



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 43 OF 2012

BETWEEN

PROSECUTOR REPUBLIC

AND

WILLIAM NYANGORO OLENYO 1ST ACCUSED

GABRIEL OMONDI OGUTU 2ND ACCUSED

IBRAHIM ODERO OLENYO 3RD ACCUSED

JUDGMENT

1. **WILLIAM NYANGORO OLENYO (DW 1), GABRIEL OMONDI OGUTU (DW 2) and IBRAHIM ODEYO OLENYO (DW 3)** were charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 26th May 2012 at Barosimbo Sub-location in Siaya District within Nyanza Province, jointly with others not before court murdered **JOSEPH OORO OLOO** ("the deceased"). The prosecution marshalled 7 witnesses to support its case while the accused gave sworn testimony and called 1 witness.

2. The fact that the deceased died was not in dispute. Dr Collins Oginga (PW 6) produced a post mortem report of an autopsy performed by Dr Rapenda who established that the deceased died as a result of a hypotensive shock following a fatal stab to the left jaw which severed the external jugular vein. He also noted that the deceased had multiple minor bruises all over the upper and lower limbs and torso. The key issue then in this case is whether the accused killed the deceased with malice aforethought.

3. The deceased's wife, Monica Anyango (PW 1), testified that on the night of 26th May 2012, she was with her husband in their house. At around 9:30pm, DW 1 came to their house accompanied by another man who was unknown to her and stated that they wished to have a word with the deceased. The deceased followed them outside but he did not return that night. At about 6.00am, on the following morning, she was informed that the body of a man lay dead at the entrance of their compound. They went to the scene and found that it was the deceased.

4. The Assistant Chief of Barosimbo sub-location, Raphael Oduol Nyapera (PW 2) testified that he was informed of the murder on the morning of 27th May 2012 whereupon he called the Commanding Officer, Siaya Police Station who came and collected the body. PW 2 further testified that the deceased, other clan members and one John Bruno Oloo ("John Bruno") had a land dispute pending in court. He told the court that the deceased was entitled to a portion of the parcel of land but John Bruno had taken the whole parcel for his own use and had hired the accused persons to guard it. PW 2 stated that he saw blood stains

originating from the disputed land where the deceased lay dead to where the accused were guarding.

5. George Odero Olenyo (PW 3), a step-brother to DW 1 and DW 3, testified that on the material night as he was headed home on his motorbike at about 8.00pm, he met the three accused in the company of two other people, he could not identify, standing on the path to his home next to the disputed land where they were armed with pangas and runqus. He was able to clearly see them from the headlight of his motorcycle. After they recognised him they moved from the path and allowed him to pass.

6. One of the police officers who went to the scene after receiving information of the murder was APC Gastron Baraza (PW 4) who confirmed that they safeguarded the scene until officers from Siaya came to take the deceased body. Thereafter they commenced investigations. After receiving tip-offs, he testified that he went to a house where he recovered a white blood stained shirt. Later on some youths gave him a blood stained rungu they said was recovered from DW 3's house.

7. The investigating officer, Chief Inspector Christopher Muraguri (PW 5) testified that he arrested DW 1 and DW 2 at Siaya Police Station where they had gone to report a case of assault. PW 5 interrogated them and they told him that they had been attacked on the previous night while guarding John Bruno's property. They stated that the attackers were armed and that they destroyed a large portion of maize growing on the land. PW 5 visited that land and ascertained that a small portion of the maize plantation close to where the deceased body was found had been destroyed. He also learnt of the land dispute that existed between John Bruno and his family members including the deceased. PW 5 recovered a blood stained panga that was in possession of DW 1 at the police station and handed it together with the rungu and blood stained shirt recovered by PW 4 to Government Chemist Department, Kisumu for DNA profiling.

8. When cross-examined, PW 5 admitted that that he was aware about the land disputes in the area concerning John Bruno who had made served reports at the police station concerning acts of trespass. He recalled PW 2 had been accused by John Bruno Oloo of acts of interference with his land.

9. A Government Analyst, Richard Kimutai Langat (PW 7), produced a DNA analytical report prepared by L.K. Muthuri, in accordance **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, which indicated the blood found on the rungu found in DW 3's house matched the DNA profile of DW 2, the DNA profile generated from the bloodstained shirt was that of unknown male whereas both the blood stains on the panga and the blood sample of the deceased did not generate any DNA profile.

10. In his testimony, DW 1 stated that on the material night he and DW2 were guarding John Bruno's property. At round 11:00pm they heard noise coming from the maize plantation. They went to investigate and they found people, armed with pangas and spears, cutting down the maize. He recognised PW 2 and PW 3 amongst the gang. They decided to run for their lives but the people caught up with them. DW 2 was cut with a panga in his arm while trying to protect DW 1 from being cut by PW 2. After the attack they called John Bruno and informed him of what had occurred. He advised them to go and report the matter at Siaya Police station on the following day. When they went to report the matter they were arrested and charged with the murder of the deceased. DW 1 denied that he was arrested with a panga at the police station.

11. When questioned on the testimony of PW 1, DW 1 denied that he was at the deceased's house on the material night or that they had left together. He also stated that on that he was only with DW 2 at the farm and that DW 3 was not with them. DW2's testimony echoed that of DW 1. He maintained that on the material night he guarded the farm with DW 1 and that DW 3 was not with them. DW 1 also stated that prior to going home, he had been at DW 3's shop at Randago where he used to assist. He claimed that the PW 1 was implicating him because she did not want to settle a debt of Kshs. 6,000/- she had incurred at DW 3's shop on account of food stuffs she had taken on credit. DW 1 also accused PW 3 of lying as he had a dispute with him over land.

12. DW 3 denied that he murdered the deceased. He testified that on the material night he was at his shop at Randago up to around 9:00pm before he went home. He insisted that there existed a land dispute

among family members and that is why he was framed for the murder. DW 4 gave testimony in relation to the land dispute that existed and related how the area residents burnt down John Bruno's house after the deceased was murdered. He accused PW 2 of masterminding the case against the accused by using his position as Assistant Chief.

13. The prosecution case against the accused was founded on circumstantial evidence. The general principle applicable to cases of this nature was that stated in the ***Rex v. Kipkering Arap Koskei and another* [1949] 16 EACA 135** where the East Africa Court of Appeal held:

In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses other than that of his guilt.

14. This holding in law was amplified and explained in the case of ***Sawe v R* [2003] KLR 364** where it was also held that circumstantial evidence can be a basis of a conviction only if there is no other co-existing circumstances weakening the chain of circumstances relied on (see also ***Musili Tulo v R NRB CA Criminal Appeal No. 30 of 2013[2014]eKLR***).

15. The prosecution case against the accused is that on the material night, the accused and others gathered to go and attack the deceased. As they gathered with their pangas and runkus, they were seen by PW 3 at about 7.30pm when he passed by with his motorbike. They lay in wait until about 10.00pm when DW 1 went to the deceased's house and lured him as confirmed by PW 1 whereupon he was murdered by the accused. In order to create a ruse, DW 1 and DW 2 went to report that they had been attacked at night while guarding the John Bruno's home but were arrested by PW 5. DW 3 was also arrested and was found with a blood stained rungu which implicated him in the murder. The question I have to answer is whether, in light of all evidence, exculpatory and inculpatory, can I state that there are no co-existing circumstances to that point exclusively to the accused as the persons who murdered the deceased.

16. In their defence, DW 1 and DW 2 told the court that they were guarding John Bruno's property when they were attacked and a fight ensued while DW 3's defence was an alibi. From the evidence, I find that DW 1 was the last person to be seen with the deceased when he came to his home and they left together. I have no doubt that PW 1 saw him leave with the deceased and since the meeting was not hostile she did not make much of it at the time. Although DW 1 suggested that her testimony was coloured by a grudge, I find this suggestion an afterthought as the facts of the grudge were not put to her in cross-examination. It is this circumstances, that I put DW 1 on his defence as he was required to explain what happened to the deceased when they left together.

17. DW 1 and DW 2, who were guarding John Bruno's property, narrated how they were attacked by a gang. After the attack, they went to report the case at the police station in the morning. DW 2 was treated for injuries he had sustained at Siaya District Hospital. He produced treatment notes from the hospital confirming that he was treated there on 27th August 2012. According to the notes, he was, "was assaulted by person known to him." The evidence points to the fact that the at least DW 1 and DW 2 were at the scene of the incident when the attack took place. PW 2 recalled that he saw a trail of blood from the place DW 1 and DW 2 were guarding to where the deceased body was but this important fact was not in his recorded statement to the police.

18. In order to close the chain of circumstantial evidence, the prosecution had to prove that the accused caused the death of the deceased. PW 2 and PW 4 recovered a blood stained panga from DW 1 which when tested, the blood thereon did not yield any profile hence it is difficult to tell whether, it is the panga that was used to cut the deceased.

19. As regards DW 3, the evidence that ties him to the scene is the fact that he was seen by PW 3 with DW 1 before the incident. Apart from this, the rungu recovered from his house, had blood with the DNA profile of DW 2. If indeed DW 3 was at the scene, then he must have hit DW 2 with it or DW 2's blood spilled on it in the course of the fight. From the evidence, PW 4 was not clear where the bloodied shirt was found. Assuming that it was found in DW 3's house, when it was tested against that DNA profiles of the

accused and deceased, the DNA profile was that of, “unknown male.” The DNA evidence pointing to an, “unknown male” tends to support the accused contention that they were attacked by gang which may or may not have included the accused.

20. In cases of circumstantial evidence, the motive assumes a greater significance. The Court of Appeal in **Libambula v Republic [2003] KLR 683** observed that;

We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain of presumptive proof especially where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.

21. The overarching background to this case is that there was a bitter land dispute. DW 1 explained that there was a longstanding dispute between John Bruno and members of the family including the deceased and PW 2. It pitted members of the family on one side and John Bruno supported by the accused on the other. The dispute was evidenced by the fact that John Bruno had filed a suit in the *Kisumu HCCC No. 53 of 2012* against, amongst others, PW 2 and the deceased stating that they had interfered with the boundary to his parcel of land. He had also filed against them *Kisumu HC Misc. 50 of 2005*.

22. In addition, John Bruno had lodged several complaints to the police accusing of interference with his land and malicious damage to his property. In his complaints he had mentioned PW 2. A letter dated 7th December 2012 addressed to the Nyanza Provincial Police Officer by the Officer Commanding Police Divisions Siaya documented no less than 12 complaints by John Bruno regarding the issues concerning the land. In the letter the writer concluded that, “*The major cause of most of the issues raised by the complainant involves a land dispute between the complainant and his brothers who are supposed to be beneficiaries of their grand father’s parcel of land at Barosimbo area.*”

23. There is overwhelming evidence that John Bruno and members of his family were involved in a land feud that sometimes bordered on violence and destruction of property as evidence by the numerous police reports made by John Bruno at Siaya Police Station. Was this incident part of the same violence? It is not lost to me that when DW 1 went to hospital he reported that he was attacked by known persons. Were these people members of the family?

24. Although there is a lot of suspicion pointing to the accused as the perpetrators, all this evidence does not point unerringly to the accused guilt. All the facts taken together do not form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no else.

25. I acquit the accused **WILLIAM NYANGORO OLENYO (DW 1), GABRIEL OMONDI OGUTU (DW 2)** and **IBRAHIM ODEYO OLENYO (DW 3)** of the murder of **JOSEPH OORO OLOO**. They are set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 28th day of September 2017.

D.S. MAJANJA

JUDGE

Mr D. Otieno, Advocate for the accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.