



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 22 OF 2014

BETWEEN

REPUBLICPROSECUTOR

AND

DOMINIC MILLER MILANDA 1ST ACCUSED

SUNDAY OLISE OTIENO..... 2ND ACCUSED

VINCENT OCHIENG OGUTU 3RD ACCUSED

JUDGMENT

1. The prosecution case was that on 1st May 2014 at about 8.00am at Luanda Rombo Beach, Wanyama Sub-Location, Rusinga West Location, Mbita District of Homa Bay County, the deceased, **Ibrahim Ochieng Rama**, was beaten, doused with paraffin and set ablaze. He died because of injuries sustained. The accused, **Dominic Miller Milanda** (“Dominic”), **Sunday Olise Otieno** (“Sunday”) and **Vincent Ochieng Ogutu** (“Vincent”), were arrested and charged with the deceased’s murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. They pleaded not guilty and the prosecution called 6 witnesses to support its case.

2. The fact and cause of death was not in dispute. Dr Ayoma Ojwang’ conducted the post mortem on the deceased’s body on 9th May 2014 at Homa Bay District Hospital after it had been identified by James Otieno Owino and Stephen Okoth James (PW 2). Dr Ojwang’ had passed away by before the trial commenced hence the post mortem report was produced by **Dr Francis Ochieng** (PW 5) under **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. He confirmed that he knew Dr Ojwang’ and was familiar with his handwriting. Dr Ojwang’ observed that although the deceased had suffered severe burns on 80% surface area of the body, there were no fractures, cuts or lacerations on the body. Internal examination revealed that the lungs were full of carbon particles. Dr Ojwang’ concluded the cause of death was respiratory failure and 80% burns on his body.

3. Samson Ogweno Okello (PW 1) and Martin Owino Ongidi (PW 4) testified that they were employed by Sunday as a fisherman on his boat. On 1st May 2014, after fishing on Lake Victoria and landing the catch at about 3.00am, they went to call Sunday from his house. They all returned to the beach and after removing the fish they all went back to Sunday’s house. When Sunday went to his house, he came out and informed them that one of his pressure lamps was missing. He went back again and came out saying that his identity card, radio and cell phone were missing. He also came out with a red woollen cap which

he said must have belonged to the person who had broken into house. The neighbours and other people who had been fishing said that the cap belonged to the deceased. PW 1 and PW 4 testified that they left together with Sunday and went to the deceased's home nearby and when they confronted him, he denied that he had stolen from Sunday's house. PW 1 and PW 4 left after telling Sunday to deal with the issue at daybreak.

4. At about 8.00am, PW 1 heard the beach bell ringing. He proceeded to the beach and found the deceased seated on the ground, the beach leader was asking to whom the red woollen cap belonged. People began shouting that it belonged to the deceased whereupon they started beating him with sticks and metal bars. He recalled that Sunday was present shouting, "*Ibrahim is a thief and we must lynch him.*" PW 1 testified that he did not see Dominic and Vincent although he knew them as fishermen.

5. PW 1 further testified that after a while the crowd stopped beating the deceased. As he was going to meet the deceased's wife, he met Sunday leaving. He saw him get paraffin, go back to the beach and pour paraffin on the deceased. When he told Sunday to stop what he was doing, Sunday told him he was just threatening the deceased. As he was talking, Sunday lit the match, dropped it on the deceased who was set on fire. He took off thereafter.

6. PW 4 testified that he responded to the beach bell that morning and headed to the beach where found the deceased seated while Sunday was asking the crowd whom the red woollen cap belonged to. PW 4 recalled that people started beating the deceased including Sunday and Vincent. From there he left and when he returned he saw Sunday light a match and throw it on the rope with which the deceased was tied but he stepped on it and put it off. He decided to leave the beach and later heard that the deceased had died.

7. The deceased's cousin, Silas Owino Okoth (PW 3), recalled that as he was leaving his house on the material morning, he met Sunday with a group of people carrying sticks and metal bars headed towards the deceased's house. The group frogmarched the deceased to the Beach Management Unit (BMU) office and ordered him sit down. PW 3 recalled that Sunday began interrogating him about the items stolen from his house while the group started beating him despite his denials that he was not involved. PW 3 told the court that Sunday left for a while and came back with a sisal rope, tied the deceased's hands and legs while the Vincent came with a metal bar and started beating the deceased until one of the people intervened. PW 3 stated that Sunday also returned with container and poured its contents on the rope while demanding that the deceased tell him where the stolen items were. Sunday then lit a match and dropped it at the end of the rope but PW 4, who was close by, stepped on the rope and put off the flame. Sunday then lit the match again and dropped it on the deceased's clothes. The deceased began to confess that he knew where the stolen things were. As he was crying and rolling on the ground, Sunday and a woman, by the name Maureen, immediately fetched some water from the Lake and poured it on the deceased thus putting off the fire. PW 3 left to report the matter to the police but by then the police had already received information of the incident.

8. The investigating officer, Corporal Edwin Nyongesa (PW 6) recalled that on 1st May 2014 at about 8.00am, he was at Mbita Police Station when he was informed that someone, who was suspected of having stolen from Sunday's house, was being beaten at Luanda Rombo Beach. He proceeded to the scene and found the deceased with serious burns seated outside the BMU office. He took him to Mbita District Hospital but was referred to Homa Bay District Hospital where the deceased was admitted and died on 4th June 2014.

9. Dominic elected to make an unsworn statement. He stated that on 1st May 2014 he left his house at about 10.00am to go to the beach. He found people had gathered in groups and were talking in low tones saying that Sunday had assaulted the deceased who had been taken to hospital. He told that court he was arrested on 8th May 2014 while at Luanda Rombo Beach.

10. Vincent recalled that on 1st May 2014, as he was going to the shop at about 7.30am, he was told that the deceased, who was his friend, was being assaulted at the beach. When he went to the beach, he was

confronted and told that he was one of the deceased's friend's. He was forced to sit down next to the deceased but one of the people told him to go away. He returned to the BMU office after hearing noise where he found the deceased burning. He told a lady who was present to get water and pour on the deceased. As the deceased was burning he was calling Sunday to rescue him while Sunday kept asking where his things were. Vincent told the court that he went home but returned when the police came in their vehicle. He recalled he was arrested on 9th May 2014 after returning from Mfangano.

11. Sunday gave sworn testimony. He denied that he went to the deceased's home or he beat, poured paraffin and set him aflame as alleged. He confirmed that he was a fisherman and when he returned home on the morning of 1st May 2014, he found items; a pressure lamp, 2 mobile phones, identity card and radio had been stolen from my house and that although he found red woollen cap in his house, it is not the one that was presented in evidence. He however took the cap to the deputy BMU leader and since he it was still dark, he was told to come back at daybreak.

12. Sunday further told the court that at about 7.50am, the BMU leader summoned him to the office where he was people gathered. The BMU leader started asking whether anyone saw the thief and whether they knew the owner of the woollen cap. Some people responded that it belonged to the deceased. The leader asked the youths to fetch the deceased. When the deceased was brought he was asked about the cap, he denied that the cap was his or that he stole from Sunday's house. At that point people became rowdy and he went home. After about 20 minutes, he returned to the beach after the noise being made by the rowdy crowd that had gathered. When he arrived, they were threatening to kill the deceased while the deceased was already on fire. He quickly ran to the lake with a basin, fetched water and poured it on the deceased. He asked the people around why they were assaulting the deceased but they did not answer him. A few minutes' later police officers and the BMU chair came and took the deceased to the police station. He also went to record a statement about the theft but was arrested on suspicion of murder.

13. Adonijah Akoko Anyengo (DW 4), who testified on behalf of Sunday, told the court that he knew Sunday and the deceased. On the material day, he was present when people had gathered at the beach. He recalled that Sunday brought the cap at the beach and began asking who it belonged to when some people in the crowd mentioned it belonged to the deceased. DW 4 testified that after the deceased was brought people became rowdy and started beating him. In the ensuing melee, someone doused him with paraffin and set him aflame. He recalled that Sunday emerged from nowhere, took a water basin and went to the lake to fetch water and poured water on deceased thus putting off the fire. He told that court that Sunday was also roughed up and was accused of helping the suspect whom he had reported.

14. The central issue for determination is whether the unlawful acts of the accused caused the deceased's death. The case against Dominic and Vincent is that they were seen in the group that was beating the deceased. Dominic was implicated by PW 1 while Vincent was implicated by PW 3 and PW 4. From the observations and conclusion made by Dr Ojwang' regarding the cause of the deceased's death, the deceased did not die from beatings but rather smoke inhalation and burns. Since the deceased did not die from the beatings inflicted on him, I must acquit Dominic and Vincent.

15. I now turn to consider the case against Sunday's case and whether he is the one who set the deceased a light on that fateful morning. Sunday's position was that he only tried to put off the fire by fetching water from the lake and pouring water on the deceased. The totality of the testimony of PW 1, PW 3 and PW 4 is that on the material morning after finding his items had been stolen and the red woollen cap found in his house, Sunday went to find out who had stolen from him. Once the deceased was identified as the owner of the red woollen cap, Sunday set in the process a chain of events that ultimately led to the death of the deceased. PW 1 heard him expressing his intention to lynch the deceased. PW 3 saw him getting the sisal rope and tie the deceased. He is the one who got the paraffin and poured it on the deceased. PW 3 and PW 4 both testified that he is the one who lit the match and he did not do so once but twice after being stopped by PW 4. I find the testimony of PW 1, PW 3 and PW 4 credible and I therefore reject Sunday's defence that when came to the scene he found the deceased already on fire and that he only tried to rescue him. His defence and the testimony of DW 4 puts him squarely at the scene of the incident and his action of trying to put off the fire perhaps came too late after he had set his intention into motion.

16. I therefore find and hold that Sunday tied the deceased with a rope, brought paraffin and drenched him with it. He thereafter lit the match that caused him to start burning. He thus committed the unlawful act that led to the deceased's death. He **must** have known that by pouring paraffin on the deceased and setting him alight, in circumstances where the deceased had been restrained with ropes, would lead to his death or at the very least result in grievous harm. I am therefore satisfied that the prosecution proved malice aforethought as defined by **section 206(b)** of the *Penal Code*.

17. I therefore find the accused **SUNDAY OLISE OTIENO** guilty of the murder of **IBRAHIM OCHIENG RAMA** and I convict him accordingly. I acquit **DOMINIC MILLER MILANDA** and **VINCENT OGUTU OCHIENG**. They are set free unless otherwise lawfully held.

DATED and SIGNED at KISUMU this 21st day of November 2016.

D.S. MAJANJA

JUDGE

DATED and DELIVERED at HOMA BAY this 29th day of November 2016

H.A. OMONDI

JUDGE

Mr Ongoso, Advocate for the accused.

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