



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 07 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

PHILIP ONSARE OUNDU.....1ST ACCUSED

ASA OUNDU AGAI.....2ND ACCUSED

MILKA KWAMBOKA OUNDU.....3RD ACCUSED

JUDGMENT

1. The accused persons herein, were jointly charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that 14th January 2012 at Sosera Sub-Location in Masaba South District within Kisii County jointly with others not before the court murdered PETERSON MURUMBA KERUMA. The accused denied the charge and were represented at the trial by Mr. Nyagwencha and Mr. Oundu advocates.

2. The prosecution called 8 witnesses in support of its case. The prosecution's case was that on the material day, the deceased herein, Peterson Murumba Keruma, in the company of his son PW1, Zachary Murumba, went to the home of the 2nd accused ostensibly to look for the deceased's daughter one Juliet Murumba (PW3) who had allegedly eloped with the son of the 2nd and 3rd accused herein, one KELVIN KAGAI OUNDU (DW6). The 1st, 2nd and 3rd accused herein are the son, father and mother respectively. PW1 testified that no sooner had they reached the home of the 2nd accused and enquired about his sister (PW3) than the 1st accused attacked the deceased with a rungu and a panga after which he bound the deceased with a rope. PW1 stated that he was also assaulted by the 1st accused and 2 other people whom he identified as Ongore Marita and Charles Obongo and that he lost consciousness which he regained in hospital but that the deceased succumbed to his injuries on 17th January 2012.

3. According to PW1, the 2nd and 3rd accused did not assault the deceased. He stated that PW3 screamed when the 1st accused attacked them. On cross examination, PW1 stated that the incident took place at about 7 p.m. and that he saw PW3 and DW6 running away from the 2nd accused's home. PW1 confirmed that his family is related to the family of the 2nd accused and that they had no differences prior to the incident.

4. **PW2 NORAH GESARE MURUMBA** was the widow of the deceased. She confirmed that PW3 had disappeared from home and that on the material day, the deceased and PW1 went to the home of the 2nd accused to enquire about her whereabouts when a confrontation arose in which the deceased was fatally wounded. She stated that she witnessed the 1st accused assaulting the deceased and added she screamed and members of the public gathered at the scene and took the deceased and PW1 to the hospital.

5. On cross examination, PW2 stated that she was not present when the confrontation started but that on her way to the home of the 2nd accused, she heard many people screaming and making noise at the said home. On arriving at the scene, she found many people gathered at the 2nd accused's home.

6. PW3 **JULIET MURUMBA** testified that she was on the material day at the home of the 2nd accused with her boyfriend (DW6) when the deceased and PW1 knocked at the gate which was opened for them, after which the 3rd accused started screaming while stating that they had been attacked by thieves. She added that many people came to the scene and attacked the deceased and PW1 and that she saw the 1st accused assaulting the deceased.

7. PW4 and PW5 who were also sons of the deceased testified that they went to the scene of the attack where they found the deceased still alive but bound with ropes and crying for help. They stated that there were many people at the scene and that the 1st accused assaulted the deceased with a nut-studded rungu.

8. PW6 identified the deceased's body for the purposes of a post mortem examination while PW7, DR. WILLIS OMWOYO, performed the post mortem examination and established the cause of death to be cardio-respiratory arrest secondary to chest and head injury secondary to assault.

9. PW8 P.C. EDWARD NZAU investigated the case and testified that on 14th January 2012, the 1st and 3rd accused made a report to Ramasha Police Station regarding an assault case at their home and that he later received a report that the victim of the assault had died while undergoing treatment. PW8 stated that he only recorded statements from witnesses who were the deceased's family members as none of the independent witnesses were willing to record statements.

10. When placed on their defence, all the accused person gave sworn statements in their defence in which they denied any involvement in the death of the deceased. They also presented the evidence of 4 witnesses in their defence. The 1st accused testified that while on his way home on the material night at about 7.30 p.m. he met many people along the road and that one Masanta informed him that some people had invaded their home. He added that he met a big crowd escorting the people who had invaded their home to the assistant chief and that later the area chief came to the scene with a torch and he was able to identify the deceased and his two sons. He then left the deceased and the sons with the assistant chief and did not know what transpired thereafter till a week later when he was arrested on the allegation that he had murdered the deceased.

11. The 2nd accused testified that he was on the material night sleeping in his house when he heard screams from outside and upon going out to find out what was happening, he found a huge crowd who informed him that they had caught a thief and that they were taking him to the area chief. He was arrested 4 days later on claims that he had killed the deceased.

12. DW3 the 3rd accused herein Milka Kwamboka Oundu testified that she was on the material night preparing supper in her kitchen at about 9 p.m. when one F N (DW4) ran into the kitchen after which she heard a loud knock on the door before someone entered the kitchen and held her by the neck. She explained that the intruder beat her up and that she was terrified because her brother in law had been killed by unknown thugs around the same time. She raised an alarm and neighbors came to her assistance and took the assailants to the chief. She denied any involvement in the death of the deceased.

13. DW4 F N, a 17 year old student, testified that she was in the kitchen with the 3rd accused on the material night when unknown people attacked them and got hold of the 3rd accused. She hid under the bed due to fear and could not recognize the attackers.

14. DW5 Rodgers Basweti was the brother of the 1st accused and the son of 2nd accused and 3rd accused. His testimony was that he was with the 1st accused on the material night and that as they were walking home at about 9 p.m., they met a large crowd on the road near a tea buying centre. The people informed them about a fracas that had taken place in their home and that they were escorting some suspects to the assistant chief.

15. DW6 Kevin Kagai Oundu testified that he was the brother of DW5 and the 1st accused. He denied being at home on the night in question and stated that he was at the time living in Meru with his other brother one Elijah Basweti (PW8). PW8 Elijah Basweti confirmed that he was with PW6 in Meru at the time of the incident and only came to learn about the arrest of his brother and parents later.

16. DW7 Lucia Mbcu Mbaka, the wife of the 1st accused testified that she heard noises and screams emanating from the home of the 2nd accused and rushed to the scene to find out what had transpired. On arriving at the home of the 2nd accused, she found the 3rd accused crying and wailing while saying that she had been attacked by people who had been escorted to the assistant chief. She stated that her husband the 1st accused was not at home on the material night.

17. At the close of the trial, counsel for prosecution and the defence filed written submissions which I have considered. The following key issues are not in dispute. The presence of the deceased at the home of the 2nd and 3rd accused on the night of 14th January 2012 when the offence is alleged to have been committed is not in dispute even though the reason for his presence in the said home is disputed or unclear.

18. That the deceased was assaulted while in the 2nd accused's home is not disputed even though the person or the people who assaulted him is in question. Lastly, that the deceased died as a result of the injuries that he sustained following the assault was not disputed. Indeed PW7 Dr. Willis Omwoyo who performed the post mortem examination established the cause of death to be cardio respiratory arrest secondary to chest and head injury secondary to assault.

19. The main issue for determination by this court is whether the 3 accused persons, with malice aforethought, inflicted the injuries that resulted in the death of the deceased. Section 203 of the Penal Code defines murder as:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

20. Malice aforethought, on the other hand, is defined under section 206 of the Penal Code thus:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some

person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

21. From the outset, it is important to note that all the key witnesses for the prosecution who claim that they were at the scene of the assault that is PW1, PW2, PW3, PW4 and PW5 are the immediate family members of the deceased. Similarly, all the witnesses for the accused persons, DW4, DW5, DW6, DW7 and DW8 are the accused's immediate family members.

22. This court is alive to the fact that is no law which says that evidence tendered by members of the same family should not be accepted as credible. (See **Peter Mutuota Gichere v Republic [2005] consolidated with Elias Kamau Mwangi v Republic [2005] eKLR**). In the same vein the court cannot ignore the fact that members of the same family may naturally be biased in their testimonies and tend to give evidence in favor of their own kin. It is for this reason that, whenever possible, the prosecution should always endeavor to furnish evidence from independent and/or impartial witnesses to corroborate the testimonies of such family members more so in a case such as this where it was stated that there were many people gathered at the scene of the assault. This court will therefore be minded to treat the evidence of such family members with the necessary caution.

23. According to PW1, he had accompanied the deceased to the home of the 2nd accused on a mission to enquire if the deceased's daughter, one Juliet (PW3) was at the said home. Indeed, the said Juliet testified that she was in the 2nd accused's home with Kevin (DW6) whom she alleged was her boyfriend. Upto this point, this court is satisfied that there could be some truth in the evidence of PW1 on the purpose of their visit to the 2nd accused's home.

24. What this court finds baffling, however, is how an "innocent" visit to the home of a neighbor (2nd accused) who was also reported to be a relative of the deceased, could turn so tragic within such a short span of time.

25. There are aspects of the evidence of PW1, the key witness who accompanied the deceased to the 2nd accused's home that this court finds hard to believe. PW1 stated as follows on the visit;

“Oundu is a neighbor, I knew his home which is about 1 kilometer from our home. When we got to mzee Oundu, we found mama Milka (3rd Accused) gathering firewood. My dad asked where her husband was and as they were talking, Phillip Onsare attacked my dad with a rungu and he (Phillip) called for a rope... I knew Phillip before this incident. He is a neighbor and I could at times work for him. I do not know why he attacked us because all we did was to go to enquire the whereabouts of our sister. Phillip did not say anything during the attack.”

26. From the above extract of the testimony of PW1, it would appear that he wants this court to believe that the 1st accused was armed way in advance even before they arrived at the home of the 2nd accused and that no sooner had they talked to the 3rd accused that the 1st accused without uttering a word, and without any provocation attacked them brutally. I find this piece of evidence incredible and questionable.

27. I further find that there is more than meets the eye in the circumstances under which the deceased was allegedly assaulted at the home of the 2nd accused. Needless to say, none of the prosecution's witnesses tendered any evidence that even remotely linked the 2nd and 3rd accused to the murder of the deceased apart from the evidence that they were present at their home at the time of the assault. My take is that mere presence in your own home at the time of an incident does not connote guilt on the part of the couple because that was their own home and the question that would arise is where else they could have been apart from their own home.

28. PW1 stated as follows regarding the presence of the 2nd and 3rd accused:

“Mzee Asa and Milka were present. Mama Milka screamed when Phillip attacked us. I did not see Asa do or say anything. We did not have any dispute with the family of the accused (Asa).”

29. I find that PW2 was equally not a very truthful witness going by her claim that even though she did not accompany the deceased to the home of the 2nd accused, she was able to get to the scene which was reported to be about 1 kilometer away and was able to find the 1st accused in the act of beating the deceased with a nut studded rungu. PW2 did not explain how she was able to see the 1st accused assaulting the deceased even though she conceded that it was already dark by the time she got to the scene of the assault and that there were many people at the said scene. It is trite law that identification particularly at night has to be treated with extreme caution and to base any conviction on it, it must be watertight. See **Mohamed Mafhabi & 2 Others Vs. Republic CA No. 15 of 1983 (NBI)**.

30. PW2 stated as follows during cross examination:

“There were many people at the scene. I cannot recall their names. When I arrived at the scene it was already dark.”

31. My finding is that none of the prosecution witnesses was able to explain how they were able to see and identify the 1st accused on the night in question considering that it was already dark. PW2 claimed that she heard the 2nd and 3rd accused call for petrol and matches to burn the deceased. I find that this claim was not supported by any evidence as the deceased was not found to have sustained any burns during the

post mortem examination.

32. A further contradiction in the testimony of PW2 is found in her answers during further cross examination when she conceded that she feared to enter the home of the 2nd accused. She stated as follows:

“I feared to enter into the home of the 2nd accused. It was dark and there were many people. I entered the home, went out and came back again.”

33. PW3, on the other hand, gave a different version of the sequence of events that led to the attack of the deceased. She stated as follows during the cross examination in chief:

“On the following day, my father and brother, Zachary, came to look for me at about 7 p.m. When they came to the compound, they knocked at the gate and it was opened for them. They asked Milka (Accused 3) that they were looking for me. The 3rd accused started screaming saying “thieves” had invaded the home. People came and started ambushing and beating my father and brother. There were many people but I saw Phillip beat them.”

34. The extract of the PW3’s testimony is a sharp contrast of the evidence of PW1 who did not state that they were attacked by many people or that the 3rd accused screamed saying thieves had attacked them.

35. PW5, also a son of the deceased, testified that he went to the scene where he found the deceased and PW4 bound with ropes on allegations that they were thieves.

36. The accused’s case was that their home had been invaded by people that they believed were thieves and that the 3rd accused raised an alarm when an unknown person attacked her in her kitchen and held her by the neck. To my mind, the claim by the defence that the deceased and his sons were attacked by members of the public over claims that they were thieves is supported by the testimonies of DW2, DW3 and DW4 and I therefore find that it is a claim that is not farfetched or unreasonable.

37. The question which then arises is whether the deceased and his sons were really thieves or if they were victims of mistaken identity. This is a question or a gap that was not filled by any of the prosecution witnesses because as I have already stated in this judgment, there are 2 completely different sides of the story from the prosecution and the defence side. The real reason why the deceased found himself at the home of the 2nd accused on the fateful night is an issue that is shrouded in a lot of mystery which could only have been demystified through evidence of independent eye witnesses who are neither members of family of the accused nor the complainant.

38. In this case, I reiterate that it was not in dispute that there were many people who were identified at the scene of the assault. It was not in dispute that the deceased was after his “arrest” on claims that he was a thief, taken to the home of the assistant chief for necessary legal action.

39. PW5 stated as follows on their interaction with the assistant chief:

“After the beating, they took us to the assistant chief one Julius Maliera where Phillip gave out the rungu that he was using to beat us.”

40. The million dollar question which arises is why the said assistant chief, to whom the ‘suspects’ were taken before they found their way to the hospital, was not called to shed more light on the case. My take is that the assistant chief as an administrator and an independent witness in the case, having handled the victim of the assault immediately after the incident took place, could have been instrumental in assisting the court understand better the circumstances under which the deceased and his sons were attacked at the home of the 2nd accused.

41. I find that the failure by the prosecution to present the testimony of the said assistant chief in court was fatal to their case and was a lapse whose benefit I must give to the accused persons. In the case of **Republic vs James Omondi alias Castro & 3 others Nairobi HCCCR No. 57 of 2008**, the court observed that serious crimes should be accorded proper and professional investigations. Further in the case of **Bukenya vs Uganda [1972] E.A. 549**, the Court of Appeal held that failure to call crucial witnesses by the prosecution entitles the court to make an adverse conclusion against the prosecution case, and acquit the accused person.

42. In my humble view, the assistant chief was a crucial witness and failure to call him weakened the prosecution case to the extent that they left many questions unanswered and failed to prove their case to the required standards.

43. In conclusion, having found that there was no evidence linking the 2nd and 3rd accused to the murder of the deceased and further having found that the evidence on the 1st accused’s involvement in the murder was shaky, if not doubtful, I cannot hesitate but find that the prosecution failed to prove its case against the accused to the required standards.

44. Consequently, I enter a verdict of not guilty in respect to all the accused persons and I acquit them of the offence of murder and direct that they shall be set at liberty forthwith unless they are otherwise lawfully held.

45. It is so ordered.

Delivered, dated and signed in at Kisii on 21st day of March, 2018.

W.A. OKWANY

JUDGE

In the presence of:

- Mr. Gachoka for the State
- Mr. Oundu for the 1st Accused
- Mr. Nyagwencha for the 2nd & 3rd Accused
- Omwoyo court clerk