



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 25 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

SYLVESTER ODUORI OUMA ALIAS OBOMO.....1<sup>ST</sup> ACCUSED

CHARLES ODUORI JUMA ALIAS NYAYO.....2<sup>ND</sup> ACCUSED

JUDGMENT

1. **Sylvester Oduori Ouma** alias **Obomo** and **Charles Oduori Juma** alias **Nyayo** 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 22<sup>nd</sup> day of September 2015, at **Sijowa** village, of **Bukhulungu** sub-Location in **Busia** County, murdered **Charles Ouma Oduori**.

3. The prosecution case is that the deceased was suspected to have stolen his mother's cock. Both accused persons beat him to death.

4. Both accused in their defence denied any involvement in the offence and contended that the deceased was a victim of mob beating.

5. The issues for determination are:

- a) Where the accused the accused were involved in the beating of the deceased;
- b) If so, whether this amounted to murder.

6. Shariff Omondi Egesa (PW2) was alleged to have been in company of the deceased when they were beaten by a mob on allegation of theft. This witness was incoherent and did not give any evidence that could assist the court arrive at a decision either way. He was therefore stepped down.

7. Roselida Nabwire (PW2) is the step mother of the deceased. Her evidence is that after she found her cock missing, she reported to her husband (accused 1). The deceased returned home and a quarrel over the missing cock ensued. The second accused, Davins and the deceased went out. While outside she heard them fighting. When the deceased told them that he was going to take them where the cock was, the trio went downwards and the noises ceased. Thereafter she heard a lot of noises but she did not go outside.

8. The evidence of this witness contradicted that of the second accused. Charles Oduori Juma alias Nyayo (accused 2) who in his defence contended that when the deceased took them to the home of Shariff Egesa whom he alleged had the cock, they found a crowd of people. The crowd started to beat the deceased together with Egesa whom they had forced to sit down. When he attempted to protect his brother (the deceased), the crowd attacked him as well.

9. Roselida Nabwire (PW2) was declared a hostile witness. A hostile witness was defined in **Coles v. Coles, (1866) L.R. 1P. &D. 70, 71**(Sir J.P. Wilde) in the following terms:

**A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.**

And in the case of **Alowo v. Republic [1972] EA** at page 324 the court of Appeal said:

**The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some**

**earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.**

The court of appeal in the case of Appeal in the case of **Abel Monari Nyanamba & 4 others vs. Republic [1996] eKLR** stated:

**The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.**

There is no evidence on record that tends to corroborate this evidence.

10. The evidence of AP sergeant Jonah Kiplagat (PW1) tended to support the defence. In his evidence in chief he said that the second accused is one of the people he found under arrest by a mob having been beaten. He however changed this position during cross examination. The prosecutor did not re-examine him to clarify this contradiction. More importantly, the evidence of this witness supported the defence contention that the deceased and another had been beaten by the public. He estimated the crowd to be comprised of about twenty people.

11. I do not have evidence on record to connect the two accused persons to the murder of the deceased. They have tendered a plausible defence. I accordingly acquit each one of them of the offence of murder and set him free unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 6<sup>th</sup> day of May, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**