



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL MURDER CASE NO.7 OF 2015**

STATE.....PROSECUTOR

VERSUS

EMMANUEL ODHIAMBO OSEWE.....1<sup>ST</sup> ACCUSED

YUSTO ODHIAMBO OJUAKA .....2<sup>ND</sup> ACCUSED

PRESTON AYAYO MIREJE.....3<sup>RD</sup> ACCUSED

PETER OCHIENG OLOO.....4<sup>TH</sup> ACCUSED

**JUDGMENT**

1. The four accused persons Viz:-

1. Emmanuel Odhiambo Osewe
2. Yusto Odhiambo Ojuaka
3. Preston Ayayo Mireje
4. Peter Ochieng Oloo

are charged with murder, contrary to **Section 203** as read with **Section 204** of the **Penal Code**, in that on the 23<sup>rd</sup> January 2015 at Kakuma Village, Ratanga Sub location, Central Kwabwai location in Ndhiwa Homa Bay County, they jointly with others not before court murdered **CHARLES JUMA ODONGO**.

2. The case for the prosecution was grounded on the facts that the deceased **CHARLES JUMA ODONGO** was son to **MARGARET ANYANGO ODONGO** (PW1) and **JOSEPH ODONGO OMOLO** (PW2) and was at their home on the material night when he was attacked by a group of people who beat him up before setting his house on fire. He escaped from the burning grass thatched house while bleeding profusely and carrying his suitcase. He thereafter lay down within the homestead but due to the serious injuries occasioned to him, he was rushed to hospital in Ndhiwa and was immediately referred to Homa Bay hospital where he succumbed to his injuries as he waited for treatment.

3. The four accused were suspected of having been in the group that assaulted the deceased and set his house on fire. Accused one, two and three were traced after a few days and arrested while accused four was traced and arrested five months after the incident. They were all charged with the present offence which they each denied and affirmed the denial in their respective testimonies in defence.

4. In that regard each of them raised an alibi and implied that none of them was in the group which assaulted and fatally injured the deceased.

Accused one stated that he proceeded to work at 6.00 a.m. at a place called Wachara. He returned home at 6.00 p.m. and on the following day heard that a person died after being beaten in their village. He proceeded to the scene and found many people. He gathered that it was the deceased who had been beaten up on allegation that he had stolen a cow.

5. Accused two stated that he was on his way to Ndhiwa at about 7.35 a.m. on the material day carrying the wife of the deceased on his motor cycle. He arrived at Ndhiwa and learnt that the deceased was assaulted and fatally injured by some people. He was later suspected of having been one of the assailants and arrested.

Accused three stated that he was at his home on the material date. He later heard that the deceased was suspected of being a thief and lynched by a mob of people. He was later arrested after being suspected of having been one of the assailants.

He attributed the suspicion on an existing grudge between him and the family of the deceased over a missing phone.

6. Accused four stated that on the material date at about 6.30 a.m. he was hired by some people to take them to a place called Sori to purchase fish. He was then a motor cycle taxi (boda boda) operator and upon his return to his village learnt that the deceased passed away after being assaulted on the previous night. He proceeded to

the scene of the assault and found the area chief interrogating the father of the deceased. He was later arrested after being suspected of having been among those who assaulted and fatally injured the deceased.

7. Basically, the offence of murder is committed when a person willfully and intentionally causes the death of another.

In this case, there was undisputed evidence that the deceased was confronted at his home by a group of villagers who assaulted and fatally injured him using offensive weapons.

There was suggestion from the defence especially through the assistant chief, **BELDIAN ADHIAMBO ODIRA** (DW1) and the chief, **PATRICK LUMUMBA AWINO** (DW2), that the deceased met his predicament after having been suspected of being a cow thief. That, he had stolen a cow belonging to one Simba Matolo and that his father (PW2) was aware of his wayward manners and behavior.

8. Accused one and three also suggested that the deceased was assaulted and fatally injured after being suspected of being a thief.

Whatever the reason, none of the villagers was permitted to take the law into their own hands and mete out the ultimate punishment on a person suspected of any kind of theft even if he was caught in **“flagrante delicto”** (caught in the act).

9. The fact that the deceased’s village mates had adjudged him guilty even without going through due process of law and decided to **“sentence”** him to death by lynching, meant that they willfully and intentionally caused his death and this was demonstrated by the serious injury to his head and respiratory system leading as per the postmortem report (**P. Exhibit 1**), to hypovolemic shock (shock due to a decrease in blood volume from bleeding). It was stated by the mother to the deceased (PW1) that the deceased died on a hospital couch awaiting blood transfusion.

10. Indeed, there was no dispute that the deceased was actually murdered. Therefore, the only issue which arose for determination in this case was whether the four accused were positively identified as having been part of the group of villagers who assaulted and fatally injured the deceased.

The defence raised was a denial on the basis that none of the accused was present at the scene of the offence at the time it occurred. They thus implied that they were not part of the **“blood thirsty”** assailants.

11. However, they were all placed at the scene at the material time by the prosecution witnesses including the parents of the deceased (i.e. PW1 and PW2).

The deceased's mother (PW1) identified by recognition all the four accused. She knew them very well as her village mates and said that the offence occurred in the night but there existed favourable conditions for identification in the form of solar generated light which is normally as bright as electric light.

The deceased's father (PW2) also alluded to there being bright light in his house which enabled him identify by recognition the first accused and another person called Pius Anyuon, said to be at large.

12. Other than that direct evidence of identification against the accused which in the opinion of the court was reasonably credible and reliable, the accused were also indirectly identified by **KENNEDY ODOYO OBUANGA** (PW3) and **PHILIP ODHIAMBO OBWANGA** (PW4), through the dying declarations made to each of them by the deceased whom they found at the scene lying on the ground while crying immediately after he had been assaulted. They were his neighbours and they rushed to the scene on hearing shouts and screams emanating from there. They each approached the deceased and heard him crying and mentioning the people who had beaten him. In that regard he mentioned to **KENNEDY** (PW3), the first, second and third accused and mentioned to **PHILLIP** (PW4), all the four accused. Other persons who were not arrested were also mentioned.

13. All the mentioned persons were not strangers to **KENNEDY** (PW3) and **PHILLIP** (PW4). They were known people and that is why they were later traced and arrested by the investigations officer, **PC SHADRACK MELI** (PW6), and his team. It is instructive to note that they all disappeared hitherto briefly, from the scene after the fact. This amounted to sufficient circumstantial evidence of their involvements in the crime. The fourth accused it may be noted disappeared from the scene for about five (5) months but the long arms of the law finally caught up with him. As it were, these four accused ran but could not hide.

14. From all the foregoing facts and factors this court must and hereby find that the four accused were positively identified as being part of the group of villagers who assaulted and fatally injured the deceased. They are therefore found guilty as charged and are hereby convicted.

**J.R. KARANJAH**

**JUDGE**

[Delivered and signed this 6<sup>th</sup> day of **December, 2018**].



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