

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

Criminal Case 11 of 1998 & 930 & 647 of 1997

REPUBLIC.....PROSECUTOR
OR

VS

GEORGE OTIENO
OMONDI.....ACCUSED

JUDGMENT The accused person herein, George Otieno Omondi, is before this court on information of the Attorney General duly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code. It is alleged that on 2.12.1997 at Marachi Estate in Busia Township, Location in Busia District within the Western Province, he murdered Isaac Otieno Alango.

The prosecution's case is buttressed by the evidence of 9 witnesses. It is the evidence of Charles Alungo Obiero (P.W1) and Juliana Atieno (P.W3) that the deceased left home for school at about 7.00 a.m. on 2.12.1997. P.W1 said shortly a child by the name Joshua came to inform him that the deceased had been assaulted by one George Otieno Omondi nicknamed 'Jomo'. P.W1 rushed out and found the deceased lying motionless on the ground. P.W1 rushed to book the report at the police station and when he came back he found P.W3 had taken the child to hospital. P.W3 said when she received the news she rushed to the scene where she took the deceased to hospital where he was pronounced dead upon arrival. The evidence of Caroline Atieno Adhiambo gives a clearer picture of what may have happened. She told this court that at about 7.00 a.m on 2.12.1997 she was washing next to her door when her son called Joshua Omondi (now deceased) came screaming and told her that he had seen a boy being attacked behind her house. She rushed out to check what was happening. As she attempted to lift the injured boy she saw the accused armed with a whip enter his house. She said she sent her son to tell the deceased's father about the incident when it became difficult for her to lift the boy. Shortly, P.W1 arrived and then proceeded to the police station. P.C Joseph Waithaka (P.W9) visited the scene of crime at 8.00 a.m on 2.12.1997 when he saw a huge crowd. P.W9 managed to arrest the accused after breaking his door to gain access to the house where the accused had locked himself. P.W9 recovered from inside that house a whip. Dr. Sylvester Maingi (P.W7) produced the post mortem report prepared by Dr. Ombima who formed the opinion that the cause of death was severe head injury. Dr. Sylvester Maingi (P.W9) also produced a medical report in respect of the accused indicating that he was mentally sound to stand trial. The P3 form was signed by Dr. Lifedha. It is the view of Dr. Maingi that it is possible that the accused was mentally ill when he committed the offence.

When placed on his defence the accused gave an unsworn statement in which he claimed that he has always been sick and that he does not know why he is before this court. He produced a copy of a medical report prepared by Dr. Wakhudu a senior medical Officer/Psychiatry dated 27th April 2000. In that report, Dr. Wakhudu formed the opinion that the accused has a mental illness schizophrenia which is a chronically recurrent condition.

In this case the defence submitted alone. He was of the view that the evidence of the 9 prosecution witnesses were hearsay. It is further the submission of Mr. Onsongo advocate that the accused is a person of an unsound mind hence he is not criminally liable for any actions he did at the time he was mentally ill.

At the end of the submissions, I summed up the evidence to the assessors and then called upon them to give their oral opinion. They were unanimous that the accused is not guilty of murder. They were of the opinion that there were no sufficient evidence connecting the accused with the offence of murder. I have considered the evidence, the submissions and the assessors' opinion and I am of the

following view of the matter. The evidence tendered before this court clearly shows that the deceased left his parents home for school in the morning of 2.12.97 and met his assailant on the way to school. It is evident from the post mortem report that he had a fracture on the parental right and bleeding from the nose. It is the evidence of Caroline Atieno (P.W8) that her son Joshua Omondi, now deceased told her that the accused assaulted the deceased. Unfortunately, the boy died before confirming what he told his mother (P.W8). The prosecution did not make attempt to produce in evidence the statement of Joshua Omondi. This rendered the evidence of P.W1 and P.W8 as hearsay. P.W8 said she saw the accused enter his house while she was trying to assist the deceased to rise up. That in my view did not connect the accused with the offence. It has only created a strong suspicion that the accused must have committed the offence. Unfortunately, suspicion however strong cannot substitute proof beyond reasonable doubt. It has also been stated that the accused may have been insane when he committed the offence. As far as I am concerned, the evidence on record shows that when the accused appeared before the Provincial Psychiatrist, he was found to be mentally sound and fit to stand . trial. It has however been noted that the accused suffers from a mental illness known as Schizophrenia which occasionally occurs. That does not mean that at the time of the offence he was of an unsound mind. The end result of this trial is that, I am in agreement with the opinion of the assessors that there was no sufficient evidence to sustain a conviction for murder against the accused. What is there is hearsay evidence. Consequently, the accused is found not guilty. He is hereby ordered set free forthwith from custody unless lawfully held.

Dated and delivered this 30th day of November, 2006.

J. K. SERGON

JUDGE