



**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL CASE NO. 14 OF 2012**

**(FORMERLY KISII HCCRC NO. 12 OF 2010)**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**RAPHAEL ORWA ..... 1<sup>ST</sup> ACCUSED**

**HILARY HENCE NYAINDA. .... 2<sup>ND</sup> ACCUSED**

**ELISHA OKINYI ..... 3<sup>RD</sup> ACCUSED**

**RULING**

1. The accused persons 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 court was informed that on 27<sup>th</sup> January 2010 on the waters of Lake Victoria between Nyachebe and Koguna Beach, Gembe West Location, Mbita Division within Mbita District they murdered Daniel Ooko Okech (“the deceased”). One of the accused Raphael Orwa Okoth died during the proceedings.
2. The prosecution case was that the on night of 27<sup>th</sup> January 2010, there were two boats on the waters of Lake Victoria. The accused were on one boat while the deceased and others were in the other boat. A fight ensued and in the process the deceased was beaten by the accused whereupon he drowned. His body was recovered two days after the incident. The prosecution called 5 witnesses to prove its case. The matter commenced before Maina J., and completed in accordance with the provisions of **section 200** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***.
3. The fact and cause of death was proved by two witnesses. PW 1, Julius Ongwech Wadeya, a cousin of the deceased, confirmed the identity of the body of the deceased on 29<sup>th</sup> January 2010 at Homa Bay District Hospital Mortuary before the autopsy was carried by PW 4, Dr Ayoma Ojwang, the Deputy Director of Medical Services at Homa Bay District Hospital.
4. PW 4 recalled that he was requested by Mbita Police Station to perform an autopsy on the body of the deceased which he did on 29<sup>th</sup> January 2010 at 2. 30pm. He observed that the deceased had 3 sweaters on his body and a tight biker and that the body was massively swollen and had peeled off. He did not find any fractures on the body. The deceased’s eyes were bulging out and he had multiple cut wounds of various sizes on his head. He concluded that the injuries could have been inflicted by a sharp object. The major finding on internal examination was that the deceased’s lungs were full of fluid. PW 4 concluded that the cause of death was drowning.

5. PW 2, Kennedy Ochieng Odongo, a fisherman and chairman of Nyachebe Beach in Gembe West, Mbita District recalled that on 27<sup>th</sup> January 2010 at about 3 am four people came to see him. As he recognized their voices went outside to see them. They had come to report that while they were fishing, some people in another boat tried to steal their fish and when they asked them why one of the people jumped into the water. Because he had a torch which he shone on their faces, PW 2 recognised the 2<sup>nd</sup> and 3<sup>rd</sup>, whom he knew. He did not know the other two persons.
6. PW 2 took the four men to the Assistant Chief Joseph Oyuko Otieno (PW 3) and told him what has transpired. He thereafter went with the four men to the beach and found the other people who were in the other boat that had allegedly attacked them and from which the deceased had allegedly jumped into the water. Later on police officers came to the Beach Management Unit office and left with the four men who had come to see him and the three men who were in the other boat.
7. PW 3 was the Assistant Chief for Mbita Township at the material time. He recalled that on 27<sup>th</sup> January 2010 at about 4 am, PW 2 came with four fishermen from Nyachebe Beach and narrated to him what he had been told him earlier. As he had a torch, he was able to see the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused and another person whose name he did not know. He told them to go back to the beach to see if the man who jumped into the water had been had been rescued. He did not accompany them back to the beach. He later called the police who went to the beach at about 9 am. He stated that body was recovered after three days.
8. PW 5, Chief Inspector Calestus Olando, was at the material time the Deputy Officer Commanding (“OCS”), Mbita Police Station. He testified that he received a call from the local councilor about a person who had drowned as a result of a fight with the accused in Lake Victoria. He proceeded to the beach where he met PW 2 who had four suspects in his office. He interrogated the suspects who told him that they had gone fishing and as they cast their nets, the lamp went off and when they went to see what was happening they met the deceased and his colleagues stealing their fish and a fight ensued. He further established that paddles were used in the fight and that the deceased was beaten causing him to drown. He arrested the accused and had them charged with murder.
9. The prosecution was unable to locate other witnesses and as result it closed its case. Both counsel for the prosecution and the defence called upon the court to determine whether there was a case to answer.
10. As I stated in the earlier part of the judgment, it is clear that the deceased perished as a result of drowning caused by head injuries inflicted on him. The issue at this stage is whether there is sufficient evidence connecting the accused to the death of the deceased in order to put them on their defence. Unfortunately, there is no evidence, direct or indirect, connecting them to the death of the deceased. The prosecution did not call the occupants of either of the boats to testify. Neither PW 2 nor PW 5 was present when the deceased was beaten and drowned. Neither witness could tell what actually happened to the deceased on the fateful night on the waters of Lake Victoria. In summary, the prosecution case was supported by hearsay evidence.
11. The accused cannot be called upon to explain hearsay evidence. The prosecution has not established a case to warrant them being put on their defence. According to the provisions of **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, I must record and I do hereby record a finding of not guilty against the accused.
12. Accordingly, the accused are acquitted and are set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 24<sup>th</sup> day of November 2014**

**D.S. MAJANJA**

**JUDGE**

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

Mr Okoth, instructed by G. S. Okoth and Company Advocates for the accused.