

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE NO. 8 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

JONATHAN OGUTU MIYOYO.....1ST ACCUSED

JULIUS ONYANGO OMARI.....2ND ACCUSED

FREDRICK OLUOCH ODHIAMBO.....3RD ACCUSED

J U D G M E N T

Jonathan Ogutu Miyoyo (1st accused), Julius Onyango Omari (2nd accused) and Fredrick Oluoch Odhiambo (3rd accused) were jointly charged with murder. The particulars were that on the night of 6th and 7th July, 2004 at Ligega sub location in North East location in Siaya district within Nyanza Province they jointly with others not before the court murdered Austine Swiga Oduor (the deceased) the each denied the charge. Mr. Nyanga represented the 1st accused and Mr. Onsongo represented the 2nd and 3rd accused.

On 17-1-2004 Dr. Elisha Kahawo Njau (PW10) then of Busia District Hospital performed post mortem of the body of the deceased. The body had a deep cut on the left side of the neck from anterior to posterior. The cut had gone through the voice box which was open. Major blood vessels had been cut. There was another cut around the ear which had also cut the mandible. There was, lastly, a superficial cut on the side of the chest. The deceased died from cardiovascular arrest secondary to hemorrhage due to deep penetrating cut of the neck. Report (exhibit 1) refers.

The prosecution called Cleophas Martin Ochungwa (PW1), Charles Oduor Odero (PW2), P.C. Dan Ouma (PW3), Fredrick Okoth Angiela (PW4), Sharon Adhiambo (PW5), Michael Owuor Otieno (PW6), Sgt Ronald Oduor Odhiambo (PW7), Morris Oduor (PW8), Corporal Stephen Mwita (PW9) and PW10. There was no dispute that on 16-1-2004 the late husband of PW5 (husband was Charles Onjiela Opiyo) was buried. Mourners dispersed leaving the deceased friends who organized a disco to which villagers came. A fight broke out at about 3 a.m that night. It was fight that the deceased was fatally cut. It was the prosecution case that the accused persons, who all come from the area, were in the disco and the fight and were the ones who cut and/or injured the deceased. The accused each testified on oath and did not call witnesses. The 1st accused stated the he was in the disco but left at 1 a.m before the fight broke out. He did not see the deceased before he left. The 2nd and 3rd accused stated that they were not in the disco.

The prosecution had the responsibility to prove the charge against the accused beyond any reasonable doubt.

The disco was in PW5's home. Her testimony was that she went to sleep at 8 p.m. She was later woken up by noise. When she went to the door to check she found people were fighting with runkus and pangas in the compound. She was prevented from going out. She closed herself in the house. When she later came out she found the deceased lying down here, bleeding from the neck. He had died. Next day police came to collect the body.

PW4 testified that he was in the disco as were the accused. He saw the 1st accused who had a rungu

begin to fight with the deceased who was knifed by Otieno Odhoo and cut on the neck by Peter. The deceased fell down while holding Peter's cap and jacket. The 2nd accused took the items. It was PW4's evidence that there was changaa and bhang being sold in the disco, and that people were drunk. This incident was at night. PW4 did not say how he managed to see what was happening and identify or recognize those who attacked the deceased.

PW7 was in the disco in which the deceased and the accused were. A commotion began. The people had pangas, swords and clubs. He ran to nearby home to bring a weapon to arm himself. When he returned he found the deceased on the ground having been cut and was bleeding. He died shortly thereafter. He did not see who had cut him.

PW8 came to the disco and found the deceased fighting with another person. They were separated. The 2nd accused had panga and wanted to cut the deceased who was shielding himself with a stool. The 1st accused had a rungu. One Dohomar stabbed the deceased with a somali sword. The 2nd accused cut the deceased's neck. The deceased was also cut by Dohomar. PW8 went to call the deceased's parents. Again, this was at night. PW8 was not led to say how he managed to see what was happening, and what enabled him to identify or recognize the accused.

In short, the attack of the deceased happened at night during a disco in the field. The disco had many people who were armed with pangas, rungu and swords. Changaa and bhang were being sold. People were drunk. PW4, PW7 and PW8 testified that they saw the people who assaulted the deceased to be the accused. The accused denied this. None of the three witnesses testified as to how, during the night, he was able to know the attackers. The circumstances, I find, were such that it cannot be said with any measure of certainty that any of the accused cut or injured the deceased. I find the charge not proved and acquit the accused person of the same.

Dated, signed and delivered at Kisumu this 7th day of May, 2014.

**A.O.
JUDGE**

MUCHELULE