



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 67 OF 2014

BETWEEN

REPUBLIC.....PROSECUTOR

AND

NEHEMIA AYUGI ODERA alias EZEKIAH.....1ST ACCUSED

JOHN OUMA OGANGA.....2ND ACCUSED

JUDGMENT

1. **NEHEMIAH AYUGI ODERA alias EZEKIAH (DW 1)** and **JOHN OUMA OGANGA (DW 2)** are charged with the murder of **PAUL OBIERO** contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars are that on 30th November 2013 at Kisumu Town, Kisumu East District within Kisumu County the accused persons jointly murdered the deceased. After the accused pleaded not guilty, the prosecution called four witnesses to prove its case. The accused gave sworn testimony and called one witness.

2. The prosecution case is that the accused assaulted the deceased after accusing him of stealing a goat. There is no doubt that the deceased died as a result of an assault. Dr Patrick Omondi (PW 3) produced the post mortem report prepared by Dr. Massawa who conducted the post mortem on the deceased's body on 16th December 2013 at Jaramogi Odinga Oginga Teaching and Referral Hospital ("JOOTRH"). According to the report, the deceased had a minor cut on the left temporal region of the head and a cut on the skull, a fracture of right distal radio-ulnar joint and a fracture of the ankle joint. Internal examination revealed collapse of the right lung. Dr Massawa concluded that the cause of death was cardio-respiratory arrest secondary to severe head injury and poly-trauma secondary to multiple fractures.

3. The deceased's wife, Roseline Ngoya Owino (PW 1) recalled that on 30th November 2013 at about 8.00pm, she was at home. She had sent her son and daughter, Stacy Akinyi (PW 4) to the nearby Wells Petrol Station to buy paraffin. They came back screaming and when she inquired what was happening, they told her that their father, the deceased, was being beaten. She rushed to the petrol station and found the deceased bleeding. He told her that both accused had beaten him. She organised for transport to take the deceased to hospital while she went back home to take care of her infant. The deceased did not recover and died as a result of his injuries on 10th December 2013. When cross-examined, PW 1 told the court that she reported the incident on 10th December 2015.

4. The deceased's daughter, Stacy Akinyi (PW 4), confirmed that PW 1 had sent her to Wells Petrol Station to buy paraffin. After buying paraffin she saw a crowd of about 20 people and when she went there she found the two accused beating the deceased while accusing him of stealing. She testified that the

people in the crowd were trying to tell them to stop but they continued beating him. She quickly ran back home to inform PW 1 who went back to the scene and returned to inform her that her father had been taken to hospital.

5. The investigating officer, PC Peter Ooyi (PW 2) of Kondele Police Station was requested to investigate a case of murder after a report was made at Nyamasaria Police Patrol Base on 10th December 2013. He recorded the statements of PW 1 and PW 4 and notably PW 1 mentioned the names of the accused as people who assaulted her father on the material night. He organised for the post-mortem of the deceased to be arranged. PW 2 testified that after the report, he tried to look for the accused but they had disappeared from the locality until October 2014, when he was informed that they had been seen. With the help of PW 4, he was able to arrest the accused who resided behind Wells Petrol Station.

6. Both accused denied murdering the deceased. DW 1 testified he resided at Nyamasaria and on the material day he left his house in the morning to go to work and returned home in the evening and remained in his house. He stated that he did not know the deceased and was shocked when he was arrested on 26th November 2014 by an officer who stated that he was looking for Ezekiah. DW 3 testified that he did not know the deceased and that he was arrested on 26th November 2016 as he was preparing to go to work.

7. George Ouma Ochoche (DW 3) testified that he was a resident of Nyamasaria and that on the evening of 30th November 2013, as he was returning from work he found about 20 people beating someone at Wells Petrol Station accusing him of stealing a goat. He further testified that he did not know any of the people assaulting the person but confirmed that DW 1, whom he had known for about 10 years, was not at the scene

8. The main issue in this case is whether the accused caused the unlawful act that led to the deceased's death. The case against the accused hinges on the deceased's dying declaration to PW 1 that it was the accused who assaulted him and the direct testimony of PW 4 identifying them as the persons who assaulted the deceased.

9. The statement the deceased made to PW 1 is a dying declaration and is admissible under the provisions of **section 33(a)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. It must however be received with the necessary caution and circumspection to support a conviction (see *Choge v Republic [1985] KLR 1* and *Pius Jasunga s/o Akumu v R [1954] 21 EACA 331*). In cross-examination, PW 1 told the court that when she reported the deceased's death on 10th December 2013, she admitted that she did not record the accused's name nor did she record that the fact that the deceased told her that he had been assaulted by the accused. However, when cross-examined, PW 3 stated that when PW 1 made the initial report of the assault on 30th November 2013, she named the two accused as her husband's assailants but did not state that he told her that the deceased identified them. Given the importance of such a declaration, PW 1 would have mentioned this fact in her first report and subsequent statement. Furthermore, given the paucity of evidence on the deceased's physical and mental condition at the time he was being assaulted, I am unable to assess whether in fact, the deceased could make such a declaration. In these circumstances, I reject the evidence of the deceased's dying declaration. I now turn to the direct testimony of PW 4.

10. The incident took place at about 8.00pm which calls for a careful examination of the evidence to ensure that the circumstances were favourable for positive identification of the accused by a single witness. The Court of Appeal in *Odhiambo v Republic [2002] 1 KLR 241, 247* set out the guiding principles for consideration of such evidence as follows:

The law on identification is not in doubt. It has been stated and restated in several judicial decisions by this Court and by the High Court. The Court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either

direct or circumstantial, pointing to the guilt of the accused persons from which the Court may reasonably conclude that identification is accurate and free from the possibility of an error. see Abdala Bin Wendo and Another v. Republic [1953] 20 EACA 166; Roria v. Republic [1967] E.A. 583.

11. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See **Maitanyi v Republic [1986] KLR 198** and **R v Turnbull [1967] 3 ALL ER 549**). This requirement is, however, relaxed when dealing with the case of recognition because, “*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.*” (see **Anjononi & Others v Republic [1980] KLR 59**). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

12. The testimony of PW 4 placed the accused persons at the locus *in quo* and as the people who assaulted the deceased at Wells Petrol Station on the material night. PW 4 was present at the scene and she was clearly able to see the two accused assaulting the deceased with the help of electric lighting from the petrol station. The two accused persons were well known to her as they were neighbours and she used to pass by their respective homes on the way to school. According to PW 2, when PW 4 recorded her statement she named both accused and stated that there was sufficient light as the place was just outside the petrol station. Lastly, PW 4 is the one who directed PW 3 to arrest the accused from their respective homes when they re-surfaced in the locality.

13. The testimony of PW 4 was straightforward and apart from the conditions of lighting existing at the petrol station on that night that were conducive to positive identification, the accused were clearly known to her hence diminishing the opportunity for mistaken identity. Nothing was suggested to her in cross-examination that she was lying or that she had a vendetta against the accused. I heard and saw her testify. Her answers were clear and resolute and I was satisfied that she was telling the truth. On the other hand, both accused disappeared from the locality only to resurface about a year later. This conduct, in the absence of a reasonable explanation, is inconsistent with innocence. In these circumstances I reject the accused defence including the evidence of DW 1 that they were not at the scene.

14. Although the evidence against the accused is that they both beat the deceased with canes, the prosecution did not establish who hit the fatal blow. In such circumstances it was necessary to establish that the accused acted with a common intention. Common intention may be inferred from the acts of the perpetrators and the surrounding circumstances. In the case of **Njogu v Republic [2007] 2 KLR 123**, it was held that:

Under section 21 of the Penal Code (Cap 63), when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

15. The key witness, PW 4, testified that when she arrived at the scene, there was a crowd of about 20 people although when she went close, it was only the two accused who were beating the accused while accusing him of having stolen a goat. She left as they continued to beat the deceased causing him to suffer multiple injuries. On the other hand, DW 3, testified that more than 10 people, who he did not know, were assaulting the deceased while accusing him of stealing a goat. For the reasons, I stated earlier I am inclined to accept the testimony of PW 4. Both accused took it upon themselves to assault the accused on suspicion that he had stolen a goat. They acted jointly hence the prosecution established that they acted with common intention to beat up the deceased.

16. The injuries inflicted on the deceased were so vicious, they led to fracture of the deceased's bones and a head injury. These injuries could only have been inflicted with the intent to cause grievous harm or

death. Accordingly, I find and hold that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

17. I find **NEHEMIAH AYUGI ODERA alias EZEKIAH (DW 1)** and **JOHN OUMA OGANGA (DW 2)** guilty of the murder of **PAUL OBIERO** and I convict each of them accordingly.

DATED and DELIVERED at KISUMU this 21st day of September 2017.

D.S. MAJANJA

JUDGE

Mr Oguso, Advocate for the 1st accused.

Mr Lore, Advocate for the 2nd accused.

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