



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL CASE NO 28 OF 2015

REPUBLIC

VERSUS

JARED WILLIAM OTAYO.....1ST ACCUSED

STEPHEN JUME OMONDI.....2ND ACCUSED

RULING

1. JARED WILLIAM OTAYO (the 1st accused) and **STEPHEN JUMA OMONDI** (the 2nd accused) are jointly charged for the offence of murder contrary to section 203 as read with section 204 OF THE Penal Code, that on 28th of October 2015 at **REMBA ISLAND in MBITA SUB-COUNTY** within **HOMA BAY COUNTY** they jointly murdered **DENNIS OCHIENG ALANGO**.

2. The prosecution case as summarized by **MS ANDABWA** (the prosecuting counsel) is that on the aforementioned date at around 9.00pm, **STEPHEN OMONDI JUMA** (2nd accused) went for drinks at the bar belonging to one **WICKI**. After entering the bar, the owner demanded that he pays a debt of Ksh 600/-. The two engaged in an argument and a fight ensued. Wicki closed the pub and called for back-up from the bouncer **DENNIS OCHIENG ALANGO**. As they continued fighting, one of the waiters called the first accused to assist in separating the parties. During the fight the deceased was hit in the head using a panga which Wicki had brought to the scene. He was rushed to hospital by members of the public, but he died. The prosecution intended to call 7 witnesses to prove its case.

3. **JOACHIM OKONG’O WERE** (PW1), a boat repairer in Remba Island was at **JACKS PUB** where he had gone to meet a friend. And as he was leaving the pub at 9.00pm, he heard noises from **WICKI’S PUB**, so he went there to find out what was going on. He found the 2nd accused and Wicki holding each other while arguing –each was saying to the other “usinichezee” (meaning don’t fool around with me) He intervened and told the 2nd accused to get out and the latter obliged.

4. **WICKI** went to the counter and came back with a panga which he used to threaten PW1 and even ordered him out, so PW1 left. As he was leaving, he found 2nd accused also leaving, going towards the police post. PW1 only got to learn on 29th October 2015 that someone had died at Wicki’s bar.

5. **CORPORAL CHARLES LEPUCHIRIT** (PW2) was at CID offices in **MBITA** when Administration Police at REMBA Island called him to say that **DENNIS OCHIENG** had been injured following a fight in a pub, and he had been rushed to a nearby dispensary within **REMBA** Island, and then moved to SORI, but he had died before reaching the transfer destination. The APs named the accused as the suspects and that they ran away from Remba Island to Sori.

6. Later on police at Sori called PW2 and informed him that they had rescued the two accused who had been beaten by members of the public after being identified by an unnamed person at Sori centre. PW2 proceeded to **MACALDER** police station in **NYATIKE** where he collected the injured two accused and escorted them to hospital for treatment.

7. During the investigations PW2 established that there had been a quarrel between the 2nd accused and the bar owner concerning a debt of Ksh 600/- which deteriorated into a fight. The 1st accused went to rescue the 2nd accused and that is how PW2 concluded that he was involved in the murder.

8. The prosecuting counsel had sought an adjournment to call more witnesses but this was not granted for reasons that there had been lack of diligence in getting witness to come to court taking into account that the two accused had made their first court appearance on 2nd November 2015-the details are contained in the ruling dated 6th September 2016.

9. The issue which arises for determination is whether the evidence presented to this court is sufficient to warrant the two accused being placed on their defence. PW1 was categorical that when he got into the bar after being attracted by the noises emanating from there, the only people he found were the 2nd accused, the bar owner and a lady whom he did not know. The only people who were then having a physical confrontation were the 2nd accused and the bar owner. He separated the fighting pair and 2nd accused left the pub after being told to do so by PW1. The person who had a panga and who made threats was the bar owner (WICKI).

10. The only other evidence presented is the report made to PW2 and the information he collected during investigations. However none of these other sources of information testified to confirm the claims PW2 stated and at best the larger part of his evidence can only be considered as hearsay.

11. There is also the curious twist in this matter arising from what the investigating officer stated that:

“Yes I learnt that one Wicki came out with a panga. Wicki disappeared, he had a panga, the person who died had a cut inflicted by a sharp object... Dennis was a bouncer at the bar....I did not establish that anyone else had a panga apart from Wicki”

12. This witness' statement in court leaves more questions than answers. Did Wicki follow the 2nd accused out of the bar after PW1 had left accompanied by his bouncer to get to teach him a lesson or did the 2nd accused go back to the bar and continue with the fight then Dennis came out to help and in the process got injured with the panga Wicki had? Is it Wicki who perhaps missed his aim on the 2nd accused and inadvertently cut his own man? Could that be the reason why Wicki disappeared? Did the 2nd accused snatch the panga from Wicki and use it to cut Dennis. Did the 1st accused join in the fight to help his co-accused or had he gone to separate the fighting pair much in the same way that PW1 did and is now a victim of circumstances because 2nd accused just happens to be his fellow country? There is no evidence as to who inflicted the fatal cut.

13. I am of the considered view that to place the two accused on their defence would be tantamount to asking them to fill the many gaps left out by the prosecution- which is not their role. Consequently, I hold and find that the evidence on record does not warrant placing the two accused on their defence and I return a finding of not guilty for each accused under section 306 (2) of the Criminal Procedure Code.

14. Each accused shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 13th day of **September, 2016** at Homa Bay

H.A. OMONDI

JUDGE