



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Murder Case 37 of 2010**

**REPUBLIC ..... PROSECUTOR**

**-VERSUS-**

**GEORGE OLUOCH DIMBA**

**CHARLES OWINO OTIENO**

**WILLIAM OTIENO OTIENO ..... ACCUSED**

**JUDGMENT**

The accused persons namely; **George Oluoch Dimba, Charles Owino Otieno** and **William Otieno Otieno** are faced with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars are that on the said 20th August, 2010 at Ligega sub-Location, Ugenya District within Nyanza Province they murdered **George Ajode Nyabar**. The accused persons pleaded not guilty and the matter proceeded to hearing. In the course of the case the 3rd accused passed away.

For its case the prosecution had a total 8 witnesses. The accused was the sole defence witness.

The prosecution's case in brief was that the three accused persons were seen with the accused on the fateful night of the 20th of August, 2010, they had a quarrel with the deceased and thereafter and the 3 accused persons murdered and buried the deceased.

**PW1 John Orada Nyabar** is a brother to the deceased and cousins to the 2nd and 3rd accused. He last saw his brother on the 22nd of August, 2010 at 6 pm and when he failed to see him for two days he reported to the village elder who advised him to break into the deceased's house. He opened an opening like a window and inside he saw a mattress and a sheet with blood and ugali in the sitting area. He reported the matter to the A. P. Camp and Ugunja Police Station where he was advised to investigate the matter further.

On 28/8/2010 he went with the accused persons to the A.P. Camp where they admitted having beat up the deceased but indicated that they had left him in his home. They were then advised to discuss the matter. The following day in the presence of the village elder, the 2nd accused admitted that they had killed the deceased and offered to show the village elder the place they buried the body about 300m away in an unfinished toilet. 3 AP's, officers were latter called who arrested them.

**PW2 Collins Oduor Aira** was known to both the accused and the deceased. It was his evidence that on the 20/5/2010 at about 11 pm while in his house he heard noise at his neighbour **George Ajode**

**Nyabar** which home was about 3 minutes away. He heard the deceased say the assailants had gone to kill him and the accused responded by asking the deceased to keep quiet. He testified that he recognized the voices as they were known to each other and lived in the same neighbourhood. On the following day he checked on deceased but found padlock on his door.

**PW3 David Oluoch Orada.** A cousin of the deceased and also known to the accused recalled that on the 22nd August, 2010 they peeped in the house of the deceased and saw a mattress and a sheet soaked in blood. They reported what they saw to the assistant chief who then referred them to Ugunja Police Station, where they were advised to check the whereabouts of the deceased from the neighbours. He recalled further that on the 25th of August they sat with the accused persons in the presences of the village elder and inquired about the deceased and the 2nd and 3rd accused admitted to have killed the deceased, and when they pin-pointed where they had buried his remains. At which point the police were called and also at which point 1st accused was brought by his brother.

**PW4 George Okelo Odhiambo.** He is a village elder. He recalled receiving information from one George Okello Odhiambo of the deceased disappearance. He advised him to look for him. He later accompanied **PW1** to the assistant chief who advised them to talk to the accused persons at which point they went back and engaged with them whereupon the 2nd accused admitted that they beat the deceased the 3 of them on the night of 20th August, 2008. He also admitted that the deceased died and they buried him. The 2nd and 3rd accused, then took them where they had buried the deceased. At which point it was decided that a report be made to the police. The A.P officers upon receiving the report arrived in the company of the assistant chief, by which time the 1st accused had been brought and they were all arrested. Ukwala Police Officers also later arrived. The exhumation of the body was done the following day. They however left police to guard the place over night.

**PW5 Joanes Ngesa Odongo.** Assistant Chief of Ligega sub-location. He recalled that on 26th August, 2010 at 11 am he received news of the deceased missing for 6 days from **PW1 & PW3**. They also informed him that the deceased had been seen the night before in the company of the accused persons. On the 27/7/2010 he met with the accused at the A.P Camp while in the company of others, they interrogated the accused who admitted having been with the deceased the night before he disappeared. He took the 3 to the Ugunya Police but they were released pending further investigations. Later on the 29th August, 2012 he learnt that the 2nd and 3rd accused had made admissions and pointed out where they had buried the deceased. He then informed the Administration Police, the District Security Officer and the officer in-charge Ukwala Police Station. They then all met at **PW1's** house. The next day the body was exhumed. He was able to see and identify the body.

**PW6 Kipchanga Simon** a Doctor at Port Victoria Hospital in Busia County. He produced the Post Mortem report relating to the deceased, which he had filled on the 2nd of September, 2010. He made the following observations:-

- The skin was pale.
- There was fluid collection where the body was raised.
- The joints were stiff
- the lungs had collapsed
- There was fracture of skull on the frontal region and compression of skull on left temporal region.
- There was haematoma on opening of skull.

From the above he formed the opinion that cause of death was the head injury due to fracture of skull and haematoma.

**PW7 A.P.C Emmanuel Korir** of Ligega A. P. Post recalled that on 22nd of August, 2010 **PW1**

made a report that his brother had disappeared since 20/8/2012. He however referred him to Ugunja Police Station. On 27/8/2012 **PW1** returned with the village elder and the accused person informing him that the 3 were last seen with the deceased. The accused person admitted having been with the deceased but stated that they had left him at his house. They also admitted having had a fight with the deceased. He then went to the deceased home with the village elder, the 3 persons and another A.P. Officer, they opened the door and found the mattress and beddings with blood. They however got no explanations and took the 3. He sent **PW1** to report the incident at Ugunja Police Station but he received instructions from the said Police Station to release the 3 pending further investigations. On 29/8/2012 at 8.00 am the 3 accused reported back and informed him that they were to meet with the deceased's brothers at 10.00 am. One **David Ajode** had told him that there was an agreement that the matter was to be resolved amicably. He was later to learn that the accused had admitted killing the deceased and had pointed out where they had buried the body.

The witness proceeded to where the meeting was. They interrogated the accused who admitted and offered to show the place they buried the deceased. They took them to a bush about 10 – 15 m away from the house of the deceased to a ½ dug pit latrine about 2m deep. They sought for reinforcement as the public was angry with the accused. The officer in-charge of crime Ukwala arrived at the scene of crime and went with the accused persons. The body was the following day retrieved and taken to Busia District hospital the next day.

**PW8 Insp. Moses Masinde** of Ukwala Police Station. He recalled that on 29/8/2010 he received information from **PW7** of 3 suspects in relation to a missing person. He went to the scene and re-arrested the said suspects. He carried investigation he also got orders to exhume the deceased body.

At the close of the prosecution case the accused persons were found to have a case to answer and were on their defence.

As noted earlier **PW3** had died and the 2 remaining accused persons namely the 1st and 2nd choose to give unsworn statements.

**DW1 (1st Accused) George Oluoch Dimba** stated that on the 29th of August, 2010 at about 10.30, he came from church and was repairing the fence at home when the village elder and other people ordered him to surrender and told him he was under arrest. The other people beat him and tied him with a rope **PW4** and the village elder called the Administration Police, they then took him to **PW1's** house after which they were taken about 150 m away and **PW1** pointed to a place. He later met with his co-accused and they were taken to the A.P Camp where they were left for 3 hours and later collected by officers from Ukwala and were incarcerated for 9 days before being charged with an offence he knows nothing about.

It was his evidence that on the 20th of August, 2010 he was at his place of work and he is aware that on the 24th of August some other people were arrested by the Police over the same incident.

**DW2 Charles Owino Otieno** on his part stated that on the 29th of August at 10.30 am as he was having breakfast with his children **PW4** and others told him he was under arrest without giving him any information. That the said persons also beat him up and tied and took him to **PW1's** house where later together with his co-accused they were led about 150m away from the said house in a shamba where someone pointed out a dug up area and later they were taken to Ukwala Police Station where they stayed for 8 days and on 6th September, 2010 they were arraigned in court and charged. He denied committing the offence.

At the close of the case the learned State Counsel submitted that the prosecution had adduced evidence to show that the deceased died in the hands of the accused persons as before death a quarrel had ensued. The postmortem report indicated cause of death as head injury and internal haematoma. That the deceased was heard complaining that the accused were killing him and this was corroborated by the fact that the accused persons led both the village and the police to the place they had buried the deceased.

The defence counsel relied on the evidence on record and made no submission.

Having considered the evidence on record the issue for consideration is whether or not the deceased was murdered and if so is there evidence linking the accused persons to the death.

The third accused died during the cause of trial and the case now remains against the first and second. I have found overwhelming evidence that the deceased **George Ajode Nyabar** was murdered on 20th of August, 2010. His remains were discovered several days after a search by his relatives and the police. He was found buried in an incomplete pit latrine 10 – 15 m away from his house. Inside his house a blood soaked sheet was found an indicator that he was assaulted/murdered at his house, where he had bleeding profusely. **PW6** the doctor produced a postmortem report that gave several injuries including injuries to the lungs and fracture of the skull. The doctor formed the following opinion.

**“most likely cause of death is head injury as supported by skull fracture and internal haematoma.”**

The next question for consideration is whether the prosecution laid sufficient evidence against the accused persons to sustain the charge of murder.

There was evidence that the accused persons were the last seen with the accused. There is also evidence by **PW4** village elder that the accused persons admitted so and the fact they quarrel had ensued between whereupon they beat the deceased. **PW4** stated also that the accused persons pointed the place they had buried the deceased. This piece of evidence was repeated by **PW1** a brother to the deceased, **PW3** and **PW5** the assistant chief who testified that the accused persons admitted that they had murdered. Indeed the body of the deceased was exhumed on 30th August, 2010 from the site the accused pointed out. **PW1 P.C**

**Emmanuel Korir** gave evidence that on the 29th of August, 2010 they were summoned to **PW1's** house where they found the accused person tied up by the villagers. The said accused person offered to take them where they had buried the deceased about 10 – 15 m away from the deceased home and where the body was the next day retrieved.

I find the evidence of the village elder, assistant chief and the police together with the brothers of the deceased credible and overwhelming as against the accused persons. All the necessary ingredients of the offence of murder are present. I see no reasons whatsoever why the witnesses would have lied against the accused persons. They did proper investigations that led to the admission by the accused and subsequent pointing out of the burial place. The body was thereafter retrieved. I am convinced beyond any reasonable doubt that the accused persons were the killers of the deceased **George Ajode Nyabar** and I accordingly convict them of the offence of murder.

**DATED AND DELIVERED THIS 18th DAY OF October 2012.**

**ALI-ARONI  
JUDGE**

**In the presence of:**

..... **present for State**

..... **present for Accused person**

..... **Accused person present**