



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL MURDER NO.10 OF 2016

REPUBLIC PROSECUTOR

VERSUS

STEPHEN OKUKU OTIENO1ST ACCUSED

CHRISANTUS ODERO NYANDURU2ND ACCUSED

ROSE AUMA ODERO3RD ACCUSED

JUDITH ATIENO OKUKU.....4TH ACCUSED

ELZA ATIENO ODHIAMBO5TH ACCUSED

GRACE ANYANGO ODERO.....6TH ACCUSED

JUDGMENT

[1] The accused, **STEPHEN OKUKU OTIENO, CHRISANTUS ODERO NYANDURU, ROSE AUMA ODERO, JUDITH ATIENO OKUKU, ELZA ATIENO ODHIAMBO** and **GRACE ANYANGO ODERO**, are charged with murder, contrary to **Section 203** as read with **Section 204** of the **Penal Code**, in that on the 23rd day of April 2016, at Kanyanjwa sub location, Gem West Location, Rangwe Division within Homa Bay County jointly murdered **JOSEPH OTIENO** alias **NYAYAL**.

[2] The case for the prosecution was that the deceased **JOSEPH OTIENO (NYAYAL)** was on the material date at about 10.00 a.m. tending to his farm with the assistance of his wife **JOYCE ANYANGO OTIENO (PW1)** and son **FELIX ODHIAMBO (PW3)** when a group of people suddenly confronted them while shouting and yelling. The First accused Stephen Okuku also known as **“City”** and the Second accused Chrisantus Odero also known as **“Abich”** were said to have been in that group of people which included some women said to be the Third accused **ROSE AUMA**, wife to the Second accused, Fourth accused **JUDITH ATIENO**, wife to the first accused, Fifth accused **ELZA ATIENO** and Sixth accused **GRACE ANYANGO**.

[3] The women were shouting and screaming while wielding clubs or sticks. The deceased appeared to have been the group’s target. He took off with the group hot on his heels with the first and second accused leading the pack. As they neared him, the first and second accused struck him with machetes (panga) in their possession. He was struck on the shoulders by the first accused and on the head by the second accused. The women were approaching from behind while shouting in the local dialect the word **“Yuero”** i.e. calling out for people (public).

[4] At that juncture, Joyce (PW1) ran to her home while wailing. Her son (PW3) ran away towards a place called Marram and hid in a sugar cane plantation. She (PW1) returned to the scene in the company of other people and found that the deceased had been assaulted and fatally injured.

[5] The area Chief, **JOEL OTINEO OGUTA (PW2)**, was at his home on that material date and time when he received a phone call from one Francis and informed that there was a commotion nearby as the deceased was being chased by people. He went to the scene and found a large group of people gathered at a road where the dead body of the deceased was lying down covered with a heap of tree branches. He also found his Assistant Chief called Florence Aoko at the scene. He could not tell who had killed the deceased but learnt that he had been involved in the assault of one Odhiambo.

[6] The Chief (PW2) called the police to the scene and they removed the body of the deceased from there.

DR. ODUNDO NICODEMUS (PW4), of Homa Bay County Referral Hospital produced a post mortem report (**P. Exhibit 1**) indicating that the death of the deceased was caused by massive cerebral hemorrhage due to assault.

[7] **SGT. VELMA KANGOGO (PW5)**, of Rangwe police station investigated the case and gathered that the deceased had been murdered near Randury Trading Centre. She visited the scene at 11.20 a.m. on the material date and found the dead body of the deceased lying on the road facing upwards. She noted injuries on the head, shoulder, and all over the body and that the body was clad with only a pair of trousers.

[8] The Investigating Officer (PW5) also gathered that the deceased was at his farm with his wife and son when he was attacked by his neighbours who alleged that he was a thief. The said neighbours included the six accused herein but the actual attack was effected by the first and second accused while armed with machetes (panga). They (accused) were pointed to her (PW5) by the area chief. They were arrested and charged with the present offence on completion of investigations.

[9] The case for all the accused was that they did not commit the offence.

Accused one indicated that he was never at the scene of the offence on the material date as he was at his farm up to 11.00 a.m. after which he returned home and then took his cattle for grazing up to 6.00 p.m. when he retired home.

Accused two also indicated that he was not at the scene on the material date as he had gone to plant sugar cane accompanied by his daughter **BRENDA ADHIAMBO (DW7)**. They returned home at about 1.00 p.m. after which he (accused two) took his cattle for grazing up to 6.00 p.m.

[10] Both accused one and two also indicated that they heard of the death of the deceased on radio Ramogi on the morning of the 24th April 2016.

Accused three, indicated that she also heard of the death of the deceased on radio on the 24th April 2016. She said that she was away at Nyalkinyi Kanyada on the material day. She had gone there to visit her sick mother. Accused four, indicated that she had travelled to her parents' home in Oyugis on the material date and also heard of the death of the deceased on radio on the 24th April.

[11] The fifth accused, indicated that she was in her farm on the material date from 8.00 a.m. to 11.00 a.m. She returned home thereafter and remained there the whole day. On the following day, she heard on radio that the deceased had been killed after returning home from Uganda where he had fled.

Accused six, indicated that she had attended a burial at Kagan on the material date. She remained there up to 5.00 p.m. after which she started her journey back home. She boarded a motor cycle taxi (boda boda) from Rangwe to Randury. It is then that she heard from fellow women travelers that the deceased had been accosted by members of the public and killed.

[12] **BRENDA ADHIAMBO ODERO (DW7)**, daughter to second and third accused confirmed that she was with her father on the material date planting sugar cane in a nearby farm. She returned home at 12.00 noon while her father did likewise at 1.00p.m. She then left home for church.

MAURICE OTIENO OKUKU (PW8), son to the first and fourth accused confirmed that he was with his father at their farm on the material date. They returned home at 11.00 a.m. His mother was away at her parents' home in Oyugis. He prepared tea for his father who took it and then took their cattle for grazing up to 6.00 p.m. when he returned home and remained there throughout.

[13] The Assistant Chief of Kanyanjwa sub location Rangwe, **FLORENCE AOKO AJWANG (DW9)**, indicated that she was heading to church on the material date at 10.00 a.m. when she was alerted by a motor cycle operator (boda boda) that the deceased had been killed. She then proceeded to the scene of the killing and found the body of the deceased covered with tree branches. There was a large crowd of people at the scene. She called the police and they arrived at the scene and removed the body to the mortuary. She confirmed that the deceased's wife was among the crowd at the scene. She also confirmed that the six accused were very well known to her as law abiding citizens who never fled from the area after the killing of the deceased.

[14] From all the fore going evidence, it is evidently clear and undisputed that the deceased met his death after the criminal act of assault was committed against him by a group of people who suspected him of having been a thief.

The postmortem report (**P. Exhibit 1**) showed that the deceased suffered serious injury to his head after the assault.

Indeed, he died from massive cerebral hemorrhage due to the assault.

The nature and degree of the injury was a clear demonstration of the assailants' intention to cause the death of the deceased. That is why they aimed their fatal strikes at his head with a view to reducing it to a pulp which they successfully did.

[15] It did not matter that the deceased was or was not a thief, the **"blood thirsty"** assailants acted with impunity and took the law into their own hands. In so doing, they committed murder with vengeance and ferocity. A fact proved without dispute by the prosecution. This leaves the identification of the assailants or anyone of them as the basic issue for determination.

[16] The offence occurred in broad daylight at about 10.00 a.m. or thereabout. This meant that there existed favourable conditions for the visual identification of the assailants and if they were known people, the conditions were excellent for their identification by recognition.

In the present circumstances, the identification of the assailants would or ought to be confined to those that actually assaulted the deceased in one way or the other than those who happened to be at the scene as part of the crowd attracted by the existing commotion.

[17] However, those at the scene urging on or encouraging the assailants to assault the deceased would invariably be held criminally liable as aiders and abettors of the offence.

Each of the accused herein denied the offence thereby implying that they were not part of the people who assaulted and fatally injured the deceased. They all indicated that they were never at the scene when the deceased was assaulted and killed and stated that they learnt of the fact on the following day on radio.

[18] However, they were all placed at the general scene by the deceased's wife (PW1) and his son (PW3) who were with the deceased in their farm on the morning of the material day before they were confronted by a group of people thereby causing the deceased to take off with the people hot in pursuit.

He ran some distance away before the people caught up with him. It was then that he was assaulted to death. His wife (PW1) witnessed the first strikes being meted on him by the first and second accused. She implied that the two were the ring leaders in the "hunt" for the deceased and in his termination from this world. This was confirmed by the deceased's son (PW3).

[19] Both the deceased's wife (PW1) and son (PW3) gave credible and corroborative evidence which established that the first and second accused commenced the unlawful attack and assault of the deceased. They were the first to strike the deceased and cause him bodily harm with offensive weapons. They were joined by others who may not have been properly identified by Joyce (PW1) and Felix (PW3) or indeed, any other person.

Whereas evidence by the prosecution showed that the first and second accused were clearly and properly identified as having been part of the crowd or mob of people who assaulted and fatally injured the deceased, the same evidence did not establish beyond reasonable doubt that the third, fourth, fifth and sixth accused participated in the unlawful act of assaulting the deceased.

[20] What was established against the third, fourth, fifth and sixth accused was that they were at the scene as part of the crowd gathered there. However, none of them was seen in the actual act of assaulting the deceased even though they arrived at the scene in a noisy frenzy holding sticks and/or clubs.

Most importantly, none of them was seen or heard encouraging or urging on the assailants in their unlawful mission against the deceased. Therefore, no credible evidence existed to show that they aided and abetted in the commission of the offence.

[21] It is thus the finding of this court that the case against the first and second accused was proved beyond reasonable doubt by the prosecution. This position was inapplicable against the third, fourth, fifth and sixth accused.

Consequently, the first and second accused are hereby found guilty as charged and accordingly convicted.

Accused three, four, five and six are hereby found not guilty as charged and acquitted accordingly.

J.R. KARANJAH

JUDGE

11.10.2018

[Delivered and signed this 11th day of **October, 2018**].