

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 3 OF 2017

BETWEEN

REPUBLIC PROSECUTOR

AND

CHARLES OCHIENG ONYANGO ACCUSED

JUDGMENT

1. **CHARLES OCHIENG ONYANGO** (“the accused”) was charged with the offence of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on 28th November 2015 at Marera Village, Maseno Division, Kisumu West District within Kisumu County, the accused murdered **CALEB ONYANGO** (“the deceased”).

2. The prosecution called 4 witnesses to support its case. Collins Ochieng (PW 2) testified that on the night of 28th November 2015, he was at a *disco matanga* at the home of the father of Lazarus Omondi Olang (PW 3) who had passed away. He testified that he was seated at the tent where the deceased and accused, who were both drunk, were present. He recalled that the deceased began fighting with the accused and they both fell down. The accused stood to leave but the deceased caught him by his shirt. The accused removed the shirt and the deceased fell down with the shirt. The accused then hit the deceased on the head with an object he was holding and he ran off. PW 2 testified from where he was seated he could clearly see the two fighting as there was electric light near the tent but he was not able to identify the object with which the accused hit the deceased.

3. PW 3 testified that on that night the accused went to him and told him that he had assaulted the deceased. PW 3 went to the tent where the assault had taken place. He found the deceased, who was bleeding on the head, lying on the ground. He asked his friends to call the deceased’s mother, Jane Atieno Odhiambo (PW 1), so that they could take him to hospital. PW 1 arrived at the scene and found PW 3 who informed her that the accused had assaulted the deceased. PW 3 assisted her take the deceased to Jaramogi Oginga Odinga Teaching and Referral Hospital (“JOOTRH”) where he was admitted and died after two days.

4. The investigating officer, PC Robert Sigei (PW 4), testified that PW 1 reported the incident at Maseno Police Station on 30th November 2015 after the deceased death. PW 4 interrogated witnesses and recorded their statements. After investigations he established that the accused assaulted the deceased for being a nuisance in the *disco matanga*. The accused disappeared from the village and was arrested on 30th March 2017 when he returned.

5. When put on his defence the accused denied killing the deceased. He stated that on the material night, the deceased was drunk and was causing a lot of disturbance including attacking guests. At around midnight, the deceased went to where the accused was standing with his friends. He began pulling his shirt and the accused removed his and left him with. The deceased was held by a person known as Owino and they both fell and in the process the deceased hit his head with the tent metallic stand.

6. The fact and cause of death is not disputed and the defence admitted the post-mortem report which was produced by PW 4. The fact that the deceased suffered a head injury was confirmed by PW 1, PW 2 and

PW 3 who saw the deceased with a head injury after he had been assaulted. The post-mortem conducted by Dr Ouma Mboya on 17th December 2015 at JOOTRH confirmed that the cause of death was as a result of internal bleeding due to blunt force trauma on the head.

7. The key issue in this matter is whether the accused caused the death of the deceased with malice aforethought. The direct testimony of PW 2 is that the accused hit the deceased with an object when they got into a fight. This evidence is corroborated by what the accused told PW 3 immediately after the incident. PW 3 was the accused's cousin and there is no reason why the accused would lie to him about what he had done. There was no suggestion that PW 3 had anything to gain by lying about what the accused told him or that he had a grudge with the accused. The accused's defence implicating a third party is an afterthought as this issue was not put to PW 2 and PW 3 in cross-examination and was inconsistent to what he told PW 3. The fact that the accused disappeared from the village after the incident is conduct inconsistent with his innocence. I therefore find and hold that the prosecution that the accused is the person who assaulted the deceased and caused his death.

8. The next question is whether the accused caused the death with malice aforethought. The only direct witness, PW 2, stated that there was a fight and both the accused and deceased were drunk. PW 2 and PW 3 admit that the deceased had been a nuisance at the funeral and had abused several people at the funeral supporting the fact there was a fight. The totality of this evidence is that the prosecution did not discharge its burden on this issue.

9. Since the accused caused the unlawful act that led to the deceased's death, I find him guilty of the lesser offence of manslaughter. I therefore convict the accused, **CHARLES OCHIENG ONYANGO**, of the offence of manslaughter contrary to **section 202** of the *Penal Code* for the unlawful killing of **CALEB ONYANGO** and I convict him accordingly.

DATED and DELIVERED at KISUMU this 7th day of March 2018.

D.S. MAJANJA

JUDGE

Mr Achura, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.