



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL MURDER CASE NO.2 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

PETER WERE NGARA.....1ST ACCUSED

FELIX OMONDI ODHIAMBO.....2ND ACCUSED

JUDGMENT

1. The first accused, **PETER WERE NGARA**, and the second accused, **FELIX OMONDI ODHIAMBO**, are charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

The particulars of the charge are that, on the 28th November 2012 at Chiga village, Homa Bay District within Homa Bay County, jointly with others not before court murdered **ALFRED LIECH OTIU**.

2. It was the prosecution case that the deceased was husband to **JANE ATIENO ALIECH** (PW1). They lived in Chiga Kanyada village in Homa Bay Town but he did not spend the night at home on the 27th November 2012. His wife was on the following morning at about 10.00 a.m. informed by one Ongure that he had been found with a cow at a place called Maram. The information was confirmed by a village elder called Samson Oyugi who was at the time in the company of Felix Omondi, the second accused herein.

3. At about 4.00 p.m. to 5.00 p.m., the deceased returned home and started to chop firewood but later at about 7.00 p.m., the village elder returned to his homestead accompanied by the second accused and the first accused (Peter) and others including one Samuel Wambi and one Kennedy. This group remained at the homestead upto or before 9.00 p.m. and left while in the company of the deceased.

4. Later, the deceased returned home with body injury and maintained a quiet demeanour. He did not tell his wife whether he was assaulted and declined to take the meal served upon him. He merely wanted to sleep and went to sleep in a separate bedroom from that of his wife. He was found on the following morning in the bedroom having vomited and died. His wife noticed some injury on his head and chest.

5. The police were notified. They arrived at the scene and removed the dead body of the deceased to the mortuary where a post mortem was carried out by a **DOCTOR OJWANG** who compiled the necessary report on 4th December 2012 indicating the cause of death as having been acute subdural haemorrhage and severe torture.

The report was tendered as **P. Exhibit 1** by **DR. KEVIN OSURI** (PW2).

6. The investigations conducted by the police were compiled in the relevant police file which was not produced in evidence but whose contents were summarized in the evidence of **IP BENJAMIN KIHILU** (PW3), who took over the investigations after they had been completed by his colleagues.

The investigations cast suspicion upon the two accused and others as having been among those who may have assaulted the deceased and occasioned him fatal injury.

7. The two accused were later arrested and charged with the present offence alongside a third suspect who passed away prior to the conclusion of this case. Whereas, the first accused was arrested almost a month after the death of the deceased, the second accused was arrested almost four years later. The police suspected that they disappeared from the scene after the fact.

8. The defence case was a denial of the accused involvement in the death of the deceased.

Accused one indicated that he was at his home on the material date and did not venture out save to proceed to work and returned at midday. He knew the deceased as his neighbor but contended that he did not kill him and did not know how he died.

9. The second accused also contended that he did not kill the deceased but went to his home on the material date to purchase fish from his wife who was a fishmonger. He went there at about 5.00 p.m. and found the deceased being questioned by a village elder with regard to the theft of a cow. He (second accused) purchased fish and returned to his home after which he travelled to Nairobi at 7.00 p.m. aboard a Transline Services Omnibus. He was later to travel to South Sudan with others to undertake plumbing services. He returned to Homa bay after some time in 2016 and was arrested by police officers while in a hotel in Homa Bay town.

10. From all the foregoing evidence, it is apparent that the deceased died from injuries occasioned by a criminal act of assault committed by persons who were very well known to him as some were his neighbours. It was also apparent that the reason for the assault was the allegation that the deceased was a cow thief. In fact, the first accused indicated that the deceased was a thief in the eyes of the local villagers.

11. This suspicion that the deceased was a thief was undoubtedly what caused some of the villagers to take the law into their own hands and purport to punish him by assaulting or lynching him. Unfortunately, the villagers used excessive force and caused him to succumb to his injuries.

He was grievously injured by the villagers such that it may safely be firmly stated that he was actually murdered. The degree of injury was a pointer towards the villagers' intention to take away the life of the deceased and they succeeded in doing so.

12. Indeed, the fact of murder was never disputed and that left the identification of the accused herein as the murderer as the sole issue for determination in this case.

The prosecution evidence of identification was provided by the wife of the deceased (PW1) but it remained uncorroborated and uncertain with regard to the accused persons actual involvement in assaulting the deceased. She only testified that the two came to her home accompanied by a village elder and left with the deceased. She did not see them assault the deceased at that time and she could not tell whether or not he was assaulted and by whom and at which place. The deceased did not confirm to her that he was assaulted and by whom.

13.. As a matter of fact, the deceased's wife (PW1) did not have any evidence of identification of the two accused as having been in the group or mob of people who assaulted the deceased and occasioned him fatal injury. She made it certain that the deceased was never assaulted at her homestead by the two accused or any other person.

In sum, there was no direct evidence of identification against the two accused or any one of them.

14. The attempt by the prosecution to provide circumstantial evidence against the two accused was futile as there was no credible facts suggesting that the two accused or any one of them disappeared from the scene after the offence. The fact that they were arrested much later after the death of the deceased and conclusion of the investigations did not amount to proof of disappearance. A fact which was not even mentioned by the deceased's wife (PW1) but was apparently imagined or assumed by the police.

15. As to the prosecution's narrative that the accused were the last persons to have been seen with the deceased before he died, no evidence was led to establish the fact if it were accepted that the accused took the deceased from his home to an unknown place and returned him later while he was alive and unwilling to say if anything had happened to him. If anything, it was the deceased's wife (PW1) who was the last person with him before he died and if the narrative were to hold she would be right in the eye of the storm.

16. All in all, the evidence by the prosecution against the accused did not establish and prove beyond reasonable doubt that they participated in assaulting the deceased and causing him fatal injury. Consequently, they are hereby found **NOT GUILTY** as charged and are acquitted accordingly.

J.R. KARANJAH

JUDGE

07.12.2018

[Delivered and signed this 7th day of December, 2018].