



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HCCR CASE NO. 9 OF 2015

REPUBLIC.....PROSECUTION

- VRS-

1. MICHAEL KEMOSI ONYANCHA.....1ST ACCUSED

2. PHILEMON MOMANYI OMWANSA.....2ND ACCUSED

3. EVERLINE KWAMBOKA OMWANSA.....3RD ACCUSED

JUDGEMENT

The accused persons are charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code particulars whereof are that on 14th June 2014 at Eronge village, Timi sub-location, Nyamira District within Nyamira County, jointly with others not before Court murdered **Charles Mogo Makori**, deceased.

Briefly the Prosecution's case is that on the material day at about 6 pm to 7 pm the deceased who was a member of community policing at Eronge village and a group of village elders had accompanied their area Assistant Chief, Patrick Biriso Shibuoga (Pw1), to the home of the 1st accused upon receiving information that he (the 1st accused) was brewing chang'aa. On seeing the Assistant Chief (Pw1) and his contingent, those in the home took to their heels but the wife of the 1st accused pretending not to know who they were started shouting thieves! thieves! The 1st accused is alleged to have asked her to give him a panga to deal with the invaders and when she did he cut the Assistant Chief on the hand with it. On seeing this, the people who had accompanied him including the deceased started fleeing, some into the tea bushes and others to the neighbouring homes. As he was fleeing the deceased who was 68 years old stumbled and fell. It was then that the 1st accused, the 2nd accused, 3rd accused and other members of the public allegedly set upon him with stones, sticks and pangas. It is alleged that the 1st accused who had cut the Assistant Chief Patrick Shibuoga (Pw1) on the hand with a panga pursued the deceased and when he fell he started beating him with the panga. He was soon joined by the 1st and 2nd accused with the latter allegedly saying he knew how to kill someone. The 1st and 2nd accused allegedly used sticks to beat the deceased. The beating left the deceased badly wounded and bleeding profusely. The Assistant Chief (Pw1) called his area Chief who went to their rescue with police officers. The deceased was rescued and first taken to Nyamatoki Administration Police Post where a police Land Rover picked him and took him to Nyamira Hospital where he was admitted. On 15th June 2014 he succumbed to his injuries.

On 18th June 2014 the body was identified to one Dr. Asavo by a brother and a cousin of the deceased (Pw4 and Pw6 respectively). The Doctor performed a post mortem and noted that the deceased had interalia sutured scalp lacerations the longest at the occipital region and measuring five centimeters, a bruise on the right supra orbital region, fractures on the 10th to 12th ribs and a haematoma on the right rib cage. His spleen was also lacerated (2cm), the right lobe liver was ruptured and there were three litres of blood in the cavity. As a result of the injuries the Doctor opined that the cause of death was multiple head and abdominal injuries due to blunt force trauma. He issued a Death Certificate No. 317853 which Dr. Onjoke Verabeck (Pw7) produced in Court on his behalf (Exhibit 1).

Kabuti Kamuren (Pw8) a police officer of the rank of Corporal testified that on 14th June 2014 at about 6 pm he was dispatched to the village where this incident took place by the Officer Commanding Station (OCS) of Nyamira Police Station where he was then based. His instructions were to provide reinforcement to the Assistant Chief of Timi sub-location (Pw1) who together with some village elders and members of the community policing had been attacked by villagers when they went to apprehend brewers of illicit liquor. He testified that on arrival at the scene he first saw that the Assistant Chief (Pw1) had a deep cut on his right palm while the deceased had multiple cuts on the head. He stated that both victims were rushed to Nyamira District Hospital but only the deceased was admitted as his injuries were more serious. He further stated that after the police learnt that the deceased had succumbed to his injuries he was once again dispatched to the scene to apprehend the perpetrators of the crime. He testified that he arrested the three accused persons within Nyamatoki trading center and that after the statements of the witnesses were recorded and the post mortem was done the three accused persons were arraigned in court. However, no weapons were recovered.

The three accused persons elected to make unsworn statements. The 1st accused started by saying that he understood the charge facing him.

He then stated that on 14th June 2014 from 5 pm to 11 o'clock when he returned home he was watching football at Nyaisa township. The next morning, he milked his cows and was delivering the milk to the market when he met about eight "boda boda" riders who asked the shopkeeper if he knew a certain Moi. When the shopkeeper answered in the negative they called the person they were communicating with and told him the person there was Kemosi but the one they were looking for was Moi. The person they had called allegedly instructed them to take Kemosi (him – the 1st accused) to the Police Station and it was then that he was taken to Mabundu AP Camp from where he was taken to Nyamira Police Station in a police Land Cruiser. On 17th June 2014 he was charged before Nyamira Court for being drunk. He denied that charge and on 26th June 2014 he was arraigned before Kisii High Court for this offence which he denied.

The 2nd accused told the Court that he was a mason. He recalled that on 15th June 2014 he worked in Nyamira in the morning and at night but on 14th June 2014 he had worked until 10 o'clock. After work on 15th June 2016 he called one Engineer Caleb of Public Works to say he was tired. The engineer went and gave him Kshs. 2000/=. He boarded a "boda boda" and went home and slept until the next morning. He stated that as it had rained heavily that day they fell. He further stated that that morning he received several calls from the engineer asking him to go do another job. Then the leader of the "boda boda" asked him what he was doing there and then said they were looking for people like him. They took him to Nyamira Police Station. After two days he was taken to Court but was not charged. He was instead taken back to Nyamira Police Station and interrogated. Thereafter he was taken to the Director of Public Prosecution's Office and then to Kisii High Court and charged with murder.

The 3rd accused told the Court that she is a mother of two and that she is a businesswoman who lives at her maiden home. She stated that on 14th June 2014 at 5 pm she took vegetables to the buying center and remained there until 7 pm. Thereafter she went and partook of some chang'aa and at 8 pm she went home to sleep. The next day as she was going to buy sugar to sweeten her children's porridge she was asked by a "boda boda" who told her not to worry to get on the motor cycle and accompany them. They took her to Ekenucha where they bundled her into a Land Cruiser which took her to Nyamira Police Station where she was charged for a crime she had not committed.

Summing up was by way of written submissions. Mr. Okenye, Advocate who represented the accused persons throughout the trial, analysed the evidence of the witnesses and came to the conclusion that it was not reliable as they possibly could not have seen what transpired. He also poked holes into the evidence stating that it was contradictory and that an identity parade should have been conducted in the case of Pw5 whose evidence was that he was not from the area where the incident took place and whose evidence was according to Counsel based on what the Assistant Chief (Pw1) told him. Counsel also discounted that the Assistant Chief (Pw1) witnessed the occurrence and submitted that he never could have as he had entered one Nyakundi's house and not the tea bushes as he alleged. Mr. Okenye submitted that the prosecution had not proved its case beyond reasonable doubt. He urged the court to acquit the accused persons.

Principal Prosecution Counsel Mr. William Ochieng on the other hand submitted that the case against the accused persons had been proved beyond reasonable doubt. He submitted that the defences mounted by the accused persons were a mere denial and that the alibis they mounted were not corroborated. He contended that all the ingredients of the offence have been proved. He submitted that it is clear from the chain of events that all three accused persons were involved individually and jointly or severally in the actions that led to the death of the deceased and that they had mens rea. He submitted that not only was the evidence overwhelming but that it remains unchallenged. He urged this Court to convict the accused persons.

Sections 203 of the Penal Code defines murder in the following terms: -

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

Section 206 of the Penal Code on its parts lists instances of malice aforethought as: -

"(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."

In this case the death of Charles Mogoi Makori is not in dispute. The points for determination are therefore whether that death arose from an unlawful act of the accused persons and if it did whether it was of malice aforethought.

The opinion of the Doctor who performed the post mortem on the body of the deceased is that the cause of death was multiple head and abdominal injuries due to blunt force trauma. The Court heard that the deceased had several cuts and bruises on the head as well as several injuries to his internal organs. These injuries are consistent with the evidence of the prosecution witnesses that the deceased was repeatedly beaten on the head and on his body by people who were armed with crude weapons. The deceased, a village elder aged sixty-eight years had accompanied their area Assistant Chief on an illicit brew crackdown and when the owner of the home and other villagers staged a retaliatory attack he could not flee like the others. According to the witnesses this was because he stumbled and fell down. He was therefore left at the mercy of the assailants who had no mercy at all. Although those he was with called for help and he was taken to hospital, he unfortunately succumbed to the injuries. From the evidence other than accompanying the Assistant Chief, his fellow village elders and members of the community policing on this operation the deceased did not do anything to provoke the attack meted upon him. His motive it would appear

was to rid his community of the illicit brew. I am therefore satisfied beyond reasonable doubt that his death arose from an unlawful act.

As to whether the accused persons were the perpetrators of this heinous crime, I have no difficulty finding that they were. The offence occurred in broad daylight and being residents in the Assistant Chief's (Pw1) jurisdiction, he and indeed the village elders and community policing members in the contingent knew them well. This was therefore not just an issue of identification but of recognition. The Assistant Chief had led this team to the home of the 1st accused to arrest him for brewing illicit liquor. The 1st accused initially ran off but his wife knowing very well who the Assistant Chief and his party were pretended they were under attack and raised an alarm which attracted the villagers turned assailants. The three accused persons were identified not just by Pw1 but also by Pw2, Pw3 and Pw5. Indeed, their identification was so clear that Pw8 (Corporal Kabuti Kamuren) had no difficulty having them arrested. Contrary to the submission by Mr. Okenye, Learned Counsel for the accused persons, my finding is that the evidence of the eye witnesses Pw1, Pw2, Pw3 and Pw5 squarely placed the three accused persons at the scene of crime. The evidence of these witnesses rendered the alibis mounted by the accused persons unbelievable much as the prosecution did not disprove the alibi as required by the law. I am convinced beyond a shadow of doubt that the three accused persons were perpetuating a common intention which was either to occasion the deceased grievous harm or to kill him. The nature of the weapons they used (panga and sticks) and the manner in which they beat him, the injuries they inflicted all coupled with the fact that they were doing this so as a retaliation against the Assistant Chief and his party all show that their unlawful act was with malice aforethought. The charge against them has been proved beyond reasonable doubt. I find them all guilty of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict them accordingly.

It is so ordered.

Dated, signed and Delivered at Nyamira this 27th day of September, 2018.

E. N. MAINA

JUDGE