



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MURDER NO.16 OF 2010**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**ERICK OCHIENG ABANG..... ACCUSED**

**J U D G M E N T**

1. The accused herein was charged with the Offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 6th day of May 2014 at Agoro West Sub-Location in Nyakach District within Nyanza Province unlawfully murdered Johannes Odawo Okwanyo. The prosecution in establishing its case called a total of 8 witnesses whose evidence can be summarised as hereunder:

2. **PW1 LAZARUS OMOLO DONDI** a teacher was the deceased's employer. He said that on 4th May 2010 he arrived home and he was told by his wife that the deceased had been assaulted by the accused. He went to see the deceased who informed him that indeed the accused assaulted him with a walking stick. The cause of the incident was as a result of one of the cows he was herding straying into the accused's grandmother's land. He did administer first aid to the deceased that night. The following day however while he was being taken to the hospital the deceased died.

3. **PW2 PETER NYAMBOK AKETHO** told the court that he was plucking sisal for purposes of making ropes on 4th May 2010 at around 14 hours when he saw the accused hitting the deceased with a whip. He was about 50 meters from the scene. He then ran to separate the two and told the accused to forgive him. He further said that the accused got the whip from the deceased and used it to whip him. The accused was the son to the witness's sister.

4. **PW3 JUMA NYAURU** said that on the material day while herding his animals he met the deceased who was limping and holding his stomach. He told him that he had been beaten by the accused for the reason that one of his cows had strayed into their land. He told him that he had problems with his chest and stomach. He assisted him in herding his animals while the deceased slept. He then drove the animals home. The following day he heard that he died.

5. **PW5 ROSE ONDIEK** was the accused's grandmother. She was told about the incident but was not at the scene.

6. **PW6 JOSEPH OBWON OPIYO** was the chairperson of community policing at Katito zone. He received a phone call from PW1 on 16.5.2010 concerning the deceased's death and reported the incident at the police station. He later accompanied the police to the scene.

7. **PW7 CPL. LINDA JUMA** who was from Nandi Hills police station testified that they received

information from an informer concerning the whereabouts of the accused. He was lured to the station where he was arrested. She then called officers from Katito Police station who came and picked him.

**8. PW8 FRANCIS GITAU** corroborated the evidence of PW7.

**9. PW9 DR. EVALYNE AKELLO** produced the postmortem report on behalf of Clarice Onyango. She testified that the cause of death was severe head injury due to assault.

**10. PW10 CPL. CHARLES MUSUNGU** was the investigating officer. He said that after receiving a call from PW6 he went to the scene where he found the body on a wheelbarrow. The accused, he was told had disappeared after the incident and gone to Nandi Hills where he was later arrested and brought to Katito Police Station and charges were later preferred against him.

**11.** When put on his defence the accused gave unsworn testimony denying the charge. He said that he was born in Kano but was working with Nandi Tea Company in Nandi Hills. He said that on 6.5.2010 the police called him at Nandi Hills. He was with one Erick Thompson. He was told to accompany the police to Nyanza. He was brought to Kabongo Police Station and incarcerated for 2 weeks. He was later charged with this offence which he did not understand.

### **ANALYSIS AND DETERMINATION**

**12.** I have carefully perused the entire proceedings together with the able submissions from both the state as well as the defence counsels. There is no doubt that the deceased died as a result of the injuries sustained. The only eye witness to the incident was PW2 who was busy plucking his sisal when he saw the accused assault the deceased. Although there was intense cross-examination by the defence counsel, he stood his ground. Infact he said that he went to separate them and told the accused that he ought to forgive the deceased. The incident according to him took about 5 minutes.

**13.** The evidence of assault was corroborated by PW3 who was within the vicinity herding his cows. He equally spoke with the deceased who according to him was limping and holding his chest and stomach. He even assisted him to herd the cows.

**14.** PW1 his employer assisted him in providing first aid that evening. The following day prior to his death he had sufficient time to speak with him.

**15.** Although the accused in his evidence seemed to suggest that he was arrested wrongly all the evidence including that of his grandmother suggest otherwise. Although it is only PW2 who saw the accused assault the deceased I find his evidence well corroborated by PW1 and PW3 who were after the facts. PW3's evidence in particular was consistent with what had just happened. PW1 later administered first aid to the deceased. Both had sufficient time to talk to the deceased.

**16.** In **KIHARA VRS REPUBLIC [1986] KLR 473**, the court held that:

**“Although there is no rule that dying declaration must be corroborated the court needs to caution itself that in order to obtain a conviction on a dying declaration it must be satisfactorily corroborated (Republic vrs Said Abdalla) 12 EACA 678. Particular caution must be exercised as to when and where the attack took place and also about the identification of the assailant and weapon used. It may be that the dying person may not remember all that and may not be telling the truth.”**

**17.** Taking the above authority I find that although the deceased told PW1 and PW3 of what had just happened that evidence was corroborated by PW2 who clearly saw what had transpired. The incident took place during the day and he was just 50 meters from the scene. PW2 infact went to separate the two and told the accused that he ought to forgive the deceased. There was nothing to suggest that the witness did not know the accused person.

**18.** In the premises based on the evidence adduced the prosecution has proved its case beyond any

Shadow of doubt. There is no doubt that the accused assaulted the deceased when one of the cows he was herding strayed into their land. PW2 clearly saw the incident and attempted to separate the two. PW1 and PW3's evidence was very weighty. I therefore convict the accused person under the provisions of Section 215 of the Criminal Procedure Code.

**Dated, signed and delivered this 8th day of March 2016.**

**H. K. CHEMITEI**

**J U D G E**

**In the presence:**

..... **for the State**

.....**for accused**