



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 16 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GEOFFREY OTEBA OTWANE**

**VINCENT PAPA OBUNGE**

**EMMANUEL OKWARA EJAPI.....ACCUSED**

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

1. The Prosecution called 5 witnesses in a bid to prove that the 3 Accused persons namely Geoffrey Oteba Otwane (A1), Vincent Papa Obunge (A2) and Emmanuel Okwara Ejapi (3) had on the night of 1<sup>st</sup> and 2<sup>nd</sup> October 2012 at Kamolo Location in Teso North District within Busia County jointly murdered Evans Oramisi Karani.
2. On 1<sup>st</sup> October 2012, A1 hosted a “Merry Go Round” meeting at his home at Kamolo. Sometime later on that day he served his visitors with alcoholic drinks. One of the visitors was Peter Okapii Oduori (PW1). PW1 said that amongst the other guests were A2, A3 and the Deceased person. All the four and their host A1 drunk the alcohol. That as the day wore on the Deceased demanded some money from A1. A1 told him that he already returned the demanded money and suggested to the Deceased to redirect his demand to A2. When A2 denied having the money, the Deceased stood up and hit A2 to ground. At this point A1 warned that he did not want a fight in his house and asked A2, A3, PW1 and the Deceased to leave. It is the evidence of PW1 that A1 physically pushed them out as he asked them to leave. In fact it was the testimony of PW1 that A1 slapped both the Deceased and A2 before pushing them out.
3. The four persons who were now unwelcome guests in the house of A1 walked out of the house together for about 60 meters. At that point it was the testimony of PW1 that they parted ways with him going his way alone and A2 and A3 going with the Deceased. The next day at about 11 a.m., PW1 received information that the Deceased had died. His evidence as to whether or not he visited the place where the Deceased was found was not without difficulty. In a recorded Statement with Malaba Police, the witness stated that he saw the Deceased’s’ body laying on a footpath where there was a large crowd but in Court the witness was unequivocal that he never visited the scene where the Deceased’s’ body was found.
4. But one of the people who visited the scene was Maurice Ekisa Karani (PW 2). On the morning of 2<sup>nd</sup> October 2012, at a time he put to be 6.00 a.m., PW2 received information from his brother Joseph Karani, that Evans, their brother, had been found dead on the road side at Akonyi village. When he visited the scene he found a gathering of people there. He also saw a body which he was

- able to identify as belonging to his brother, the Deceased. When he observed the body he saw what looked like some bruises on its head. There was a depression above the left ear. The body was fully dressed in clothes.
5. At the scene the witness saw A1, A2 and A3. That on seeing the body A2 turned to A1 and asked him **“Geoffrey you went this far”**. PW2 understood this to mean that A2 was asking A1 whether he had gone as far as beating the Deceased to death. The witness was later to record a statement at Malaba Police Station. Missing from that Statement was the allegation by the witness that he had heard A2 turn to A1 and asking him whether he had gone that far. This aspect of the evidence of PW2 shall be discussed further in this decision.
  6. PW4 is Chief Inspector Sabastian Mulili. At the material time he was the Officer In-Charge of Malaba Police Station. Between 9.30a.m and 10.00 a.m., PW4 visited Kamolo Location accompanied with Police Constable Gitonga and Ogero. He was acting on information received from Mr. Lawrence Ingura (PW3) the Chief of Kamolo Location about a suspected murder that had occurred in the Location. On arrival at the scene, he found members of the public around a body that was laying on the ground. The body had blood oozing from its mouth and had bruises on the neck and forehead. It seemed to the witness that the scene had been interfered with by those people who had arrived there earlier. He caused the body to be removed to Webuye District Mortuary for preservation and post mortem. After carrying out his investigation he made a decision that the current charges should be preferred against the Accused persons.
  7. The last witness for the Prosecution was Dr. Beatrix Juliana Atieno (PW5) she produced a post mortem report prepared by her colleague Dr. Alex Munyendo. That report was the finding of the outcome of the post mortem conducted by the Doctor on the body of the Deceased on 9<sup>th</sup> October 2012. The major findings were that the Deceased had a superficial bruise of 6 cm by 3cm on his left supra orbital region extending to the temporal area. There was another bruise measuring 4cm by 5cm on the left lateral lower thoracic. Internally he ruled that the Splenomegaly had moderately enlarged, rupture laterally with hemoperitoneuse of 2<sup>nd</sup> liver and shrunken liver nodular. As a result of the examination the Doctor formed the opinion that the cause of death was Hemorrhagic shock due to ruptured spleen caused by blunt trauma on a victim who had co-existing liver cirrhosis.
  8. In their Defence each of the Accused persons made sworn statements. A1 admitted that he hosted a “Merry Go Round” at his home on 1<sup>st</sup> October 2012 and that he entertained his visitors with Busaa, a Traditional liquor. The Deceased arrived at the venue of the function between 6.30 p.m. to 7.00 p.m. According to A1 the Deceased was already drunk at arrival. At one point A1 left the room where his visitors were sitting to fetch hot water from the kitchen. While there he heard a commotion and on his return he stopped the music. On enquiring, he was told that the Deceased was the trouble maker and so he requested him to leave. The Deceased obliged and left. This was about 8.00 p.m. That the Deceased left alone. A1 further stated that his Co-Accused who were amongst his guests on that day left shortly thereafter. A1 denied pushing or slapping or assaulting the Deceased in any other way.
  9. A2 hails from Kamolo Location and confirms attending a “Merry Go Round” meeting hosted by A1 where alcoholic drinks were served. While there, he saw his Co-Accused, the Deceased and one Odeo. The Deceased came to the function after A2, and he appeared already drunk. That at one time the Deceased stepped on A2’s leg. A2 told the host about the incident and A1 asked the Deceased to leave. The Deceased left alone staggering as he did so. A2 denies assaulting the Deceased.
  10. A3 gave a little more detail of how the Deceased stepped on A2. That the Deceased who had come to the function drunk danced in an unstable manner. In his instability, he stepped on A2. That when this happened A1 who had returned to the room asked him (The Deceased) to leave. That the Deceased left alone without resisting. 30 minutes after the Deceased left, the party was called off as the host had run out of the Traditional liquor. That it is not true that A1 asked them to leave. He denied the offence.
  11. At the close of hearing, Mr. Obiri submitted that the Prosecution had proved its case beyond reasonable doubt. The Prosecution theory is this. On the night of 1<sup>st</sup> December 2012 while at the house of A1 the Deceased caused a commotion. This was because he was drunk and had stepped on A2 while dancing. That responding to the behavior of the Deceased, the Accused persons slapped and kicked the Deceased. Thereafter A1 dismissed his visitors, leaving behind only one

- completely drunk visitor (Odeo).
12. It was also argued for the Prosecution that even after they left the house of A1, A2 and A3 subsequently assaulted the Deceased. That the Doctors finding that the cause of the death of the Deceased was a ruptured spleen was consistent with the kicks and slaps inflicted upon the Deceased. Never mind that there was a pre-existing liver cirrhosis.
13. For the Defence, Counsel Ipapu argued that as there was no direct evidence linking the Accused persons to the death of the Deceased, one would have to fall back to any circumstantial evidence. That whilst there was a quarrel in the house of A1, there was no evidence of a violent confrontation which could lead to death. Secondly, that the Deceased left the house of A1 alone only to be found dead on the following morning. Lastly that *mens rea* was not proved at all.
14. There is undisputed evidence that the Deceased visited the home of A1 in the evening of 1<sup>st</sup> October 2012. There is also evidence that amongst the visitors he joined were A2, A3 and PW1. The host, A1 was also in the house. The visitor's entertained themselves to Traditional liquor. At about 8.00 p.m. the Deceased left the house of the A1. The circumstances under which he left and whether he left alone is not agreed between the Prosecution and the Defence. It is however not in dispute that the Deceased was found dead on the morning of 2<sup>nd</sup> October 2012. In answering the question whether the Accused persons were responsible for his death, at least, two questions must be answered:-
- I. Did the Accused persons or any of them cause fatal blows to the Deceased while he was at the house of A1?
  - II. Can it be inferred that all or any of the Accused persons caused fatal blows to the Deceased after he left the house of A1?
15. The only Prosecution witness who was present in the house of the A1 in the evening of 1<sup>st</sup> October 2012 was PW1. His evidence calls for some detailed examination. When he arrived at the house of A1 at about 4.30 p.m., the witness found A1, A2 and A3. They invited him to join them in drinking alcohol. Later at about 7.00 p.m., the Deceased arrived and joined in. At some time, he put at 9.00 p.m. a quarrel ensued between the Deceased on the one hand and A1 and A2 on the other.
16. The genesis of the quarrel was that the Deceased demanded some balance of his money from A1. It is not clear how that came to be. A1 denied having the money and asked the Deceased to inquire from A2 who was seated next to the Deceased. The Deceased then turned to A2. When A2 denied having the money, the Deceased stood up and hit A2 to ground.
17. At one point in his testimony PW1 said that A1 then warned the visitors and asked them to leave as he did not want trouble in his house. All the visitors then dispersed. That would seem to be a peaceful parting. Yet at a later part of his testimony PW1 says that he saw A1 slap both the Deceased and A2 before pushing them out. In cross examination he said:-

**“Apart from slapping the Deceased, Geoffrey (1<sup>st</sup> Accused) did not hit the Deceased. I never saw the other 2 Accused persons hit or beat the Deceased”.**

18. Of course all the Accused persons deny hitting the Deceased. In statements that supported each other A1, A2 and A3 told Court that when it was apparent that the Deceased was drunk and would be troublesome, A1 asked him to leave and he left without incident.
19. Even if the Prosecution evidence is to be believed in its entirety, the only evidence of a Physical confrontation in the house of A1 was that A1 slapped the Deceased. But the evidence of PW1 was that even after the slap, the Deceased was able to walk away from the house of A1. There is no evidence that the slap caused any injury or substantial injury to the Deceased. The opinion of the Doctor who conducted that post mortem on the Deceased was that the cause of death was Hemorrhagic shock due to a Ruptured Spleen caused by blunt trauma on a victim who had a co-existing liver cirrhosis. But what the Prosecution failed to prove was that the slap by the A1 was on a part of the Deceased's body that could have caused a rupture to the spleen. It has to be remembered that the witnesses who saw the Deceased body on the next day saw some visible injuries to his body. PW2 says he saw bruises on the head and a depression above his left eye. PW3 saw blood on the Deceased's mouth and visible swelling on the upper side of his left eye.

PW1 saw blood on the mouth and bruises on the neck and forehead. While on the external appearance of the body, the Doctor (PW5) observed two bruises. This Court is however not told that the slap inflicted by A1 could have caused these visible injuries. It seems to me that the Deceased sustained these injuries after he left the house of A1. Is it for this Court to draw a conclusion that the slap could have been the blunt trauma in the absence of medical evidence to that effect? The conclusion this Court must reach is that the Prosecution did not prove beyond reasonable doubt that the death of the Deceased was caused by the slap of A1.

20. The Prosecution further or in the alternative suggested that the death of the Deceased was caused by those who left the home of A1 with him. PW1 says that as he left the house, he walked with A2, A3 and the Deceased for some 60 meters before the Deceased together with A2 and A3 took a different route. The evidence of PW1 on this aspect exonerates A1 as it was the evidence of the witness that the Deceased left with A2 and A3 only. In their Defence A1, A2 and A3 all stated that the Deceased left alone, and A2 and A3 remained in the house of A1 and left 30 minutes or so thereafter. The three (3) Accused persons were firm in their evidence as was PW1 in his story. So whether or not the Deceased left alone or with A2 and A3 is the subject to rival evidence of the same strength. In this circumstance the Court is unable to draw a conclusion that the two Accused persons were the last people seen with the Deceased before he met his death.

21. There is then the evidence of PW2 which would seem to incriminate A1 and A2. PW2 told Court that all the Accused persons were at the scene where the body of the Deceased was found. And that when A2 saw the body he started to cry and turned to the A1 and asked him:-

**“Geoffrey you went this far”**

PW2 understood that to mean that A2 was asking A1 whether he (A1) had assaulted the Deceased to death. But in cross examination, it became apparent that all this was not in the statement that the witness recorded with the police on the very day they were at the scene. This was crucial evidence as it tended to incriminate A1. The witness indeed thought that it was crucial evidence and was surprised that it was omitted from his statement. He said:-

**“I cannot know why such important information was omitted”.**

The witness blamed an Officer by the name Kiprof who recorded the Statement as he narrated his evidence. For some reason the Prosecution did not deem it necessary to call Kiprof. In the absence of evidence from Kiprof, it cannot be ruled out that the evidence given by the witness while in the Dock incriminating A1 was not an afterthought.

22. In the end, this Court reaches a decision that the evidence put forward by the Prosecution is not sufficient to found a safe conviction against any of the three Accused persons. I do hereby acquit each one of them of the Offence on Jointly murdering Evans Oramisi Karani.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 3<sup>RD</sup> DAY OF MARCH 2015**

**F. TUIYOTT**

**J U D G E**

**IN THE PRESENCE OF:**

**KADENYI.....COURT CLERK**

**OBIRI.....FOR THE STATE**

**IPAPU.....FOR THE ACCUSED PERSONS**