



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL CASE NO. 12 OF 2015

REPUBLIC..... PROSECUTOR

VERSUS

OSCAR OCHIENG OWENGA ACCUSED

RULING

1. The Accused herein **OSCAR OCHIENG OWENGA** is charged with an offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63 Law of Kenya)**. The particulars of the offence are that on the 8th day of February 2015, at Dienya West Sub-Location, Gem District within Siaya County, the accused murdered one **JULIUS OWENGA ABONYO**.

2. At the close of the case for the prosecution, Mr. Wakla, Learned defence Counsel submitted that the accused has no case to answer. M/s. Odumba Learned State Counsel submitted that the prosecution has established *prima facie* case to warrant the accused being put on his defence.

3. The prosecution called five witnesses and from their testimonies the prosecution's case is as follows:- On 8th February 2015, at 7.30 p.m. Michael Abaki the Assitant Chief of Dienya East Sub-Location, Gem Sub-County, Siaya County and who testified as PW1, was on his way home from Nyagondo Market when he received a telephone call from one of the residents of his area, that one Ochieng Owenga (accused) and "Dakitari" (PW5) and one "Major" were fighting at the Market but suddenly Ochiengo Owenga (accused) beat one by the name Onyango Abonyo who was taken to the hospital at Siaya District Hospital. That at 3.30 a.m. PW1 received another telephone call from one Otieno Obunga, that the person beaten by Ochieng Owenga (Accused) one Onyango Abonyo had already passed on. PW1, proceeded then to District Officer's Office at Wagai, collected Police Officers and proceeded to the home of Ochieng Owenga (accused) found him and arrested him. PW1 and the Police Officers took Ochieng Owenga to Akala Police Station. Ochieng Owenga was known to PW1, as one of his residents and PW1 identified him as the person in the dock who he had arrested then.

4. PW1, in cross-examination testified that he did not see the body of the deceased at any time since he passed on and that he had received information of a fight at the market and was given three names of the people who were fighting, who included Dakitari (PW5) whose other name he did not know, but stated that he did not know the name of the resident, who gave him that information and as such he did not give the police the name of the informer. PW1, stated as he was not at the scene of the incident he cannot tell who was beating who and with what.

5. PW2, Pamela Awino Abonyo, mother to the deceased testified that on 8.2.2015 she was on her way to the market at Apuoyo between 5-6 p.m. when along the road, a Boda Boda rider passed by carrying her son Julius Onyango Abonyo, rushing him to the hospital. That she testified before she had reached the

market she had heard some noises of people shouting “*Woi Woi Woi*” That as the motorcyclist was passing her was pointing to her ahead and thus when she saw the passenger was her son Julius Onyango Abonyo. She observed that he was bleeding from the ear and his clothes were soiled with blood. The Boda Boda rider did not stay for long and advised PW2 to follow him to the hospital. That on the way to the hospital PW2 met the Boda Boda rider but did not speak to him but she proceeded to Dienya Health Centre where she found her son who she asked what had happened and he told her Ochieng Owenga is the one who had beaten him. That he was attended to and referred to Siaya County Referral Hospital, from where he died while being attended, PW2 asked the Doctor to let her take the body home and she was allowed as she did not have money for the Mortuary charges. That at 8.00 p.m. the Police Officers from Akala Police Station came and collected the body and took it to Siaya Referral Hospital Mortuary. PW2 testified that she does not know the name of the Boda Boda rider who took her son to the hospital but she knew the accused Ochieng Owenga as a neighbor.

6. On cross-examination PW2, testified she met the Boda Boda rider and her son close to the market about 15 metres from the market. She testified that they call the Boda Boda rider by the name “Odhis” and that she knew him very well as a Boda Boda rider. She stated the rider did not stop nor make a sign to her as he did not see her. PW2 did not stop the Boda Boda rider who she met on his way back to find out what had happened. PW2 testified she talked to her son who told her it was Ochieng Owenga who assaulted him but he did not give her more details as to how it happened. On being referred to her statement dated 16.2.2015 which she stated was her statement and which she confirmed was read back to her and bears her signature, she admitted that she told the police that she followed the Boda Boda rider to Dienya Health Centre and that she asked her son who assaulted him but he did not respond. She admitted what she told the police and this Court do not agree and that what is in her statement to the police is what she told the police. She admitted she did not lie to the police. PW2 on being pressed to tell the Court the truth she stated that at Dienya Health Centre her son did not talk to her and that when she came with the version that her son told her that he was assaulted by Ochieng Owenga she admitted she was telling the Court a lie. PW2 further stated she had no reason to fix the accused in this matter.

7. PW2, further on cross-examination admitted in her statement to Police she told Police she asked the Boda Boda rider who had assaulted her son and he told her it was the accused Ochieng Owenga and she asked him because her son had not talked to her. PW2, admitted further on cross-examination at the first time she saw the Boda Boda rider and her son he did not talk to her nor did he tell her at the said time, she met him from the hospital anything. PW2 admitted that in her evidence before the Court she was not truthful because she is pained by the loss of her son and urged the Court to forgive the person who caused the death of her son.

8. In re-examination PW2, confirmed her son never spoke to her and gave her the name of his assailant but insisted that she met the Boda Boda “Odhis” who told her, her son was assaulted by Ochieng Owenga.

9. PW3, Henry Otieno Ombuga, testified that on 12.2.2015 he identified the body of Julius Onyango Abonyo for postmortem purposes at Siaya County Referral Hospital Mortuary in company of John Turunya and Mary Ochieng. Thereafter postmortem was done they were supplied with postmortem Report (MFI-P1). of the deceased who was his nephew.

10. PW4, Dr. Okun Benjamin Ochieng, produced the postmortem Report on behalf of Dr. Ahono who had conducted the postmortem on the body of Julius Onyango Abonyo on 12.2.2015 at Siaya District Hospital at 2.26 p.m. On external appearance, there was no cyanosis or other obvious external injuries. On internal appearance of the body, respiratory system, cardio-vascular system, Genito-urinary, spinal cord and spinal column system all were normal. That there was massive epidural hematoma left temporal occipital region, brain matter compressed on left temporal occipital region. Dr. Ahomo as a result of his examination of the body of the deceased formed the opinion that the cause of death was cardio pulmonary arrest due to epidural hematoma.

11. PW5, Evans Erick Omondi, a nurse based at Rambara Health Centre testified that on 8.2.2015 he was on duty at Dienya Health Centre when at around 5.30 p.m. he left for Apuoyo Market to look for supper

in company of a friend and a neighbor one David. That after buying the food he saw people running within the market as if they were escaping from some danger. That as he was walking someone told him that Dakitari you are going to be struck. He turned and saw a man carrying a burning stick. PW5 tried to escape but the man caught up with him, hitting him on the right shoulder to which he sustained injury. That as PW5 tried to defend himself he was hit on the forehead and right ear. PW5 tried to disarm the attacker and with help of his friend David they disarmed the man. PW5 and David were pulled out of the crowd by someone who knew him. PW5 left for duty and on the way he was told there was a patient who was at labour as he lived in the health centre. That later a patient was brought escorted by members of public, he did first aid on the patient who was semi-conscious and bleeding from his ear. He then referred the patient to Siaya District Hospital. He testified the patient was a man who had been brought from Apuoyo market. PW5 stated the person who hit him at Apuoyo market was unknown to him but he saw him clearly during the struggle as the incident took place at 6.00 p.m. He testified the person who attacked him is the accused (pointing at him at the dock.).

12. On cross-examination of PW5 he testified that Dakitari refers to him and “Major” to David. He denied there was a fight between himself, David and the accused but that the accused attacked him. PW5 stated the person who died was nicknamed “Browny” who was a friend of “Major” PW5 testified on that material day he saw “Browny” going to Mpesa shop but did not see him at the market again but later at the Health Centre with some injuries to which he did not know how he got them. PW5 reported his assault to Akala Police Station.

13. PW6, No. 67148 Cpl. John Turunya, testified that he knows C.I. Julius Munene, who has since been transferred from Akala Police Station to Wajir South Diff Police Station. That on 9th February 2015, PW6 was at Akala Police Station when accused was brought at around 5.30 a.m. by PW1 Assistant Chief Michael Abaki in company of 2 Administration Police Officers on allegation of having killed someone by the name Julius Onyango Abonyo. PW6, in company of Inspector Munene, P.C. Chege, accused, Assistant Chief and the two APs proceeded to the scene of crime and to the home of the deceased as the deceased had been taken from the hospital to his home. That they later returned to Police Station, issued P.3. forms to the injured members of Public and the accused who also had injuries. PW6 recorded witnesses statements. That on 12.2.2015 PW6 witnessed postmortem conducted on the body of the deceased Julius Onyango Abonyo by Dr. Ahono. That after postmortem was conducted PW6 was given postmortem Report. He produced the postmortem Report as P exhibit 1.

14. The prosecution closed its case after No. 67148 Cpl. John Turunya had testified.

15. The issue that now arises for consideration at this stage is whether the evidence so far on record establishes a *prima facie* case to require the accused person to be put on his defence? To determine this issue the Court at this stage must define what a *prima facie* case is.

16. The definition as to what amounts to a prima facie case is given in the case of **Bhatt V R [1957] EA 332** where the Court of Appeal stated as follows:

“Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to suggesting that the Court would not be prepared to convict if no defence is made but rather hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It is true as Wilson J said that the Court is not required at this stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively. That determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case” but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

17. It is sufficient for the Court at this stage to critically look at the evidence on record and determine whether such evidence as it meets the threshold as set out in the **Bhatt Case** (Supra) in regard to what constitutes a *prima facie* case. The strength of evidence establishing a *prima facie* case must be the kind of evidence upon whose strength the Court could convict if the defence does not give any explanation rebutting that evidence or opts to say nothing to rebut such evidence. It is also worth noting that at this stage the prosecution does not have to prove its case beyond reasonable doubt, for proof beyond reasonable doubt is required when the defence has also given its evidence or has closed its case either way.

18. **Section 203 of the Penal Code** defines murder as follows:-

“Sec.203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

19. **Section 206 of the Penal Code** defines Malice afterthought as follows:

“Sec. 206. Malice aforethought shall be deemed to be established by Malice aforethought 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. In a Murder case the prosecution must prove the accused person, had the intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not, that he had knowledge that the act or omission causing death could probably cause the death or grievous harm to some person whether that person is the person actually intended or not or that he had the intention to commit a felony. The ingredients of murder are as follows:-

i. Death of the deceased and cause of death.

ii. That the accused caused the death through an unlawful act or omission.

iii. That accused possessed an intention to cause harm/kill or possessed malice afterthought.

21. In the instant case the prosecution case is neither direct nor circumstantial but is based on suspicion. The incident in this case is said to have taken place at around 6.00 p.m. at a market place where members of public were present, yet the prosecution did not avail a single eye witness to give an account of what they saw, heard and the role played by the accused in this case before the deceased met his death. The prosecution relied on hearsay evidence of PW1, Assistant Chief Michael Abaki who could not give the name of the person who informed him of the fight involving the accused, PW5 and Major also known as David. PW1's evidence, that the accused beat the deceased Julius Onyango Abonyo is hearsay as no single witness was called and testified that Julius Onyango Abonyo was beaten by the accused. PW5 denied there was a fight as stated by PW1 but that he was assaulted by the accused. PW5 never mentioned seeing the deceased being beaten by the accused. Indeed PW5 testified he does not know how the deceased, whom he referred to as "Brown" got injured. PW2's evidence is not credible as she admitted that she lied to the court that her son talked to her and that the Boda Boda rider also talked to her

mentioning the accused as the person who assaulted her son. I noted PW2 was not a credible witness as she even admitted that she did not tell the court the truth. She was further not at the scene of the crime and as such she did witness nor saw what happened.

22. As regards suspicion, the law is very clear that no amount of evidence based on suspicion, no matter, how strong the suspicion may be can be treated as a credible evidence, such evidence is worthless in criminal trial in which the threshold is very high (See **Sawe V R (2003) KLR 364**)

23. In the nutshell though the prosecution proved the deceased death and the cause of death as opinioned by the doctor to be as a result of severe head injury, the prosecution failed to prove that the said injuries were caused by the accused or were caused by an unlawful act or omission on part of the accused person nor did the prosecution prove that the accused committed the act with malice afterthought. Faced with the evidence before me it cannot be therefore said, that the court can proceed to convict the accused person on the strength of the evidence that is before me, if the accused is put on his defence and elects to say nothing in his defence. The evidence on record is wanting as its credibility and weight is wanting. It is in my view and finding that faced with the evidence on record and considering the law, it would be hard to convict the accused even if he said nothing in his defence. It is not in my view the duty of the court to seek the defence to fill the gaps in the prosecution's case.

24. My ruling would not be complete if I do not at this stage lament at the shoddy investigation in this matter. The Police failure to record witnesses statement from eye witnesses and their failure to avail a single eye witness beats common sense. This case is amongst many other poorly investigated cases by police in this country. This case in my view is a classic example of how investigation has been taken lightly by law enforcement agency and in criminal cases as a matter of arresting and charging someone without considering the strength of evidence that the prosecution intends to rely on and may be with an intention to have an accused person cleansed by court through acquittal. The prosecution should know that such poor and shoddy investigation breed, impunity, creates false image on the role played by Judiciary in administration of justice and more specifically in determining cases and that it is high time the law enforcement organ take its duty seriously, wake up and ensure justice is done to all both the accused and victims by conducting thorough and diligent investigations in all matters so as not to do injustice to the society.

25. In view of the aforesaid, I find the evidence placed before me to be insufficient to warrant the accused being put on his defence. The accused has no case to answer. I therefore make a finding that OSCAR OCHIENG OWEGA is not guilty of Murder of JULIUS ONYANGO ABONYO for want of sufficient evidence and is accordingly acquitted under the provision of Section 306 (1) of the Criminal Procedure Code. I direct that the accused be set at liberty unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 1ST DAY OF DECEMBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 1ST DAY OF DECEMBER, 2016

IN THE PRESENCE OF:

M/S. M. ODUMBA FOR THE STATE

MR. WAKLA FOR THE ACCUSED

ACCUSED - PRESENT

COURT ASSISTANTS . 1. K. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE