



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRC NO. 60 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

PIUS ONYANGO OLIECH ACCUSED

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the Information are that on 16th September 2014 at Marera Sub-location, Kisumu West Sub-County in Kisumu County, jointly with another not before court they murdered **DANIEL OLILO OYIEKO**.

The accused pleaded not guilty to the charge. At the trial the Prosecution called six witnesses and briefly their evidence was that on the material day the accused, nicknamed Dadi, and his brother one Otieno, disputed over some 500/= which they were supposed to share but which the accused had spent. A fight broke out between them and it was when the fight intensified that the deceased is said to have intervened to stop them. According to Mary Akumu Ogutu (**PW2**) and Samuel Omondi Ayieko (**PW3**), both of who allegedly witnessed the fight between the two brothers, when the deceased approached the room where the accused had locked himself in and asked him why they were fighting the accused came out and stabbed him (the deceased) on the hand. When Mary (**PW2**) saw this she started screaming thereby attracting other villagers including the mother of the deceased (**PW1**) to the scene. In the meantime the deceased started walking towards his home but soon collapsed and by the time those present got a motor cycle to take him to hospital he had died. His mother (**PW1**) reported the matter to Maseno Police Station and police officers among them Corporal Mose Wagwe (**PW5**) went to the scene and removed the body to the mortuary. The accused is alleged to have fled to the police station for his life and was arrested and charged with this offence. A post mortem was subsequently conducted at the Jaramogi Oginga Odinga Teaching and Referral Hospital

(JOOT&RH) with the deceased's body being identified to Doctor Okello by John Odhiambo (**PW4**). John Odhiambo (**PW4**) testified that he knew the deceased and that during the post mortem he saw that the deceased had a cut on the hand. However according to Doctor Okello and this is also what is in the post mortem report the deceased died as a result of severe hemorrhage secondary to severe head injury secondary to blunt trauma. The only injury reported on the body of the deceased and this was confirmed by Doctor Sava (**PW6**), the Pathologist who produced the post mortem report on behalf of Doctor Okello, was the deep cut wound on the lateral aspect of the right arm. There was no injury whatsoever on the head.

When this court put the accused on his defence he vehemently denied that he killed the deceased and stated that on that day he was at his place of work in Maseno. He contended that he was arrested when he went to Maseno Police Station to collect his identity card. He however admitted that the deceased had passed by the scene of his and his brother Kevin Otieno's fight and that the deceased had separated them twice. He narrated how they, including the deceased, all fell into a garbage pit that was at the scene and stated that whereas he got out of the pit his brother and the deceased were left inside and that his brother over powered the deceased. He denied that any of them had a knife.

After the close of the defence case this court heard submissions from Counsel for both sides. According to Mr. Odumbe, Learned Counsel for the accused, it is in doubt that the accused stabbed the deceased. He submitted that the pit into which the three fell ordinarily has sharp objects and that the deceased too was armed with a sharp object. He contended that there was no evidence of a dispute between the deceased and the accused and the prosecution had not proved its case beyond reasonable doubt. He contended that the accused had no intention to inflict injury on the deceased and urged this court to set him at liberty.

On her part Miss Chelangat, Prosecution Counsel, submitted that there was evidence the accused had vowed someone would die that day and that while there may not have been an intention to kill the deceased he nevertheless died. She disputed that the evidence about the garbage pit was true and stated that the accused was seen stabbing the deceased on the hand by **PW2**. She contended that the injury on the hand was confirmed by the post mortem and stated that the issue of whether the deceased and the accused had an acrimonious past does not arise as the person who was fighting with the accused was his brother. She contended that the accused killed the deceased but as to whether that was premeditated was for this court to determine.

Section 203 of the Penal Code defines murder as follows:-

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

In this case therefore this court is called to determine the following:-

- a) Whether the accused person caused the death of the deceased;**
- b) Whether it was by an unlawful act; and**
- c) Whether it was of malice aforethought as defined in Section 206 of the Penal Code.**

There is evidence beyond all reasonable doubt that the accused person in this case stabbed the deceased on the hand when the deceased intervened to quell a fight between him and his brother. Like the Prosecution Counsel I do not find the story about the accused, his brother and the deceased falling into a pit true. Mary Akumu Ogutu (**PW2**) and Samuel Omondi Ayieko (**PW3**) witnessed this occurrence which took place in broad daylight and both were emphatic that the fight begun as a scuffle at the home of the accused and culminated in a gruesome full blown fight at the house of Mary Akumu Ogutu (**PW2**). **PW3** was nearby collecting some charcoal. They both testified that the accused was armed with a knife and his brother a jembe. This fact was corroborated by the mother of the deceased (**PW1**) when she testified that she had seen the accused run past her house with a knife in his hand and that he had made a vow that someone was going to die. That the deceased was stabbed in his hand was also confirmed by **PW4** and the post mortem report. The identity of the person who stabbed him is not in doubt that person having been positively identified by **PW2** and **PW3** to the satisfaction of this court. The accused himself admitted having come into confrontation with the deceased as the latter tried to stop the fight.

What I find baffling however and which I find casts doubt on the guilt of the accused person is that the deceased's death was as a result of a head injury but not the stab on his hand. There is no evidence whatsoever that the accused caused injury to the deceased's head. It cannot therefore be said that the death of the deceased was caused by an unlawful act of the accused person or put in another way that the accused committed the unlawful act which caused the death of the deceased. Accordingly this court finds the accused not guilty of murder and has acquitted him. He should be set at liberty forthwith unless otherwise lawfully held.

Signed and dated at Kisumu this 2nd day of May 2018

E. N. MAINA

JUDGE

Signed and delivered at Kisumu this 3rd day of May 2018

T.W. CHERERE

JUDGE