



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE (MURDER) NO. 7 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NICHOLAS OTIENO.....ACCUSED**

**JUDGMENT**

1. Accused and another were jointly charged with the Offence of Murder Contrary to **Section 203** as read with **Section 204** of the Penal Code.

**The particulars of the charge are that on 8th January, 2016 at Katuk Village in Muhoroni Sub-County within Kisumu County murdered Kennedy Omondi Okunya.**

2. In support of its case, the state called a total of 5 witnesses whose evidence I have summarized as follows:

3. **PW 1 Macarios Golo Odolo**, a member of Nyumba Kumi recalled that on 8.1.16, one Christopher Okoth informed him that he had seen George Wandere, Nicolas Otiemo, Bernard Omondi and Joseph Onyango fighting with another man at the home of Thomas Mbola Ng'ola. That the following day, Christopher called him against and informed him that police had collected a body of a man.

4. **PW2 Patrick Onyango Odongi** recalled that on 8.1.16 at about 8.00 pm, he was passing near the home of Thomas Mbola Ng'ola when he heard a man screaming that he was being killed because of his wife. That he saw 2 men at the said home but he did not recognize them because it was dark. That the following day, he received information that the deceased who was his neighbor had been found lying dead by the road side.

5. **PW3 Christopher Okoth** recalled that on 8.1.16 at about 8.00 pm, he was at home when he heard people screaming and fighting in the home of one Onyango 100 metres from his house. That he recognized the voice of the accused restraining the people that were beating a man that was screaming. That the following day, a man was found lying dead by the road side.

6. **PW5 Bernard Ogada Okoth**, an assistant chief called police that recovered the deceased's body and took it to the mortuary.

7. **PC Japheth Kimutai**, the investigating officer arrested and charged accused and another upon receiving information that they had beaten and killed the deceased. He produced a postmortem report (**PEXH. 1**) which shows that deceased died of severe head injury secondary to blunt force trauma to the head.

**Defence case**

8. Accused 2 was acquitted under section 210 of the Criminal Procedure Code since he had not been implicated by any of the witnesses. In his sworn defence, accused 1 herein denied the offence. He however conceded that he heard some people quarrelling on a public road near his home on 8.1.16 but that he did not go to the scene because he had an injury on his leg. He stated that deceased was unknown to him and denied murdering him.

**Analysis and Determination**

9. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

***(a) Proof of the fact and the cause of death of the deceased;***

***(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which***

*constitutes the 'actusreus' of the offence;*

*(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mensrea' of the offence.*

**(a) Proof of the fact and the cause of death of the deceased:**

10. The postmortem report (**PEXH. 1**) shows that deceased died of severe head injury secondary to blunt force trauma to the head. There is therefore no dispute that one Kennedy Omondi Okunya, the deceased herein died.

**(b) Actusreus**

11. None of the prosecution witnesses stated that accused committed the unlawful act or omission on the part of the Accused which constitutes the 'actusreus' of the offence. In fact, the prosecution failed to prove that the deceased was the same person that was allegedly beaten on the night of 8.1.16.

**(c) Mens Rea**

12. Having found no evidence to connect accused to the unlawful act that resulted in deceased's death, it would be futile to delve into the issue of malice aforethought.

**Disposition**

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

**DATED, DELIVERED AND SIGNED THIS 10TH DAY OF MAY 2018**

**T. W. CHERERE**

**JUDGE**

Read in open court in the presence of-

**Court Assistant - Felix**

**Accused - Present**

**For Accused - Mr. Amule Holding Brief for Kyamazima**

**For the State - Ms. Wafula**