



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KISUMU

#### CRIMINAL CASE (MURDER) NO. 01 OF 2015

REPUBLIC .....PROSECUTOR

VERSUS

DANIEL OBALA ONDU.....ACCUSED

#### JUDGMENT

1. **DANIEL OBALA ONDU**, the accused herein and another who was acquitted under Section 306(1) of the CPC were jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the information are that:

*On 12.12.14 at Korando Sub-location in Kisumu East District within Kisumu County, jointly with others not before the court murdered GERISHON NDALO OKUDO*

#### PROSECUTION CASE

2. The prosecution called 7 witnesses. **PW1 Joshua Owuor** recalled that on the night of 12.12.14, he used light from his spot light to recognize his nephews Dan Ondu, Olewe Ondu and Ogada Ndeya among 7 people that had spotlights and who were walking from the home of his neighbor Ndalo Okudo. That the following morning, he received information that Ndalo had been assaulted and had died in hospital. **PW2 Sophia Olang Ochieng** also stated that on the night of 12.12.14, she saw a group of people including Ndalo, Ogonda and Dan Ouma. That after they parted ways, she heard Ndalo screaming for help and she went to the scene in company of other people where they found that Ndalo had been assaulted. **PW3 Perez Akinyi Mbonga** found an injured Ndalo Okudo lying near her home and didn't know how and by whom the injuries were inflicted. **PW4 Edward Andiego Kotinga**, identified deceased's body to the doctor that conducted an autopsy on 29.12.14. **PW5 Boaz Ouma Okudo** recalled that on the night of 12.12.14, he found his injured deceased's brother surrounded by about 7 people that included Ogonda, Dan Obala, Dan Ochieng and Richard Oriedo but he did not see them beat him. **PW6 Horris Odhiambo** recalled that on the night of 12.12.14, he found deceased who looked like he had been assaulted surrounded by a crowd of about 50 people. He stated he did not see accused persons at the scene. **PW7 Dr. Joy Kalondu** produced deceased's postmortem filled by his colleague Dr. Mboya who had gone for further studies and with whom he stated he had worked for 2 years and knew his signature and handwriting. The postmortem dated 29.12.14 PEXH. 3 shows that the body of deceased had multiple soft tissue injuries, fractured 5th rib, bleeding in the brain with a resultant conclusion that deceased died of severe head injury secondary to blunt force.

#### DEFENCE CASE

3. After the close of the prosecution case, I placed the 2nd accused person on his defence. In his sworn defence, he denied the offence and stated that on the night of 12.12.14 at about 11.00 pm, he heard some people talking next to his house. That he went out and found Dan Ochieng who was armed with a rungu and Michael Ogonda who was armed with an axe standing next to a man that was lying on the ground. That he was chased from the scene and he screamed attracting a crowd that gathered at the scene. That he returned to the scene and identified the man that was lying on the ground as Gerishon Ndalo Okudo and he reported the matter to Gerishon's brother George Ochieng and PW5.

#### ANALYSIS AND FINDINGS

4. I have considered the evidence on record. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In Anthony Ndegwa Ngari vs Republic [2014] eKLR, the elements of the offence of murder were listed as follows: -

(a) *the death of the deceased occurred;*

(b) *that the accused committed the unlawful act which caused the death of the deceased; and*

(c) *that the accused had malice aforethought.*

**(a) The death of the deceased**

5. The death of the deceased has been confirmed by the PW4 who identified the body to the doctor that conducted an autopsy and by the postmortem form **PEXH. 4** produced by PW7 that shows that deceased died of severe head injury secondary to blunt force.

**(b) Proof that accused committed the unlawful act which caused the death of the deceased**

6. **PW1 Joshua Owuor** stated that he saw accused 2 and others walk from deceased's house on the night of 12.12.14. **PW2** met the deceased in company of Ogonda and Dan Ouma on the night of 12.12.14. **PW5** found his injured deceased brother surrounded by about 7 people that included Ogonda, accused 2, Dan Ochieng and Richard Oriedo but he did not see them beat him.

7. From the evidence on record, it is apparent that none of the prosecution witnesses saw accused cause the fatal injuries to the deceased. The only evidence that placed accused 2 at the scene of crime is that of PW5 but who however did not see him cause the fatal injuries to the deceased. Accused does not deny that he was at the scene of crime. He explained that he was attracted to the scene by the sound of people talking next to his house at night and he found Dan Ochieng who was armed with a rungu and Michael Ogonda who was armed with an axe standing next to the deceased that was lying on the ground. At the time PW5 arrived at the scene, accused explained that he had returned to the scene after he screamed and attracted a crowd there.

8. The presence of Dan Ochieng or Dan Ouma and Michael Ogonda at the scene was confirmed by PW2 who stated that she met Ogonda and Dan Ouma walking with the Ndalo (deceased) after which she heard Ndalo (deceased) screaming only to return to the scene and find that Ndalo (deceased) had been assaulted.

9. From the above analysis, the evidence on record exonerates accused and overwhelmingly points to the participation of Dan Ochieng or Dan Ouma and Michael Ogonda in the murder of the deceased. With this kind of evidence, the investigators ought to have been able to properly investigate the case and bring the proper culprits to justice.

10. Consequently; I find that the Prosecution failed to prove beyond reasonable doubt that the Accused person did the unlawful act which caused the death of the deceased which constitutes the '*actus reus*' of the offence.

**(c) Proof that the said unlawful act or omission was committed with malice afterthought**

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

**Disposition**

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

**DATED, DELIVERED AND SIGNED THIS 4<sup>th</sup> DAY OF October 2018**

**T. W. CHERERE**

**JUDGE**

Read in open court in the presence of-

**Court Assistant - Felix**

**Accused - Present**

**For Accused -**

**For the State - Mr. Muia**