

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

Criminal Case 16 of 1998

REPUBLIC.....
PROSECUTOR

VS

1. PATRICK OTIENO
ONGWESO

2. WILSON OBONDO ONGWESO.....
.....ACCUSED

3. GEORGE ONYANGO
OBWANDA

J U D G M E N T

Patrick Otieno Ongweso, Wilson Opondo Ongweso and George Onyango Obwanda are on information of the Attorney General on behalf of the Republic dated 4th June 1998 charged with the offence of murder contrary to Section 203 of the Penal Code as read together with Section 204 of the same code. The particulars of the offence are stated that on the 25th day of January, 1998 at Mugambo village, Tingolo sub-location in Busia District within Western Province jointly murdered Fredrick Odongo Olumbe.

The prosecution's case against the 1st accused is that on the 25th day of January 1998 at around 9.30 p.m. Charles Oduori Olumbe (P.W1) and Fredrick Odongo Olumbe (deceased) were walking along Mung'alo – Kanyumba Road back home from a funeral at Baluba. On the way PW 1 and the deceased saw 3 people who were ahead of them with the assistance of moonlight. P.W 1 is said to have seen the Patrick Otieno Ongweso (1st accused) strike the deceased on the head using a whip. He said he saw the 1st accused wearing a white shirt. PW 1 was the only eye witness who is said to have seen the 1st accused assault the deceased. P.W 1 claimed he screamed and as a result Alice Okoth (P.W 4) rushed to the scene where she found the deceased lying down with blood oozing from his mouth. She did not find anyone at the scene. She also screamed and her screams made Peter Opondo (P.W 2) visit the scene of crime where he found the deceased profusely bleeding. P.W. 2 said he reported the incident to the village elder whom he claimed gave him the names of the deceased's assailants. The post- mortem report prepared by doctor Omondi was produced by Inspector Hellen Abisi (P.W.6) which report revealed that the deceased died as a result of head injury. The post-mortem report also reveals that the deceased suffered a skull fracture and intrauranial haemorrhage. When placed on his defence the 1st accused raised the defence of alibi. He stated that he was at Bumala at the time when the alleged incident took place. The 1st accused blamed the area chief of framing him up. Mr. Balongo advocate for the accuseds submitted that there is doubt whether the evidence of the doctor contained in the postmortem and the evidence of P.W 1 were talking of one and the same body. Mr. Balongo based his assertion on the fact that no member of the family of the deceased was called upon to identify the deceased's body before the postmortem was conducted on it. He further averred that the police also did not visit the mortuary to witness the performance of the post-mortem.

The post mortem report was dismissed as having no evidential value in view of the fact that no witness had testified in respect of the head injuries.

The learned counsel for the defence also argued that the circumstances were not favourable for positive

identification.

Turning to the case against the 2nd accused, Wilson Opondo Ongweso, it is said that P.W. 1 saw him fighting deceased with the help of moon light on the night of 25.1.1998. P.W 3 Martin Kabaka said he managed to have the 2nd accused arrested when his name was stated by an unnamed good citizen. The 2nd accused denied the offence and raised the defence of alibi saying he was at Butula when the incident took place. Mr. Balongo adopted the submissions he made in respect of the 1st accused.

The prosecution's case against the 3rd accused, George Onyango Obwanda is that P.W 1, saw him beat the deceased in the night of 25th January 1998 with the aid of moonlight. P.W 4, Alice Akoth, says that she heard the name of the 3rd accused being mentioned as one of the assailants who assaulted the deceased. On his part the 3rd accused said on the 25th day of January 1998 he had gone far away from the scene of crime to prepare bricks for a client of his. The learned Principal state counsel argued that the 2nd and the 3rd accused persons were the last people to be seen fighting the deceased. He urged this court to find that the duo had a common intention with the 1st accused.

At the end of the submissions, I summed up the evidence to the assessors and directed them on the applicable legal principles. Each of the assessors was given a chance to give his oral opinion. The assessors returned a unanimous verdict that all the accused persons were not guilty. They were of the view that there was a cover up on the part of the deceased's relatives. The assessors formed the opinion that the deceased's body may not have been properly identified at the time of performing the post-mortem on the body. The assessors were convinced that the 3 accused persons were not within the scene of crime at the time when the offence was committed.

I have considered the evidence, the submissions, and the assessors' opinion. The view I take is that Fredrick Odongo Olumbe was killed on the night of 25th day of January 1998. As far as the evidence of the prosecution is concerned, they rely on the evidence of a single identifying eye witness, that is P.W 1. P.W 1 says he saw the accused persons assault the deceased with the assistance of moonlight. However this piece of evidence is contradicted by the evidence of Peter Olumbe, who says that it was dark and that there was no other form of light. He said as a result he used a torch to walk that fateful night. With these contradiction I am not prepared to accept that there was sufficient form of light to enable the single witness positively identify the deceased's assailants. Even if I were to agree with the evidence of P.W 1 that there was sufficient moonlight to enable him see the accused persons then he did not appear from his testimony to be a credible witness. First of all he did not name the accused persons when he reported to the chief. In the circumstances I hold that there were no favourable conditions to allow for positive identification free from error.

The postmortem report produced by the prosecution in evidence shows that the deceased's body was identified by Peter Olumbe (P.W. 2) and Charles Oduori (P.W 1) to the doctor before a post mortem was done on the body. However these two witnesses did not state in their testimonies whether or not they identified the deceased's body. I am inclined to agree with the assessors that there was doubt whether the post-mortem report presented to court by the prosecution related to that of the deceased.

There is doubt in view of the evidence presented whether the accused persons were actually at the scene of crime when the deceased was killed. Although there may be strong suspicion against Patrick Otieno Ongweso, Wilson Opondo Ongweso and George Onyango Obwanda, the prosecution has not proved beyond reasonable doubt that the three were involved in the murder of the deceased person. They should therefore be acquitted and be released from custody forthwith unless they are otherwise lawfully detained in custody.

The assessors are hereby discharged but they should not be summoned to serve again as assessors in another case until the lapse of 12 months from the date hereof. This directive is issued in compliance with Section 271 of the Criminal Procedure Code.

DATED AND DELIVERED THIS 7th DAY OF July 2 005

J.K. SERGON

JUDGE