



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 7 OF 2018

REPUBLICPROSECUTION

-VERSUS-

THOMAS OGANGA AMAYA.....1ST ACCUSED

ALEX ONTARIGI ONYANCHA ALIAS MOI AMAYA....2ND ACCUSED

JUDGMENT

1. The accused persons, **THOMAS OGANGA AMAYA** and **ALEX ONTARIGI ONYANCHA alias MOI AMAYA** are charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It is alleged that on 16th January, 2008 at Mang'ere Sub-Location in Gucha Sub-County within Kisii County jointly with others not before court murdered **AMAYA ONYANCHA AMAYA** ("the deceased"). The prosecution called six witnesses in support of its case against the accused persons.

2. Bwari Amaaya (PW1) recalled that on the material day at about 10:00 a.m. in the morning, her husband, the deceased came from the shamba holding his mouth, saying that the 1st accused's wife had hit him with a stone on the mouth. Shortly after, she saw the 1st accused and the 2nd accused come towards them. She testified that the 1st accused as her co-wife's son and said she knew the 2nd accused as "Moi". The 1st accused was armed with a rungu a panga and the 2nd accused had a panga and a stick. They were both shouting saying, "*today we will finish you*". She, her daughter, PW 2 and a grandchild ran into the house and the deceased ran to the kitchen where he locked himself.

3. She testified further that the accused persons broke into the kitchen, burnt it down and brought the deceased outside where they killed him. The accused persons then began hitting the house with a panga causing her and PW 2 to scream. They took a table and bolstered the door with it when the accused persons tried to get in. Later, PW 3 asked them to come out of the house as the accused had left. PW 1 testified that when she went outside, she saw the deceased covered in blood. She testified that she was the eldest of the deceased's 3 wives and that the accused persons had once accused the deceased of giving them a small shamba and giving her a bigger portion yet she had no male child. At the time she gave her testimony, PW 1 could not see but testified that at the time the incident happened she could see well. During cross examination, she testified that there were other people at the scene including Nyangito Omay and Omwana but the ones she saw armed with pangas were the accused persons.

4. Regina Nyanchoka Amaya (PW 2) stated that she was the deceased daughter and the 1st accused and 2nd accused persons were her step brothers. On the material day, she saw the deceased come from the shamba bleeding on the mouth saying that the 1st accused's wife had hit him. As they prepared to go to hospital, they heard screams coming their way. She saw 4 people including the accused persons and Amwama Nyabuto shouting, saying that they would kill someone. Both accused persons were armed with a rungu and a panga. The deceased went into the kitchen and they entered the main house. While in the house, she heard the deceased screaming, "*they have killed me.*" Then he went silent. They also began screaming when the accused persons started destroying the house using pangas. They did not know when the accused persons left and only came outside when PW 3 called them from the house. They found the deceased lying down bleeding all over his body. She confirmed that her mother PW 1 could not see at the time of the trial but used to see before.

5. Zephaniah Ogendi Onyancha (PW 3) testified that the deceased was his elder brother. He confirmed that the accused persons were the deceased's sons. He recalled that the deceased was hacked to death by his children on 16th January, 2008. In his opinion, the accused had been killed because of his shamba. He stated that he had not seen PW 1 and PW 2 on the material day. He went on to state that he was outside his house when the deceased was killed and that he saw 3 people on that day. At first, PW 3 testified that he had not been called to resolve any case but when a portion of his statement was read to him, he stated that the deceased had called him to settle a dispute between him and his sons. He testified that the deceased sons had cut him at the place where they had the case.

6. Amos Onsero Ogendi (PW 4), testified that at the material time he was the assistant chief of Mang'ere Sub-Location and the deceased was his uncle. He was in his office when he was informed that the deceased had been killed by his sons. He reported the matter to Ogembo Police Station and proceeded to the scene in the company of police officers. He found the kitchen burnt and the deceased lying down dead. He had a

cut on the head and was bleeding from the stomach and the hand. The police carried the deceased and took him to Hema Mortuary, where he identified the body. PW 4 told the court that the deceased had a long standing dispute with his sons over shambas. He had once called the entire family to discuss the dispute as an assistant chief and had read to them the award made by the court on the dispute and had warned them against quarreling over the matter. He testified that after the incident the accused persons had all left and had moved with their entire families and livestock.

7. Gilbert Simba (PW 5) produced the post-mortem report prepared by Doctor Ombae whom he had worked with before he relocated. The post-mortem was conducted on 5th March 2008 at Hema Hospital Mortuary, after the body of the deceased had been identified by Pw 4 and Evans Ontita. Doctor Ombae observed that the deceased was of poor nutritional status. An external examination showed the deceased had mucus membrane and blood stains on his head, chest and abdomen. The deceased had suffered cut wounds on the anterior chest wall on the right side about 5cm long and on the left lateral chest wall about 3cm long. The deceased also had a penetrating chest injury on the right chest wall about 4cm on the 4th intercostals space. The doctor observed a deep cut wound on the left leg with a compound fracture of the tibia. He also observed a laceration of the scalp.

8. An internal examination of the deceased revealed a laceration of the right lung with massive haemathorax and a compound fracture of the skull of the parietal region on the nervous system. There was oozing of brain matter through the fractured skull. The doctor concluded that the cause of death was severe brain injury secondary to trauma and severe hemorrhagic shock due to penetrating chest injury with a sharp object.

9. Chief inspector Benson Naibe (PW 6) testified that when was working under Ogembo CID Office he was asked to look for the accused persons who had gone missing after they had been involved in a murder in 2008. He arrested the accused persons on 16th February, 2018. He testified that he met the 1st accused armed with a panga, rungu and a torch, intending to run away. He preferred a charge of murder for both accused persons for killing their father the deceased because of a land dispute.

10. When the accused persons were put on their defence, they each gave sworn testimonies. The 1st accused testified that on 16th January, 2018, he left home for work at 6:00 a.m. and was still there at 12:30 p.m. when he was informed that his father, the deceased, had wanted to rape his wife. A fight had ensued between his father and his wife. His wife had overpowered the deceased and had hit him with a stone. He testified that his entire house got burnt down by the deceased. The deceased met the accused elder brother Christopher Nyabuto and threatened him with a spear. He testified that as the two were struggling, the spear pierced the deceased and killed him. His brother, Christopher Nyabuto, was charged in Criminal Case No. 50 of 2012. The case did not proceed when Christopher died. He pointed out that he had not been charged in Criminal Case No. 50 of 2012. His wife, who had also been arrested for the murder, was later released. He denied involvement in the death of the deceased.

11. The 2nd accused testified that he was in Transmara at the time grazing cattle. He was informed that the deceased and his elder brother had been involved in a fight when the deceased went to beat up the 1st accused's wife. He testified that the deceased had a spear and that they struggled with his brother and he was speared to death. He had to return home to arrange the deceased's burial. His brother was arrested and charged in Criminal Case No. 50 of 2012. He urged the court to peruse the file to verify his claims.

12. After the close of the defence case, the accused persons filed written submissions in which they argued that PW 1 and PW 2 did not witness the crime as they had locked themselves in and merely heard the deceased screaming without naming his killers. The accused contended that the evidence on record is that there were many people at the scene and it could not be ascertained whom among his many children had killed the deceased.

13. The offence of murder is defined in **section 203** of the **Penal Code** as follows, "*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*" The prosecution is required to prove the following three ingredients beyond reasonable doubt; first, it must prove the death of the deceased and the cause of that death; second, that the accused committed the unlawful act that led to that death; and that the accused committed the unlawful act or omission with malice aforethought.

14. The fact and cause of the death of the deceased are not contested. The clinical officer Gilbert Simba (PW 5) produced the post-mortem report prepared by his former colleague Doctor Ombae in accordance with **section 77** of the **Evidence Act** which permits the production of documents prepared under the hand of a medical practitioner of any matter submitted to him for examination. The doctor concluded that the cause of death was severe brain injury secondary to trauma and severe hemorrhagic shock due to penetrating chest injury with a sharp object. This was corroborated by the testimony of PW 4 who noted the cut on the deceased head and saw him bleeding from the stomach and the hand.

15. The next question for consideration is whether the accused persons inflicted the fatal injuries on the deceased person. To answer this question, the prosecution presented circumstantial evidence as there were no eye witnesses to the crime. In **Joan Chebichii Sawe v Republic CA NRB Criminal Appeal No. 2 of 2002 [2003] eKLR** the Court of Appeal laid down the test to be considered when a court is presented with circumstantial evidence as follows:

In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.

16. Since none of witnesses saw the accused persons deal the fatal blow, the prosecution also had to prove that the accused persons shared a common intention to kill or to do grievous bodily harm (see **Peter Gachoki Njuku & Another v R NYR CA Crim. App. No. 115 of 2002 [2002] eKLR**). **Section 21** of the Penal Code states as follows;

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the

prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

17. PW 1 and PW 2 placed the accused persons at the scene of the crime. They were able to recognize the two accused persons who were their relatives and the incident also occurred during the day. PW1 could not see during trial but testified that at the time the incident occurred, she was able to see. This was affirmed by PW 2.

18. PW1 and PW 2 saw the accused persons armed with pangas and rungs and heard them shouting threats as they approached them. PW1 and PW 2 were at the time in the company of the deceased. He ran towards the kitchen and they ran to the house when they heard the accused persons shouting threats and saw them armed with weapons. PW2 heard the deceased shouting, “*they have killed me,*” then he went silent.

19. The accused persons then turned to the house PW 1 and PW 2 had sought refuge in and began cutting the house with pangas. When they finally got out of the house, PW1 and PW 2 saw the deceased lying down dead with blood oozing all over his body. The totality of the evidence of PW 1 and PW 2 placed the accused persons at the *locus in quo* armed with pangas and rungs shortly before they found the deceased dead and with blood all over his body. The conditions prevailing at the time were conducive for positive recognition of the accused persons. They both issued threats and were both armed which shows that they shared a common intent to kill the deceased.

20. PW 4 stated that he noted that the kitchen burnt down when he arrived at the scene which corroborated the testimony of PW 1’s that the accused persons had burned down the kitchen to flush out the deceased before they killed him.

21. Contrary to what PW 1 and PW 2 stated, PW 3 testified that he did not see them on the material day. He testified that his house was close to the deceased and that he had seen three people kill him. He did not however state who they were. In situations where questions arise as to which witness is to be believed that question turns on the manner and demeanour of the witnesses. In this case, PW 3 could only remember resolving a dispute between the deceased and his sons when his statement was read to him in court. He also could not recall the accused persons names whom he said he referred to as his children. He testified that he was born in 1920 and his vague recollection of the facts can be attributed to his age. I find the version given by PW 1 and PW 2 more believable. They gave cogent and consistent evidence of the incident as it unfolded on that fateful day.

22. In their defence, the accused persons denied being in the vicinity when the crime occurred. The 1st accused stated that he had gone to work and learnt that the deceased had tried to rape his wife. He testified that the deceased had been killed by his brother Christopher Nyabuto who had been charged with the murder of the deceased in Criminal Case No. 50 of 2012. The 2nd accused testified that he was in Transmara at the time grazing livestock. He reiterated the 1st accused’s testimony that the deceased was killed by their brother Christopher and asked this court to peruse the file to verify his claims.

23. In Criminal Case No. 50 of 2012, Christopher Nyabuto Amaya was accused of charges similar to those faced by the accused persons in this case. It was alleged that he murdered the deceased on 16th January, 2008 at Mang’ere Sub-Location in Gucha Sub-County within Kisii County jointly with others not before court. Counsel for the accused stated that the witnesses in that case didn’t mention the accused in Criminal Case No.50 of 2012 and argued that the accused were being falsely implicated for the murder of the deceased.

24. Having perused that file, I noted that the accused persons herein were not charged for the murder of the deceased in Criminal Case No.50 of 2012. PW 6 explained that the accused persons were arrested in February 2018 as they could not be traced after the murder of the deceased. This was corroborated by the evidence of PW 4 who told the court that the accused moved from the area after the murder of the deceased. These facts do not argue well with the accused claim of innocence as it indicates that the accused persons were guilty and went into hiding after the death of the deceased. Further and contrary to counsel’s submissions, the witnesses in this matter did not testify in Criminal Case No. 50 of 2012 as the accused died before trial could commence. It cannot then be said that the witnesses in this case did not mention the accused persons in Criminal Case No. 50 of 2012 as they did not give evidence in that case in the first place.

25. The accused persons also raised alibis to counter the prosecution’s case. In ***Kiarie v Republic [1984] KLR 739***, the Court of Appeal held that;

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 is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

26. When weighed against the prosecution’s case, the accused persons’ defences does not raise reasonable doubt in the mind of the court. They testified that the deceased was speared to death by Christopher but based on the medical evidence tendered and the testimony of PW 1, PW2 and PW 4, the deceased died of multiple injuries to his body. I therefore reject their defences and find that the prosecution proved beyond reasonable doubt that the accused persons murdered the deceased.

27. Additionally, the prosecution witnesses testified that the accused persons had a dispute with the deceased over land. It has been held that, “*Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.*” (See ***Dishon Litwaka Limbambula v Republic KSM CA Criminal Appeal No 140 of 2003 [2003] eKLR.***) The prosecution’s witnesses evidence that the accused persons had a dispute with their deceased father over land was not rebutted. I therefore find that the prosecution proved that the accused killed the deceased due to a long standing land dispute and this corroborated the circumstantial evidence against the accused persons.

28. Turning to the last ingredient of malice aforethought, a court is entitled to consider the surrounding circumstances including factors such as the part of the body that was targeted, the type of weapon used and the type of injuries inflicted upon the deceased (see ***Rex v Tubere s/o Ochen [1945]12 EACA 63***). The accused hacked and clobbered the deceased to death with pangas and clubs causing him a fatal brain injury

and chest injury. I find that their actions were meant to cause the deceased grievous harm or death and therefore find the prosecution have proved that the accused persons were actuated by malice aforethought.

29. I therefore find **THOMAS OGANGA AMAYA** and **ALEX ONTARIGI ONYANCHA *alias* MOI AMAYA** guilty of the murder of **AMAYA ONYANCHA AMAYA** contrary to **section 203** of the ***Penal Code*** and I convict them accordingly.

DATED, SIGNED and DELIVERED at **KISII** this **11th** day of **April 2019**.

R.E. OUGO

JUDGE

In the presence of;

Accused No. 1 Present

Accused No. 2 Present

Mr. Okenye For the accused persons

Mr. Orinda Senior Prosecution Counsel Office of the DPP

Rael Court Clerk