



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL CASE NO.13 OF 2020**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MICHAEL OTIENO.....1<sup>ST</sup> ACCUSED**

**JOSEPHAT NYONGESA HAMISI.....2<sup>ND</sup> ACCUSED**

**ENOCK NYONGESA WAFULA.....3<sup>RD</sup> ACCUSED**

**J U D G M E N T**

[1] The three accused, Michael Otieno Osuru, Josphat Nyongesa Hamisi and Enock Nyongesa Wafula are charged with murder, contrary to s.203 as read with s.204 of the Penal Code, in that on the 10<sup>th</sup> June 2020 at Murende village – Matayos Busia County, jointly with others not before court murdered Daniel Juma Ouma.

[2] The case for the prosecution was that on the material date at about 6.00a.m., a group of four people including the three accused met a businessman, **Geoffrey Linus Ouma (PW 1)** and indicated to him that they were looking for the deceased, Daniel Juma Ouma, on allegations that he had set on fire a house belonging to a brother of the first accused called Joshua Osuru, who was part of the group of four.

[3] Later, the group learnt that the deceased was hiding in a maize plantation and proceeded there. Shortly thereafter the businessman saw a larger group of people running towards the maize plantation. He followed them and found the deceased running and entering into a neighbours house and locked himself inside. The group in pursuit of him including the three accused broke open the door and pulled the deceased out of the house. They then clobbered him mercilessly while being led by the said Joshua. As a result, the deceased suffered fatal injuries. His dead body was found at and removed from the scene by the police.

[4] **Evans Odhiambo Oluoch (PW 2)**, a mason in the area also saw the initial group of four together with other people assaulting the deceased using sticks and machetes. A village elder, **Antony Juma Wanyama (PW 3)**, was notified on phone that the deceased had been assaulted and killed by a mob of people on allegation that he had attempted to set the house of Joshua on fire. He (**village elder**) reported the matter to the police.

[5] **P.C Eunice Namatse (PW 5)**, confirmed that the incident was reported to the police and investigations revealed that the deceased was assaulted and fatally injured by the three accused and others who included the suspect called Joshua, who disappeared from the area and could not be traced to be arraigned in court. It was further revealed that the deceased and Joshua were not in good terms and this may have prompted the deceased to set fire to a house belonging to Joshua.

[6] **Dr. Cedric Tumbo (PW4)**, carried out an autopsy on the body of the deceased and compiled a post mortem report (**P.Ex 1**) which indicated that the cause of death was severe head injury secondary to penetrating injuries caused by sharp objects.

The good doctor opined that the deceased was lynched by a mob of villagers.

[7] The three accused were said to have been part of the lynching mob. They were arrested and charged with the present offence which they all denied and implied that they were not part of the mob which fatally assaulted the deceased. Accused one said that he was a village elder and was at the scene as such but found that the deceased had already been assaulted by a large group of people. He thereafter notified the area chief who then called the police. He said that the deceased was his neighbor and the person called Joshua was his step-brother.

[8] Accused two indicated that he was a casual worker at a local quarry and that he was attracted to the scene by noises. He found the deceased having been lynched by a mob. He was suspected by the mob to be a partner of the deceased and was beaten up before being set

free. Accused three also worked in a quarry and was also attracted to the scene by noises and screams. On arrival, he learnt that the deceased had been killed by a mob of people.

**[9]** From all the foregoing evidence, there is no contest or dispute that the deceased suffered fatal injuries in the hands of a group of villagers who took upon themselves the role of enforcing the law and meteing out punishment on an innocent soul in the person of the deceased who was presumed innocent until proven guilty by a court of law. What transpired at the material scene on the material date was simply a criminal transaction propelled by a group of people who attempted to righten a wrong by committing another more serious wrong of assaulting and fatally injuring the deceased on suspicion that he had set the house of a fellow villager on fire.

**[10]** As manifested by the degree of injuries inflicted upon the deceased, those who assaulted him did so with a clear intention of terminating his life. Unfortunately, they succeeded in doing so as the deceased died from severe head injury inflicted by sharp objects. The basic issue for determination was therefore whether the three accused were part of the mob of people who assaulted and fatally injured the deceased. The question is actually whether the three accused were positively identified as having been part of the group or mob of people who assaulted and killed the deceased.

**[11]** Evidence has shown that the offence occurred in broad daylight thereby rendering conditions for identification favourable. Coupled with that, the offence was committed by people from one village who knew each other and were known by fellow villagers who did not participate in the offence but witnessed the unfortunate event unfolding or being put into motion. Therefore, the possibility of mistaken identification and/or recognition of the offenders was remote.

**[12]** The defence by all the accused was generally a denial and a contention that even though they respectively arrived at the scene of the offence, they found the deceased being beaten or having been beaten by a group of fellow villagers. They maintained that they did not participate in the assault and implied that they observed the incident as mere bystanders.

**[13]** Accused one stated that being a village elder and seeing a large group of people having assaulted the deceased he acted by alerting the area sub-chief of the incident through a phone call. Accused two and three indicated that they were innocent quarry workers who were merely attracted to the scene by noises and screams and on arrival found the deceased having already been lynched. Accused two even said that he became a victim of the beatings by the mob after being deemed to be a partner of the deceased in the sale of alcoholic drinks from Uganda.

**[14]** Despite their defence and claim of innocence, the three accused were clearly placed at the scene at the material time by the businessman, Geoffrey (**PW 1**) and the mason, Evans (**PW 2**). The two contended that they directly witnessed the three accused and others, including a brother of the first accused called Joshua, assaulting and fatally injuring the deceased on allegation that he had set on fire a house belonging to Joshua.

**[15]** As a matter of fact, the evidence by Geoffrey (**PW 1**) and by Evans (**PW 2**) corroborated each other in establishing that the three accused were part of the mob of villagers who assaulted and fatally injured the deceased.

Indeed, Geoffrey (**PW 1**) actually indicated that it was the three accused and the said Joshua who set in motion the criminal transaction which led to the death of the deceased by firstly, menacingly searching or looking for the deceased for allegedly committing arson against the brother of the first accused and secondly, attacking and assaulting the deceased with sharp and/or blunt objects after finding or locating him where he was hiding in fear.

**[16]** In the process, other villagers joined the three accused in assaulting the deceased thereby taking the law into their hands and purporting to mete out punishment on an innocent soul who never was even given an opportunity to defend himself against the allegation of arson made against him.

The three accused were not truthful in contending that they were merely innocent bystanders and did not participate in assaulting and killing the deceased.

**[17]** Evidence adduced against them particularly by Geoffrey and Evans (**PW 1 & PW2**) was overwhelmingly cogent and credible enough to prove that it was the three accused and the fugitive Joshua who actually precipitated the whole episode and actively participated in it enthusiastically. Their respective defence was thus effectively disproved. They were clearly identified and recognized by Geoffrey and Evans while in the process of committing the offence together with others not before court.

**[18]** Suffice to say that the evidence of identification against the three accused was solid, credible and reliable for a finding by this court that they were positively identified as having been part of the mob of villagers who assaulted and fatally injured a fellow villager in the person of the deceased.

**[19]** In their submissions, they made heavy weather of the fact that a potential witness called Rhoda Achieng was not called to testify in court. However, this omission could not be construed against the prosecution nor could adverse inference be drawn on that basis simply because the evidence already gathered and availed by the prosecution in support of its case was more than sufficient even in the absence of the said potential witness.

**[20]** Besides, the success of the prosecution case in any given circumstances would be determined by veracity and quality of the evidence availed rather than the number of witness called to testify. Thus, a thousand witnesses may fail to prove a case against a suspect if their evidence lacks necessary cogency, credibility and probative value. If such quality of evidence is available even from a single witness, the prosecution case would stand proved beyond reasonable doubt.

**[21]** Herein, with the evidence of **PW1** and **PW2**, the prosecution case against the three accused stands proved against them beyond

reasonable doubt. Accordingly, they are hereby found guilty as charged and convicted accordingly.

**J.R. KARANJAH**

**J U D G E**

**[Dated & Delivered this 12<sup>TH</sup> day of OCTOBER 2021]**