



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL CASE NO. 20 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

1. DAVID OMONDI OKANGA alias OSWAGO TEN

2. MOURICE OTIENO ABANGE.....ACCUSED

JUDGMENT

1. David Omondi Okanga alias Oswago Ten and Mourice Otieno Abange are charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 22nd day of April, 2016 at Kaumo village, Kanyamwa South location in Ndhiwa Sub County of Homa Bay County, jointly murdered Erick Otieno Were.
3. The evidence by the prosecution is that after the deceased had cut Erick Ouma Debe who was rushed to hospital where he was admitted, the accused persons and others went and fatally attacked the deceased.
4. Both accused persons pleaded an alibi and contended that when the deceased was killed, they were at Homa Bay Hospital with Erick Ouma Debe.
5. The issues for determination are:
 - a. Whether the accused were part of the mob that killed the deceased.; and
 - b. Whether the offence of murder was established.
6. It would appear that the incident was in two phases. The first phase was at about 5 p.m. This we gather from the evidence of Merciline Apiyo Were (PW1) the mother of the deceased. In her evidence, she testified that she saw Oswago (accused 1) chasing her son while armed with a machete while cutting him. He was joined by other young men in the chase. The evidence of John Njonyo Okatch (PW4) was that while at near Kaumo primary School, he saw the deceased herein being chased by the two accused and two other. They were armed with machetes and when they caught up with the deceased, they started to assault him using the machetes. According to him, it was about 6 p.m.
7. The second phase of the attack on the deceased was at night at his home. It is however not clear what time at night this took place but it must have been between 9 p.m. and 11 p.m. PW1 testified that when she returned to her home at 9 p.m., she did not find her son anywhere. When she returned at 11 a.m. she found him dead.
8. Let us briefly return to the first incident. According to the evidence of Merciline Apiyo Were (PW1) and John Njonyo Okatch (PW4) the deceased was attacked by at least four people using machetes. This incident was triggered by the action of the deceased who cut one Erick Ouma Debe.
9. According to the investigating officer, Peter Mbugua, after the deceased had cut Erick Ouma Debe. Some people pursued the deceased while others took Ouma Debe to hospital.
10. The accused contended that they took Erick Ouma Debe to hospital. It would appear from the narration of the witnesses that the deceased ran away and was not caught up at the first instance. This is would explain why PW1's evidence was shifty and incoherent while explaining

what befell her son. For instance, in her statement to the police she stated that she indicated that her son ran Jamko's place before going to Midera's place. This witness's evidence in court and her statement to the police had other contradictions. She denied that she did not record that she saw Erick Ouma Debe bleeding from the hand.

11. Nancy Auma Okoth (PW2) is another witness whose evidence was not adding up. She testified that Oswago (accused 1) told her that if they found Erick, they were going to kill him. After Onyango had told her that she had been given two minutes to leave, they began to cut the deceased when she ran back to Osundi's. The question is where was Erick and where did he surface from? In her statement to the police she did not record that she saw the accused assaulting the deceased. She also contradicted Merciline Apiyo Were (PW1) who said that she followed the assailants from behind and saw them attack her son. This witness (PW2) testified that PW1 was at her shamba and could see what was happening.

12. John Njonyo Okatch (PW4) is another witness who testified that he witnessed the first incident. He said that after the two accused and two others had caught up with the deceased and started to attack him with machetes, members of public intervened and the four ran off to their homes while the deceased ran into a forested area. This contradicted Merciline Apiyo Were (PW1) who said that the deceased ran into some sugar cane plantation. During cross examination he said the deceased entered a nearby bush.

13. Can these three witnesses be believed? The Court of appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**(Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

Am afraid these witnesses have portrayed themselves as unworthy of belief.

14. The second phase of the incident was between 11 p.m. and 3 a.m. None of the witnesses was clear as to exactly when it took place. According to the evidence of PW1, when she returned home at 9 p.m., she did not find her son at home. She went away and when she returned at 11 p.m. she found her son dead. No witness was called to testify on the happenings of the second phase.

15. Neresa Anyango Oyugi (PW5) testified that the deceased herein attacked Erick Ouma who was rushed to hospital.

16. The accused contended that they took Erick Ouma to hospital and that they were not present when the deceased was killed. The Court of Appeal in the case of **Kiarie vs. Republic [1984] KLR** held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

Owing to the many contradictions I have cited, and given the circumstances of this case, I find that the prosecution evidence on record has not displaced the alibi defence of the accused persons.

17. From the foregoing evidence on record, I find that the prosecution has failed to prove its case against any of the accused persons. I accordingly acquit each one of them and set them at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE