



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL CASE NO. 20 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

- 1. STEPHEN OTWANE OPALAKADI**
- 2. PETER EMOJONG OPALAKADI**
- 3. DAVID OTIENG ESABA**
- 4. SILVESTER OMARE IPAPATA.....ACCUSED**

**JUDGMENT**

1. **Stephen Otwane Opalakadi, Peter Emojong Opalakadi, David Otieng Esaba and Silvester Omare Ipapata** are 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 night of 23<sup>rd</sup> day of August 2017, at **NGELECHOM** Sub-location, of **CHAKOL** Division, in **BUSIA** County, jointly murdered **Patrick Okaa**.
3. This is a very unfortunate incident. The first accused was a tenant of the deceased. He operated a kiosk on the premises of the deceased. It would appear that there was a rent dispute between the two. At about 3 p.m., the deceased went to ask for the rent from the first accused. Apparently, nothing was forthcoming for he returned to his house angry. He armed himself with an iron bar and went and removed the door from the kiosk. The first accused went and reported to the chief and to the police. It would appear when the authorities failed to act, he resorted to self-help. In the process, the deceased was killed.
4. In his defence, **Stephen Otwane Opalakadi**, the first accused contended that he had reported the matter to the chief and the police and was told that police officers could not be available until the following day, he went back home to guard his shop for it had no door. He did this until the following morning.
5. **Peter Emojong Opalakadi**, accused two, contended that he was unconscious throughout the time of the incident from 6<sup>th</sup> June 2015.
6. **David Otieng Esaba and Silvester Omare Ipapata** denied any involvement in the offence.
7. The issues for determination are as follows:
  - a) How did the deceased meet his death?
  - b) Did any of the accused persons participate in the killing of the deceased; and
  - c) Was the offence of murder proved?
8. After the deceased had removed the door from the kiosk of the first accused, it is not clear from the evidence where he went to. His wife, Christine Abita Okaa PW1, testified that after the removal of the door, her husband returned to the house, put on shoes and went away. It was clear from her evidence that her husband did not return home. The following morning, she received a report that he had been killed.
9. At about midnight of the same day, Wilmena Akol Ikawa (PW2) received a telephone call from the first accused. She is the area chief.

The first accused informed her that he had brought Patrick Okaa (the deceased). When she enquired from him if he was with police officers, he disconnected the call. Shortly her dogs started barking. She went with her husband to check. She heard noises at her gate of a person who was being beaten. When they moved to the gate, she saw shadows of people who were going away. They found the body of the deceased. He had blood on the head.

10. There is evidence on record that the deceased did not return to his home after he had removed the door to the first accused's kiosk. He was beaten to death by a group of people. Augustine Omela Adungo (PW4) testified that at 10 p.m. he saw the first and the second accused and another whom he identified as Bonny beating the deceased with sticks. At the time, he said that Christine Abita Okaa (PW1) was standing outside their mother's house. This evidence is not supported by the other evidence on record and specifically by that of PW1, the widow of the deceased. The widow did not testify to have witnessed her husband being beaten. The evidence of Augustine Omela Adungo (PW4) is also self-contradictory. During cross examination he changed his version and said that at the time he did not know where Patrick (the deceased) was. This witness is therefore not credible. He falls in the category described by the Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, in the following terms:

***The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.***

11. Margaret Anyokot (PW7) is another witness who claimed during cross examination that she witnessed accused one and two beat the deceased using clubs. Curiously, she never gave this evidence in examination in chief. When pressed further during cross examination, she conceded that she did not see the first and the second accused persons after 5p.m. on the material day. She further conceded that she did not witness the fight. Her evidence is therefore worthless just as that of Augustine Omela Adungo (PW4). She is bereft of credibility.

12. The evidence of Wilmena Akol Ikawa (PW2) the area chief was that when the first accused called her by phone to inform her that they had arrested the deceased, she went to her gate with her husband. This was about midnight. As they approached the gate, she saw shadows of people walking away. She could not therefore be in a position to tell who these people were, except the first accused who had told her that they "had brought" the deceased. There was no evidence which established the presence of the other accused persons. I therefore find that the prosecution did not adduce evidence to connect the second, fourth and the fifth accused persons to the offence. There is however, sufficient evidence that connect the first accused to the offence.

13. The first accused must have been a frustrated person. After reporting to the chief and to the police, he was not given the assistance required. Had this been forthcoming, the unfortunate death would not have occurred. It would appear that the deceased met his death as the first accused in company of others were taking him to the authorities. We may never know what transpired so as to end the way it did. I am persuaded from the evidence to make a finding that this was not murder for malice aforethought was not established but manslaughter contrary to section 202 of the Penal Code. The section provides:

***(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.***

14. From the foregoing analysis of the evidence on record, I find that the prosecution has not proved the case against accused two, four and five. I acquit each one of them and set them free unless otherwise lawfully held. On the other hand, I find that the prosecution has proved the case of manslaughter against accused one contrary to section 202 of the Penal Code. I find him guilty and accordingly convict him of the offence.

**DELIVERED and SIGNED at BUSIA this 19<sup>th</sup> day of February, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**