



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL CASE (MURDER) NO. 10 OF 2016**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**GEORGE OUMA OYOMBE.....1ST ACCUSED**

**HESBON OTIENO OYOMBE.....2ND ACCUSED**

**JOSEPH AGUMA AGUMA.....3RD ACCUSED**

**JULIUS OCHARA OLANG.....4TH ACCUSED**

**GEDION OTIENO ORIMBO.....5TH ACCUSED**

**JUDGMENT**

1. **George Ouma Oyombe, Hesbon Otieno Oyombe, Joseph Aguma Aguma, Julius Ochara Olang and Gedion Otieno Orimbo (Accused 1, 2, 3 4 and 5 respectively)** were jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that:

**On 01st January, 2016 at Kanyamwega sub location Kisumu West sub-county within Kisumu County jointly murdered Elias Orao Omino**

**PROSECUTION CASE**

2. The prosecution called six (6) witnesses in support of its case. **PW1 Christopher Ooko Abongó**, stated that 01st January, 2016 about 04.30 pm, he heard screams coming from the house of Elias Orao Omino (*deceased*). That he went to the said home where he found the deceased and his family and some Administration Police Officers and the deceased told him that he had called police because villagers who accused him of killing one Mama Hellen had threatened to kill his whole family. It was his evidence that on his way back, he met accused 1, 2, 4 5 and other people carrying a coffin which they deposited at the deceased's door after which they broke the deceased's door and window panes. That the APS were overcome by the attackers and they went away as a result of which accused 1, 2, 4 5 and other people stoned the deceased and injured him seriously. He stated that he later returned to the home of the deceased and found that his body had been set on fire. He stated that accused 2 and 5 beat the deceased with stones whereas accused 1 and others used whips and stones.

3. **PW2 Michael Aboma Omino**, deceased's younger brother identified deceased's body to the doctor that conducted a postmortem on 05.01.16 at Jaramogi Oginga Odinga Odinga Teaching and Referral Hospital Mortuary.

4. **PW3 Tobias Omino**, deceased's younger brother recalled that on 01.01.16 at about 04.00 pm, he heard mourners who were escorting the body of a neighbour who had been inherited by the deceased shouting. He stated that the about 200 mourners dumped deceased's body killing the lady and then attacked the deceased. He stated that he went to the scene and upon being attacked ran away and did not see those that killed the deceased.

5. **PW4 Phoebe Atieno**, deceased's wife recalled that on 01st January, 2016 at about 11.00 am, she ran away from home when she saw and heard mourners who were escorting the body of a neighbour who had been inherited by the deceased shouting towards their home and did not return until 11.00 pm when she found that her husband had been killed and the body taken to the mortuary.

6. **PW5 PC Robert Sigei**, visiting the scene of crime about 09.00 pm to 10.00 pm on 01.01.16 from where he collected a partly burnt stick **PEXH. 1** and 3 stones **PEXH. 4** which were suspected to have been used to assault the deceased; a burnt yellow jerrican **PEXH. 2** suspected to have contained the fuel that burnt deceased's body, partly burnt clothes **PEXH. 3** suspected to belong to the deceased. He stated that accused persons were later arrested and charged.

7. **PW6 Dr. Pauline Odanga** produced deceased's postmortem form **PEXH. 5** that was prepared by her colleague Dr. Sendeva on 05.01.16. It shows that deceased had injuries to his head, cheek and 70% burns on the whole of his body except feet. The cause of death was indicated to be multiple cut wounds on the head with resultant probable severe head injury.

### **DEFENCE CASE**

8. After the close of the prosecution case, I entered a plea of not guilty against accused 3 since he had not been implicated and place accused 1, 2, 4 and 5 on their defences.

9. Accused 1 in his sworn defence stated that on the material date, he was at the home of his late uncle Adhiambo Olang preparing food for mourners because his wife Mama Hellen that deceased had inherited had died. He recalled that Mama Hellen's mother informed him that the body had been taken to the home of the deceased by boda boda riders. That he and his co-accused went to deceased's home where they found police and a rowdy boda boda riders who were throwing stones at everyone around. That he managed to calm the riders and together with his co-accused and PW1 returned the body of Mama Hellen to her home and left an agitated crowd beating the deceased. He later received information that the deceased had been killed.

10. Accused 2, 4 and 5 gave similar evidence to Accused 1 and denied the offence.

### **ANALYSIS AND FINDINGS**

11. I have considered the evidence on record. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari v Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

**(a) the death of the deceased occurred;**

**(b) that the accused committed the unlawful act which caused the death of the deceased; and**

**(c) that the accused had malice aforethought.**

12. In the case of **Joseph Kimani Njau v Republic [2014] eKLR**, the court held:

**“The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution”.**

#### **(a) The death of the deceased**

13. The death of the deceased has been confirmed by all the prosecution witnesses and the accused persons and has been confirmed by a postmortem form produced as **PEXH. 5** which shows that deceased died of multiple cut wounds on the head with resultant probable severe head injury.

#### **b. Proof that accused persons or any one of them committed the unlawful act which caused the death of the deceased**

14. The only witness that gave evidence implicating accused persons was **PW1 Christopher Ooko Abongó**. He stated that 1 and 4 and others used whips and stones. Whereas accused 2 and 5 beat the deceased with stones.

15. Both the prosecution witnesses and the accused persons are in agreement that there was a crowd of about 200 people at the home of the deceased where the incident happened. In fact, it has been conceded that the crowd was so rowdy that even three armed police officers who were at the scene had to run for their lives. That the crowd was rowdy was confirmed by **PW3 Tobias Omino**, deceased's younger brother who stated that the crowd beat him causing him to run away from the scene. The deceased's wife similarly conceded that the crowd was so hostile that she ran away from home and did not return until about 11.00 pm when she found that her husband had been killed and his body taken to the mortuary.

16. Accused persons have denied that PW1 was at the home of the deceased when the incident happened saying that they met him at the deceased's gate and he assisted them to take Mama Hellen's body to her home and that they had left the crowd beating the deceased. Indeed, PW1 has confirmed that he was one of the persons that carried the body of Mama Hellen back to her home. One then wonders at what point in time he was able to see the deceased being attacked.

17. From the prevailing circumstances at the scene as described by both the prosecution witnesses and accused persons, I am persuaded that the circumstances were so unfavourable for PW1 or indeed anyone else to have had the opportunity to identify the accused persons from a crowd of over 200 people that attacked the deceased with such precision as PW1 wants the court to believe.

18. A witness whose sole evidence the state wholly relies upon in support of its case should not raise any doubt in the mind of the court he is an untruthful witness. PW1 has done exactly that and for that reason, his evidence is rejected.

19. Having found that the prosecution has not proved *actus reus*, it would be pointless to delve into the issue of malice aforethought.

**Disposition**

20. Accordingly, I have come to the conclusion that the state has failed to prove its case beyond reasonable doubt. Accused persons are hence found **NOT GUILTY** of the offence of murder and are accordingly acquitted. Accused persons shall be set at liberty unless otherwise lawfully held. It is so ordered.

**DATED AND DELIVERED IN KISUMU THIS 11TH DAY OF DECEMBER 2019**

**T. W. CHERERE**

**JUDGE**

Read in open court in the presence of-

**Court Assistant- Felix**

**Accused 1- Present**

**Accused 2- Present**

**Accused 4- Present**

**Accused 5- Present**

**For Accused persons-**

**For the State- Ms. Gathu**