



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 2 OF 2019**

**REPUBLIC.....PROSECUTOR**

**=VRS=**

**1. RICHARD OGETO ABEGA.....1<sup>ST</sup> ACCUSED**

**2. KEVIN BWOGO OKINYI.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

The accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 5<sup>th</sup> January 2019 at Gesiaga village of Nyamira South Sub-county within Nyamira County, jointly with others not before court they murdered Johnson Bange Obaga.

The accused persons pleaded not guilty to the charge whereupon a trial in which the prosecution called a total of five witnesses ensued. The prosecution was led by Mr. Majale Senior Prosecution Counsel, while the accused persons were represented by Mr. Ondigo, Advocate.

Briefly the prosecution's case is that on the material day at about 5pm Dorris Nyabeta Obaga (Pw2) together with her sisters Nancy Boyani (Pw3) and Marion Bosibori Isoe (Pw4) went to fetch water at the river and were on their way back home when they met their cousin one Jared Aberi. The said Jared took a stick and hit Dorris (Pw2) on the hip felling her to the ground. On seeing this Marion (Pw4) put her jericane down and intervened to stop him from beating her again. Nancy (Pw3) did the same and it was then that Jared called out to his wife one Carol who was in the house to come and join him to kill them. The said Carol came from their house which was at the brow of the hill and started fighting with Marion (Pw4) and in the process bit her on the right arm. It was then that a full-fledged fight ensued between them (Pw2, Pw3 Pw4 and Jared) until they were separated by people who included Richard (the 1<sup>st</sup> accused). According to Pw2, their mother (Pw1) also went to the scene and uttered some obscene words to Jared but was told not to do so by the 1<sup>st</sup> accused's mother. Then the 1<sup>st</sup> accused assaulted Pw4. After that Pw2, Pw3 and Pw4 started going back home but before they could get there they heard wailing and observed that a group of people were headed towards their home. Sensing danger, Pw1, Pw2 and Pw4 hid in a cow shed while Pw3 went and hid in some tea bushes behind the house. It was their evidence that from their hideouts they could hear someone being beaten although they could not see who it was. All of them however stated that they were able to recognize the voices of two of the attackers as those of the accused persons in this case and that they even clearly heard the 2<sup>nd</sup> accused say that he had beaten the person in the manner he had been trained to. When the assailants left and all was quiet they left their hideouts only to find their father the deceased lying on the ground unconscious with injuries on his mouth, ears, face, limbs and head. With help of a motor cycle rider he was rushed to Nyamira County Hospital where after a CT Scan he was referred to Kisii Teaching and Referral Hospital where he succumbed to the injuries. The matter was then reported to the police.

On 9<sup>th</sup> January 2019 a post-mortem was conducted on the body of the deceased and it was established that the cause of death was head injury (traumatic brain injury) due to blunt force trauma due to assault (see post mortem report Exhibit 2).

Corporal Mureithi (Pw5) testified that a report concerning the offence was made to the police on 6<sup>th</sup> January 2019 by one Ikombe the Assistant Chief of Gesiaga Sub-location. He stated that together with other officers he immediately proceeded to the scene and found piles of sticks and stones which they suspected to have been used to commit the crime. They however carried only two pieces of wood and three stones which he produced in evidence as Exhibit 1. He stated that although there were about ten assailants Pw2, Pw3 and Pw4 alleged to have recognized only the two accused persons and that the two accused persons were apprehended at their homes by the area Assistant Chief and when they could not offer any satisfactory explanation he charged them with this offence.

After considering the evidence in support of the charge this court made a finding that the prosecution had established a prima facie case against the accused persons and put them on their defence.

The 1<sup>st</sup> accused testified on oath and called one witness while the 2<sup>nd</sup> accused made an unsworn statement and did not call any witnesses.

The 1<sup>st</sup> accused testified that on the material day he first went to church and afterwards went to Nyamira Level 5 Hospital. At about 6.30pm he left the hospital to go home but before reaching he saw a crowd of people. On moving closer, he saw Jared lying on the ground. He inquired and was told that Jared had fought with Marion, Nancy and another person whose name he could not remember. While he was there a truck (Pick-up) stopped and they put Jared inside and brought him to Nyamira Level 5 Hospital. He stated that in the vehicle he was with Oboso Okinyi (his witness Dw1) and one Duncan Nyambati. On reaching the hospital he and Oboso took Jared to the emergency room and a doctor begun attending to him and it was at that stage that the deceased was wheeled into the Emergency Room by his wife. He contended that he did not know that the deceased had been assaulted and stated that he was not on good terms with his cousins Pw2, Pw3 and Pw4. He contended that their bad blood developed after his wife died and their mother (Pw1) who was a Manager at her work place refused to release her dues. He stated that she also owed him Kshs. 3,000/= which she refused to pay. He stated that after the death of the deceased the area Assistant Chief convened a baraza to inquire into the issue but nobody was willing to talk and that is when the Assistant Chief asked him to accompany him to his home and later requested him to go and record a statement. When he declined to do so he was arrested by the police.

The 2<sup>nd</sup> accused stated that he was on his way home at about 5pm when he saw a crowd at Jared's home. He stopped his motor cycle and noticed Jared lying in a gutter and when a pick-up stopped they put him at the back. He stated that he followed the pick-up to Nyamira Level 5 Hospital and that it was as Jared was being attended by the doctors that the deceased was brought in by another motor cyclist who told him that the deceased had fallen ill. He stated that he left the hospital for his home after Jared was taken to the ward. The next morning, he heard screams and when he went to the road he learnt the deceased had died. He was then arrested for allegedly taking part.

Mark Oboso Okinyi (Dw3) a boda boda cum electrician stated that on the material day he left church at 2pm and went to Konate to pick his child's clothes from a tailor. At around 5pm going to 6pm he was still waiting at the tailor's shop when someone called him and asked him why there were noises at his home. He told the caller he was not at home so the caller promised to go and investigate. Shortly afterwards the same person called him and told him Jared was lying as if he was drunk. He immediately left for his home but before reaching he saw a pick-up which was carrying Jared. He contended that the 1<sup>st</sup> accused was inside that pick-up. He turned his motor cycle and followed the pick-up up to the hospital. He stated that he assisted the 1<sup>st</sup> accused to carry Jared to the emergency room and then left to pick something from the shop. He stated that on his way back he received a call from the deceased's wife requesting him to go take the deceased to hospital but he told her he was in Nyamira but he could go for him only for her to call him shortly after that and tell him she had found other means to take him. Like the accused persons he stated that the deceased was wheeled into the emergency room as Jared was being attended by the doctors. He stated that he spoke to the deceased's wife and she told him the deceased was sick. He contended that the 1<sup>st</sup> accused did not leave the hospital between the time they got there and the time the deceased was taken there.

In summing up, Mr. Ondigo submitted that the prosecution did not prove its case beyond reasonable doubt; that there was no direct evidence to connect the accused persons to the offence and that the circumstantial evidence was full of contradictions and was doubtful. He contended that the 1<sup>st</sup> accused raised an alibi which was not dislodged by the prosecution. He cast doubt upon the evidence of the prosecution witnesses and urged this court to find the accused persons not guilty and acquit them.

Mr. Majale, Senior Prosecution Counsel did not submit instead preferring to rely on the evidence of the prosecution witnesses.

To prove the charge against the accused persons, the prosecution required to establish the following beyond reasonable doubt: -

- (a) The death of the deceased and the cause of that death.**
- (b) That the death was as a result of an unlawful act of the accused persons and;**
- (c) That that unlawful act was actuated by malice aforethought.**

The death of the deceased is not in doubt as even the accused persons acknowledge that he died. Neither is the cause of death as it was established through a post-mortem report that he died due to a head injury due to blunt force trauma due to an assault. The doctor who conducted the post-mortem report ruled out evidence of a chronic or ongoing active illness but noted the deceased had defensive injuries on the forearms more especially on the right side. He also observed several/multiple injuries on the deceased's head. I find it a fact from the evidence therefore that the cause of death was indeed the head injury due to blunt force trauma resulting from an assault. I also find it a fact that this finding was consistent with the evidence of the prosecution witnesses Pw1, Pw2, Pw3 and Pw4 that the deceased was assaulted at their home by a group of people. That assault was unlawful and his death was therefore by an unlawful act.

From the circumstances of the offence, the large number of the attackers, the objects used in the commission of the offence, the fact that the attackers repeatedly hit the deceased on the head and the injuries inflicted upon the deceased, it is clear that the perpetrators intended to kill or do grievous harm to the deceased and hence they acted of malice aforethought.

In the classic case of **Republic v Tubere s/o Ochen [1945] EACA 63**, the Court of Appeal stated that in determining whether malice aforethought has been proved, the following elements should be considered: -

**“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”**

The only issue remaining for determination is whether there is evidence to connect the accused persons to the offence. It is my finding that the evidence of the four key prosecution witnesses taken as a whole placed the two accused persons at the scene of this crime. It is instructive firstly that the accused persons were well known to the four prosecution witnesses. The 1<sup>st</sup> accused conceded that he was their cousin and they were well known to each other. The 2<sup>nd</sup> accused was from their neighbourhood. It is also noteworthy that before the attack, Pw2, Pw3 and Pw4 had encountered the 1<sup>st</sup> accused and at that time it was not dark. This was during their fight with Jared and his wife Carol. All 3 of them testified that the 1<sup>st</sup> accused was among the people who went to stop the fighting. The attack against their father did not

happen long afterwards. They had not even entered the homestead when they heard a group of people who were wailing as they headed to their home causing them to take cover in different places. I am satisfied that although they could not see the attackers from their hideouts they could hear their voices as they were not far from the house. Pw1, Pw3 and Pw4 hid in the cow shed while Pw2 hid in the tea bushes behind the house. They were within range of the attackers and could hear their voices. They knew the 1<sup>st</sup> accused well and so they knew his voice and were in a position to recognize it. Similarly, they knew the 2<sup>nd</sup> accused and when he uttered the words that he had beaten the deceased just as he had been trained to, they recognized it was him. They were so certain about it that when they spoke to the police officers they did not hesitate to tell them that they had identified the accused persons by their voices.

In the case of **Choge v Republic [1985] KLR**, it was held that such evidence is admissible and it can, depending on the circumstances, carry as much weight if not more than visual identification. All the four key prosecution witnesses testified they recognized the accused persons and this was not evidence of a single witness. I find that the contradictions in their evidence were minor and did not go to their credibility and as such they were not fatal to the prosecution's case.

As for the defence, the 1<sup>st</sup> accused's evidence was sharply contradicted by his witness when he denied that they were at the back of the pick-up together. While it may be true they had taken Jared to hospital and also true the deceased may have been wheeled into the emergency room while they were there they must have gone to the hospital to take Jared after assaulting the deceased. As for the 1<sup>st</sup> accused's allegation of a grudge arising from a debt, the same was clearly an afterthought otherwise it would have been put to the witnesses during cross examination. The defence of the accused persons did not offer any rebuttal to the prosecution's case.

As has been demonstrated by the post-mortem report the deceased was not sick. He was taken to hospital because of the injuries he sustained as a result of the attack. Pw5 testified there were piles of sticks and stones at the scene although he only carried a few – which confirms that the attack occurred and those who did it did it of malice aforethought. The accused persons were positively identified as being among the attackers and I am satisfied that the charge against them was proved beyond reasonable doubt. In the premises I find them guilty of the offence of murder and convict them accordingly.

**Dated and delivered in Nyamira this 30<sup>th</sup> day of January 2020.**

**E. N. MAINA**

**JUDGE**