



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 15 of 2006

REPUBLIC.....PROSECUTOR

Versus

ALFRED OUMA OGUTU & 2 OTHERS.....ACCUSED

RULING

(On whether or not the accused have a case to answer)

On 31st January 2006, the three accused herein, namely **ALFRED OUMA OGUTU, JOHN VINCENT OCHIENG** and **BENSON OCHIENG ODOYO** were charged with the murder of **OLIVER OMONDI**.

The information reads that the three accused, together with another not before the court, on 6th October 2005, at Majengo Estate in Pumwani Division, within Nairobi Province jointly murdered **OLIVER OMONDI**, contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya.

In the course of the proceedings which commenced on 15th May 2007 and concluded on 12th February 2008, the prosecution called a total of 9 witnesses, who testified before this court, at the end of which both Counsel for the State, Mr. Bifwoli and Mr. Ochako for the defence, left the decision on whether or not the accused had any case to answer to the court. Neither of the learned Counsels made any submissions on the matter.

I have very carefully gone through the massive evidence adduced by the nine prosecution witnesses and evaluated the same in light of the tenets of the law under which the three accused are charged.

I have reached the following findings and conclusions.

Neither of the nine witnesses who testified witnessed the incident – the beating of the deceased by any of or all of the three accused. The best witness, who claimed to have been around, was PW 1 – **Daniel Odhiambo Ondigo**, who said that given the quality of the lighting at the scene, he did not identify anybody who assaulted the deceased. He further told the court that there was no light outside the kiosk, the alleged scene of the assault incident.

Other than PW 1's evidence, all the others produced hearsay upon hearsay, which, apart from the difficulties in admitting the same, contradicted the testimony of even those alleged to have given the information. Two examples will suffice.

PW 3 **Irene Akinyi Yongo**, told this court that PW 1 was with the deceased – **OLIVER** – when he was beaten and that it was PW 1 **DANIEL** who told them how the deceased was beaten by four people who included a Mr. “Korongo”. It is important to recall that PW1 had told this court that he did not witness the assault on the deceased and he did not, and could not, identify anybody given that it was dark at the scene of the alleged assault.

PW 6, **Inspector Rahah Ngao**, reproduced before this court what he had been told by **Henry Obiero Ojunge** PW 7, uncle to the deceased, who in turn was repeating what he had heard from the other friends and relatives of the deceased, including PW 1.

The deceased was alleged to have died from the beatings on the chest by the accused persons. That is the evidence of six of the prosecution witnesses. But that was not the cause of death according to the Postmortem Report by PW8 **Dr. Okemwa Minda**. The Pathologist told this court that the cause of death was T.B, enlarged liver and spleen which would not be caused by beating.

On the basis of the above, I find and hold that the prosecution evidence has totally failed to link any of the accused herein, with the death of the deceased.

It should also be remembered that for the crime of murder, the two ingredients of **actus reus** and **mens rea** must be established by the prosecution, and linked to the accused, beyond any reasonable doubt.

All that is gatherable from the evidence before me is no more than that the deceased – **Oliver Omondi** died of a cause not related to what the accused are alleged to have done on him, even if that had been proved, which has not been the case. And even if the accused had been linked to the death of the deceased, the motive, **mens rea** has not, and cannot, be discerned from the evidence adduced.

All in all, and given the above analysis of the evidence by the prosecution, I find and hold that there is no **prima facie** case for murder, upon which the three accused or any one of them, can be put on his defence.

Accordingly, I find and hold that there is no case to answer by all the three or any one of them.

I order that the three be released forthwith unless they are otherwise lawfully held.

Dated and delivered in Nairobi this 21st day of April, 2008.

O.K. MUTUNGI

JUDGE