



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MURDER CASE NO. 29 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NICHOLAS ONYANGO ODADA.....1ST ACCUSED**

**JACOB ODHIAMBO RAKWACH.....2ND ACCUSED**

**DAUDI ONYURO MUGA.....3RD ACCUSED**

**JOHN APII OPIYO.....4TH ACCUSED**

**SAMUEL OJWANG OKELLO.....5TH ACCUSED**

**AKOTH RAKWACH.....6TH ACCUSED**

**FANUEL AGEKO APII.....7TH ACCUSED**

**JUDGMENT**

The accused persons are charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars in the information are that on 11th March 2011 at Magina Sub-location, Nyando District within Nyanza Province, jointly with others not before Court they murdered Maricus Ongidi Othare and Dorina Nyaranga Ongidi.

They all pleaded not guilty to the charge.

Briefly the Prosecution's case is that on the night of 11th March 2011 a group of people invaded the home of Ongidi Othare for allegedly harbouring people from Nyakach and caused mayhem before setting the home ablaze and in the process killing Maricus Ongidi Othare and his wife Dorina Nyaranga Ongidi.

According to their son George Ochieng Ongidi (PW1) the invasion was preceded by wailing and shouting at the home of their neighbour and suddenly a crowd congregated at the homestead of one Omondi. After thirty minutes the screaming stopped and the people started speaking in low tones. They were allegedly saying that they would invade Ongidi's home and burn it because of "allowing the people of Nyakach to come". Shortly after that the crowd invaded the home and set fire to the granary after which they surrounded the house of Ongidi. They waited for him to come out and when he didn't they set the house on fire. From there they slashed the cattle killing two. They then proceeded to the house where George (PW1) used to sleep and where he had taken refuge when the mayhem was taking place. When he saw them approaching he ran into the sugarcane plantation. The crowd pushed the door and collected the household goods and burnt them. They then damaged the roof of the house. He however managed to

grab his phone from the house and outrun the crowd when it chased him. He used that phone to inform his kin and when they arrived at the scene at about 3AM they went to look for his parents but all they found were their charred remains. They had been burnt beyond recognition. Their bodies were subsequently removed to the Nyanza General Hospital Mortuary and when Post Mortems were done the cause of death was found to be severe haemorrhage secondary to body mutilation and burns.

George Ongidi (PW1) testified that during the occurrence he recognized Jacob Odhiambo Rakwach (2nd accused), Samuel Ajwang Okello (5th accused) and Fanuel Ageko Apii (7th accused). He stated that he knew them before that incident and that he saw them because there was light from the flames of the fire. He told the Court that they were carrying crude weapons. He recognized other villagers whose names he told this Court but those were not charged.

Karilus Odhiambo Ojwang (PW2) testified that earlier in the day some people had set the deceased's sugarcane farm and fodder on fire but had run away on seeing him. Later at about 6pm he (PW2) heard some screams and went to see what was happening. He did not get there however as he was apprehended by two people Mzee Onyuro (3rd accused) and William Apii who said they were taking him to the chief. On arrival there the chief called the police who however did not respond. It was then that the Chief got three men who escorted him (PW2) to Ombugi Primary School and from there he found his way to the deceased's home only to find it burnt and deserted. He saw three people with spotlights but did not identify them. He spent that night in the sugarcane farm. When he went to the scene in the morning he stumbled upon the bodies of the deceased at different corners of the house.

Richard Adika Acheru (PW3) told the Court that when he heard noise at his uncle's house he went there and found his uncle's house engulfed in flames. He entered the maize plantation and from there he could see people going around the house lighting fire. He stated that among the people he saw were Jacob Odhiambo (the 2nd accused), Rasto Akoth (the 6th accused) and Andele Apii (the 7th accused). After observing the mood at the scene he went home. He confirmed that his cousin, PW1, later went there and made calls to their kin. When their kin arrived from Ringa they went to the scene only to find the houses of the deceased and that of his son razed to the ground. Some of the cows had also been burnt and one had been speared. The deceased and his wife Doris were also been burnt to death.

Phillip Otieno Ongidi (PW4) was in Eldoret when his father, the deceased, flashed him and on calling back told him that his (deceased's) life was in danger. After that he stopped talking but PW4 could hear a stampede. From then he tried to get information from the police as well the area Chief (1st accused) but all they did was assure him all was well at home. Later his brother (PW1) called him and told him what had happened. He travelled home in time to see the charred remains of his parents being brought to the Mortuary. He was also present during the post mortem.

Michael Ochieng (PW5) told the Court that on 10th March 2011 he was summoned to chief Odada's (1st accused) home only to find him at a meeting where everyone present was contributing Kshs.20/= for petrol to burn Odidi's forest. He stated that he left in the middle of the meeting. He mentioned those as the meeting as Odada, Daudi, John, Ouko Obura, Andile and Aguati. He also told the Court that on 11th March 2011 at about 9p.m one Ouko Andile (7th accused), Bondo John Apii (4th accused) and Aguati stormed a funeral armed with crude weapons. He stated that they left shortly afterwards and that he followed them to one Michael Juma's house where they started drinking liquor. He stated that he eavesdropped and heard Bondo and Ouko lamenting that they had received only 1800/= yet they had done so much work. The next day he yet again found them at the home of John Ondido drinking liquor. He stated that some youth wanted to apprehend them for allegedly killing Ongidi; that they were drinking liquor yet Ongidi had been killed just the previous day. He alleged that he heard them say they were involved.

Joel Desai Syukih (PW5) an Assistant Superintendent of Police recalled receiving a call from Eldoret between 7PM and 9.30PM on 11th March 2011. He told the Court that the caller informed him there was a problem in Magina but when he called Chief Odada (1st accused) he assured him there was no problem there. He only informed him of a suspect he had released unconditionally earlier. PW5 sent police officers to patrol the area and when they returned at 2a.m they briefed him that they had patrolled the area with Odada (1st accused) and there was nothing amiss. It was not until the following morning that the 1st

accused informed him of what had happened at Ongidi's home. He went there and confirmed it was true.

According to Khamela Maede (PW8) an Inspector of Police then based at Ahero Police Station and one of the officers who accompanied PW7 to the scene, the bodies of Ongidi and his wife were burnt beyond recognition. He told the Court that in the course of his investigations he received information that around the material time the Chief (1st accused) and Onyuro had hosted meetings of the area residents where the agenda was to burn Gem Forest and to destroy Ongidi and his property for harbouring the people of Nyakach who were their enemies. He learnt that the people of Nyakach were allegedly drawing water from Ongidi's well. He summoned all those who were mentioned by name. They recorded statements after which the investigations file was forwarded to the DPP (Director of Public Prosecutions) who made a recommendation they be charged with murder. They were then arrested and charged.

Dr. Bosire Anna Moraa (PW9) told the Court that the cause of death for both the deceased was severe haemorrhage due to mutilation and severe burns.

All the accused persons gave sworn evidence. They all maintained they were innocent. The 1st accused confirmed that he is the chief of Wawidhi Location in Nyando Sub-County. He stated that on the material day he first came to Kisumu for a workshop, then went to brief the O.C.P.D. on the security on the border between Nyakach and Nyando. After that he was asked to record a statement and it was not until 8pm that he commenced his journey back home. He stated that he arrived there at some minutes to 9PM only to find the 3rd accused and other people at his gate. They alleged to have apprehended a youth who had been roaming the village. When he called the O.C.S. and the O.C.P.D Ahero Police Station they instructed him to detain the suspect in his house but he found it unfair and since he was himself unwell he instructed some boys to take the suspect to the O.C.S. who they were to meet at Ochogo High School. He stated that at 3a.m he was asleep in his house and denied participating in the killing of the deceased. He contended that his home is 3 kilometers from that of the deceased and that he was not told when the latter's home was torched. He only learnt about it the next day. He further confirmed receiving a call from PW3 but stated that when he tried to make inquiries the telephones for all the people he called were off. He confirmed that police officers went to his home later that night. He also denied that any meeting took place in his home as alleged. He denied neglecting his duty as a chief and stated that when the deceased called him at 6.20PM he was with the O.C.S. and he reported the matter to him. He stated that the dispute between the two communities arose from grazing rights.

The 2nd accused testified that he is a teacher at Mier Pamoja Academy and that on the material day he arrived home at 8PM with his children and did not leave. He contended that at 3AM he was in his house. He stated that he was being framed by PW1 but stated there is no bad blood between them. He was categorical that PW1 did not mention him when he made his statement to the police.

The 3rd accused said he was a village elder at the time and confirmed that he had met PW2 on the road, apprehended him and taken him to the chief's house with the 4th accused. He stated that upon leaving the chief's home he went straight to his house. He stated that the fleeing man told him there was a fight between the people of Nyakach and Kano. He contended that he knew nothing of what transpired at Ongidi's home as he did not go there.

The 4th accused confirmed taking the lad to the chief's home with the 3rd accused. He stated that was at 7.30PM and that since the chief was not home he left the lad with the 3rd accused and went back home. He also stated that the lad had told him he was fleeing a fight. He only learnt about the occurrence at Ongidi's home at 6AM.

Like his co-accused the 5th accused stated that he knew the deceased. He however stated that he was nowhere near the scene on that night as he had gone for overnight prayers at a place called Ong'ande. He stated that he went back to his village on 12th March and could not have participated in the crime.

On his part the 6th accused stated that on the evening of 11th March 2011 he ate dinner, listened to the radio then retired to bed at 9PM. At 6AM he heard screams and went to find out what was happening only to find Ongidi had been burnt. He stated that the deceased's home was 2 ½ kilometers from his and

that he had not heard any noises from there. He contended that he had never been to the home of the deceased.

The 7th accused's testimony was that on the material night he was in Eldoret where he worked as a conductor for a Town service vehicle Registration Number KAG.

He stated that he only learnt of the demise of Ongidi when he was arrested in Eldoret. He contended that he did not know why PW1 and PW4 implicated him.

Isaiah Ng'eno Tanui (DW1) was a witness for the 1st accused. He stated that at the material time he was the District Commissioner Nyando and that the 1st accused was one of the chiefs in his area of operation. He testified that on 10th/11 2011 the 1st accused went to his office to brief him first about a meeting that had taken place the previous day and second about the tension between Nyakach and Nyando. He stated that as the chairman of the Security Committee he visited the area and there was no indication things would get out of hand. He however could not tell if the 1st accused participated in this crime. He also recalled that on 12th the 1st accused informed him that a home had been torched and a husband and wife killed. He visited the scene the next day.

Janet Aoko (DW2) testifying on behalf of her husband the 2nd accused stated that on the day in question he arrived home from the school he teaches at 7.30PM and that she spent the entire night with him.

The 3rd accused called Mary Adhiambo who testified that she was his wife of twenty eight years. She stated that from the night of 10th March to the evening of 11th March they were home together but only, left the home on hearing shouts that a child of their village was being killed. She stated that he came back shortly afterwards and told her they had been to take a lad to the chief.

Section 203 of the Penal Code provides:-

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of Murder”.***

Malice afterthought is defined in Section 206 as deemed to be established by evidence proving anyone or more of the following circumstances -

***(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”.***

Evidence from the Prosecution as well as the defence establish that what transpired at the home of Ongidi on that fateful night was murder. There was no doubt an intention to cause the death or to do grievous harm to Ongidi and his wife. There must also have been knowledge that the torching of his house would probably cause the death of or grievous harm to the occupants therein and there certainly was an intent to commit a felony. Of all the Prosecution witnesses only George Ochieng Ongidi (PW1) and Richard Adika Achero (PW3) claim to have directly witnessed the events of that fateful night. Carilus (PW2) returned to the scene after the incident occurred while Phillip Otieno (PW4) was away in Eldoret. As for Michael Ochieng (PW5) he spoke of events that took place the day before the incident and the day after the incident. The witnesses estimated the time the incident occurred to be 7.30pm. The incident was

preceded by noise in the neighbourhood after which people armed with crude weapons stormed the home and set it alight ostensibly because the deceased was harbouring their enemies – the people of Nyakach. Both PW1 and PW3 told the Court that from their hideout and with the help of fire from the flames they were able to see some of the perpetrators. PW1 stated that among those he recognized were Jacob Odhiambo (2nd accused), Samwel Ojwang Okello (the 5th accused) and Fanuel Ageko Apii (the 7th accused). The other people he saw were not charged. As for PW3 his evidence was that he identified Jacob Odhiambo (the 2nd accused), Rasto Akoth (the 6th accused) and Adili Apii (the 7th accused).

The 1st and 3rd accused persons were implicated by PW5 who alleged that he had attended a meeting at the home of the 1st accused whose agenda was first to burn the forest and second to destroy Ongidi and his property. PW5 also told the Investigating Officer (PW8) that a second secret meeting was held in the home of the 3rd accused person.

The point for determination therefore is whether the evidence of these witnesses against the accused persons proves their guilt beyond reasonable doubt.

For the 1st, 3rd and 4th accused persons no witness alleges to have seen them at the scene. Their only nexus to this crime is the evidence of PW5. However this witness did not strike me as a credible witness. He was very inconsistent. To begin with whereas he alleges to have been a close neighbour of the deceased he could only narrate events before and after the date of the incident. Secondly he alleged to have gone to the home of the 1st accused upon being summoned by him but found the chief in a meeting. It was his evidence that the chief told him that the meeting was for those people there meaning Odada, John, Ouko, Obura, Daudi, Adili and Aguati. He did not however explain how he stayed on to listen in on a meeting that did not concern him. It was also his evidence that he left in the middle of the meeting. The question that begs an answer is whether he indeed was at the meeting and whether he in fact heard the people say they were going to attack the deceased and his property. He himself says although he found the meeting in progress he was told it did not concern him. If that is true then he could not have been allowed to sit in the meeting. Secondly why did he not report the matter? He did not give an explanation on this and nobody seemed interested to ask him why. His evidence made light of a very serious matter where an elderly man and his wife met their death at the hands of very brutal killers.

His testimony is rendered even more incredible by the testimonies of the 1st, 3rd and 4th accused persons. All had alibis which somewhat got support even from the prosecution witnesses. PW1 and PW3 who were eye witnesses were categorical that they did not see these three accused persons at the scene. The accused persons accounted for their movements throughout that day up to the time they retired to bed and as the evidence of PW5 is unreliable the Prosecution's case against the 1st, 3rd and 4th accused is weak.

As for the 2nd, 5th, 6th and 7th accused PW1 and PW3 allege that they saw them at the scene. These two witnesses knew the accused persons prior to that incident and their evidence would be that of recognition which it is now well settled is even better than that of identification. The incident occurred at night and according to these witnesses the only light available to them and by which they recognized the accused persons were the flames of the fire. The point for determination therefore is whether the circumstances at the scene were conducive to a positive identification.

My finding is that they were not. PW1 told this Court that when the attackers entered the home he was in his brother's (PW4) house. He however claims to have seen what the attackers were doing while he was in that house and later as he hid in a sugarcane farm. He stated that the attackers first, went to his father's house which they torched before going to the house where he was hiding. He did not however tell the Court how he saw the attackers. Did he see them through the window or through the door? What was the intensity of the flames? All these are issues that ought to have been addressed. It was at night after all. Moreover it is also baffling that he was able to dash out of the house then go back for his phone and finally escape when the marauding mob was only fifty meters from the house. It is also instructive that despite being so sure he had seen these accused persons at the scene he never mentioned their names to the police when he reported the matter. His own father had just been murdered by people he knew yet he could not tell the police their names? The only logical conclusion that one can draw from this is that he

did not identify let alone recognize the attackers and more so these accused persons. This is lent more credence by the fact that there is evidence that the 2nd accused who he and PW3 places at the scene could not have been at the scene at all. According to PW2 the 2nd accused had accompanied the 4th accused to take him (PW2) to the chief's home. This witness testified that he himself took a long time to get back to the scene which means that these two accused persons could have taken a similar period of time and therefore could not have been there when the deceased's home was invaded. Even the Investigating Officer (PW8) confirmed it would have taken no less than 4 hours to walk to the scene from the chief's (1st accused) home. It is noteworthy that when PW4 was questioned about the 2nd accused he stated that the first time he saw the 2nd accused on that day the said accused was riding a bicycle towards his home. PW4 did not say the 2nd accused was riding from the scene of the crime and it might as well be that that was the time the 2nd accused was going back home after leaving PW2 at the home of the 1st accused. During the trial it transpired that whereas PW4's statement was first recorded by hand that handwritten statement was not available. The defence was not even supplied with it despite several orders by this Court and there were areas which it was conceded it differed with the typed statement that was availed in Court. This raises the question as to why the Prosecution did not want to reveal the handwritten statement and whatever it was the benefit of doubt must go to the accused persons. It is therefore my finding that much as the killers of the deceased persons deserve the most severe punishment possible there is doubt as to whether the accused persons in this case are the killers. That leaves this Court with no alternative but to give the accused the benefit of doubt. Accordingly I find them not guilty of Murder and acquit them.

**Signed, dated and delivered at Kisumu this 24th day of October 2016**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Mr. Muia for the state

Mr. Onsongo for all the accused persons

All 7 accused persons

C/A: Serah Sidera