue in this case, which was emphasized by counsel for the accused, Mr Oduor, was that the prosecution case was based on dying declarations of the deceased which the court must evaluate carefully. He cited the case of *Aluta v Republic [1985] KLR 543*, the Court of Appeal delivered itself thus on the subject;

It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration.

13. What is clear from the prosecution evidence is that apart from the declarations made by the deceased to the various witnesses, there was no other evidence pointing to the accused as the persons who assaulted him at the Oyosi homestead. Four prosecution witnesses testified to what the deceased's told them. To his mother (PW 1), he stated that he was beaten by Tela Oyosi and Fred at Oyosi's homestead. To PW 2 he mentioned that he was beaten by Tela, Fred, Olango Osingo, Cyprian Abich and Raburu while to PW 4 he mentioned Tela Oyosi, Fred, George Orwa Ochieng, Olango and Cyprian Abich. The question that these declarations beg is why the deceased would have mentioned only two people to his mother and then other people to his brother. Furthermore, the deceased did not mention the names of his assailants when he spoke to PW 3 who is the first person he met.

14. The only other evidence implicating the accused are the statements made to PW 7 by Fred and Tela when they came to report that the deceased had gone to their house demanding a gun and that the accused joined the resulting altercation. Very little weight can be attached to these statements because Fred and Tela had reason to lie to PW 7 in order to protect themselves. Earlier that morning they had told PW 3 that the deceased had stolen and that is why they were taking him to the chief. Their statements to PW 6, apart from being hearsay statements, could not therefore be relied upon to implicate the accused.

15. This evidence presented by the prosecution is insufficient to put the accused on their defence as there was no evidence placing them at the scene of the incident. While the accused may have been involved and may indeed have knowledge of what took place at the Oyosi homestead that night, I cannot act on mere suspicion however strong without evidence that would call upon the accused to defend themselves. What comes out of the evidence though is that there is a conspiracy of silence to protect the Oyosi family in whose homestead the deceased suffered the injuries that led to his death.

16. The police cannot escape blame for the manner in which investigations were conducted. No account of was given of efforts made to locate the members of the Oyosi family who were said to

have disappeared. Other persons like Tela's mother, Raburu and Jim Abichi were not called as witnesses. It is also strange that Akinyi Olima, who was with Fred and Tela and the deceased when they met PW 3 earlier and who also informed PW 1 of her son's death was not called as a witness nor an account given of her whereabouts. It is my hope that the Oyosi family will one day be called to account for the murder that took place in their homestead.

17. Nevertheless, according to the provisions of **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, I must now record and I do hereby record a finding of not guilty against all the accused.

18. I therefore acquit all the three accused. They are set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 22nd day of May 2015

D.S. MAJANJA

JUDGE

Mr Oduor, Advocate for the accused.

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