

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 72 OF 2013

BETWEEN

REPUBLIC **PROSECUTOR**

AND

PETER ONYANGO **1ST ACCUSED**

VITALIS ODERO **2ND ACCUSED**

RULING

1. The prosecution case was that the deceased, **GEOFFREY OMONDI AGALLA**, aged 18 years, was residing with his uncle. At about 4.00am on 1st November 2012, the deceased's aunt, Emma Wamboi, heard some movement within the compound and when she looked outside she saw the two accused. The accused woke up the deceased and left with him. He was reported dead later that morning. After investigations, this court was informed on 7th November 2013 that **PETER ONYANGO** and **VITALIS ADERO** ("the accused"), jointly with others not before the court, murdered the deceased on 1st November 2013 at Nyambara Village in Rangwe District within Homa Bay County, contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. The accused pleaded not guilty and the prosecution marshalled 4 witnesses before it closed its case. At this stage I am required to decide whether there is a *prima facie* case to put the accused on their defence. The test for a *prima facie* case was propounded in *Ramanlal Trambaklal Bhatt v R [1957]EA 332* and it is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
3. The deceased's father, Agalla Matoro (PW 2), testified that on that morning he received a call from his sister-in-law informing him that this son had been killed. He immediately went to Nyambara village where he found the deceased lying on the road. He had multiple head injuries but was still breathing. PW 2 called for assistance and they took the deceased to Kisii Level 5 Hospital but he was declared dead on arrival.
4. On 12th November 2013, Dr Peter Asava conducted the post-mortem on the deceased's body after it was identified by Antony Ongete (PW 1). The doctor observed multiple facial lacerations, two 6 inch long occipital lacerations, a ligature abrasion on the left wrist, a bruise on the left elbow and a laceration on the left elbow and thumb on the deceased's body. The deceased also had a linear fracture on the occipital part of the head resulting in massive bleeding in the head. The doctor certified that the deceased died from a severe closed head injury due to blunt force injury.
5. The investigating officer, Corporal Joseph Nyamai (PW 4), testified that he was directed to investigate the deceased's death on 4th November 2013 when the deceased relatives reported an

incident of “*mob justice*” at Nyambara Village to the District Criminal Investigation Officer at Homa Bay. They stated that the incident had been reported at Rangwe Police Station. He recorded a statement from Emma Wamboi who stated that she had seen the two accused within her compound at 4.00 am in the morning of 1st November 2013 when they came to take the deceased away. He also took a statement from Kevin Obote who was sleeping in the same house as the deceased. He recorded that he heard the accused call the deceased and that the deceased left with them. PW 4 stated that he had made every effort to locate Emma Wamboi and Kevin Obote but he has not been successful as they had disappeared after the incident.

6. The Commanding Officer, Rangwe Police Station, Chief Inspector Peter Mbuvi (PW 3) recalled that he was called by the Chief of Kotieno Location at about 7.00am on 1st November 2013 and informed that there was an incident of “*mob justice*” was taking place at Nyambara Village. He rushed to the scene and found that the victim had been rushed to hospital. He did not find anyone at the scene. He was later requested to summon the accused by the DCIO, Homa Bay. With the assistance of the Chief, Kotieno Location, the accused were brought to Rangwe Police Station. PW 4 re-arrested the accused and caused them to be charged.
7. From the evidence I have outlined, it is clear that the deceased died as a result of assault by several people on the morning of 1st November 2013. There is no evidence suggesting that the accused were at the scene where the deceased was assaulted and died as a result. Furthermore, in the absence of the testimony of Emma Wamboi and Kevin Obote, what they informed PW 4 remains hearsay. The totality of the prosecution evidence is that there is no evidence connecting the accused to the murder of the deceased.
8. In these circumstances, I am required to enter a verdict of not guilty against **PETER ONYANGO** and **VITALS ADERO** under **section 306(1)** of the ***Criminal Procedure Code (Chapter 75 of Laws of Kenya)*** which I hereby do. The accused are acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 13th day of April 2016

D.S. MAJANJA

JUDGE

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

Mr Shabola, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.