



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 4 OF 2018**

**THE REPUBLIC.....PROSECUTOR**

**=VRS=**

**1. JOSEPH ANARI OMAMBIA.....1<sup>ST</sup> ACCUSED**

**2. RICHARD NYAKUNDI NYARERI.....2<sup>ND</sup> ACCUSED**

**3. JOSEPH MONYANCHA OMAMBIA.....3<sup>RD</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 15<sup>th</sup> July 2017 at Embaro village in East Kitutu Location Masaba North Sub-county within Nyamira County the accused persons jointly murdered **EDWIN ONYANCHA ONGUSO.**

They all pleaded not guilty to the charge. To prove its case, the prosecution called eight witnesses three of whom claimed to be eye witnesses. Briefly the prosecution's case is that on the material day the deceased's mother (Pw1) suspected him of stealing sugar which she had bought to brew liquor. She demanded that he give back the sugar to her but he became violent towards her. She therefore called the "nyumba kumi" of their community. It is said that when the "nyumba kumi", the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons together with one Charles Gekonge arrived at the home of Pw1 they tied the deceased's hands with a chain and secured it with a padlock. They then frogmarched him away on the pretext that they were taking him to the area Assistant Chief but instead they went and tied him to an electricity pole using a rope and took turns at beating him. The deceased's brother Davis Ogendi Maina (Pw2) and cousin Félix Matara Onguso (Pw3) testified that they were home when the 1<sup>st</sup> and 2<sup>nd</sup> accused persons and the said Charles Gekonge went for the deceased and that when they took him away they followed them closely without being noticed. They confirmed that the accused persons handcuffed the deceased with a chain and further stated that they witnessed them tie the deceased to an electricity pole. They stated that the time when this happened was between 6pm and 7pm and that it was not dark and they could see properly. Davis testified that even when it got dark he could still see what was happening as the scene was being lit with a torch by the 1<sup>st</sup> accused. They stated that after tying him to an electricity pole the 1<sup>st</sup> accused slapped the deceased across the face and Charles Gekonge hit him on the head with a stick knocking him to the ground. Then the 3<sup>rd</sup> accused kicked him in the stomach. At this point Davis (Pw2) became afraid and ran off back home. Felix (Pw3) however continued watching. He stated that the deceased begged the accused persons for forgiveness but they would not relent but continued beating him until around 10pm when they untied him. Pw3 stated that at that juncture he ran home and joined Pw2 and pretended to be asleep. After some time, the deceased arrived home and asked them to open the door for him and he told them he had pain in the head and stomach. He also told them that he had been beaten by Anari, Gekonge and Monyancha. At about 5am in the morning the deceased woke up, packed some clothes and went to his grandmother's home. The deceased's grandmother Dorca Nyanchama Obongo (Pw6) testified that she could not recall the exact date but she could remember that the deceased went to her house very early in the morning and told her he had been beaten by "nyumba kumi" after his mother reported him to them for taking her sugar. She stated that he narrated to her how they bound him to an electricity pole and beat him and when she asked him if he knew the people who beat him he told her they were a village elder called Gekonge, Anari and Monyancha. She stated that the deceased's head was swollen and he was incontinent (leaking urine) and there were injuries on his legs. She gave him some pain killers and then called his mother. After that she went to tether her goats but when she went back she did not find him. She later confirmed he had gone back home. His mother (Pw1) testified that because he was complaining of a lot of pain in his head she took him to a hospital where he was treated and discharged. His grandmother (Pw6) who went to his home to inquire into his condition told this court that he had a neck cast but he still complained of feeling a lot of pain when passing urine. Three days later, specifically on 5<sup>th</sup> July 2017 his condition deteriorated but as he was being rushed to hospital he died.

The prosecution also called the Chief of the area where the incident occurred. The Chief (Pw7) testified that the 1<sup>st</sup> accused was the Chairman of "Nyumba Kumi" in the area, the 2<sup>nd</sup> accused who he referred to as Richard Gekonge was a clan elder and the 3<sup>rd</sup> accused was his neighbour. He stated that Nyumba Kumi helped him to maintain law and order in the community. He stated that he was aware that the accused persons had been requested by the deceased persons to go to her aid after he stole her sugar and that they had gone to her aid and done what they were required to do.

The deceased's father Evans Onguso Nyangaresi (Pw8) was the last to testify. He stated that on the material day he arrived home at around 8pm and found Charles Gekonge Ogaki, Richard Nyaberi (the village elder), Joseph Monyancha and Joseph Anari at the gate with the deceased, who they had apprehended. He stated that they had bound the deceased's hands with a chain and that Charles Gekonge told him they were taking him to the Chief. When he asked them what the deceased had done Charles Gekonge torched him in the eyes and shoved him aside. He stated that the deceased pleaded with him to help him and as his wife conversed with the village elder the 1<sup>st</sup> accused took him aside to discuss the issue. The deceased asked for forgiveness and the 1<sup>st</sup> accused said he should be untied but Charles Gekonge hit the deceased on the head with a metal bar. He stated that after that the deceased was unchained and they went home and slept. The next morning when he went to check on the deceased he did not find him. He was told that he had left at 5am. He therefore went to work. Two weeks later the deceased was allegedly found in his maternal grandmother's home in Kebirigo. His wife sent the deceased fare and he went back home with his leg bandaged. He asked him what had happened to his leg but he did not respond. Pw8 stated that it was the deceased's wife who disclosed to him that the deceased had fought with a neighbour called Charles Nyalunda. He went to the neighbour's shop but he did not find him. Later that evening he questioned the deceased and his mother but they remained mum. Later the deceased died. He stated that he died as he was being taken to Tenwek Hospital because the doctors at Keroka and Kisii Public Hospitals were on strike. He stated that the cause of the deceased's death was the injury inflicted by Charles Gekonge. After the matter was reported, police officers looked for the accused persons in their homes but did not find them and Charles Gekonge has not been seen since. He further stated that it was his wife who had called the four men who apprehended the deceased.

On being cross examined, Pw8 testified that he heard that the cause of the fight between the deceased and Charles Nyalunda was an affair between the deceased and Nyalunda's wife. He also negated evidence by the other witnesses that the accused persons assaulted the deceased. He was categorical that it was Charles Gekonge who assaulted the deceased.

A post mortem conducted on his body on 12<sup>th</sup> July 2017 revealed that he succumbed to severe head injury secondary to blunt trauma.

The matter was reported to Keroka Police Station and the accused persons were arrested a year later and charged with this offence. The 1<sup>st</sup> and 2<sup>nd</sup> accused were the first to be arrested but when the 3<sup>rd</sup> accused was found he too was arrested and charged and the charges were later consolidated in an information dated 12<sup>th</sup> July 2018.

All the 3 accused persons testified on oath and altogether called two witnesses.

The 1<sup>st</sup> accused testified that on the material day he was at his home about 200 metres from that of the deceased. He received a phone call from Richard Nyaberi Gekonge the village headman about a fight at the home of the deceased. The two of them went to that home getting there between 8.30pm and 9pm. He stated that the deceased had been beaten by villagers and was bleeding from the nose and that his mother told them he had stolen her sugar and asked him (1<sup>st</sup> accused) to take the deceased to the Chief of Ebaro, Peter Mokaya. He stated that the deceased's mother and brother and the village headman and himself left to take the deceased to the Chief's place but about 200 metres into their journey the deceased beseeched his mother to forgive him and she agreed and they released him and the two went back home. The 1<sup>st</sup> accused stated that the next day he met the parents of the deceased and they told him the deceased had gone to Nairobi. He met them again two days later and they told him the deceased had been involved in a fight with a neighbour called Nyalunda for seducing his wife and he could not walk. Then two days after the alleged fight the deceased was taken to hospital but he died. The 1<sup>st</sup> accused stated that they were arrested a year after that but Charles Gekonge was not arrested. He contended that to-date nobody knows his whereabouts. He vehemently denied that he assaulted the deceased and blamed Nyalunda and Charles Gekonge for killing him.

Testifying on behalf of the 1<sup>st</sup> accused, Edgar Mokaya Ongwenyi (Dw1), a cousin of the deceased's father, testified that sometimes in June 2017 he saw the deceased entering the house of Nyalunda and that he witnessed the beating Nyalunda gave the deceased after finding him with his wife and stated that he went and took the stick away. He stated that he went and called the deceased's mother. Five days later he heard the deceased had died. He was categorical that the deceased was killed by Nyalunda. He was however candid enough to state that he did not witness the events of the day it is alleged the accused persons assaulted the deceased.

The 2<sup>nd</sup> accused confirmed he is also known as Richard Nyakundi Nyaberi and that he is a village headman. He confirmed that he knew the deceased and that his mother called him on the material day. He stated that she called at 8.30pm and asked him to go and take the deceased to the Assistant Chief as he had troubled her. He stated that he knew that the deceased used to beat his mother, a chang'aa brewer. He stated that he called the 1<sup>st</sup> accused and they went to the scene. He stated that there was a big crowd of people and the deceased had a club. The deceased and his mother were separated. The 2<sup>nd</sup> accused stated that the deceased appeared drunk and there were bloodstains on his shirt and blood was oozing from his nose and as he admitted he had stolen sugar from his mother they left to take him to the Assistant Chief. Along the way the deceased begged for forgiveness and his mother told them to release him. He stated that they obliged and released him and they dispersed each going to their respective homes. The 2<sup>nd</sup> accused stated that the next day he got a telephone call from the 1<sup>st</sup> accused informing him that the deceased had bought sugar for his mother and had left before she and his father woke up. Two weeks later he heard the deceased had returned but that he had fought with one Nyalunda because of having an affair with Nyalunda's wife. The 2<sup>nd</sup> accused stated that the next day the deceased was taken to hospital by his mother and his leg was bandaged and he returned home. However, he complained of a headache the next day forcing his mother to take him to hospital again. The 2<sup>nd</sup> accused denied killing the deceased and remained categorical that the deceased had been assaulted by one Nyalunda two weeks after their encounter with him. He confirmed that he was arrested one year after their encounter with the deceased and reiterated that on that material night the deceased fought with his mother.

The 3<sup>rd</sup> accused also denied killing the deceased. He recalled that on that day he was going home from the shamba when he encountered a fight between the deceased, his mother and two brothers. He testified that he intervened and stopped the fight then proceeded to his house to take his jembe. When he went back to the scene he found Gladys – the deceased's mother had called the 1<sup>st</sup> and 2<sup>nd</sup> accused. She told them the deceased had stolen her sugar and demanded they take him to the Assistant Chief Dalton Ombaye. He stated that when they left to do so they were followed by a group of people. However, along the way the deceased asked for forgiveness and promised to buy sugar for his mother the next day. At that juncture the deceased was released and he (the 3<sup>rd</sup> accused) accompanied them to their home. The next morning, he met the deceased's mother and she told him the deceased had left early the next day. He stated that the deceased returned after 2

weeks and one day at about 9pm he heard the deceased had been caught with someone's wife. He stated that Nyalunda's house was 10 metres from his own house but he did not go there but he heard Nyalunda saying the deceased was having an affair with his wife. When he saw the deceased the next day he was limping and Nyalunda was arrested and taken to Keroka Police Station but he was released. He contended that like his two co-accused he was at home throughout but he was arrested on 15<sup>th</sup> May 2018 as he was strolling in Keroka. He stated that the evidence of the deceased's father was that it was Charles Gekonge who hit the deceased on the head. He contended that his co-accused did not touch the deceased.

Alice Moraa Amisi (Dw2) testified that on 15<sup>th</sup> July 2017 at about 9pm she heard the deceased's father saying he wanted him to go to jail. Then she heard the deceased telling his father to forgive him and promising not to repeat it. She testified that on hearing that she went to the road and found Joseph Anari, Gekonge, Joseph Monyancha, the deceased and his mother on the road. Then she heard the deceased saying he would buy sugar and then everybody went home. She stated that she did not see the accused persons killing the deceased. She contended that they only had torches and confirmed that the death of the deceased occurred two weeks later. It was after he died that she heard he was found with another man's wife and beaten.

In summing up, Mr. Bwonwong'a and Mr. Ondigo, Learned Counsel for the accused persons submitted the prosecution had not proved its case beyond reasonable doubt and urged this court to acquit the accused persons. Mr. Bwonwong'a submitted that none of his clients inflicted injuries upon the deceased and the only thing they did was to go to the rescue of the deceased's mother when she asked them to do so. He submitted that none of the witnesses went to record statements on the material night and that there was evidence from the deceased's father and other witnesses that he was having an affair with a neighbour's wife. Mr. Bwonwong'a contended that the deceased's injuries may have been inflicted by either his mother or the man whose wife he was seducing. He submitted that a dying declaration would have assisted the court to know who the deceased's assailant was. He also submitted that his death came long after the encounter with the accused persons and that there was no evidence of a grudge between them and that the accused were clan elders who maintain law and order.

These submissions were echoed by Mr. Ondigo who further submitted that there was nothing to the effect that the deceased suffered injuries in the stomach. He urged this court to disregard the evidence of Pw2, Pw3 and Pw7 and pointed out that there were contradictions in the prosecution's case and variance on the nature of the object used, whether a panga, metal bar or rungu. He submitted that the burden in this case shifted to Nyalunda who was seen assaulting the deceased. He urged this court to acquit the 3<sup>rd</sup> accused.

In this case the prosecution was required to prove the following elements beyond reasonable doubt: -

- (a) The death of the deceased and the cause of that death.**
- (b) That the death was caused by an unlawful act or omission of the accused persons.**
- (c) That the accused persons caused that death of malice aforethought.**

The death of the deceased is not in doubt as even the accused persons who hail from the same area as he admitted that he died. The cause of that death as revealed by the autopsy was severe head injury secondary to blunt trauma to the head. This opinion by the doctor was not controverted and therefore it stands as the cause of death.

As to whether that death was caused by the accused persons, the deceased's mother (Pw1), cousin (Pw2), brother (Pw3) and father (Pw8) testified that the accused persons went to their home after Pw1 reported to them that the deceased had stolen her sugar and was causing her trouble. The matter was reported to them as members of "Nyumba Kumi", a community policing outfit. All three accused persons in their defence admitted being called to the home and apprehending the deceased their evidence only differing with that of the four prosecution witnesses on the time they arrived there and what transpired upon and after their arrival. This court was convinced beyond reasonable doubt that the accused persons arrived at the homestead anywhere between 6pm and 7pm and that upon arrival they apprehended the deceased and after tying his hands to his back with a chain they left with him on the pretext that they were taking him to the authorities. According to them it was to the Assistant Chief. It is my finding that instead of doing so they went and tied him to an electricity post and beat him in turns. Although the 1<sup>st</sup> accused himself did not beat the deceased, he participated by being there and holding a light to the 2<sup>nd</sup> and 3<sup>rd</sup> accused and one Charles Gekonge, who was not brought to book. He did so as they continued to batter the deceased late into the night. Indeed, they only released him after giving him a thorough beating so that even the next day he was reeling from the result of that beating. As I have stated, their defence corroborates evidence by the prosecution witnesses that they apprehended him which places them at the scene of the crime. Pw2 and Pw3 testified that after the accused persons took the deceased they followed them and saw them tie him to an electricity post. They also witnessed them beating the deceased. Pw2 was however too scared to watch all of it and was the first to run back home. Pw3 however witnessed it. The deceased's father (Pw8) confirmed that the deceased's hands were tied with a chain as the accused persons led him away and he therefore posed no danger to them. Pw2 and Pw3 knew the accused persons well and had followed them right from the time they apprehended the deceased. I am therefore satisfied that they positively identified the accused persons. There was identification by recognition which I find was free from any possibility of error. Pw1's, Pw2's and Pw8's evidence that the accused persons assaulted the deceased was further corroborated by a dying declaration made by the deceased to his grandmother (Pw6) when he went to her home with a swollen head, legs and genitalia. Their evidence is also consistent with the cause of death and I do not believe the accused's defence that the deceased sustained those injuries in a fight with his mother or with a man whose wife he had seduced. It is my finding that that was a story they made up to save their skins. Even then it is not convincing as it is based on hearsay. Even the 3<sup>rd</sup> accused who claimed to live less than 100 meters from the said Nyalunda's house claim to have only heard about the fight but did not witness it. It is also not true that the morning after their encounter with him the deceased went to Nairobi. The truth is that he went to his grandmother's (Pw6) house. That is what he told Pw3 and it was corroborated by Pw6. He however returned home the next day and was taken to hospital by his mother. The testimonies of Pw1, Pw2 and Pw3 confirmed that the deceased remained at home until he succumbed to the injuries. Edgar Mokuu the first witness for the accused persons stated he was not at home on 15<sup>th</sup> July 2017. He seemed not very certain on the date he witnessed "Nyalunda beating the deceased" only stating it was in June, was it before or after the deceased's encounter with the accused. His evidence was not of much probative value to this court and in my view he was coached to "corroborate" an incident which never took place. If such an incident took place and he could recall it so vividly then he should have been sure about the date. It is also my finding that at the time he alleges to have seen the deceased going into Nyalunda's house and Nyalunda finding him with his wife there was not enough light for him to make a

positive identification of the person he saw and unlike the evidence of Pw2 and Pw3, his was evidence of a single witness and the prevailing circumstances were not conducive to a positive identification and he could probably have been mistaken. I am satisfied therefore that there is evidence beyond reasonable doubt that the accused persons caused the death of the deceased.

I am also satisfied that they did so by an unlawful act. From the evidence Pw1 called them because they were members of the community policing outfit in that area. She wanted them to apprehend him and hand him over to the lawful authorities which they claim they were going to do if she did not forgive him. However, instead of doing what was expected of them they morphed into vigilantes and battered the deceased occasioning him injuries which afterwards led to his death. Their conduct of beating him was unlawful.

I am further satisfied that the prosecution proved beyond reasonable doubt one or more of the circumstances establishing malice aforethought as provided in **Section 206 of the Penal Code**. Whereas they may not have set out to kill the deceased, the manner of tying his hands with a chain then tying him to an electricity pole with a rope and then using a wooden plank and metal bar to beat him and the nature of injuries inflicted which included injuries to his genitalia, is evidence that they had intention to cause him grievous harm or that they had knowledge that they could cause him grievous harm. This completes the elements of the offence of murder. The fact that they were arrested a year later does not in my view connote their innocence. **Section 215 (1) of the Penal Code** is clear that the only time one is not deemed to have killed another is if the death of that person does not take place within a year and a day of the cause of death such period being reckoned inclusive of the day on which the unlawful act contributing to the cause of death was done (**Section 215 (2) of the Penal Code**).

It is my finding that the defence did not shake the prosecution's case in any way and that whatever inconsistencies or contradictions exist in the evidence were not fatal. The upshot is that the charge against the accused persons was proved beyond reasonable doubt.

I find them guilty of the murder of Edwin Onyancha Onguso, deceased, contrary to Section 203 as read with Section 204 of the Penal Code and convict them accordingly.

**Signed, dated and delivered in open court this 19<sup>th</sup> day of December 2019.**

**E. N. MAINA**

**JUDGE**