



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 19 OF 2015

REPUBLICPROSECUTOR

VERSUS

1. JOHN MILLER OKEYO

2. ALFAYO OKINYI OUMA alias DAN

3. ALEX NYANGORO VIJEDI.....ACCUSED

JUDGMENT

1. **Brian Ouma Tom** (hereinafter referred to as '**the deceased**') brutally met his death on 08/04/2015 at Kadika village within Migori County. Out of police investigations **John Miller Okeyo, Alfayo Okinyi Ouma alias Dan** and **Alex Nyangoro Vijedi**, the accused persons herein, were charged with the murder of the deceased on 16/04/2015. They all denied the information. I will refer to John Miller Okeyo as '**the first accused person**', Alfayo Okinyi Ouma alias Dan as '**the second accused person**' and Alex Nyangoro Vijedi as '**the third accused person**'.

2. In a bid to prove the information, the prosecution called a total of seven witnesses. **PW1** was **Kikura Ochieng Japheth**, a teacher at Kadika Primary School within Kadika village in Migori County. **Daniel Otiego Otiego** testified as **PW2** and he was a Caretaker in the first accused person's farm in Kadika village. **PW3** was one **Andy Joseph Ondong** who was a younger brother to the first accused person and an uncle to the deceased. The deceased was hence a nephew to **PW3**. **PW5** was one **David Onyango Okeyo**, also a younger brother to the first accused person and an uncle to the deceased. The deceased was his nephew too. **Buttus Okello Ongoro** testified as **PW6**. He was a brother to the mother of the deceased and an uncle to the deceased. **Dr. Vitalis K'Ogutu** testified as **PW7** and the Investigating Officer **No. 65494 Cpl. Josephat Ongoki** testified as **PW4**. For the purposes of this judgment. I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. **PW2** testified that he woke in the morning of 08/04/2015 in the first accused person's homestead and as usual undertook all his normal chores which included taking cattle for grazing and general cleaning. That, at around 09:30am **PW2** was inside the house he slept when the first accused person called him in a manner that he was in a distress. **PW2** rushed put and he was told by the first accused person to take a panga and follow him. The first accused person then proceeded to his main house and took a spear, a panga and a Maasai sword and ran past the main gate as **PW2** instead walked as he followed him.

4. **PW2** passed the first accused person's farm where six workers were planting rice and he was surprised not to see any one despite having taken tea to them a short a while ago. **PW2** caught up with the first accused person and the six workers on a road leading to Kadika Primary School. The workers carried the equipment they were using at the farm. The group then began looking for the deceased who was also known as 'Doctor'. They proceeded to the house where the deceased slept and did not find him. The group then split into two groups as to quicken the process of finding the deceased. One group was headed by the first accused person and had four people and the three were in the second group. The first accused person then gave the group Kshs. 2,000/= before they dispersed in different directions. **PW2** was asked to return home.

5. As **PW2** walked home using a different route he met the deceased who was visibly drunk and told him that the first accused person was looking for him. As **PW2** was talking to the deceased the two groups emerged from opposite directions and engulfed the two and wanted to beat them up. Sensing danger the deceased escaped and ran towards the Kadika Primary School and the seven people viciously pursued him while armed. **PW2** followed them by walking instead of returning home. The group caught up with the deceased as he entered the school compound and pounced on him mercilessly alleging that the deceased was a thief and had stolen iron sheets from the house of the first accused person.

6. **PW2** saw **PW1** urging the group to get the deceased out of the school compound and the group pushed the deceased through the school fence and continued assaulting him. **PW2** then left for home and about 30 minutes later he was called by one **Omondi** (not a witness) and was informed that the deceased had died. **PW2** went back to where he had left the group assaulting the deceased but found that they had taken him to the roadside.

7. PW2 later recorded a statement with the police and identified two of the workers who had also taken part in assaulting the deceased as the second and third accused persons whom he knew well and had attended them as they worked in the farm.

8. **PW1** confirmed that he witnessed group of people he did not know pursuing the deceased and caught up with him inside the school compound as he was planting some trees at the fence. That, he asked the group to get out of the school compound as the school was not involved in the matter and the group obliged.

9. **PW3** narrated how he was twice called by his wife and told of a group of people assaulting the deceased and took a motor cycle and rushed to the scene. He saw the group six people beating the deceased while others were just milling around including pupils of Kadika Primary School. That, he then rushed to where the deceased was, but found the deceased already dead. He hurriedly proceeded to Migori Police Station to report the incident but before reaching he saw a police vehicle rushing to the scene and he returned. The police collected the body to Migori County Referral Hospital Mortuary for preservation and post mortem examination. PW3 confirmed that he did not see any of the accused persons at the scene.

10. **PW5** was at his home when he heard noises of people chasing someone towards Kadika Primary School. His home was about 30 metres to the school and he saw the group catching up with the one they were chasing, beat him and removed him out of the school compound. That, through the intervention of the first accused person the deceased got an opportunity and escaped towards the main road. The chase continued. That, he recognized the one who was being beaten as the deceased. PW5 clarified that the deceased managed to escape towards the road due to the intervention of the first accused person. PW5 did not recognize any of the assailants.

11. **PW4** investigated the case. He visited the scene with other police officers and collected the body of the deceased. That, he interviewed several people and recorded statements from potential witnesses and confirmed that the accused persons were part of the group that killed the deceased. That, he arrested the first accused person at the Migori Police Station and **PW6** assisted him to arrest the second and third accused persons at Kakrao village. He escorted the accused persons for mental examination at Migori County Referral Hospital before charging them.

12. PW4 drew a rough sketch map of the scene and later drew a fair sketch plan and produced them as exhibits. He also witnessed the post mortem examination of the body of the deceased.

13. On 11/04/2015 **Dr. Ndege** conducted a post mortem examination of the body of the deceased. He saw multiple bruises all over the body and the skin was peeling. There were multiple blunt wounds on the head, blood clots on the ears and mouth. There was also a fracture of the skull. He formed an opinion that the cause of the death of the deceased was due to the severe head injury due to fracture of the skull causing occipital hemorrhage. He filled in a Post Mortem Report and signed it. The Report was produced as an exhibit by **PW7**. PW7 also produced the P3 Forms for the accused persons their mental assessment as exhibits which confirmed that they were all fit to stand trial.

14. The prosecution then rested its case with the foregone evidence and on consideration of the evidence this Court placed the accused persons on their defenses. The accused persons opted for and gave sworn testimonies and called one joint witness, **Christabella Auma Okeyo, DW1**. The first accused person testified that he was at his home on the said day having deployed his two farm assistants to plant a special rice variety on moist land after his farm was used a demonstration plot by the County Agricultural officers the day before. That, as he was marking examination papers for his students he heard some disturbing noises at around 10:35am. Since he had set up his home out of his father's homestead he learnt that the noise was from his father's homestead and he rushed there.

15. The first accused person found a large group of people chanting some incomprehensible words and molesting the deceased. That, he intervened to save the deceased and he was also assaulted in the process. He however managed to rescue the deceased who got a chance and ran towards the road as the group followed him. He called and informed the police of the incident and by the time the police arrived 40 minutes later the deceased was already dead. He discredited the prosecution evidence that he took part in killing the deceased.

16. The second and third accused persons gave a common defense that as they worked in the farm of the first accused person they heard noises in the direction of Kadika Primary School, but they did not go there. They only heard some pupils discussing about the noise over lunch break. That, they continued working for three days and were paid their dues thereafter and returned home.

17. **DW1** testified that the deceased was her grandson and a habitual thief who was attacked and killed by a mob. That, the first accused person who is his son was not at the scene.

18. The accused persons closed their cases and Counsels were granted leave to file written submissions which they failed to. The matter was then set for judgment.

19. I have carefully considered the evidence on record as well as the exhibits. As the accused persons are charged with the offence of murder, the prosecution must prove the following three ingredients:

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will therefore consider each of the issues independently.

(a) Proof of the fact and cause of death of the deceased:

20. It is not in dispute that the deceased person in this matter died. That position was confirmed by all the witnesses who testified except PW7. The first limb is hence answered in the affirmative.

21. As to the cause of the death of the deceased, PW7 who produced a Post Mortem Report prepared by Dr. Ndege whom they had worked together stated that the possible cause of death of the deceased as severe head injury due to fracture of the skull causing occipital hemorrhage. Since there is no any other evidence contradicting that of PW7 on the cause of death of the deceased, this Court so concurs with that medical finding. The second limb is also proved in the affirmative.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused persons:

22. This issue is aimed at establishing whether the accused persons caused the death of the deceased and if so, whether it was by an unlawful act or omission.

23. The incident that led to the death of the deceased was witnessed by several people. There is no doubt that the deceased was attacked by a group of people using crude weapons and that the incident took place during the day. There is also concurrence by PW2 and the first accused person that the first accused person was at the scene where the deceased met his death. What is at variance is the role played by the first accused person.

24. According to PW2 the first accused person was the leader of the six attackers who assaulted and eventually killed the deceased. He gave a chronology of the events from the time he was allegedly called by the first accused person and asked to arm himself with a panga until how the deceased was killed by the group led by the first accused person. Although many people witnessed the assault on the deceased, it was only PW2 who testified that he identified the accused persons as among those who killed the deceased.

25. The evidence of PW2 was confronted by that of PW5 and the first accused person. PW5 and the first accused person testified that although the first accused person was present at the scene he did not assault the deceased but instead defended him. PW5 was about 30 metres from the scene. PW1 testified that the distance from where he stood with the deceased and the school gate was about 300 metres and that it took him about 3 minutes to walk to the school compound. According to PW1, for unknown reasons although he had been asked to arm himself he was instead asked to return home as the group pursued the deceased. When the group caught up with the deceased and PW2 standing both the deceased and PW2 were about to be attacked and that is when the deceased ran away towards the school. PW2, while in that state of fear and having been asked to return home instead walked following the group.

26. Whereas the group ran after the deceased, PW2 walked and caught up with the group later which was by then assaulting the deceased. Unlike PW5, PW2 did not state how far he was from the place the group was allegedly assaulting the deceased. The question which now begs an answer is whether in view of the instructions which PW2 had been given by his employer to return home and which he did not and the threat of physical violence by the group still PW2 managed to get near the scene to clearly see all the occurrences. How come that PW2 did not state how close he went to the group which allegedly assaulted the deceased?

27. It is on record that many people had gathered at the scene including the pupils. There was hence disorder and that called for one to be so observant and careful to say with certainty what happened. The distance from the scene no doubt determined the visibility. There is no doubt PW2 was not comfortable being at the scene in view of his employer's instructions and the fear of attack. PW2 did not therefore witness the entire chain of events which led to the death of the deceased with clarity.

28. It is also PW2 who allegedly recognized the second and third accused persons. Apart from stating that the two had been hired by the first accused person to plant rice on the farm and that he had taken tea to them at the farm that morning, PW2 did not state whether he knew the second and third accused persons before or how long and well he interacted with them at the farm to be able to recognize them later. Was his recognition of the second and third accused persons based on their clothing, appearance, acquaintance or otherwise?

29. The circumstances under which a witness alleges to have identified an accused person must always be clear from any possibility of error otherwise that can cause an injustice to an accused person. The principles for consideration in such instances are by now well settled by precedent. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under; -

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

30. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

31. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

“... 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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? 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 the 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 his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

32. The evidence on the identification of the accused persons in this case was hence that of PW2; a single witness. That evidence called for corroboration as so provided under **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya. In this case the evidence of PW2 was not corroborated. On the other hand, the evidence of PW5 was corroborated by the first accused person.

33. I must state that there can still be a legal conviction in such instances of single witness identification even without any corroboration. However, before a Court convicts on such evidence, the Judge must really warn himself/herself of the dangers of relying on such evidence. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus:

"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it.This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."

34. I have carefully addressed my mind to the facts and the law in this case alongside the defenses tendered. I am not satisfied that the evidence of PW2 passes the various qualifications discussed above. I am therefore inclined to believe the evidence of PW5 and the defense of the first accused person against the evidence of PW2. Having so found, the second ingredient is hereby answered in the negative and since the analysis on the third ingredient will not add any value to this judgment I will not consider it.

35. The upshot is that the prosecution has failed to establish that the accused persons caused the death of the deceased having failed to prove the ingredients of the offence of murder in law. I now come to the conclusion that the information of murder facing the accused persons has not been proved. The accused persons herein, **John Miller Okeyo, Alfayo Okinyi Ouma alias Dan** and **Alex Nyangoro Vijedi** are hereby found **NOT GUILTY** of the murder of **Brian Ouma Tom** and that each of them is hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of June 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Marvin Odero Counsel for the Accused persons.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant.