



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 32 OF 2008

REPUBLIC PROSECUTOR

=VERSUS=

ROBERT OCHIENG OWINO ACCUSED

JUDGEMENT

The accused **ROBERT OCHIENG OWINO** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 of the PENAL CODE**. The particulars of the offence were that:

“On the 1st day of January, 2008 at Majengo area in Mombasa District of the Coast Province, murdered Simon Kiema”

The prosecution led by the State called a total of seven (7) witnesses in support of their case. **MR. MUSHELLE**, Advocate appeared for and defended the accused in this murder trial which commenced before me on 28th May 2009.

The brief facts of the prosecution case as narrated by **PW1 JOHN STEPHEN OKWIRRY**, were that on 1st January 2008 at about 6.00 A.M. he was on his way to attend prayers at the Mombasa Pentecostal Church. As he approached Makupa he noticed two young men armed with a panga walking towards an un-armed elderly gentleman. Then **PW1** told the court that he heard a *‘thwack’* sound of metal hitting flesh. He looked up and saw the old man fall down. The two young men searched the old man’s pockets then finding nothing they began to walk away. **PW1** and others began to shout and chased the two young men. **PW1** concentrated his chase on the accused herein, whom he chased for about 200 metres and finally apprehended him still holding the iron bar in his hands. The mob descended on the accused with kicks and blows. **PW1** tried to prevent the mob from beating him and finally managed to take the accused back to the scene. A police vehicle happened by. The police arrested accused and took him to Makupa Police Station as well as removing the body of the deceased to the mortuary. **PW1** later wrote his statement at the police station. **PW2 MAUA KIVATA** is the widow of the deceased old man. She tells the court that on the material morning her husband **SIMON KIEMA** had woken up and left to check on the state of their business stall nearby. This date 1st January 2008 was during the height of post-election violence and there was general unease and lawlessness in all major towns in the country. **PW1** told the court that the deceased had left to check if their stall was still standing. He never returned. Later some men came to their house and informed **PW2** that her husband had been killed in the streets. **PW2** went to Coast General Hospital and saw the body of the deceased whom she identified as

her husband '**Simon Kiema**'. The police conducted investigations into the matter and finally charged the accused with this offence of Murder.

At the close of the prosecution case the court ruled that the accused had a case to answer and he was called upon to give his defence in compliance with S. 306(2) of the Criminal Procedure Code. The accused gave an unsworn defence in which he denied any involvement in the attack and/or murder of the deceased. He told the court that he was merely running away from a commotion when he was mistakenly identified as a thief and beaten by the mob. Police later rescued him and took him to Coast General Hospital where he was treated for the injuries he had sustained. After listening to final submissions the court reserved the judgement for 20th April 2011.

S. 203 of the Penal Code defines the offence of Murder thus:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

In this case the fact of the death of the deceased is not in any doubt. **PW2 MAUA KIVATA** confirms that he saw the dead body of her husband Simon Kiema at the mortuary. **PW1** confirms that the elderly gentleman whom he witnessed being attacked did die on the spot and **PW7 CHIEF INSPECTOR SAID BWETA**, told the court that it was he who went to the scene along Jomo Kenyatta Avenue in Mombasa and collected the body of the deceased which he then removed to the mortuary. Lastly, **PW5 PC. JOSEPH MEPUKOY** of CID headquarters, Mombasa took photographs of the body of the deceased, which photographs were duly produced as exhibits in this case **Pexb3**.

The next crucial question in a charge of murder is whether it is proved that the deceased met his death as the result of the unlawful act or omission of a third party. **PW1** the only eyewitness told the court that he only heard the sound of metal hitting flesh and when he looked up he saw the deceased fall down. The sound that this witness heard was most probably the sound of the deceased being hit on his body with a metal rod (which is the implement **PW1** states he saw the accused carrying in his hand). His evidence is that the deceased did not just suddenly drop dead on the streets of Mombasa. He was attacked by certain persons. The fact that the deceased was attacked is corroborated by the testimony of the witnesses who viewed his dead body. **PW2** the widow to the deceased told the court that when she viewed the body of her late husband she saw a bruise on his forehead, cheek and the back of his head. The two police officers who visited the scene **PW7** told the court that he found the deceased lying in a pool of blood ruling out the possibility that the deceased met his death as a result of natural causes. This court has had the opportunity to view the photographs of the deceased's dead body **Pexb3**. The images show clear bruises and injuries on the head and face of the deceased. Finally and most conclusively on this point is the evidence of the pathologist **DR. K.N. MANDALYA** who testified as **PW4** in this case. He conducted the post-mortem examination on the body of the deceased on 7th January 2008. The pathologist noted bruises on the face of the deceased as well as fractures to the left skull, head and spine. He also noted evidence of bleeding over the brain. In the opinion of **PW4** the death of the deceased was caused by ***“intracranial haemorrhage due to skull and spine fractures due to blunt trauma to the head”***. This is evidence of an expert witness which was in no way challenged or controverted by the defence. It is clear beyond a shadow of a doubt that the deceased met his death as a result of an unlawful act i.e. an unlawful attack by some person or persons and I do so find.

The next crucial question is whether it has proved beyond a reasonable doubt that the accused before this court is one of the persons who so attacked and killed the deceased. Only one (1) out of the total of seven (7) witnesses called by the prosecution was an eye witness to the incident. However even this eye witness is unable to tell the court exactly what happened. **PW1** was candid enough to admit in his evidence that he did not actually see anyone deliver blows to the person of the deceased. It was only the sound of human flesh being struck that caused him to look up. He then joined in the chase and apprehended the accused some 200 metres away from the scene. **PW1** is categorical that at no time did he lose sight of the accused. He chased the accused from the scene and caught him some distance away. The fact of the arrest of the accused by a mob is not in any doubt. The accused himself admits in his defence

that he was chased and caught by a mob who beat him up thoroughly on that day. Indeed accused has availed his medical notes from Coast General Hospital as proof that he was treated for injuries sustained during that incident. However the mere fact of the arrest of the accused on that day is not sufficient proof that he was actually involved in the attack on the deceased. From my analysis of the evidence on record I find several anomalies that place great doubts on the prosecution case.

Firstly although **PW1** is categorical that when he apprehended accused he had in his hands the iron bar allegedly used to hit the deceased, this iron bar was neither recovered at the scene nor was it produced as an exhibit in this case. All **PW1** can offer is that the iron rod must have gotten lost during the commotion which accompanied the arrest of the accused. As Mr. Mushelle counsel for the accused has pointed out this iron rod would have been a crucial exhibit and merely to tell the court that it '**got lost**' will not suffice.

Secondly **PW1** told the court that he together with others when they apprehended the accused. Under cross-examination by Mr. Mushelle **PW1** says:

“I was not the first person to catch the accused”

Evidence is that the accused was subjected to mob justice after his arrest. Thus there must have been well over ten (10) people at the scene when the accused was arrested. Out of this mob only **PW1** has testified and identified the accused in court. No other eye witness was called to testify. This is even despite the evidence of **PW7 Chief Inspector Bweta** that:

“The accused was chased and apprehended by a group of people”.

PW6 CORPORAL RAPHAEL MWARUA also told the court in his evidence that:

“John Okwiri [PW1] and Omari Swalleh told us what had happened”

The accused in his defence called for OB No. 13 of 1st January 2008 which related to his arrest and which was availed in court. The OB entry signed by a PC. Marga indicates that the incident was witnessed by (1) John Okwiri who testified as **PW1**, and ***“(2) SWALE OMAR AHMED of tel. 0729-412866 working with unlights cables near Cocala Marine area”***

Despite having the full contact of this second eye witness, his phone number and work address the prosecution failed to call him to testify. No reason is given for their failure to call this witness. No evidence is given of any attempt to trace this witness, which may have failed to bear fruit. The evidence of this witness would have been crucial to corroborate the testimony of **PW1**. Therefore failure to call this witness (or any other eye witness for that matter) greatly weakens the prosecution case. In the case of **BUKENYA & OTHERS –VS- UGANDA EALR [1972] 549**, it was held inter alia by the East African Court of Appeal that:

“(iv) Where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution”

Likewise I find that the failure by the State to avail any other eye witness to testify and more especially the witness whose full particulars the police had, leads this court to infer that the evidence of those uncalled witnesses may have tended to be adverse to the prosecution case. The State is under an obligation to avail before the court **all** evidence relevant to a case, to enable the court reach a just conclusion. The prosecution must not pick and chose and call only those witnesses whose evidence may tend to favour their case.

The eye witness **PW1** only spoke of hearing the sound of one blow of an iron rod hitting a human body. This is puzzling when taken together with the massive and severe injuries which the deceased was

found to have suffered. **PW4** Dr. Mandalya in his evidence listed the injuries he noted on the body of the deceased as:

“bruises on right side of head, cheek, and right mandible. I saw multiple skull fractures of the left skull bone to back, fracture to midside of head and fracture to the spine”

These multiple fractures are not in my view consistent with one blow to the person. The injuries as described by **PW4** are in my view more consistent with several blows to the head and body i.e. a thorough working over. This is puzzling in view of the fact that **PW1** only heard the sound of one blow. He did not witness any blow to the deceased and most certainly he did not witness the deceased being hit severally by a blunt object. The evidence of the injuries sustained by the deceased, which injuries the pathologist has confirmed led to his death is not in my view consistent with what **PW1** told the court he heard and saw. Was **PW1** telling the truth? Did he witness the full attack or only part of the attack? If the accused only inflicted one blow to the deceased as testified by **PW1** then his single blow could not have caused the multiple fractures described by **PW4** and could not have been the sole cause of death of the deceased. This anomaly remains unexplained and casts a doubt on the prosecution case.

Finally on this point it would seem that even the prosecution were not too sure of whether the accused had committed the offence of murder or not. This is evident from their prevarication with respect to what charge to levy against the accused. The OB entry referred to above indicates that the accused was arrested and was to be charged with the offence of Murder. However despite this the accused was on 14th January 2008 charged in the Chief Magistrate’s Court with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. This case commenced and proceeded before the lower court. Yet before the conclusion of this trial the State entered a **‘Nolle prosequi’** and charged the accused with this offence of Murder before the High Court. This dilly-dallying with respect to what charge to levy against the accused indicates that the prosecution were themselves not convinced of the guilt of the accused.

The accused in his defence raised the possibility that his arrest was a case of mistaken identity. He denies having attacked the deceased at all. I do take judicial notice that 1st January 2008 was at the height of post-election violence. As suggested by defence counsel and admitted by **PW6** there were groups of marauding gangs in the city centre with a lot of commotion across most parts of the country. It is not entirely unfathomable that the accused was caught up in these skirmishes as he alleges. This possibility has not entirely been ruled out. I therefore find that it has not been proved beyond reasonable doubt that it was the accused who committed the unlawful act which led to the death of the deceased.

Even assuming that the actus reus of the offence of murder had been sufficiently proven against the accused (which as I have stated above has not been proved), in order to prove the offence of murder the prosecution is required to prove that the accused had the requisite mens rea for the offence of murder which is **‘malice aforethought’**. The accused and the deceased were total strangers to each other. There is no evidence that the two knew each other before, much less that the accused had a grudge against the deceased such as would act as a motivation to the accused to attack or kill the deceased. Without proof of malice aforethought the offence of Murder cannot stand. Therefore on this basis too I find that the prosecution have failed to prove their case.

My analysis of the evidence adduced in this case is that it falls short of proving the charge of Murder as against the accused. Doubts abound which doubts must legally be settled in favour of the accused. I therefore enter a verdict of not guilty and acquit the accused of this charge. He is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 20th day of April 2011.

**M. ODERO
JUDGE**

In the presence of:
Mr. Mushelle for Accused
Mr. Onserio for State