



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Criminal Case 26 of 2008

REPUBLIC PROSECUTOR

VERSUS

1. WALTER OCHIENG' OWINO)
2. PETER OUMA OLALI alias ADIANG) ACCUSED
3. GEORGE OBIERO OCHUPE)

JUDGMENT

The accused were charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on the 30th day of June 2008 at Usao sub location in Suba District within Nyanza Province, jointly with others not before court, they murdered **Jared Onango Ouko**, hereinafter referred to as **“the deceased.”**

The prosecution called 8 witnesses. Their evidence may be summarized as hereunder:

Dorine Atieno Ochieng, PW1, testified that on 30th June 2008 at around 11.00 p.m. she was in her mother in law's house where she was selling chang'aa. The 2nd and 3rd accused and one other person known as **George** arrived and

ordered some chang'aa. She sold the illicit drink to them and they drunk it outside the house. After a while they started quarrelling amongst themselves. The 1st accused joined them together with the deceased. PW1 heard the deceased asking **“why are you assaulting me?”** Shortly thereafter the group walked away. All along PW1 was inside the house while the drinking parties were outside where there was no light. But PW1 said that when the accused were placing the order for the chang'aa they went up to the door step of the house where there was a lantern lamp and she was able to see their faces.

After the accused and the deceased left, PW1 left her mother in law's house and went to her home. On the following morning at around 6.00 a.m. She heard screams emanating from a farm near her house. When she rushed there she saw the deceased lying dead on the ground.

On 3rd August 2008, PW1 was arrested by police officers and taken to Mbita police station where she was interrogated and later released. She alleged that when the accused went to buy the chang'aa, the 2nd accused was carrying a rungu which she identified in court.

In cross-examination, PW1 said that she did not see anyone assaulting the deceased.

All she heard were heated arguments. The accused and the deceased were already drunk when they ordered the chang'aa on that material night.

Bernard Okeyo Ooko, PW2, is a brother of the deceased. He testified that on 29th June 2008 the deceased told him that some people had assaulted and robbed him of Kshs. 460/=. They also threatened to kill him. He named his assailants as **Grados Ochupe** (3rd accused), **George Agola** and **Agode** (1st accused). The deceased did not name the 2nd accused.

At that time the deceased had some bruises on his right hand. PW2 asked the deceased to go and report the incident to the area Assistant Chief, **William Omogi Kingi, PW4**. He added that on the morning of 1st July 2008, the deceased went to report to PW4 but he never saw his brother again.

On 2nd July 2008, PW2 learnt that the deceased had been murdered and his body was lying in a maize plantation. He rushed to the office of PW4 who told him that the deceased had on the previous day reported to him the aforesaid incident of assault and robbery. Thereafter PW2 proceeded to Mbita police station where he made a report.

In cross-examination, PW2 stated that when he talked to the deceased, he had only a scratch on his right hand.

Silas Onyango Odongo, PW3, testified that on 1st July 2008 at about 6.30 p.m. he was looking for his lost animal when he stumbled upon the body of the deceased in a maize plantation. The body had some injuries on the left hand fingers, on the abdomen and on the neck there was blood that was oozing out. The maize plantation belonged to one **Tiberius Odonda** and PW3 went and notified him. Thereafter they reported the matter to the area Assistant Chief.

PW4 testified that the deceased went to see him on 30th of June 2008 at about 8.00 a.m. and reported that on the previous night he was with the 3rd accused and one **George Agolla** and the two attacked him, took his pair of open shoes and Kshs. 460/= . PW4 wrote a letter and gave it to the deceased to take it to a local dispensary so that he could be treated. He also asked the deceased to report the incident to the police.

On 1st July 2008, PW4 was informed by PW3 that he had found the body of the deceased in a maize plantation. He telephoned the area Chief who in turn reported the incident at Mbita police station. The police went to the scene at about midnight and removed the body to the mortuary.

On 2nd July 2008, PW4 and other people from the area started looking for the suspects, that is, the 3rd accused and George Agolla but they did not trace them. On 4th July 2008 the 1st accused was arrested and on the following day the 2nd accused was also arrested. Thereafter the 3rd accused presented himself to the police.

In cross-examination, PW4 said that when the deceased reported to him he had no visible injuries. He said that he had been attacked on the previous evening, that is, 29th June 2008. The deceased did not tell him about any threats that had been made to him by anyone.

James Okoko Miyanga, PW5, is a brother to the deceased and is the one who identified the deceased's body to **Dr. Okumu Joel Omondi, PW7**, who performed a post mortem. After the burial of the deceased, PW5 learnt that some people who were alleged to be connected to the death of the deceased wanted to escape. He therefore informed the police and on 13th July 2008 the accused were arrested.

In cross-examination, PW5 said that he was not aware that the accused had been arrested before 13th July 2008 as

alleged by PW4.

Corporal James Ragira, PW6, was stationed at Mbita police station as at 29th July 2008 when he was directed by the District Criminal Investigation Officer (DCIO) to accompany other police officers to Usao area to arrest a murder suspect. The DCIO had been told about the murder suspect by a certain police informer. At Usao village they met the informer who directed them to a suspect who was at the time looking after his cows. The suspect was the 1st accused herein. They ordered him to stop and they effected the arrest.

Police Constable Muthoka Ngolya, PW8, said that on 29th July 2008 together with PW6 and PC Ndisya they proceeded to Usao village where they arrested the 1st accused and took him to Mbita police station. On 3rd August 2008 they returned to the same village and arrested the 2nd accused. They recovered a maasai rungu from his house. That is the rungu that had been identified by PW1. The same was produced as an exhibit. On 31st August 2008 the police got a tip off that the 3rd accused was at Mbita Township. PW8 together with one police Constable Ouma proceeded to the bus

stage at Mbita where they arrested the 3rd accused at about 2.30 p.m. The 3rd accused was pointed out to the police by PW1 and PW4.

According to the findings of PW7, the body of the deceased had a bruise below the right ear and there was blood on the head. There was also blood that was oozing from the nose. PW7 concluded that the deceased died due to a head injury.

In cross-examination, PW7 said that his finding as to the cause of death was not conclusive because he did not open up the deceased's head due to lack of facilities at Homa Bay District Hospital where he performed the post mortem on 10th July 2008.

In his defence, the 1st accused said that on 29th July 2008 he was arrested by police officers when he was looking after his cattle near his home. He was taken to Mbita police station where he was interrogated about the death of the deceased. He denied any knowledge of the same. He was taken to court on 8th of August 2008 and charged with murder of the deceased. He said that there existed a grudge between him and PW1 because he had asked her why she was brewing chang'aa. She told him that even the area Assistant Chief, PW4, was aware that she was a chang'aa dealer. She

allegedly threatened that she would deal with him if he continued to talk about her illicit business.

The 2nd accused said that he was arrested from his home on 3rd August 2008 and taken to Mbita police station. He also denied any involvement in the murder.

Regarding the evidence of PW1, the 2nd accused said that there was a family dispute between him and the husband of PW1. He added that PW1 had not told the truth regarding the death of the deceased. He further stated that there was nothing to indicate that the rungu that was recovered from his house by the police had been used to hit the deceased.

The 3rd accused testified that on 31st August 2008 he went to Mbita police station because he had heard PW4 saying that he was one of the people who had murdered the deceased. He was locked up and interrogated about the death of the deceased. He told the police that he knew nothing about the death.

On 8th September 2008 he was taken to court where he appeared before a deputy registrar who fixed the date of plea as 6th October 2008.

He denied that on the night of 30th June 2008 he went to take chang'aa at the home of PW1's mother in law. He said that at the material time he had a fracture on one of his knees and was unable to move. He added that his brother, who is an

Assistant Chief, had once arrested PW1 for making chang'aa and she had threatened that she would revenge.

Regarding the evidence of PW4, the 3rd accused said that if the Assistant Chief was aware that he had been involved in the death of the deceased, he would have taken action against him much earlier. He asserted that he took himself to Mbita police station so that appropriate investigations would be conducted following the allegations by PW4 that he was involved in the death of the deceased.

Having considered all the evidence on record, it is clear that no one saw any of the accused assaulting the deceased. PW1 testified that she heard the accused and the deceased quarreling amongst themselves. Shortly thereafter she heard the deceased alleging that he had been assaulted. The accused and the deceased were taking chang'aa in a dark place and she was not therefore able to see what was happening. After a short while the accused and the deceased went away and PW1 could not tell what happened thereafter. She only learnt about the death of the deceased on the following day.

According to the evidence of PW1, the accused and the deceased were already drunk when they went to the house of her mother in law to buy the chang'aa. Their disagreement could have been attributed to their drunken state.

The information that was filed by the prosecution indicates that the deceased was murdered on 30th June 2008. However, PW2 said that the deceased told him that he had been assaulted and robbed by the 3rd and 1st accused on 29th June 2008. At that time the deceased had only bruises on his right hand. PW2 went on to state that the deceased went to report to PW4 on 1st of July 2008. PW4 said that the deceased reported to him on 30th June 2008 at about 8.00 a.m. He reported that on the previous night, as they were coming from

a drinking spree, he was attacked by the 3rd accused and one George Agolla who was not among the accused. PW4 learnt about the death of the deceased on the following day.

From the foregoing, it is not clear whether the arguments that arose on 30th of June 2008 during the drinking spree had anything to do with the death of the deceased. The deceased allegedly reported to his brother and to the Assistant Chief about an incident of assault and robbery of Kshs. 460/=. But he had only minor bruises at the material time. If indeed he had been so assaulted and robbed by the 3rd accused or any other person whom he was with on the night of 30th June 2008, from the evidence of the PW2 and PW4, it would seem that the said assault was not the cause of the deceased's death.

PW3 was the first person to see the body of the deceased on 1st July 2008 at about 6.30 p.m. It is obvious that there is serious contradiction on the issue of dates as regards the evidence of PW1, PW2, PW3 and PW4.

PW1 said that she learnt about the death of the deceased on the morning of 1st July 2008. PW2 says that the deceased went to report to PW4 on the morning of 1st July 2008. But PW4 said that the deceased reported to him on the morning of 30th June 2008 whereas PW3, the first person to see the body of the deceased said that he stumbled on the body on 1st July 2008 at about 6.30 p.m.

Notwithstanding the above contradictions, there is no direct or circumstantial evidence that any of the accused persons murdered the deceased. If indeed PW4 and the relatives of the deceased

truly believed that the accused were involved in the death of the deceased, they ought to have taken immediate action against the accused shortly after the death of the deceased.

Although PW4 said that on 2nd July 2008 when the police went to look for the accused they were not able to trace them because they were at large, that evidence was not corroborated. PW4 alleged that the 1st and 2nd accused were arrested on 4th and 5th of July respectively, and the 3rd accused presented himself to the police. However, PW6 and PW8 who were police officers attached to Mbita police station, said that they arrested the 1st accused on 29th July 2008 and the 2nd accused on 3rd August 2008.

PW8 said that the 3rd accused was arrested on 31st August 2008 at Mbita Township, having been pointed out to the police by PW4 and PW1. The evidence of PW7 and PW8 sharply contradicts the evidence of PW4.

No witness was able to tell how the deceased's body ended up in the maize plantation where it was found. The cause of death as stated by PW7 was not conclusive.

Considering the sum total of the prosecution evidence and weighing the same against the defence tendered by the accused persons, I find that the prosecution did not prove beyond reasonable doubt that the accused murdered the deceased. Consequently, each accused is acquitted of the charge of murder of the deceased. They are ordered set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF MARCH, 2010.

**D. MUSINGA
JUDGE.**

11/3/2010

Before D. Musinga, J.

Mobisa - cc

Mr. Mutai for the State

Mr. Minda for the Accused

Court: Judgment delivered in open court on 11th March, 2010.

**D. MUSINGA
JUDGE.**