



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL (MURDER) NO. 2 OF 2015

REPUBLIC .....PROSECUTOR

VERSUS

LAMECK JAMES OBARA

MARK MOTURI ONDIENGA .....ACCUSED

JUDGMENT

1. The first accused, **Lameck James Obara**, and the second accused, **Mark Moturi Ondienga**, are jointly charged with murder, contrary to S. 203 read with S. 204 of the Penal Code, in that on the 18<sup>th</sup> January 2015, at Ekona Market, Boige Sub-location in Gucha South, Kisii County, murdered John Gwaro Mocha.

2. It was the prosecution case that on the material date a brother of the deceased, **Stephen Orandi Mocha (PW 1)**, was called on phone by a teacher **Okengo Onyancha Alias Willis (PW 5)**, and informed that the deceased was very sick and needed to be taken to hospital.

3. Stephen (PW 1) thereafter proceeded to the home of the teacher and found the deceased groaning and sickly. He learnt from the teacher that some medicine men had been called by the teacher to administer "thief catching" drugs on the deceased after he was suspected of stealing from the teacher.

4. Stephen was led to the two medicinemen or wizards whom he identified as the first and second accused. They demanded a sum of Kshs. 20,000/= and a cow but he (Stephen) did not have the money. He went away and returned with Kshs. 2000/= which had been given to him by the teacher. Upon his return, he only found the second accused but was taken by a motor cycle taxi operator (boda boda) to a place where he met the first accused.

5. The first accused demanded Kshs. 5000/= which he (Stephen) did not have. He managed to raise Kshs. 3000/= which was accepted by the two accused for purposes of treating his sick brother. They commenced treatment by giving him a drug after which they left the scene. The patient did not recover immediately but instead vomited blood right inside the house of the medicinemen and died.

6. A crowd of people had already gathered at the scene and in the process the matter was reported to a nearby Administration Police Camp. The two accused were traced and arrested. They were later charged with the present offence which they both denied.

7. The first accused's defence was that he was at Ekona Market on the material date when he received a phone call from a strange caller at about 4.30 pm and informed that he had visitors. He was later directed by the caller to a certain place where he found a group of people who forced him into a vehicle even as police officers arrived there and arrested him together with the second accused who had taken him to the place on his motor cycle. They were taken to the police station and charged with the present offence.

8. In his defence, the second accused said that he was a farmer cum a boda-boda operator and on the material date at 4.30 p.m he was at his place of business when he was hired by a customer to proceed to Ekona. He dropped the customer who was the first accused at that place and collected a second customer enroute to another destination. However, he was stopped on the way by a group of people who ordered him into a vehicle where he found the first accused. They were both arrested and taken to the police station where they were charged with the present offence.

9. It was the first accused's contention that he did not know the deceased and never gave him any medicine.

The second accused contended that he had nothing to do with the offence.

In the light of the defence raised by each of the accused, the burden of establishing their guilt lay solely with the prosecution on a standard of proof which is beyond any reasonable doubt.

10. From the evidence, it is apparent that the deceased died in unusual circumstances prompted by an allegation of theft made against him by the teacher "Willis" (PW 5). Although "Willis" (PW 5) implied in his testimony that he did not make such an allegation, he was disproved by the deceased's brother (PW 1) to whom he made the allegation and also by the deceased's other brother **Evans Nyandoro (PW 3)**.

11. He (PW 5) denied that he was not at his home when the deceased was found there in a dozed and confused condition while inside a school bus. However, the denial was discredited by the testimonies of the deceased's brother (PW 1 and PW 3) and Moses Onyancha (PW 2). All these witnesses indicated that the teacher (PW 5) was at the scene when the deceased was found there dozed and sickly. In fact, Stephen (PW 1) and Evans (PW 3) indicated that some drug was administered to the deceased by some medicinemen while he was at the teacher's home.

12. The teacher was said to have called some medicinemen into his home so that they could administer "drugs" to the deceased for him to confess that he was the thief or be proved to be the thief or be proved to be the thief by eating grass.

The initial administration of the drug to the deceased by the medicinemen was in the absence of the deceased's brothers (PW 1, 2 and 3). They did not find the medicinemen at the home of the teacher (PW 5) and did not therefore know them.

13. The only person who knew the medicinemen and who was responsible for bringing them to the material scene was the teacher (PW 5) who nonetheless made a futile attempt to deny the fact. He was, in the eyes of this court, a very unreliable witness whose mission was nothing short of telling lies regarding the circumstances which led to the death of the deceased.

14. He (PW 5) was the person who identified the two accused as the medicinemen who administered some drug to the deceased while he was at his (PW 5's) home and that is why he pointed them out to the deceased's brother (PW 1) and they offered to "treat" the deceased further after some money was paid to them.

15. It was during the further "treatment" of the deceased in a house at Ekona Market that his condition became worst and he died. This further treatment was witnessed by all the brothers of the deceased (PW 1, PW 2 and PW 3) and they all said that it was done by the two accused in the form of administering more drugs to the deceased.

16. The investigations officer, **Cpl Francis Juma (PW 6)**, indicated that the two accused normally practiced herbal medicine and were about to be lynched by members of the public after the death of the deceased in their own hands. He (PW 6) confirmed that the teacher (PW 5) was the person who had availed the two accused for purposes of "treating" the deceased.

17. The evidence has shown without doubt that the responsibility for the death of the deceased ought to have been extended to the teacher (PW 5) who was ironically treated as a prosecution witness but ended up adding no value to the prosecution case. His testimony was an attempt to divert criminal responsibility from himself to others.

18. The post mortem report (P.Ex 2) revealed that the cause of death was cardio-pulmonary arrest due to possible intoxication (poisoning).

The evidence by the deceased's brothers (PW 1, 2 and 3) indicated that it was after administration of more drugs to the deceased by the two accused in the course of "treating" him that his condition deteriorated and he died. It was also indicated by the same witnesses that the initial "treatment" had been done by the two accused at the home of the teacher (PW 5).

19. The teachers' employer, **Jeremiah Justus Onchieki (PW 4)**, was informed by the teacher that the deceased had taken traditional herbs which harmed him. He (PW 4) had also employed the deceased as a driver and it would appear that the information that the teacher provided the medicinemen who administered the herbal medicine to the deceased was concealed from him.

20. Although the two accused denied any responsibility for the death of the deceased, the evidence against them was strong and reasonably credible. It showed that they administered drugs to the deceased while subjecting him to some traditional "treatment" without the knowledge that the drugs were toxic. They were therefore responsible for the death of the deceased but without any intention to kill him.

21. The "treatment" offered by them to the deceased was a "congame" which proved too dangerous with the death of the deceased. Their respective defence implying that they had nothing to do with the death of the deceased was discredited. However, the charge proved against them by the prosecution was not that of murder but manslaughter contrary to S.202 (1) of the Penal Code.

22. Accordingly, both accused are hereby found guilty of manslaughter and convicted.

**[Delivered and signed this 14<sup>th</sup> day of June 2017]**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

Mohe CC

Mr. Imbali State Counsel

Mr. Okenye for accused

Accused 1 and 2 present

**J.R. Karanjah, J**

**State Counsel:** Accused may be treated as a first offender.

**Mitigation by Mr. Okenye:** Both accused are first offenders. They ask for leniency. Accused 1 is aged 36 married with children. Accused 2 is 48 years old also married with children. The incident was unfortunate. They request for a non-custodial sentence.

J.R. Karanjah, J

**COURT:** Accused are first offenders. Mitigation noted. Matter be mentioned on 31/7/17 for a probation officer's report. Bond extended.

J.R. Karanjah, J

**31/7/2017**

Before J.R Karanjah - Judge

Mohe CC

State Counsel – Mr. Otieno

Mr. Kinyosi – Probation Officer

Mr. Okenye for both accused

Accused 1 - Absent

Accused 2 - Present

**J.R. Karanjah, J**

**Mr. Kinyosi:** The Probation Officer's Report is ready.

**Mr. Okenye:** The first accused is absent on account of illness as per this note from hospital (shown to court). May the report be presented in his presence on another date.

J.R. Karanjah, J

**Probation Officer:** No objection.

J.R. Karanjah, J

**State Counsel:** No objection.

J.R. Karanjah, J

**COURT:** Matter be mentioned on 2/10/17 for Probation Officer's Report. Bond extended.

J.R. Karanjah, J

31/7/17

**2/10/2017**

Before J.R Karanjah - Judge

CC Njoroge

State Counsel – Mr. Otieno

Mr. Kinyosi – Probation Officer

Mr. Okenye for both accused - Absent

Accused 1 - Absent

Accused 2 – Present in person

**J.R. Karanjah , J**

**State Counsel:** We were lastly told that the first accused was in hospital. Mr. Okenye gave us the information. We have not received further information.

**Mr. Kinyosi:** The reports are ready.

J.R. Karanjah, J

**COURT:** It would appear that we are not getting credible information about the whereabouts of the first accused who was released on bond. The matter is now taking an unpleasant path at the behest of the first accused. To avoid further complication and have a definite order made by the court, a warrant of arrest shall issue respecting the first accused and his surety be summoned to appear in court on 4/10/17 for necessary explanation. And to be on the safe side, the second accused shall now remain in custody until further orders. He shall be produced on the mention date.

J.R. Karanjah , J

2/10/17

**4/10/2017**

Before J.R Karanjah - Judge

CC Njoroge

State Counsel – Ms. Mbelete

Mr. Kirui – Probation Officer

Mr. Okenye for both accused - Absent

Accused 1 - Absent

Accused 2 – Present in person

**J.R. Karanjah , J**

**State Counsel:** Accused one not arrested. Surety was summoned but not present.

J.R. Karanjah , J

**COURT:** Further mention on 4/12/17. Warrant of Arrest against A1 remains in force. Warrant of Arrest to issue against surety for Accused 1. Bond Extended (A 2).

J.R. Karanjah , J

4/10/17