



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 8 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

NICK MIGUNO OPIYO.....ACCUSED

JUDGMENT

1. Nick Miguno Opiyo is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 11th day of October, 2016, at Kabuor village, Kakoko sub location in Rachuonyo North Sub County of Homa Bay County, jointly with others not before court, murdered Irish Okoth Otieno.
3. The scene of the incident was at Kanyamfwa Secondary School. The deceased and another were suspected to have broken into the box of Oballa and stole a phone from therein. Irish recorded a statement and said that the accused and two others had slapped him. The following morning the deceased complained that he was unwell. He was allowed to seek medication. On 16th October, 2016 he succumbed while undergoing treatment.
4. Nick Miguno Opiyo, the accused, denied the offence. He contended that the deceased was hit by Jacob, whose box had been broken and items stolen from therein.
5. The issues for determination are:
 - a) Whether the accused hit the deceased; and
 - b) Whether the offence of murder was established.
6. The evidence of Richard Ochieng Odhiambo (PW1), the Principal of Kanyamfwa Secondary School was that the deceased had recorded a statement and alleged that the accused was one of the three students who beat him. He stressed that according to the deceased, Jacob Ogweno hit him most.
7. George Otieno Omega (PW2) is the father of the deceased herein. He said his son told him that he was beaten by Ogweno and two other boys whose names he did not mention.
8. Mary Atieno Awino (PW3) was the deputy Principal of the school and the disciplinary mistress at the time of the incident. When the matter was referred to her, the deceased said he was beaten by some three boys who included the accused. However, in the statement she recorded with the police, she indicated that after the deceased was implicated in some theft, the accused stopped him while Jacob Ogweno hit him on the head with a piece of wood. She said she got this information from the deceased.
9. Eunice Akinyi Ogot (PW4) testified that she was the deceased's aunt. When she found him in bed and said he was unwell, he told her that Miguno, Oballa and Ogweno had beaten him as he headed to the dormitory.
10. The defence of the accused was that after the deceased and two others were implicated in some theft of the items of a fellow student, Jacob Ogweno hit the deceased on the head with a piece of wood. This is when he was making enquiries in his capacity as a dorm captain.
11. The unfortunate incident that led to the death of the deceased herein was triggered by an alleged theft from the box of another student. The deceased was one of the suspects of the theft. Probably this explains why his reports to various people differed as to who injured him. To his father (PW3), he said he was beaten by Ogweno and two other boys whose names he did not mention.

12. Whereas the deceased told the Principal that the accused was one of the three boys who beat him, the evidence of Mary Atieno Awino (PW3) the deputy Principal of the school and the disciplinary mistress was that the deceased told her he was beaten on the head by Jacob Ogweno, after the accused had stopped him. At this point, his health had not deteriorated. He was at the time complaining of a mild headache.

13. Can the accused herein be said to have had common intention with Jacob Ogweno? Section 21 of the Criminal Procedure Code states as follows:

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

14. From the evidence on record, there is no sufficient evidence to show that the accused and Jacob Ogweno had common intention. I accordingly find that the prosecution has not proved the offence of murder against the accused. I acquit him of the charge and set him free unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 8TH DAY OF JUNE, 2021

KIARIE WAWERU KIARIE

JUDGE