



REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CRIMINAL CASE NO. 70 OF 2013

BETWEEN

REPUBLIC.....PROSECUTOR

AND

ANTHONY AORO AMOLA.....1ST ACCUSED

TOBIAS ODHIAMBO AMUGA.....2ND ACCUSED

JUDGMENT

1. The accused, **ANTONY AORO AMOLA** and **TOBIAS ODHIAMBO AMUGA** persons were presented before this court on information dated 4th July 2014 charging them 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)*. The particulars of the offence were that on the 1st day of November 2013 at Kasimba village in Rachuonyo South District within Homa Bay they murdered **ERICK ODONGO AGUTU** (“the deceased”). They pleaded not guilty and prosecution called 5 witnesses.

2. The deceased’s father, David Agutu Odede (PW 1), told the court that on 1st November 2013 he decided to sell one of his cows. He sent the deceased and his nephew Brian Otieno Okoth (PW 5) to escort the cow to Oyugis market as it was market day. Due to his disability, he would follow them later on a motorcycle. Before he could follow the two boys to the market, Silvanus Odhiambo Omodo (DW 3) came riding a motorbike and informed him that he had seen the two boys being beaten at Kasimba Junction on suspicion stealing a cow. He rode on DW3’s motorcycle to Kasimba where he found the deceased and PW 5 tied to a tree and the accused persons were beating them. PW 1 recalled that he shouted at them and they stopped beating the boys. Some boys who were passing by untied the boys. PW 1 told the boys to go back home with the cow. PW1 did not inspect the gravity of the injuries inflicted the boys at the scene. He only learnt that the deceased had a head injury when he collapsed at home. On cross examination, PW 1 denied the suggestion by defence counsel that the deceased and PW 5 had stolen the cow.

3. Brian Otieno Okoth (PW5) recalled that PW 1 requested him and the deceased to drive a cow he wanted to sell to Oyugis market. On reaching Kasimba Junction, they met the two accused persons who were known to them. He described what happened to him as follows;

They asked us where we were taking the cow. We told them we were taking the cow to the market. They were both talking. They accused us of stealing the cow. They were shouting that we were

thieves. They tied us. Ochocho is the one who came with a rope and tied us on a treeSomeone was sent to call my uncle. I do not recall his name The beatings took about 15 minutes. People came. PW1 came and asked why we were being beaten....They kept beating us. They told my uncle that he had brought up thieves. The first accused beat Eric on the head until he started bleeding. They continued. The first accused pushed PW1. A good Samaritan came and intervened.

4. After PW 1 arrived with DW 3 and the boys were released, he told the boys to take the cow back home. According to PW 5, the deceased walked for some distance but since he could no longer walk, he called a motorbike to take him home. When they reached home, the deceased went to sleep.

5. When PW 1 arrived home, he found the deceased sick. He decided to go and look for money to take the deceased to hospital but was not successful so he returned home at about 5.00pm. The deceased mother came back from the market at about 6.00pm and decided to take the deceased to Matata Hospital at Oyugis. She returned at around 9.00pm and informed the family that the deceased had died.

6. On 2nd November 2013, Sergeant Omar Mohammed Noor (PW 4) was informed by his Commanding Officer that a suspect had been arrested by area Chief concerning the deceased's death. He went to the place where he was being held and arrested the 1st accused. The investigating officer (PW 2) told the court that he went to PW 1 who informed him that the accused persons beat up the deceased who died on the same evening. He formed the opinion that the injuries sustained by the deceased during the beating led to his death. The 2nd accused was arrested a month later.

7. The 1st accused (DW 1) elected to make a sworn statement when called upon to make his defence. He denied assaulting the deceased and stated that on that day he went to the market, carried out his duties and then went back home. His wife Josephine Awino Ondhige (DW 4) testified that on the material day the DW 1 came home at around 5.00pm as usual and did not inform him of any strange occurrence on that day.

8. The 2nd accused (DW 2) also gave sworn evidence and denied assaulting the accused. He stated that on 1st November 2013 he was away in Nairobi where he worked as a carpenter.

9. Silvanus Odhiambo Omodo (DW 3) told the court that on the material day he was heading home from Oyugis when at Kasimba Junction he found that two boys had been caught on suspicion of stealing a cow. He knew that the deceased as the son of PW 1 so he immediately boarded a motorbike and went to call PW 1. He stated that when he arrived, PW 1 was shocked as he had no knowledge that the boys had taken the cow. The two boys were released to PW 1 and they went home with the cow. DW 3 stated that the boys were unharmed when they left the scene.

10. In order to secure a conviction for the offence of murder under **section 203** of the **Penal Code**, the prosecution must prove beyond reasonable doubt (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought as defined under **section 206** of the **Penal Code**.

11. As regards the fact and cause of death, Dr Peter Ogola (PW 3) performed an autopsy on the body of the deceased on 6th November 2013. He concluded the cause of death to be bleeding below the scalp resulting from head injury. He also formed the opinion that the object used was a blunt one. This finding was consistent with the testimony of PW 5 who saw the deceased being hit on the head.

12. As to whether the accused committed the unlawful act that led to the deceased death, the prosecution relied primarily on the direct testimony of PW 5. Learned counsel for the prosecution, Ms Ongeti, submitted that ordeal took place in broad day light and hence the issue of mistaken identity could not arise. She noted that there was no grudge between the accused persons and PW 1 and there was thus no reason to frame them.

13. As against the prosecution evidence, the accused raised alibi defences and stated that on that day

neither of them was at the scene. The law has been settled that an accused person who raises the defence of alibi does not thereby assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime (**see Kiarie v Republic [1984] KLR 739**). This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial. In this case the accused did not give notice of his intention to give alibi defence in order for the prosecution to call evidence in rebuttal. This leaves the court with the task of comparing the alibi defence with the prosecution evidence.

14. Mr Osoro, learned counsel for the accused, submitted that there was a gap in the evidence in that anything could have happened to the deceased from the time he left Kasimba Junction with no apparent injury to the time he went home and was taken to hospital by his mother. He contended that the gaps in the prosecution evidence left room for speculation as to what had really happened more so because the deceased's mother and the chief who arrested 1st accused were not called as witnesses. He also questioned why PW 1 did not report the assault to the police.

15. I find that the prosecution evidence disproves the alibi for several reasons. The incident took place at daytime and it is clear that the PW 1 and PW 5 knew the accused person as they were from the same locality. The evidence did not disclose any grudge between the accused persons and the family of the deceased hence there was no reason for randomly picking the accused out as the people who assaulted the deceased. DW 3 admitted that it was possible the boys were assaulted while he was away fetching PW 1.

16. I did not detect any reason to reject the testimony of PW 1 and PW 2 nor is the credibility of PW 1's testimony undermined by the fact that he did not report the assault to the police. Since the injury was not apparent and the deceased died later that night, it was not unreasonable for the PW 1 not to report the matter to the police. I also reject the suggestion something could have happened to the deceased between the time he left Kasimba to the time he died. The testimony of PW 5 was clear on this point and it is that the deceased sustained a head injury, went home to sleep, was taken to the hospital and died that night.

17. For the reasons I have outlined above, the failure to call the chief who arrested DW 1 or the deceased's mother did not weaken or undermine the prosecution case. The fact is that DW 1 was re-arrested the very next day by PW 4 confirms that he was not a stranger to the deceased, PW 1 or PW 5. The deceased's mother was not a necessary witness as she only took the deceased to hospital and came back to report that he had passed away on the same day. Her testimony would neither add nor subtract from the prosecution case.

18. The testimony of PW 5 clearly established that both accused acted together when they confronted the two boys, accused them of stealing a cow, tied them on a tree and proceeded to inflict violence on them. Although, PW 5 stated that it is the 2nd accused who inflicted a blow on the head, the 1st accused cannot escape liability on the basis of common intention. The Court of Appeal in **Njoroge v Republic [1983]KLR 197** stated that;

If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavour to effect the common object of the assembly.

19. In **Rex v Tabulayenka s/o Kirya [1943] EACA 51**, the East Africa Court of Appeal stated that common intention may be inferred from the accused presence, their actions and the omissions of either of them to disassociate himself from the assault. Thus while the 2nd accused did not administer the fatal blow, he participated in the whole ordeal. From the evidence of PW 5 he is the one who used a rope to tie the boys to the tree.

20. In view of the foregoing I find and hold that the accused caused the unlawful act that led to the death of the deceased. From the evidence, it is also clear that the prosecution established malice aforethought. Not only did the accused intend to cause grievous harm to the deceased, they also acted with the knowledge that their acts would cause the deceased grievous harm within the meaning of **section 206(a)**

and **(b)** of the *Penal Code*.

21. I therefore find the accused **ANTONY AORO AMOLA** and **TOBIAS ODHIAMBO AMUGA** guilty of murdering **ERICK ODONGO AGUTU** and I convict them accordingly.

DATED and SIGNED at KISUMU this 24th day of June 2016.

D.S. MAJANJA

JUDGE

DATED and DELIVERED at HOMA BAY this 27th day of June 2016

H.A. OMONDI

JUDGE

Mr Osoro instructed by Osoro and Company Advocates for the accused.

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