



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA**

Criminal Case 9 of 2008

REPUBLICPROSECUTOR

VERSUS

CHRISTOPHER OWINO OREMBEACCUSED

RULING

The accused, Christopher Owino Orembe, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code. The charge read that he Christopher Owino Oreme, on the 28th day of July 2008 at Lwanya village Bujumba sub location, Bujumba location in Busia district within Western province, murdered Fredrick Okado Orembe.

The star witness was PW3, V. O. O whose age is given as 15 years. He did not understand the meaning and importance of an oath but he appreciated the propriety of telling the truth. He appears to have been present when the incident which allegedly led to the death of the deceased Fredrick Okado Orembe, occurred.

V's evidence was that on 28.7.2008 at about 4.00p.m. he arrived home from taking cattle to the river. He found the deceased, who was his father, seated outside their house. His grandmother sat with him. That is when the accused is said to have come there. The accused without any explanation, took a brick and hit the deceased who was his own brother, on the chest with it. The deceased fell down, collapsed and died there and then.

V also said that the accused was in the company of one Kenyatta. When the deceased collapsed, Kenyatta chased the accused into a maize plantation where he escaped to. Soon many neighbours who included PW1, Joseph Okando Akonyango, and Nyandeki, came.

PW1 Joseph Okando Akonyango in response to screams came to the deceased's home. He saw the body of the deceased lying outside the house and noticed a brick which was allegedly used to kill the deceased near the body. There was already a big crowd there and accused was present as the crowd threatened to lynch him. He arrested the accused and took him to Bumala police post. The police accompanied the witnesses to the deceased's house at about midnight and took the body away.

PW2, Eunice Atieno Onyango, is the wife of the deceased. She had left her house when the incident occurred. She returned home at 6.00p.m. to find her husband dead. The accused was near the body when she arrived. She saw a brick which was said to have been used to kill the deceased near the body. She narrated that there had been a misunderstanding between the accused and deceased over their father's cow which accused wanted to sell without father's permission. The deceased had stopped the accused from doing so until he got their father's consent. She concluded her testimony by saying that the fight might have originated from that issue. She however conceded that the brick which was found near the deceased's body, was collected from elsewhere and put near the body by their son V before other people including the police came.

PW4 Marasandu Orembe who is the father of the deceased and the accused, was not present when the incident occurred. He came to his home after he got a report of the death of one of his sons. He found many people. He did not even know that his two sons were quarrelling over his cow.

The Doctor who performed the post-mortem on the body of the deceased could not be found. Dr. Zachariah Gathini who knew Dr. James Kisilu well and had worked with him for several years, produced the post-mortem report. He identified Dr. Kisilu's handwriting and signature and was sure that the post-mortem report was filled and signed by Dr. Kisilu.

He observed that the cause of death of the deceased, according to Dr. Kisilu, was cardio pulmonary arrest due to a cardiac shock. The

cause of the cardiac shock was not identified. The body had no injuries both internally and externally. No bone was broken. The age of the deceased was not shown although it was indicated elsewhere that he was still a young man who had just married and had one or two children.

Dr. Gathini could not therefore find a link between the cardiac arrest or shock with the brick which was allegedly used to hit the deceased by the accused, especially since the brick apparently caused no visible injury. He was therefore doubtful whether the brick ever indeed hit the deceased. Had it been used by the accused and if indeed it had hit the deceased, it would have caused external or internal mark or injury he concluded. The fact that no such injury was noticed, the doctor said, meant that the brick or any other weapon, may not have been used to cause the collapse or death of the deceased.

The last witness who gave evidence as PW6 was Inspector Joseph Muchai, the investigating officer. He recorded the witnesses statements. He also collected and safely kept the exhibits which were produced in this case. He also wondered that the brick allegedly used by the accused to hit the deceased on the chest, did not cause any external or internal injury.

At the end of the prosecution case, Mr. Okuta for the accused submitted a no case to answer. He opined that there was no link between the brick allegedly used and the death of the deceased. He said that non-appearance of any mark or injury on the body, confirmed that the accused did not use the brick or any other weapon to hit, nor did he indeed use any force on him. He also pointed out that the really cause of the deceased's death is unknown as it was not established by the doctor who performed the post-mortem. He concluded that an accused should not be placed on his defence just to fill in the gaps left by the prosecution where otherwise the court could not convict him if he said nothing in his defence.

I have carefully considered the evidence on the record. First, the evidence of PW3, V.O.O a boy of 15 years, was one which would call for corroboration. It was unsworn and therefore untested by cross examination to establish reliability.

Secondly, its not safe to rely on his evidence because for one, his mother PW2, clearly stated that V at one stage of this incident, picked the brick from some place in the compound and fixed it near the body of his father before other people including the police, came. This put into serious doubt the fact that the brick was what was used by the accused to hit the deceased to his death. Indeed it depicts V as a cunning and unreliable witness whether he moved the brick by himself or whether he was instructed by another adult to do so.

Once the evidence of V, the eye witness is discredited, as it has, the whole case tumbles. There is no other material evidence that is left to link the accused with the death of the deceased, except hearsay evidence that is plenty in this case.

Thirdly, the doctor who performed the post-mortem failed to link the cause of death with the brick allegedly used by the accused. That delinked the accused from the death once again. The doctor found the body normal. He saw no external or internal injuries. There was no broken bone or torn muscle or organ. That evidence eliminated the allegation that the brick or any other weapon was used on the deceased's body before he collapsed. This left intact the possibility that the deceased's death may have been from a natural cause.

In these circumstances this court agrees with the defence that a sufficient case has not been established to require the accused to be put in his defence. The accused will accordingly under section 306(1) of the Criminal Procedure Code, be and is hereby acquitted. He should without delay be set at liberty from remand prison, unless otherwise lawfully held there.

Orders accordingly.

Dated and delivered at Busia this 19th day of May, 2010.

D.A. ONYANCHA

J U D G E