



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL CASE NO. 3 OF 2014

BETWEEN

STATEPROSECUTION

AND

DANIEL OKUMU OWINO ACCUSED

JUDGMENT

1. The accused **DANIEL OKUMU OWINO** (“the accused”) is charged with murder. According to the information dated 18th August 2014, he murdered **LINCOLN OTIENO OINDO** (“the deceased”) on 9th August 2014 at Cox Pub, Namba Village within Migori County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.

2. On the night of 9th August 2014 the deceased had gone to Cox Pub which was owned by the accused. The prosecution case is that the deceased started breaking glasses whereupon he was ushered out by the watchman and in the process he was assaulted by the accused. He was found lying unconscious on the next day near the pub and was taken to hospital where he died. The prosecution called 8 witnesses while the accused elected to give sworn testimony and called 2 witnesses.

3. A security officer employed at Cox Pub, Obuchi Job Mosiona (PW 1), recalled that on 9th August 2014 at about 9.00pm, while he was at work, he heard glasses breaking inside the bar. He went inside the pub to find out what was happening. He found the deceased, who was a regular customer, drunk and seated near the door. The deceased had dropped a glass. PW 1 removed the broken glass, went back and requested him to pay for it. The deceased told him he would pay but he did not have cash. PW 1 held him and removed him from the bar. As he was removing him from the rear door, he met the accused, who the proprietor of the bar, and informed him what had happened. PW 1 testified that the accused began to slap the deceased and removed him from the bar. He also tried to control the accused, who was also drunk, as he feared he would injure the customer. He stated that the accused continued to inflict blows on the customer until he was removed to the road. PW 1 tried to intervene but the accused slapped him. As he followed them, the deceased told him to be careful as the accused would also beat him once he was through with him. The deceased told PW 1 to secure his cap and shoes which were still inside the bar and that he would pick them the next day.

4. As PW 1 was leaving work at about 7.00am, he heard motorbike riders saying that the deceased, who was known in the area as Ras, has been admitted to Akidiva Memorial Hospital. He decided to go there immediately. He found the deceased in asleep in the ward. He left and came back at about 5.00pm and found him still asleep. On the next day the accused’s father came and took him to Migori Police Station to record a statement where he learnt that deceased had died.

5. The deceased's mother, Syprina Akinyi Oindo (PW 2), testified that on 10th August 2014 she was concerned that the deceased had not come home as it was unusual for him to sleep outside. At about 2.00pm, a young man came and informed her to go to Akidiva Memorial Hospital. She found the deceased unconscious. She was informed by PW 1, whom she met at the hospital, that he had been beaten by the accused for breaking a glass at Cox Pub. She decided to go to Migori Police Station to report the incident.

6. PW 2 called her sister, Dorothy Waisiko (PW 4), and informed her that her son was in hospital. When she arrived at the hospital, she met PW 1 who introduced himself as a watchman. He told that he had the deceased's items at Cox Pub. She went there and collected the deceased's cap and shoes which she later handed to the police. The deceased's wife, Sharon Atieno Otieno (PW 5), testified that the deceased had left home on 9th August 2014 and that he did not return that night. On that next morning she heard people saying that he was sick or drunk along the road. When she went there, she found he had been taken to Akidiva Memorial Hospital. She went to the Hospital at about 2.00pm and found him unconscious. She observed that one of his eyes were injured, his ears were bleeding and his face had bruises.

7. When the deceased was taken to Akidiva Memorial Hospital by good samaritans, he was attended by Winnie Achieng Ouma (PW 3), a registered clinical officer. He was brought in an unconscious and unresponsive state on 10th August 2014 at about 8.00am. PW 3 examined him and noted that he was smelling of alcohol, his pupils were dilated and he not responding to light. She also observed bruises and swelling on the hands. When she reviewed his systems, she found that his chest was clear and there were no crepitations or other sounds other than the heart which sounded normal. She formed that impression that the deceased had alcohol intoxication and was suffering from hypothermia.

8. Dr Jared Ndege (PW 7) conducted the post mortem on the deceased body on 13th August 2014. He observed that the deceased had blood in the chest cavity on both sides and that the heart had been ruptured and there was blood in the pericardium. The deceased had a bruising on the left temporal aspect and the left cornea was ruptured. He certified the cause of death was the haemothorax resulting from a lung injury and ruptured heart. He opined that the chest injury was caused by a blunt object. When cross-examined PW 7 admitted that he did not do any assessment of alcoholism. He posited that a rupture of the heart, would almost lead to instant death. In this case he noted that the deceased ribs were not crushed but that the injuries he observed were on the chest. Dr Joseph Otieno (PW 8) conducted a mental examination on the accused and concluded that he was mentally stable and fit to stand trial.

9. The investigating officer, Inspector Jackline Wangila (PW 6), recalled that on 10th August 2014, PW2 reported that her son's wife had not come back home the previous night and that she had heard information that he had been assaulted at Cox Pub and was admitted at Akidiva Memorial Hospital. She reported that the her son had been assaulted by the owner Daniel Owino Okumu. PW 2 came back on the next day and reported that her son was still unconscious. PW 6 proceeded to the hospital with PW2 and found the deceased unconscious. PW 6 then proceeded to Cox Pub to make inquiries. She interviewed PW1 who told her that the deceased came to the pub drunk and he broke a glass and that it was the accused who beat him and pulled him outside the compound and left alongside the Migori - Isebania Road. PW1 told her that he had handed over items to PW 4 which the deceased had left with him. She arrested the accused and initially intended to charge him with assault but after being informed of the death of the deceased by PW4 she decided to prefer a charge murder.

10. When put on his defence, the accused elected to give sworn testimony. He testified that on the material night he was Cox Pub when PW 1 drew his attention to the deceased who had been breaking glasses. He knew the deceased as a regular customer. At the time he stated that the deceased, who was drunk, had broken three glasses. He denied that he assaulted the deceased but only directed PW 1 to remove the deceased out of the pub to the road which was about 10 metres away. He further testified that before the deceased walked away he removed his cap and shoes and gave them to PW 1 telling him that he would come and pay the next day.

11. The accused further testified that on the next day when he heard that the deceased had been taken to hospital he went there at about 12.00pm but found him unconscious. Later that afternoon he was arrested

and taken to the police station where he recorded a statement to the effect that he did not know what happened to the deceased.

12. Mark Ouma (DW 2) testified that he was the accountant at Cox Pub at the material time. He recalled that on the night of 9th August 2014, while he was at work at around 11.00pm, he heard shouting in the bar which caused him to reduce the volume of the music. He summoned PW 1 and gave him the bill for a man who had been breaking glasses. He also told PW 1 to call the accused who was sitting outside. The accused came and instructed PW 1 to remove the deceased from the bar and leave him at the road. He denied that he saw the accused beat or assault the deceased.

13. Musa Rajab Ali (DW 3) stated that he knew the deceased as they were staying in the same village. He was going to work on 10th August 2014 at about 7.00am when he found people gathered along the road talking about someone lying there. He went and saw that it was the deceased whom he knew. He tried to talk to him but he was not responding. He decided to go to the deceased home where he found PW 2 and informed him that he had seen her son and had left him being taken to hospital.

14. At the close of the defence case, counsel for the accused submitted that there was no evidence that the accused caused the death of the deceased. He submitted that none of the witnesses established the cause of death and if an assault took place that would have led to the rupture of the heart, then the death would have been sudden. Counsel contended that the death took place more than 12 hours after the incident and it is probable that something could have happened to the deceased which was not explained by the prosecution. Counsel pointed out the testimony of PW 3 and PW 7 was inconsistent as to the cause of death hence the accused must be acquitted.

15. In order to secure a conviction for the offence of murder under the provisions of **section 203** and **204** of the **Penal Code**, the prosecution must prove beyond reasonable doubt the following ingredients;

- a. Proof of the fact and the cause of death of the deceased.
- b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.
- c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the **Penal Code**.

16. The prosecution case is that the accused assaulted the deceased which led to his death. PW 1 testified that the accused slapped the deceased and inflicted blows on him. In cross-examination, he stated that the accused kicked the deceased from the back. The accused, PW 1 and DW 2 all agree that after the deceased was removed from the bar he walked away staggering as he was drunk.

17. The issue is whether the assault by PW 1 led to the death of the deceased. In this case the medical evidence is critical. PW 3, who first saw the deceased, noted that the only visible injuries were bruises on the hand which were swollen according to her report (Exhibit No. 3). Dr Ndege noticed bruising on the left temporal aspect of the head and the right cornea was ruptured. The cause of death was a ruptured heart. He admitted in cross-examination that if the cause of death is a ruptured heart then death would be instant.

18. Taking all this evidence into consideration, I cannot say that the prosecution proved that the act of that the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission. PW 1 did not testify that he saw the accused with head or eye injuries. In any case, the description he gave of the accused assaulting the deceased are inconsistent with the injuries detected by PW 7. The bruises on the deceased hands are unexplained by what happened at the pub. Further, PW 1 did not testify as to the intensity of the assault by the accused whether such slaps or kicks were such as to cause the injuries sustained by the deceased.

19. There is a possibility that when the deceased left the bar on that night at about 11.00pm, he was

assaulted by unknown persons between that time and the time he was found at 7.00am. He may have tried to fight back hence the bruises on his hand. While this remains a matter of conjecture, it is a reasonable explanation of the evidence. Finally, a rupture of the heart, as PW 7 stated, would have led to instant death. This is also unexplained by what PW 3 described in her testimony that the heart was normal.

20. While I accept that the accused assaulted the deceased, whether the assault led to the death of the deceased is a matter of doubt. As the accused is entitled to the benefit of the doubt, I do hereby acquit him of the murder of **LINCOLN OTIENO OINDO**.

DATED and DELIVERED at MIGORI this 16th day of November 2015

D.S. MAJANJA

JUDGE

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

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