



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

Criminal Case 44 of 2006

REPUBLIC PROSECUTOR

VERSUS

KENNEDY OTIENO OYANGA alias ANYONA ACCUSED

JUDGMENT

The accused was 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 7th day of July 2006 in South Kabuoch Location of Homa Bay District within Nyanza Province jointly with others not before court, the accused murdered **Oure Rabondo Rakiro**, hereinafter referred to as “**the deceased**.” The prosecution called five witnesses.

The facts of the case can be summarized as hereunder:

On 7th July 2006 at about 8.00 p.m. **Mola Boniface Ojowa, PW1, Alfonse Omondi Jaramba, PW2** and **Stephen Ochieng, PW4**, among others, went for a local village dance that was held after a funeral service. The dance was in the home of one **Maindi Ombija**. The deceased attended the ceremony as well. As the deceased was dancing towards a place where a bonfire had been lit he was ordered to move away by the accused’s brother known as Migwalla, who also slapped him with the side of a panga. PW1 intervened and he was told to take the deceased to his home. PW1, PW2 and PW4 decided to escort the deceased to his home but along the way the deceased decided to go back to the dance. He wanted to go and ask Migwalla why he had slapped him. PW1 and his colleagues decided to follow up the deceased. Before they caught up with him they heard some commotion inside a maize plantation. When they got into the maize plantation, they found the accused and his brother Migwalla slapping the deceased with a panga. The deceased was bleeding on his face and on one of his hands. PW1 asked the accused and his brother why they were beating the deceased. The accused responded and told PW1 that if he was not going to take the deceased home he would also deal with him. The deceased had a deep cut on the face.

On the following day the deceased was taken to a hospital for treatment. He was attended to but on his way home he succumbed to the injuries.

PW2 and **PW4** substantially corroborated the evidence of **PW1**. **PW2** said that he clearly saw the accused and his brother assaulting the deceased with a panga. The only source of light was moonlight. However, at the dance place where the deceased was first slapped by Migwalla there was light from the bonfire. **PW4** said that he saw the accused cutting the deceased with a panga. That was at the dance floor when he returned. One other person known as **Ngwato Kitangire** was also said to have assaulted the deceased using a stick that had a metal bolt at the end. At the material time there was light from a bonfire. When the people who were dancing saw the deceased having been cut they disappeared. The accused and his brother Migwalla also ran away. A lantern lamp was brought thereafter. **PW4** further stated that together with some other people they decided to take the deceased to his home after he had been cut with a panga by the accused. They wanted to take him to a hospital but the accused and his brother waylaid them and they could not reach the hospital that night.

The deceased's body was taken to Homa Bay District Hospital Mortuary where a post mortem was conducted on 18th July 2006 by **Dr. Stephen Nyamai, PW5**. The deceased's body was identified to him by **Evans Otieno Bondo, PW3**, the deceased's brother. The doctor said that the deceased's body had a cut wound on the cheek bone. There was also a cut on one of the arms and bruises on the middle part of the chest. Internally there was no abnormality. The doctor stated that the deceased's death was caused by cardiopulmonary arrest but he could not establish the cause of the same.

In cross examination, **PW5** stated that the injuries sustained by the deceased appeared insignificant to have caused his death.

In his defence, the accused stated that he was not known as Anyona. He further stated that he was arrested on 6th September 2007 and taken to Ndhiwa police station. He denied having caused the death of the deceased as alleged. He claimed that **PW1** mentioned his name because there were differences between them over a certain lady. **PW1** had also threatened him, he added. There was also a land dispute between him and **PW2**. In addition, the accused alleged that he was kept in police custody for 85 days before he was taken to court. He said that his constitutional right had been violated. However, this court had delivered a ruling on 11th March, 2010 and dismissed the accused's constitutional reference emanating from the alleged delay in prosecuting him.

Mr. Otieno for the accused submitted that at the time the offence was allegedly committed there was insufficient light that could have enabled positive identification of the accused. The offence was committed at about midnight and the only source of light was moonlight. He urged the court to acquit the accused.

From the evidence of **PW1**, **PW2** and **PW4**, they were together with the deceased in the home of Maindi Ombija where there was a dance. There was a bonfire in the said place. **PW1** and **PW2** saw the accused's brother known as Migwalla slapping the deceased using a panga. Only **PW4** said that he saw the accused cutting the deceased with a panga at the dance venue. That was after he decided to go back to the dance. **PW1** and **PW2** said that they followed him up and allegedly found him being assaulted once more by the accused and his brother, Migwalla. That assault took place in a maize plantation. The only source of light was

moonlight. It was not stated how bright the moonlight was. PW1 said that they found the accused and Migwalla slapping the deceased with a panga but he also realized that the deceased was bleeding on his face and on the hands. The witness did not say that he saw the accused cutting the deceased with a panga. That was also the evidence of PW2. Only PW4 testified that he saw the deceased being cut with a panga by the accused.

According to PW5 the deceased sustained minor injuries which ordinarily could not have caused his death. He was unable to determine what had actually caused the death of the deceased.

Given the evidence on record, whereas there is no dispute that the accused and his brother assaulted the deceased at different times, there is no conclusive evidence that such assault caused the death of the deceased. PW1 and PW2 did not see the accused cutting the deceased with a panga. Only PW4 made such an allegation. It is however doubtful if there was sufficient light at the dance venue to enable PW4 see clearly. But even if he did, given the inconclusive nature of the findings by PW5 it would be unsafe to convict the accused over the death of the deceased. I find that the evidence adduced by the prosecution is insufficient to sustain a charge of murder. Consequently, the accused is acquitted for lack of evidence. He is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 18TH DAY OF MAY, 2010.

**D. MUSINGA
JUDGE.**

18/5/2010

Before D. Musinga, J.

Mobisa - cc

Mr. Mutuku for the state

Mr. Okenye HB for Mr. Otieno for the accused

Accused - present

COURT: Judgment delivered in open court.

**D. MUSINGA
JUDGE.**