



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 24 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

GEORGE ODERA ODEMBA.....ACCUSED

JUDGMENT

1. **George Odera Odemba**, the accused person herein, was charged with the murder of **Benard Odicho Livenje** (hereinafter referred to as 'the deceased') over two years after the death of the deceased. The particulars of the information of murder were that the accused person murdered the deceased on 03/03/2013 at Shanga village Kandera Lwala Sub-Location within Migori County in the Republic of Kenya. He denied the information and a trial was held.

2. A total of five witnesses testified in support of the information. **PW1** was **Douglas Opiyo Odijo** who was a son of the deceased. **Shem Otieno Ogembo** testified as **PW2**. He was a tractor driver whose tractor had been hired by the deceased to plough a parcel of land Ranen within Awendo Sub-County of Migori County. **Jack Omondi Midego** was an assistant to **PW2** and testified as **PW3**. A daughter to the deceased one **Nancy Achieng Ondijo** who witnessed the post mortem examination on the body of the deceased testified as **PW4**. **No. 63085 Cpl. Stephen Mulumba** attached at Awendo Police Station took over the matter as the subsequent investigating officer from No. 61096 Corp. Peter Mutua who was transferred to Kitui County. He testified as **PW5**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case is that the deceased hired **PW2** and **PW3** to plough his parcel of land at Ranen on 03/03/2015. **PW2** and **PW3** were accompanied by **PW1**. As the work progressed **PW2** called the deceased to avail some more fuel for the tractor which was running out. The accused person, then unknown to any of the three, appeared at the farm and sought to see the owner. **PW3** told him that the owner of the farm was not yet there but they were expecting him. The accused person left and returned later but the owner had not arrived as yet. Again **PW3** informed the accused person that the owner who was the deceased had called them and confirmed that he was on the way to the farm. It did not take long before the deceased arrived at the farm and immediately the accused person came to meet him. He was armed with a panga and sought an explanation from the deceased as to why the deceased had cut down his tress on his adjoining farm. The deceased denied such and requested that the matter be referred to the local administration but the accused person refused and demanded for an immediate and adequate explanation lest either the deceased or himself was to die.

4. That, in the midst of the disagreement two sons of the accused person appeared while armed with pangas as well. There was a lot of tension and **PW1**, **PW2** and **PW3** sensed danger. They all pleaded with the accused person to amicably resolve the matter but the accused person threatened to shoot them. As the accused person searched his waist for a gun **PW1**, **PW2**, **PW3** and the deceased fled helter skelter. As the deceased was running towards a sugar cane plantation he was hit with a stone on the head and fell down. The accused person and his two children then pounced on him and cut him severely as the rest watched from a distance of about 75 metres away. **PW1** rushed to the nearby AP Post and reported the matter as **PW2** drove the tractor to Dede AP Post. As the police rushed to the scene they only found the deceased lying on the ground with several cuts all over his body. The deceased was already dead.

5. Police officers from Awendo Police Station later on arrived at the scene and removed the body to Rosewood Mortuary in Awendo before the body was taken to Migori County Referral Hospital Mortuary where a post mortem examination was conducted after the body of the deceased was identified by **PW4**. Following police investigations, the two sons of the accused person were arrested and charged in the High Court at Homa Bay with the murder of the deceased. They two were eventually acquitted on 12/02/2015 and the accused person was arrested on 17/07/2015 and accordingly charged.

6. At the close of the prosecution's case, the accused person was placed on his defence and opted to give sworn testimony without calling any witnesses. The accused person recalled how he went to Church on the 03/03/2013 leaving behind his three children at home and on return he learnt that his children had quarreled the deceased. That, two of his sons were arrested in Sori on 09/03/2013 and charged in the High Court at Homa Bay with the murder of the deceased and were acquitted on 12/03/2015. That, all along he used to accompany his children to Court and he never left his home and he was therefore shocked to be arrested around 5 months after his children were acquitted and that he was charged with a similar offence. He denied committing the offence and wondered why he had been wrongly implicated. The defence case was then closed.

7. From the above evidence, this Court is now called to find if the ingredients of the offence of murder have been proved in this case. The offence of murder carries three ingredients which are: -

(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 'actus reus' of the offence;

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

8. On the first issue, there is no doubt that the deceased died. That was attested to by PW1, PW2 and PW4 who saw the lifeless body of the deceased. Infact PW4 witnessed the post mortem examination conducted on the body of the deceased. The first limb is hence answered in the affirmative.

9. As to the cause of the death of the deceased, no expert, medical or documentary evidence was availed in such proof. Apart from the evidence of PW1, PW2 and PW3 that they witnessed the deceased being attacked and severely cut no further evidence was availed. Despite PW4 referring to the Post Mortem Report which was accordingly marked there was no attempt to produce the same whether by the maker or otherwise legally. Even PW5 did not so attempt.

10. Since the nature and extent of the injuries on the deceased were not clearly ascertained and in the absence of expert or documentary evidence on the death of the deceased, I find it unsafe to even attempt to presume that the deceased died out of the said injuries. The upshot is that the death of the deceased is unknown save for an assumption. I therefore answer the second limb in the negative.

11. Having so found it will not serve any meaningful purpose to attempt consideration of the other ingredients. However, I must point out that the issue of the identification of the attackers was not properly settled by the prosecution. I say so because although the attack was during the day PW1, PW2 and PW3 confirmed that they did not know the attackers prior to the incident and that the suspects were arrested later by members of public and handed over to the police. Further, the witnesses stood around 75 metres from where the attackers were assaulting the deceased. I am also at a loss as to whether PW1, PW2 and PW3 gave a description of the attackers to the police since that aspect did not come out in evidence. I am still at a loss as to the time taken by the attackers and the witnesses who were at the scene more so given that there was commotion amidst heightened tension. It did not come out either in evidence what really made the witnesses settle for the accused person as one of the attackers; was it his physique, speech, dressing, how he moved or otherwise.

12. Faced with such a scenario it was imperative that an identification parade be conducted with a view to clear the issue. I hence find that the identification of the accused person as one of the attackers was in error.

13. There was also the issue of the arrest and prosecution of the two children of the accused person. Despite being not clear why they were acquitted, what really begs for an answer is why the accused person was arrested and charged long after his sons were acquitted and yet his testimony that he used to accompany his children to Court although and that he never left his home went uncontroverted.

14. I think the foregone is sufficient to dispose of this matter. I now find that the prosecution did not prove the information against the accused person. The upshot is that the accused person herein, **George Odera Odemba**, is found **NOT GUILTY** of the murder of **Benard Odicho Livenje** and he is hereby acquitted accordingly. He is therefore set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 4th day of May 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Omonde Kisera Counsel instructed by the firm of Messrs. Omonde Kisera & Company Advocates for the Accused person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyn Nyauke – Court Assistant