



IN THE HIGH COURT OF KENYA AT KISII

(CORAM: R.E OUGO)

CRIMINAL CASE NO.31 OF 2018

REPUBLIC.....PROSECUTION

-VERSUS-

JOB ATANGA GEITA.....ACCUSED

JUDGMENT

1. By an information dated the 24th April 2018 the accused, **Job Atanga Geita**, is 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)**. The particulars of the offence in the information dated 24th August 2018 are that on 23rd August 2018 at Motondo market centre in Bomorenda location within Kisii South Sub-County in Kisii County he murdered **Peter Kebiro Okari**. The prosecution called 8 witnesses in support of its case whereas the accused gave an unsworn statement in his defence.

2. **Jerusha Kemunto** (PW 1) testified that she and the deceased used to do business together for a short time before his death. On 23rd August 2018, PW 1 woke up and left her house with her two children at 4:00 a.m. When she got to the stage the accused came from behind screaming. He then began cutting her with a panga on the head. PW1 raised her right hand and the accused cut her hand and chopped two fingers off. She managed to run to a house about 5 meters away when the deceased intervened and held the panga. She testified that she did not know the accused but got to know his name when she heard the deceased asking the accused, “*Job what you are doing to this mama?*” She recalled that the accused had then raised the panga and cut the deceased on the head at the neck. She heard that the deceased had died when she was at the hospital where she stayed for a month.

3. The deceased’s daughter, **Isabella Kerubo Peter** (PW 2), recalled that on that fateful Thursday morning, she was preparing to go to the market with the deceased at 4:30 a.m. Her father had already gone to the stage which was about 25 meters away from her house. PW 2 heard screams from the stage and when she opened the door PW 1, who was bleeding on the head and hand ran inside. She testified that there was moon light and she was able to see the accused cutting her father on the head about 7 meters away. She screamed and ran to the police station which was close by. The police came and arrested the accused. The body of the deceased was taken to Christamarianne and she later identified the body when a postmortem was conducted. She also testified that the accused was a motor bike rider and she had known him since her childhood.

4. After *voir dire* examination, **S.B.** (PW 3) gave her sworn statement. She testified that on the material day, at 4:30 a.m., she, her mother PW1 and her sister were going to the market to buy uniform. They went to the stage and were waiting for a vehicle to take them to the market when the accused came and began attacking her mother with a panga, telling her to scream. She recalled that the accused had cut her mother on the head and on the hand. They screamed and the deceased came running. He asked the accused why he was beating her mother and the accused left PW 1 and turned on the deceased and began cutting him with the panga. PW 3 testified that her mother ran into a house and they followed her there.

5. **APC Japhet Adona** (PW 6) recalled that on the material day heard, he heard screams from the center from both male and female voices at about 4:00 a.m. He jumped out of bed and joined the night guard. He found a crowd at the entrance of the station who told them that the accused, had slashed a male adult to death when he tried to save a lady from imminent harm. PW 6 testified that the accused, a local bodaboda rider was known to them. They went to the scene which was about 100 meters from the station. They were told that the accused had dropped the murder weapon. PW 6 had hand cuffs and his colleague CPI Lisemaye was armed with a gun. Together with another colleague, Daniel Kiraro, they approached the deceased and tried to handcuff him. Immediately they put the handcuffs on one hand, the accused became wild and they had to wrestle with him and hand cuff both hands. They put him in the AP camp and retrieved the murder weapon as they waited for the police. He recalled that there had been a lot of tension as they took the accused to Gesonso Police Station. While there, they got a report that the accused had brutalized another lady.

6. In cross examination PW 6 testified that they found the accused standing next to the body at the scene and his clothes were stained with blood. There were cut wounds were at the back part of the deceased’s head and his brains were out. He also testified that there was a Nissan matatu ferrying people about 20 meters away and the headlights were on.

7. Inspector Police, **Leyrice Ligaka Mukutsi** (PW 4) testified that he was taken to Motondo market by other officers at 7:20 a.m. and

requested to take photographs of the scene. He took photographs of the body of the deceased which was lying in the middle of the road. He produced the photographs and the certificate as exhibits.

8. **Doctor Peter Momanyi Morebu** (PW 5) testified that he had conducted a postmortem of the deceased at Christamarriane Mission Hospital. His general observation was that the deceased was aged about 53 years old and his clothes were soiled with blood. He noted 5 linear deep cuts wounds on the skull of the deceased with exposed brain tissue. His conclusion was that the deceased had succumbed to severe head injury secondary to penetrating injury to the head. He testified that he had taken a blood sample for investigations and produced his post mortem report as an exhibit.

9. **Richard Kimutai** (PW 7) testified that he had been working with the government chemist department for 26 years. On 6th September 2018, he received a police memo marked “DCI Kisii South CR 647/2006 of 2018,” concerning the accused and the deceased. He marked it as reference No. A99/2018. The Memo form forwarded three items for the purpose of determining the DNA genetic relationship. The first item was a blood sample from the deceased marked “A”, the second item was the blood stained panga marked “B” and the third was a blood stained trouser from the accused person marked “C”.

10. PW 7 extracted DNA from the 3 exhibits and subjected them to the DNA analyzer. All items generated DNA profiles which he tabulated in his report. The DNA profiles from the blood on the panga and also that generated from the blood stains from the trouser item marked “C” matched the DNA profile of the deceased. PW 7 prepared his report on 21st March 2019, which he produced as an exhibit.

11. Lastly, the investigating officer **Gilbert Chisindayi** (PW 8) who was attached to DCI Kisii South testified that the accused was brought in by Administration Police from Motondo AP Camp with a blood stained panga to Gesonso Police Station at about 5:50 a.m. on 23rd August 2018. He testified that they were briefed that the accused was found at the scene having murdered the deceased. He noticed that the accused had blood stains on his trouser and asked him to remove them. He then went to the scene with a colleague and the scenes of crime personnel. On arriving at the scene they found a crowd of people and the body of the deceased with his head totally cut from the top to the ears. They collected the pieces of the body and took it to Nyangena mortuary where a postmortem was carried out. They also took the panga and the accused’s trousers and blood samples from the deceased to the government analyst at Kisumu.

12. In the course of their investigations, they learned that the deceased was in the company of his two sons and they were waiting for a vehicle at the stage to go to the market. There were other people going to the market and one was severely injured during the incident. As they interrogated the accused, he told them that his cow was missing from his cowshed and when he found the people at the stage he thought that they were the people who had stolen his cow. He stated that they did not record his confession as he had no close relative then. He testified that they had taken the accused for mental assessment and he was found to be mentally stable. He produced the mental assessment report as an exhibit together with the panga and pair of trousers.

13. When placed on his defence, the accused elected to give his unsworn statement. He testified that he was a farmer and was also a motorbike rider. He stated that the day before he was arrested he built his business premises where he intended to start a new business of selling the legs of cows. On the night of 22nd and 23rd, he was looking for his cow which had gotten lost. He asked neighbours to assist him look for his cows. As he searched, he met PW 1 and asked her who she was and what she was doing there but she did not respond. He began screaming and people came to the scene. He met with an askari whom he used to carry on his motor bike who asked him what was wrong. He told him that he had come to report that his cow had been stolen and that there was a lady there and a man had been killed. He testified that he went to the station where he found a crowd had gathered because he had raised an alarm. He testified that the askaris beat him up and he was even brought to the court naked. He told the court that he did not know how the accused had been killed.

14. After the close of his case, the accused’s counsel filed written submissions arguing that in as much as the prosecution had proven that the deceased had died as a result of the injuries inflicted on him, they had not shown any link between the deceased and the accused. It had not been proven that the accused had differed with the deceased or that he saw the deceased on the material day. He submitted that the accused had raised an alarm after his cows were stolen and that two police officers had led him to Motondo AP patrol base where they assaulted him severely. It was submitted that there was no sufficient evidence to convict the accused as the AP officers had framed the accused for the death of the deceased as a cover up.

15. For the offence of murder under **section 203** of the **Penal Code** to be proved, the prosecution must establish the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

16. The fact and cause of the deceased’s death is not in issue. PW 2, PW 4, PW 6 and PW 8 all testified that they saw the body of the deceased lying at the scene on the material day. Dr. Peter Morebu (PW 5) conducted the post mortem on the body of the deceased and concluded that the deceased had died as a result of a severe head injury secondary to penetrating injury to the head.

17. The main issue to be determined is whether the accused inflicted the deceased with the fatal head injuries. The first prosecution witness was PW 1 not only witnessed the assault of the deceased by the accused but was also a victim of the accused and might have sustained graver injuries had the deceased not intervened. She testified that was at the stage heading to the market at about 4:00 a.m. with her two children when the accused approached her from behind and began attacking her with a panga. Her testimony was corroborated by that of her daughter PW 3, who was also at the scene. Both witnesses did not know the accused but PW 2 testified that she had known him since her childhood.

18. PW 2 testified that she was at home preparing to go to the market with her father, the deceased, when she heard screams from the stage which was close to her house. She opened the door and PW 1 who was bleeding from the head and the hand ran in. She testified that from where she was she could see the accused attacking her father with a panga which he used to cut him on the head severally.

19. It has been held that recognition of persons is more assuring and reliable as compared to the identification of strangers. (See *Anjononi versus Republic [1980] KLR 57*). However the court is still required to exercise caution to rule out the likelihood of a mistaken identity.

20. Lord Widgery C.J. in the case of **R vs. Turnbull and others(1976) 3 All ER 549**,held;

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?”

21. The attack on the deceased occurred at 4:00 a.m. while it was dark, making the conditions of identification difficult. However, PW 2 testified that there was moonlight and she could see the deceased attack the deceased as he was 7 meters away from her house. The identification of the accused as the deceased’s assailant was further affirmed by PW 6, who found the accused at the *locus in quo* with the body of the deceased lying next to him and a terrified crowd surrounding the scene. He testified that there was a matatu about 20 meters from the scene with its headlights on and this would have aided his vision.

22. PW 6 also retrieved a panga from the scene which was submitted for analysis together with the accused person’s pair of trousers and a blood sample from the deceased. The accused’s trousers had been taken from him by the investigating officer PW 8, soon after he was taken to the police station while the blood sample from the deceased was collected by PW 5 during his examination. When these items were subjected to a DNA analysis by PW 7, he reached the conclusion that the panga and the accused trousers were stained with the deceased’s blood.

23. In his defence, the accused had testified that he was looking for his lost cows on the material day and was arrested by police officers who took him to the AP camp. He testified that the officers had assaulted him and falsely accused him of killing the deceased.

24. The accused does not deny that he was within the *locus in quo* at the material time and in fact admits that he saw PW 1. He also failed to raise the complaint of his alleged assault by the Administration Police when he was arraigned in court. In my view, the accused’s defence is a feeble attempt to escape liability for his actions as there was overwhelming evidence that he was the person who viciously attacked the deceased causing him to sustain fatal injuries.

25. The prosecution also needed to prove that the accused killed the deceased with malice aforethought for the conviction of murder to be sustained. In **R v Tubere s/o Ochen 1945 12 EACA 63** the circumstances to be considered by the court in inferring malice aforethought were outlined as follows;

- a. The nature of the weapon used (whether lethal or not).
- b. The part of the body targeted (whether vulnerable or not).
- c. The manner in which the weapon is used (whether repeatedly or not).
- d. The conduct of the accused before, during and after the attack.

26. Applying the above guidelines to the evidence led by the prosecution, it is clear that the element of malice aforethought was established. Although there was no proof of bad blood between the accused and the deceased, the accused’s action of turning on the deceased and attacking him with a panga on the head and striking him severally was a manifestation of intention to cause death or serious grievous harm.

27. I therefore find **Job Atanga Geita** guilty of the murder of **Peter Kebiro Okari** and I convict him accordingly as provided in section 203 as read with section 204 of the Penal Code.

Dated, Signed and Delivered at Kisii this 25th day of October 2019.

R.E. OUGO

JUDGE

In the presence of;

Accused In Person

Mr. Kaburi for the Accused Person

Mr. Otieno Senior State Counsel Office of the DPP

Ms Rael

Court clerk