



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE NO. 25 OF 2017

CORAM: MAJANJA J.

BETWEEN

REPUBLIC.....PROSECUTOR

AND

GORDON BRUNO ONYANGO.....1ST ACCUSED

ERICK OMONDI BARRACK.....2ND ACCUSED

RULING

1. The accused **GORDON BRUNO ONYANGO** and **ERICK OMONDI BARRACK** jointly with others not before the court are charged with the murder of **FRANCIS KIMANI WAITHANJI** contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The incident took place on 29th August 2017 at about 21.50 pm at Ongalo village, Kisumu West Sub-County of Kisumu County. I have heard the testimony of five prosecution witnesses and I am now required to determine whether to put the accused on their defence.

2. The fact and cause of the deceased's death is not disputed. All the witnesses confirm that the deceased's lifeless body was discovered on 29th August 2017 along the fence of Bishan Hayer Construction premises along the Kisian - Bondo Road. The postmortem was done by Dr Nyakombo on 31st August 2017 at Jaramogi Odinga Oginga Teaching and Referral Hospital. He confirmed that the deceased had a fracture on the base of the skull with resultant bleeding in the occiput area and brain swelling. The doctor concluded that the deceased died as a result of a severe head injury at the base of the skull following blunt force trauma from assault.

3. The question is whether the accused killed the deceased and on this issue, the evidence is circumstantial. The accused and deceased were working at Bishan Hayer Construction. The accused were working at the Bitumen plant while the deceased was a driver.

4. On the night 29th August 2017, the deceased together with Abraham Akala (PW1) had come from work outside. According to PW 1, the deceased parked the vehicle and left the company premises ahead of him. After about 10-15 minutes, the watchmen came running towards him and told him that the deceased had died. The three watchmen who alerted him were George Abuto Ochola (PW 4), Julius Hongo (PW 2) and John Okore. They all went to the scene which was outside the gate and as they viewed the body, they were joined by both accused.

5. Julius Hongo (PW 2) confirmed that on that night the deceased came with PW 1. He signed in the vehicle and then left the premises. After about 10 minutes, the accused followed by PW 4 came to where he was. PW 4 told him that the motorbike riders, who were passing by, told him that the deceased had been killed. They all went out to view the body.

6. PW 4 testified that he heard some noises around the gate then he heard some motorbikes hooting. When he went outside, he found the deceased's body. Although there is evidence, from his recorded statement, that he heard deceased being beaten then peered over the fence and saw him being assaulted. He was, however, declared hostile witness. At any rate, since he knew the accused he could have mentioned them in his statement unless of course the circumstances obtaining at the time were not favourable for positive identification or recognition.

7. It is clear from these witnesses that the deceased had already left the company premises when he was killed. None of the watchmen testified to the fact that the accused who had been working at the Bitumen plant followed the deceased outside the gate where he was assaulted. They all testified to the fact that the accused like themselves went out to view the deceased's body when they heard motorbike riders hooting and raising alarm about someone being beaten.

8. The Investigating Officer, PC Paul Masika (PW 5) suggested that the accused had issued threats to the deceased. Unfortunately, the employer to whom these statements were made was not called to give evidence and thus this evidence remains hearsay. PW 5 also noted that

a blue cap that belonged to the 1st accused was found in the vicinity of the deceased's body. The cap was not put to any witness to confirm whether the 1st accused had been seen wearing it. Further when it was taken for DNA analysis to compare the biological material on it and buccal swabs from the accused, the results were that the DNA profiles on the cap was of an unknown female and not the accused.

9. The totality of the evidence I have outlined is that there is no nexus between the accused and death of the deceased. The prosecution case is weak tea hence I cannot call on the accused to make their defence. Under **section 306(1)** of the ***Criminal Procedure Code (Chapter 75 of Laws of Kenya)***, I am required to enter a verdict of not guilty which I hereby do against **GORDON BRUNO ONYANGO** and **ERICK OMONDI BARRACK**. They are therefore acquitted of the murder of **FRANCIS KIMANI WAITHANJI**.

DATED and DELIVERED at KISUMU this 17th day of May 2018.

D.S. MAJANJA

JUDGE

Mr Anyul, Advocate for the 1st accused.

Mr Maganga, Advocate for the 2nd accused.

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