



**REPUBLIC OF KENYA**

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

**MURDER CASE NO. 33 OF 2013**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**MICHAEL OUMA ..... 1ST ACCUSED**

**PETERLIS KUNGU ..... 2ND ACCUSED**

**JUDGMENT**

The accused persons are charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars in the information are that on 19th July 2013 at Kotetin Village, Karando A Sub-location in Kisumu North District within Kisumu County they murdered Boaz Otieno Ndong'a.

They both pleaded not guilty to the charge.

Briefly the Prosecution's case is that on the material day at about 11p.m. the deceased and his friends Michael Juma Opiyo (PW1) and Enock Oranga (PW2) left a funeral at the home of one Nyakwaka to go home. Enock (PW2) was driving the motor cycle they were riding home while Juma and the deceased were passengers. Along the way they were accosted by two people who they recognized as the accused persons in this case. The 1st accused was empty handed but the 2nd accused was armed with a rungu (club). They immediately set upon the deceased saying that they had a score to settle with him. Juma (PW1) and Enock (PW2) fled when the 2nd accused said they also had an issue with them. Juma went to the home of the area Assistant Chief (PW5) and reported the matter. He also informed the village elder (PW4) who both proceeded to the scene and found the attackers were nowhere to be seen. Only the body of the deceased was at the scene.

Since the identities of the assailants had been disclosed to them and upon alerting the police the Assistant Chief (PW5) and village elder (PW4) went to their homes and apprehended them. The 1st accused was in his house but the 2nd accused was just getting into his house when they were arrested. They were taken to Riat

police station while the body of the deceased was taken to Jaramogi Oginga Odinga Hospital Mortuary.

The next day officers went back to the scene and collected a club which both Juma and Enock identified as the one the 2nd accused had used to beat the deceased. The same was exhibited and produced in evidence as were photographs of the body and a post mortem report whose conclusion is that the deceased died as a result of traumatic head injury.

The accused persons gave sworn testimonies and called a witness each.

The 1st accused testified that before this case he was a cleaner at the Molasses plant in Kisumu. He also owned a sand harvesting boat. He stated that he did not know the deceased and that at the time it is alleged he killed the deceased he was at a funeral. He recalled meeting Juma (PW1), Enock (PW2) and another man at a junction on his way to the funeral. He stated that the three stopped the motor cycle they were riding and were disputing with Enock (PW2) demanding to be paid by the third person. He stated that Enock (PW2) told him (1st accused) that he could not solve the dispute as he was not from their village. He told the Court that he proceeded to the funeral and remained there until 4a.m. when he left to go home with his girlfriend Damaris (DW1). He narrated how he found the Assistant Chief at his home when he got there and stated that the Assistant Chief told him he was required to go record a statement concerning what he had witnessed between Enock and the man he did not know. He told the Court that the incident had taken place between 8p.m. and 9p.m. and that although there was no light at all he recognized Juma (PW1) and Enock (PW2) from their voices as he knew them. He denied he fought with anybody and contended that he had no reason to kill the stranger.

The 2nd accused also recalled meeting Juma (PW1), Enock (PW2) and the deceased at the junction on his way to the funeral. He stated that it was dark and cloudy so he could not see them properly but he asked them what was happening. When they retorted it was none of his business he left and went to the funeral. He stated that he went back to his house at 3a.m. accompanied by his brother William Owino. He fell into deep slumber only to be awakened by the Assistant Chief and police officers. He was taken to Central Police Station. He discounted the evidence of Juma (PW1) and Enock (PW2) saying it was not true he was with his co-accused at the junction on that day. He emphatically denied that he killed the deceased. He confirmed that he knew Juma (PW1) and Enock (PW2) and stated that they grew up together.

Damaris Akoth Atieno (DW1) stated that she arrived at the funeral at 7.30p.m. and found the 1st accused (her boyfriend) waiting for her. After a while he got her some food and from then until 3a.m. when they left they were together. She testified that when they got to his house they found the Assistant Chief and two other people who took him away. It was only later that she learnt he had been arrested.

William Olweny Apunya (DW2) testified that he is the 2nd accused's younger brother and that on that day the 2nd accused arrived at the funeral at 9.30p.m. and helped to dig the grave until 3a.m. when they left together. They each entered their respective houses. The next morning he left for Busia to attend to a customer and it was whilst on his way back home that he was informed the 1st accused had been arrested. He was categorical that his brother did not leave the home of the person who had died anytime between the time he arrived and the time they went home together. He stated that whereas Enock (PW2) was known to him he did not know Michael Juma (PW1).

The Court heard submissions from the defence as well as the prosecution. Mr. Nyanga, the Advocate for the accused persons, summed up by stating that there were a lot of contradictions in the prosecution's case; that PW2 told the police that he reported the incident to one Lazarus Nyakwaka but whose son came to testify. He stated that whereas PW1 told the police they were two when they met the accused persons PW3 said they were three. He contended that the benefit of the doubt arising from the contradictions ought to be given to the accused. On the lighting he submitted that PW2 contradicted PW1 when he said there was no moonlight. He contended that by stating there was light PW2 was trying to clarify identification. He contended that the photographs produced in evidence do not corroborate the Doctor's testimony that blunt objects had been used and stated that even then the weapons produced in evidence was not found in the possession of the accused persons. Further that no mens rea was proved. He wondered how three men could have been attacked by two men. He contended that PW1 and PW2 may have killed the deceased and framed the accused persons; that there is evidence from the accused persons that the three were contending. He submitted that the accused persons passed the junction separately and arrived at the funeral at 9p.m. and remained there until 4a.m. If the attack occurred at 11p.m. then it is inconceivable they were arrested at 4a.m. He submitted that the accused persons were innocent.

On his part Mr. Muia, Prosecution Counsel, urged the Court to find that the information had been proved beyond reasonable doubt.

Section 203 of the Penal Code which creates the offence of murder states:-

***“Any person who of malice aforethought causes death of another by an unlawful act or omission is guilty of murder”.***

Malice aforethought is defined in Section 206 as follows:-

***“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.***

From the circumstances of this case it is safe to conclude that the deceased in this case was murdered. The photographs produced and the results of the autopsy conducted on his body on 5th August 2013 are proof that whoever assaulted him intended to cause him grievous harm if not to kill him. He had very serious injuries on the head. The Doctor who performed the post mortem describes those injuries as a laceration on the left parietal region and left temporal region, a swelling in the left occipital region and a large depression on the right frontal temporal region. The cause of death was traumatic head injury. Looking at the photographs one comes to the conclusion that with such injuries the person could not have survived. Juma (PW1) and Enock (PW2) testified that they were with the deceased when he met his death. They point to the accused persons as his attackers. The accused persons however deny that they killed the deceased and the issue for determination by this Court, having found that the deceased was murdered, is whether the accused persons were positively identified as the assailants.

Having evaluated the evidence from both sides I am satisfied that the culpability of the two accused persons was proved beyond reasonable doubt. Both Juma (PW1) and Enock (PW2) knew the accused persons prior to this incident. Indeed both accused persons admit they met these two witnesses and a third person at the junction and that they recognized them. They both stated that they were well known to the witnesses. Although they allege to have come across them at different times they both stated that they even spoke to them and inquired from them what was happening. Counsel for the accused submitted there was no light but it is my finding that if the accused persons recognized the two witnesses then the two witnesses must also have identified them. The accused persons having conceded that they and the witnesses recognized each other the issue of there having been light or not light is rendered immaterial. The two accused testified that they were on their way home from the funeral when the incident occurred. They approximated the time of the occurrence as 11p.m. The accused persons however stated they could not have been at the scene as at that time they were at the funeral. A closer scrutiny of their evidence will however show that that may not be so. For instance whereas the 1st accused stated that he went to the funeral between 8p.m. and 9p.m. his girlfriend stated that she found him there at 7.30p.m. It is my finding that nobody not even the defence witnesses could give the actual time of their arrival or departure from the funeral as none of them told the Court how they could tell that time. Be that as it may I am satisfied there is proof beyond reasonable doubt that the two accused persons were the ones who beat up the deceased. The two eye witnesses told the Court that the 2nd accused had a club with which he hit the

deceased and which he also used to frighten them away. I believed these two witnesses. They were credible. They reported the matter to their village elder and Assistant Chief immediately and although PW3 did not go to the scene he too confirmed that he had heard the commotion near their gate. These (PW1 and PW2) two witnesses disclosed the identities of the attackers to the village elder and clan the same night as they were very certain of those identities. The accused persons admit they were known to them even before that day. From the evidence there is nothing to show that PW1 and PW2 had any reason to lie against the accused persons. The findings of the post mortem corroborate an intention to kill. As stated earlier looking at the photographs no one could have survived those kind of injuries. I find that the evidence against the accused persons is water tight. Accordingly I find them both guilty or murder Contrary to Section 203 as read with section 204 of the Penal Code and convict them.

**Signed, dated and delivered at Kisumu this 3<sup>rd</sup> day of November 2016**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Mr. Muia for the state

Mr. Nyanga for the accused persons

C/A: Serah Sidera