



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL CASE NO.36 OF 2014**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ERICK OCHIENG OLOO alias OMBETO ..... 1<sup>ST</sup> ACCUSED**

**ERICK OWUOR OKECH alias MOI ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused, **ERICK OCHIENG OLOO** alias **OMBETO** and **ERICK OWUOR OKECH** alias **MOI** are charged with the murder of **JOSEPH NDEDA OCHORO** (“the deceased”). The particulars of the charge are that on 11<sup>th</sup> January 2014 at Komenya Sub-location, East Kagan Location, Rangwe Division within Homa Bay County they jointly murdered the deceased.

2. The prosecution case, supported by 10 witnesses, was that on the evening of 11<sup>th</sup> January 2014, the accused found the deceased next to their car parked outside a bar. They accused him of damaging the car and proceeded to assault him causing him to suffer a head injury. The deceased left for home but his condition deteriorated. He died in hospital on 21<sup>st</sup> January 2014.

3. On the evening of 11<sup>th</sup> January 2014 at about 6.30pm, the deceased was at Manyatta Centre in Rangwe where Peter Omondi Otieno (PW 3), a boda boda cyclist had taken his motorbike for repairs. While the *fundi* was working on the motorbike, PW 3 recalled that the deceased, whom he knew, came shouting. He observed that the deceased was drunk. After his motorbike was repaired PW 3 left.

4. Stephen Owino Onyango alias Oduor (PW 4) was at the material time running a bar at Manyatta. On 11<sup>th</sup> January 2014 at about 8.00pm, both accused came into the bar. He knew both of them as Toyota Probox drivers. He recalled that PW 3 had come to the bar earlier than the accused but he left first. After taking their drinks, the two accused left. After the accused left, he heard some noise outside the bar. He went out and saw a Toyota Probox in a ditch and the deceased, whom he knew, seated next to the car in the middle of the road. The deceased shirt had blood. The accused were standing next to the car. He further testified he knew that the car was normally driven by the 1<sup>st</sup> accused.

5. PW 4 asked the accused what had happened, the 2<sup>nd</sup> accused responded by asking why the deceased was hitting the car with a stone. The accused further told him that they wanted to take the deceased to the police station. PW 4 stopped them and called the deceased’s sister in law to inform her that the deceased was at the Centre. The deceased’s brother and sister in law arrived at the scene after a few minutes. The

accused explained to them that the deceased had hit their car and had damaged the brake light.

6. The deceased's brother, John Osano Ochoro (PW 5), confirmed that after receiving a call from PW 4 informing him that the deceased had been beaten, he proceeded to Manyatta with his wife, Grace Akinyi Osano (PW 6) to take the deceased to hospital. At the Centre, they found both accused whom they knew. The deceased was seated beside the road. He had injuries on the head and his clothes were blood stained. He also saw the Toyota Probox car nearby. The 2<sup>nd</sup> accused told them that they were in the bar and that the deceased quarreled with them and as they were leaving, the deceased took a stone and hit the car. As PW 5 and PW 6 were talking to the accused, the deceased stood up and started walking towards his home. PW 5 and PW 6 went to their home as the deceased walked to his nearby home.

7. The deceased's mother, Syprosa Okello Ochoro (PW 7), testified that the deceased was her eldest son. She recalled that when she heard he had been injured, she went to see him in house. He was lying in his bed alone and when she asked him what happened, he told her that both accused beat him. She knew both accused as they lived in the village. She observed that the deceased's head was swollen and he had some bruises on the neck. She told him to go to hospital and confirmed that he was taken to Matata Hospital in Oyugis and thereafter to Kisii Level 5 Hospital for further treatment where he died.

8. Chief Inspector Peter Mbuvi (PW 8) testified that he took over the case from the investigating officer PC Hassan, who had been transferred. He confirmed that on 22<sup>nd</sup> January 2014 at about 11.00pm, PW7 reported the death of her son at Rangwe Police Station. She recorded that the deceased had informed her that he had been assaulted by two people known to him. She stated that the deceased did not seek immediate medical attention but later went to hospital where he died on 21<sup>st</sup> January 2014. PW 8 established that the deceased died as a result of being assaulted by the accused whom he decided to charge the accused with murder.

9. When put on their defence, the accused elected to give sworn testimony and called one witness. The 1<sup>st</sup> accused (DW 1) denied that he assaulted the deceased. He testified that on the evening of 11<sup>th</sup> January 2014, he was going home from Homa Bay with the 2<sup>nd</sup> accused (DW 2) when they decided to stop at Manyatta as the car DW 2 was driving had developed a mechanical problem. They left the car with the mechanic and went into the bar. He stated that he saw the accused shouting when they were about to leave the bar at about 7.30pm. When they went outside, he saw the deceased seated beside the road shouting in a drunken state. He went in the car with another passenger and DW 2 drove off.

10. DW 2 testified that he was with DW 1 on the material day, when they stopped at Manyatta as the car developed a mechanical problem. As the car was being attended to, they both went into the nearby bar and while they were in the bar, the deceased walked in very drunk. DW 2 testified that he did not talk to the deceased or beat him as alleged. As he was leaving, he saw the deceased seated beside the road shouting. He saw the deceased's brother come and ask the deceased why he was shouting and why he had not gone home. He did not talk to the deceased or his brother. He left with DW 1.

11. Joseph Oloo Opiyo (DW 3), a teacher, testified that he was from the same area from as the accused. He also knew the deceased as they were age mates. He further testified that the deceased used to drink and abuse people at the Centre. On the material day at the Centre in the evening. He saw DW 1 and DW 2 coming from the garage where a car had been parked. He recalled that he saw the deceased seated on the ground alone shouting but he did not see the accused beat him. He saw PW 5 tell the deceased to go home. Since he was going in the same direction with DW 1 and DW 2, he got into the car and they left.

12. After the close of the defence case Mr Nyauke, learned counsel for the accused, submitted that the prosecution had failed to prove its case as none of the prosecution witnesses saw the accused fighting with or beating the deceased. He contended that the injuries that the deceased suffered and from which he died after a few days could not be connected to the actions of the accused. Counsel maintained that the court should take into account the fact that the deceased was a drunkard and that he could have been assaulted by anyone other than the accused before or after the incident.

13. Ms Andabwa, learned counsel for the prosecution, submitted that the deceased died as a result of a head injury inflicted by a blunt object and that the accused were within the vicinity of the incident leading to the irresistible inference that they were the ones who beat the deceased. She further submitted that the dying declaration made by the deceased to PW 7 implicated the accused.

14. In order to establish the offence of murder under the provisions of **section 203** and **204** of the **Penal Code**, the prosecution must prove beyond reasonable doubt the following ingredients;

- a. Proof of the fact and the cause of death of the deceased.
- b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.
- c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the **Penal Code**.

15. Dr Dennis Oeri (PW 9) conducted the postmortem on the deceased's body on 23<sup>rd</sup> January 2014 after Nelson Otieno Ochoro (PW 1) and Maxwell Ouma Rao (PW 2) identified it. He did not find any external injuries on the body. The significant finding was a massive left sided subdural haematoma. He concluded that the injury was a result of an assault with a blunt object. This injury was consistent with the injury PW 5 and PW 6 saw when they went to pick the deceased at the Centre and also what PW 7 saw when she visited the deceased at his home. I therefore find and hold that the deceased died from a head injury inflicted by a blunt object.

16. The central issue for determination is whether the accused assaulted the deceased. On this issue there is no direct testimony but there are several pieces of evidence pointing to the accused. First, the principal witness, PW 4, recalled that after the accused left the bar, he heard some noise and when he went outside he found the accused standing next to the car and the deceased seated in the middle of the road with his clothes soaked in blood. PW 4 asked the accused what happened and the accused told him that the deceased had hit their car with a stone. He also saw stones and bricks in the surrounding area. Second, when PW 5 and PW 6 arrived at the scene, DW 2 told PW 6 that they had quarreled with the deceased and that the deceased hit the car with a stone. The testimony of PW 5 corroborated that of PW 4 regarding the statements made by the accused regarding what had transpired. PW 4, PW 5 and PW 6 knew both accused and there was no reason for them to lie or mislead the court about what they seen and heard. In light of the testimony of PW 4 and PW 5, I reject the defence of DW 1 and DW 2 that they did not quarrel with the deceased or that the deceased did not damage their car.

17. Additionally there is the testimony of PW 7 who stated that the deceased told her that the accused beat him. The statement that the deceased made to PW 7 is a dying declaration and is admissible under the provisions of **section 33(a)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. It must however be received with the necessary caution and circumspection to support a conviction (see **Choge v Republic [1985] KLR 1** and **Pius Jasunga s/o Akumu v R [1954] 21 EACA 331**). In this case, the deceased made this statement to his mother. The accused were persons that were very well known to him and PW 7 and there was not ulterior motive for him to implicate the accused. Likewise, I find no discernable reason for PW 7 to implicate the accused.

18. The totality of the prosecution evidence is that on 11<sup>th</sup> January 2014 in the evening, the accused arrived at PW 5's bar and after taking refreshments; they went out and found the deceased in a drunken state shouting and throwing stones at DW 1's car. Both accused had an altercation with the deceased and in the course of the altercation, they hit the deceased on the head causing him to suffer injury. I therefore find and hold that the accused caused the injury that led to the deceased's death.

19. The final issue is whether the injury resulting in death was committed with malice aforethought. **Section 206** of the **Penal Code** states as follows;

*Malice aforethought shall be deemed to be established by evidence proving any one or more of the*

*following circumstances—*

*(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit a felony;*

*(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

20. As I have found, the incident that led to the deceased being injured was preceded by some altercation as a result of the deceased damaging the DW 1's car. PW 1, PW 4, PW 5 and PW 6 all confirm that the deceased was drunk on that evening hence the likelihood that he threw stones at the accused car and an altercation took place. It can hardly be said that the accused intended to cause death or grievous harm in those circumstances or that the accused could not have foreseen that their act would result in death or grievous harm. Malice aforethought is also negated by the testimony of PW 4 who stated that the accused wanted to take the deceased to the police station for damaging their car before PW 5 came to take him home. I therefore find and hold that the prosecution failed to prove malice aforethought.

21. Having considered all the evidence, I find that the accused jointly committed the unlawful act of killing the deceased but that the prosecution failed to prove malice aforethought. I therefore find the accused **ERICK OCHIENG OLOO alias OMBETO** and **ERICK OWUOR OKECH alias MOI** guilty of manslaughter and convict each of them accordingly.

**DATED and DELIVERED at HOMA BAY this 10<sup>th</sup> day of February 2016**

**D.S. MAJANJA**

**JUDGE**

Mr Nyauke instructed by Nyauke and Company Advocates for the accused.

Ms Andabwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.