



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 58 OF 2015

(MURDER)

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....PROSECUTOR

VERSUS

ALBERT SETH IFIRE.....1ST ACCUSED

JOSIAH OTEMBO IFIRE.....2ND ACCUSED

JUDGMENTS:

1. **ALBERT SETH IFIRE** (*1st Accused*) and **JOSIAH OTEMBO IFIRE** (*2nd Accused*) are charged with an offence of murder contrary to section 203 as read of Section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the charge are that on the 6th day of June 2004, at Uhui Village, Ugunja Sub-County within Siaya County, jointly with others not before court murdered one **GEORGE MACHANGA ODHIAMBO**.

2. The trial of this case commenced at Kisumu High Court before Hon. Justice H.K. Chemetei – J., on 22.01.2015, the same was transferred to Siaya High Court on 21.10.2015.

3. The Prosecution line up seven (7) Prosecution witnesses whereas the Accused upon being put on their defence gave sworn statements and called each one witness.

4. The Prosecution's case is briefly as follows:- that on 6th June 2014, PW1, Benson Odhiambo Masakwe, father to the deceased at around 8.00 a.m. while at his home, he received a call from Joseph Munyerere Odhiambo, his son also, that his son George Machanga Odhiambo had been killed at his girlfriend's house by his girlfriend at Uhui village in Nyanza and that there was a threat of him being lynched. PW1 reported the matter to Ibindo Police Post and left with one Police Officer, one Kipchumba for the scene after 8.00 a.m. On arrival he found his son being beaten while seated down by two people, thus Josiah Otembo, and another, while armed with a rungu which he used to hit the deceased on the head while the other person had a slasher which he was cutting the deceased with, both of who were not known to PW1.

5. The two continued beating the deceased for an hour as PW1 watched and only stopped when the Police Officer cocked his gun. The deceased was then taken to Uhui AP Camp, from where he was transported on a motorbike to the hospital from where PW1 got a call that his son had passed on. PW1 went and reported the matter at Sigomre Police Station. That he found his son's body at Sigomere Sub-County Hospital Mortuary, from where he transferred the body to St Mary's Hospital Mortuary. He then returned to Police Station and recorded his statement. That on 12th June 2014, PW1 and in company of Joseph Munyorere Odhiambo, went to St Mary's Hospital Mortuary and identified the deceased's body to a doctor for Postmortem examination.

6. Upon the Accused being called upon to defend themselves, each of the Accused person opted to give sworn statement and each called one witness.

7. DW1, Albert Seth Ifire denied the charge stating that on 6.6.2014 he was at home having attended the funeral of his grandmother the late Jesca Malala which was held on 3.6.2014 at Uhui Village. That on 6.6.2014, he had guests and on his way to meet them he found a crowd of people on the road numbering over 50 and saw his maternal uncle one Josiah Otembo Ifire amongst the people one Josiah Otembo Ifire preventing the crowd from attacking the deceased as the people were beating the deceased with sticks and stones and as he was asking the 2nd Accused what was happening, on other man (PW1) come with a Policeman (AP), who assisted the 2nd Accused in preventing the crowd

from beating the deceased, who was lying on the ground. That the old man (PW1), the Police and the 2nd Accused, took the young man who was being beaten and placed him on the motorbike and left for nearby Police Station. That the 1st Accused then left to meet his guests at Usanda Centre at 11.00 a.m. That he stayed with his guests at his grandmother's home upto 6.30 p.m. and left with them upto Limuru where he was staying them. He denied beating the deceased and said PW1 lied when he said he saw the Accused beating the deceased. He stated he was surprised to be arrested on 28.12.2014 notwithstanding he used to go to his home and did return home in the months of July, August, September and December 2014. He denied beating the deceased or having come close to him at the material time.

8. DW2, Josiah Otembo Ifire, denied the charge testify that on 27.5.2014 he went home and found Police Officers from Sigomere at his mother's homestead following murder of his mother during a robbery. That they took the body to St. Mary's Mortuary and burial conducted on 3.6.2014, that his friends visited him on 5.6.2014 and spent the night at his place. That he escorted them on 6.6.2014 at 8.00 a.m. That on the way he found a crowd of people assaulting a young man, who was the age mate of his children, hence he started preventing the mob from beating him, telling them to take the deceased to the Police station. That the people were around 50, and that is when an old man came and fell on top of the young man and DW2, pushed him back as he protected the young man only later to learn the old man was the father of the deceased. DW2 then with the old man (PW1) pushed the crowd and stopped them from attacking the deceased and rescued him taking him to a motorbike nearby and had him rushed to the Police Station. DW2 then left with his guests to a Bus Stage at a town called Musanda. He stayed upto 12.5.2017 when he was arrested. He later learned the young man and others had tried to rob and rape Hellen Akinyi at the previous midnight, from where he was arrested, interrogated by mob and seriously beaten. He stated PW1 did not tell the Court the truth as he did not beat the young man but was rescuing him from the mob. He urged he was beaten as he protected the young man urging he is before Court because of his kindness in seeking to save life of the young man.

9. At the close of the defence case Mr. Simiyu, learned Advocates, for the Accused submitted the Prosecution has failed to prove their case against the Accused persons beyond any reasonable doubt, whereas M/s. M. Odumba Prosecution Counsel submitted the Prosecution has proved all the necessary ingredients of murder and urged the Court to convict the Accused as charged. I shall now delve to consider the Prosecution and defence case, the law relating to the charge of murder taking into consideration the counsel respective opposing submissions.

10. The Prosecution in a murder case must prove that the accused had formed the necessary intention to cause death or grievous harm to the deceased. **Section 206 of the Penal Code**, describes circumstances which constitute the same as follows:-

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

c) An intent to commit a felony;

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

11. To prove a charge of murder, the Prosecution has a duty to establish the following ingredients:-

a) Death of the deceased and its cause.

b) That the accused caused the death through an unlawful act or omission.

c) The accused possessed an intention to cause harm/kill or had malice aforethought.

(a) Whether the Prosecution has proved the death of the deceased and its cause?

12. PW1 in his evidence testified that he received a telephone call of the death of his son, proceeded to Sigomere sub-county hospital, found the body of his son which was transferred to St. Mary Hospital Mortuary, that on 12th June 2014 on the same month in company of Munywere Odhiambo, PW1's son, they identified the body of the deceased to the doctor for postmortem examination. PW2 and PW4 in their evidence testified that they heard the deceased herein passed on. PW5, the Assistant Chief who escorted the deceased with members of public to Sigomere hospital testified, the deceased died before treatment and saw PW1 took the deceased's body to St Mary Mission Hospital Mortuary using Sigomere Police Station vehicle. PW6 No. 234617 C.I. Isaac Ewatoni, testified PW3 Hellen Akinyi reported a case of attempted rape on 6.6.2014 at 3.00 a.m. and later he received the deceased with injuries, who he directed to be taken to Sigomere Health Centre and later received a report of the deceased's death from Cpl. Munene. He proceeded to the Hospital, collected the body of the deceased and took it to St Mary Mission Hospital, Mumias. In the instant case the death of the deceased is not indispute. PW7 Doctor Juma Agumbi in-charge of St Mary's Mission Hospital, Mumias produced a Postmortem Examination Report by Doctor Bonface Nyombule, who he had worked with and who he was familiar with his handwriting and signature. The Postmortem Report exhibit P.1. Corroborates the evidence of the Prosecution witnesses especially PW3, PW4 and PW5 on the Accused being beaten by mob. On external appearance the Doctor noted:- Deep cut wound lateral to the left canchus (2 ft c.m.), Two scalp cut wounds: Due on the left parietal region (5 x 1 c.m.). Another one over the occipital region (6 x 1 c.m.), Bruises over the thorax anteriorly. Deformity of the left leg. Head: No fracture of the skull, Nervous system: Intracranial hemorrhage.

I therefore find the Prosecution proved the death of the deceased. On the cause of death exhibit P1 shows that the doctor opined the cause of

death to have been head injury due to trauma I therefore find that the cause of death is also proved to the required standard of prove.

(a) Who caused the death of the deceased?

13. The Accuse denied causing the death of the deceased. The 1st Accused stated that though he found a big crowd of about 50 people he did not participate in beating the deceased but noted the 2nd Accused was struggling with the crowd preventing it from beating the deceased. Similarly the 2nd Accused denied ever beating the deceased and stated he risked his life as he tried to save the deceased's life by preventing the crowd from beating the deceased till the deceased father (PW1) came, and both were able to restrain the crowd from beating the deceased any further till they whisked him out and had him taken to the hospital.

14. PW1 and PW2's evidence is that it is the Accused persons who beat and caused the death of the deceased, whereas PW3, PW4, PW5 as well as DW3 and DW4 exonerated the Accused persons.

15. PW1, PW2, PW3, PW4, PW5 and PW7's evidence is inconsistent and contradictory. PW1 and PW2 testified that they saw the Accused beating the deceased. PW1 testified on 6.6.2014 at 8.00 a.m. he was at the scene of murder with an A.P. from Ibindo Police Post one Kipchumba when he found the two Accuseds beating the deceased, the 2nd Accused had a rungu while the 1st Accused had a slasher which they were using to assault the deceased and stopped only when the AP cocked his gun and told the two to stop and not to kill the deceased. He stated the crowd was of 50 people and only the two Accuseds were the only people assaulting the deceased. PW2 contradicted PW1, in that he stated at arrival at the scene at around 8.00 a.m. he found he deceased being beaten by many people using rungu, slasher and stick. He further stated that the 2nd Accused told him the deceased was being beaten for having killed the Accused's mother. He stated the A.P. who had come with the PW1 fired in the air and all people dispersed. PW3 and PW4's evidence is that on 5.6.2014 the deceased with others broke into PW3's house with intention to rob and Rape PW3. She raised alarm and all other members of the gang escaped save the deceased who PW3 locked inside her house. The members of public who came to PW3 aid, apprehended the deceased and beat the deceased using different types of crude weapons from 1.00 a.m. upto 4.00 a.m. and later from 6.00 a.m. to 8.00 a.m. till PW3 and PW4 with members of public had the deceased handed over to the Police PW3 and PW4 contradicted PW1's and PW2's evidence. They stated at no time did the Accused assault the deceased, however, PW3 and PW4 stated the 2nd Accused was around 8.00 a.m. of 6.6.2014 at the scene of the incident protecting the deceased from being assaulted while the 1st Accused was watching from a distance. That the 2nd Accused even helped PW1 to take the deceased to a nearby motorbike to be taken to the hospital PW5, the Assistant Chief who came to the scene at around 9.00 a.m. who PW1 claimed he caused the death of the deceased with the Accused and who helped take the deceased to the hospital, did not state the Accused beat the deceased. PW7, the Investigating Officer, contradicted the evidence of PW1 and PW2 in stating that the people he who came to know as having beaten the deceased were 1st and 2nd Accused, one Amos and PW3, as PW1 and PW2 never mentioned PW3 and Amos as some of the people who beat the deceased. PW2 contradicted PW1 in stating the A.P. fired in the air when PW1 stated AP only cocked the gun. He also contradicted PW1 when he stated the crowd was beating the deceased as opposed to PW1's evidence that it was only Accused persons who were beating the deceased.

16. The Accused in their defence denied having been involved in assaulting the deceased. The 1st Accused testified on his way to meet his guests he found a crowd of 50 people and saw his uncle the 2nd Accused preventing the crowd from attacking a young person lying on the ground as he was being beaten by the mob with sticks and stones, when an old man (PW1) came with an A.P. and both together with the 2nd Accused prevented people from assaulting the person and even the 2nd Accused assisted in taking the person to a nearby motorbike. He stated he did not participate in the incident in anyway zs that he left to meet his guests.

17. The 2nd Accused in his defence, denied beating the deceased but admitted on his way escorting his guests he found a crowd of people on the road beating a young man. He decided to protect the person from further assault and in the process he was also beaten and continued protesting the young man till an old man (PW1) came and together they prevented the crowd from beating the young man as he tried to have him rescued and taken to the hospital. DW3, who was being escorted by the 2nd Accused to Nairobi, testified that the 2nd Accused only prevented the crowd from beating the deceased. PW3 and PW4 also confirmed the 2nd Accused was preventing the crowd from assaulting the deceased and was not one of the assailants. DW4 testified that on the night of 5.6.2014 he heard screams from the home of PW3, went and found a young man being beaten with sticks, pangas and stones. He testified the 2nd Accused was not amongst the people he found beating the young man and that he did see the 1st Accused either.

18. In the instant case, the defence Counsel submitted that the prosecution's case is riddled with irreconcilable inconsistencies and contradictions. That the evidence of PW1, PW2, PW3, PW4, PW5 and PW7 is inconsistent, and riddled with inconsistencies. Shoddy investigation as key witnesses were not called to testify and that this is a case fit for inquest and not Prosecution.

19. I have analyzed and evaluated the Prosecution's evidence and considered the submissions on behalf of the Accused persons by Mr. Simiyu Learned Advocate and M/s. M. Odumba, Learned State Counsel. I have noted indeed the Prosecution witnesses contradicted one another on material facts of this case and more so on whether the Accused were the ones who beat or did beat the deceased and whether the deceased was beaten by the crowd. The inconsistencies and contradictions go to the root of the Prosecution's case. I have very carefully examined the Prosecution witnesses evidence and I am satisfied that there are fundamental inconsistencies and contradictions that dent the Prosecution's case. The Contradictions and inconsistencies, are not minor but goes to the root of the Prosecution's case. The Accused have in my view succinctly identified the inconsistencies and contradictions and how they dent he Prosecution's case.

20. In the instant case, PW1, testified he proceeded to the scene with AP Kipchumba, who I find was a crucial witness for the Prosecution's case and who ought to have been called to corroborate the evidence of PW1 and PW2. PW1 and PW2 contradicted one another as to the ole played by the AP Kipchumba. PW2 testified he was told of the beating of the deceased by Amos Juma and PW2's boys. Amos Juma was a key witness as he was mentioned by PW3 and PW7 and ought to have been called as a witness. I find failure to call the two key witnesses was not explained hence the Court draws an inference that the two eye witnesses were not called in a such a serious case, because their evidence would not have been favourable to the Prosecution's case.

21. I therefore, in view of the inconsistencies and contradictions in the Prosecution's case find that the prosecution did not prove, that it was the Accused who caused the death of the deceased. From the evidence of PW3, PW4 and PW5, I find that the deceased's death was caused by mob who started beating him from 1.00 a.m. all the way through to 8.00 a.m. when he was rescued by PW1 and the 2nd Accused in this matter.

22. I have further considered the defence case coupled with the evidence of PW3 PW4 and PW5 and I am satisfied the Accused did not participate in the beating of the deceased though the two were at the scene of the crime. The 1st Accused was an incident observer of the events whereas the 2nd Accused acted as a good Samaritan and risked his life as he prevented the unruly crowd from metting further punishment to the deceased for allegedly breaking into PW3's house and attempting to rape her.

23. I find that the deceased's death was not caused by the two Accused persons but by the mob in an alleged case of mob justice.

(b) Whether the Accused had malice aforethought?

24. The Prosecution urged the deceased underwent a painful torture and beating for 6 hours which in itself is not only to long but demonstrates an intention to kill the deceased. The State urged the two Accused had an intention to kill the deceased as he had been alleged to have killed the mother to the 2nd Accused and grandmother to the 1st Accused. That the State urged malice aforethought had been proved. The Accused denied having beaten the deceased. The evidence on record is that the deceased was arrested at PW3's house where it was alleged he with 5 others broke to PW3's house with intention to rob and rape her. The crowd which came after alarm was raised interrogated and beaten the deceased not on allegation of having killed mother to the 2nd Accused and grandmother to the 1st Accused but for attempting to rob and rape PW3. The Accused were not even at the scene. The Accused never alleged nor instigated the crowd to beat the deceased on allegation that he killed the mother to the 2nd Accused and grandmother to the 1st Accused. There was no evidence put forward to that effect from the Prosecution witnesses and even if it was the evidence as to the participation of the Accused persons has not been proved to the required standard of proof.

25. In **Republic v Philip Mwangi Chege HCCRC 88 of 2003 (2006) eKLR** the Court dealing with a case similar to the present one, in its ruling on a case to answer H.M. Okwengu – J., as she then, was held:

“Secondly there is clear evidence from the Prosecution's own witnesses that the deceased was attacked by a crowd and members of a vigilante group who responded to the alarm raised by P.W.7 and that the Accused though present did not participate in the attack.”

26. In the instant case there is no evidence that the two Accused had met and planned to kill the deceased. There is no evidence they knew the deceased had the previous night been arrested at PW3's home by members of public, who had interrogated him and told them who had murdered the mother to the 2nd Accused and grandmother to 1st Accused. The Accused just found a crowd assaulting the deceased on their way to discharge their daily chores but did not join the crowd in assaulting the deceased. I find the Prosecution has failed to prove malice aforethought.

27. The upshot is that the Prosecution has failed to prove the charge of murder against the 1st and the 2nd Accused beyond reasonable doubt. Accordingly the 1st Accused, Albert Seth Ifire and the 2nd Accused, Josiah Otembo Ifire are found not guilty of murder of George Machanga Odhiambo and are accordingly acquitted and set forthwith at liberty unless otherwise lawfully held.

DATED at SIAYA this 20TH day of APRIL, 2018.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

IN THE PRESENCE OF:

M/S. M. ODUMBA FOR STATE

MR. SIMIYU FOR 1ST AND 2ND ACCUSED

1ST ACCUSED – PRESENT

2ND ACCUSED – PRESENT

COURT ASSISTANTS:

1.LABAN ODHIAMBO

2. LEONIDA ATIKA

J. A. MAKAU

JUDGE