



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 25 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL ADONGO ACHOLA1ST ACCUSED

CORNELIUS OMBAGI NYABERA.....2ND ACCUSED

JUDGMENT

1. On 1st April 2012, J M a child aged 15 years and described to be of slow speech suffered beating in the hands of a cruel mob. He was said to have attempted to steal from a house in Kayole estate. His mother rescued him and rushed him to Mama Lucy's Hospital Nairobi where he later succumbed to the injuries. After investigation, **Samuel Adongo Achola** then a teacher; and, **Cornelius Ombagi Nyabera** then a senior civil servant (the 1st and 2nd accused respectively), were arrested and charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 1st April 2012, at Kayole within Nairobi Area within the Nairobi County they jointly murdered J M.
2. The prosecution called 6 witnesses in support of its case. The deceased's mother H W M testified as PW1. She told the court that on the material day, while on her way home she encountered a mob. On close scrutiny she found that two people were beating her son. She rescued him and took him to hospital. PW2, P N O a child aged 11 years, testified to have heard someone screaming and on responding, he saw a boy running out of the gate. Shortly thereafter, he witnessed the boy being beaten. PW3 L M, testified that on the material day, she heard someone screaming, 'thief! and on getting out of her house, she saw a boy running out of the gate. She saw him being grabbed by people and on rushing to the scene, she saw people hitting him with wooden sticks.
3. PW4 Dr. John Mungai carried out the post-mortem on the body of the deceased on 10th April 2012. He testified that the deceased had suffered multiple lacerations and bruises. He concluded that the cause of death was head injury, blunt trauma as a result of assault. He produced the post-mortem report in evidence. An identification parade in which the 2nd accused was identified, was carried out on 7th April 2012 by Chief Inspector John Wainaina who testified as PW5. Investigation of the case was conducted by Cpl. David Kibet who testified as PW6. He recorded statements from witnesses and recovered a whip from the 1st accused.
4. After hearing the prosecution evidence, both accused persons were placed on their defence. The 1st accused gave an unsworn statement while the 2nd accused gave a sworn statement and also called three witnesses.
5. The 1st accused stated that on the material day, he had been away in Dandora and only returned late in the evening when he was informed about the incident by the care taker. He added that he had just moved houses and while he just moved in, police officers came asking for the tenant of

the house. The police ransacked his house and found nothing, and then took him to the police station. He stated that at the police station, the police said that the tenant of the house had participated in beating the deceased. The 1st accused stated that he had moved into that house on the day he was arrested. He said that he was asked to be a witness but declined since he had not been present on the material day. According to him, he was subjected to an identification parade and the identifying witness was not able to identify him. He denied that the whip produced in court was found in his house and further stated that he believed he was charged with the offence when he declined to be a witness.

6. The 2nd accused testified that on 5th April 2012, police officers came to his house and conducted a search after which he accompanied them to the police station. He was booked in and the following day he was asked to record a statement. The 2nd accused stated that all the while, he had not been given the reason for his arrest. He was taken to an identification parade on 7th April 2012. The identifying witness moved along the parade 2 or 3 times and stated in kikuyu that she had not seen him. Then the police officer asked her to take her time. The officer then came and told the 2nd accused to turn as the witness had picked him out. Later on, the DCIO informed him that someone had been killed near his residence and that the 2nd accused would be charged with murder. He denied being briefed on the identification parade. He further testified that he did not leave his house on the material day as he was studying for exams and also had guests in the afternoon.
7. The 2nd accused called three witnesses in his defence: his wife Florence Asibwe Nyabera (DW2), Elijah Ouma Okello (DW3) and Joseph Silvanus Okore (DW4) who all testified that they were with the 2nd accused in his house on the afternoon of the material day. DW2, DW3 and DW4 stated that they were visiting the family and left at about 5p.m. when they were escorted to the gate by the 2nd accused. They stated that during the period they were visiting, the 2nd accused did not leave the house.
8. The 1st accused relied on submissions made during arguments on the case to answer, while the prosecution and the 2nd accused filed their respective written submission. Both accused persons denied being present at the scene and taking part in the beating of the deceased. They also challenged the evidence of identification. The accused, particularly the 2nd accused, also challenged the credence of the prosecution witnesses on the ground that their testimonies were contradictory.
9. In order to prove the offence of murder, the prosecution bears the duty of proving: the death of a person; that the death was unlawfully caused, that such death was caused with malice aforethought, and that the accused person caused such death. **Section 206** of the **Penal Code** provides that malice aforethought may be proved by establishing any 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.”

10. The death of the deceased was proved by the prosecution. There is ample evidence that the deceased had been assaulted by a mob over suspicion of being a thief. PW1, PW2 and PW3 all testified to having been present when the deceased was assaulted by a mob. PW1 rushed him to Mama Lucy Hospital where he later succumbed to the injuries before being transferred to

Kenyatta National Hospital where he had been referred. PW4 Dr. John Mungai carried out the post-mortem on the body of the deceased. He found that the deceased had multiple lacerations and bruises mainly on the face and scalp. He concluded that the cause of death was head injury and blunt trauma as a result of assault. He produced the post-mortem report which detailed the autopsy results.

11. From the evidence on record and the respective submissions, the critical issue is whether the 1st and 2nd accused were positively identified as the persons who participated in fatally assaulting the deceased and whether the evidence taken as a whole is sufficient to lead to a conviction for the offence of murder.
12. PW1, PW2 and PW3 testified as having witnessed the deceased being beaten. As earlier stated, the deceased's mother H W M testified as PW1. She told the court that on the material day, at about 4.00pm, she was on her way home when she saw a crowd. On drawing close, she saw two men beating a child. On drawing closer still, she found that the child who was being beaten was her son. She intervened and stopped them from beating him. She stated that she recognized them but she had not known them before that encounter. The two persons stated that the boy was a thief, adding that they had taught him a lesson. She then took the deceased to hospital. He died later on and she reported the matter at the Kayole Police Station. She pointed at the accused persons in the dock and identified them as the persons she found beating the deceased. She further stated that she identified the accused persons in an identification parade that was carried out at the police station.
13. PW2, P N O a child aged 11 years, was another eye witness. The court was satisfied that he was of sufficient knowledge and allowed him to testify on oath. PW2, testified that he was at his home studying when he heard someone screaming outside. When he went outside, he saw a boy running out of the gate. The boy was caught and beaten by some people. PW2 stated that he saw one *Baba D* holding a stick but stated that he did not know him and had only heard his name being called out. He stated that he could not recognize him if he saw him again. During cross-examination, he stated that he did not see any of the tenants attack the boy and that he did not know the accused persons. In re-examination, PW2 stated that he saw the boy being beaten while surrounded by a crowd.
14. PW3 L M, testified that on the material day, she heard someone screaming, 'thief! She got out and saw a boy running towards the gate. She saw him being grabbed by people and when she rushed to the scene, she saw the people hitting the boy with wooden sticks. However, PW3 stated that she could not identify them as she had not seen them before. On 3rd April 2012, police officers recorded her statement after informing her that the boy had passed on. PW3 stated that she was not keen as to have been able to identify the attackers but described them as two men of medium build.
15. A careful examination of the testimonies of PW1, PW2 and PW3 leaves lingering doubts as to whether the identification of the 1st and 2nd accused at the scene is reliable. I will first address the evidence of PW2 and PW3. PW2 struck the court as a knowledgeable witness given his age. It is clear from his testimony that indeed he witnessed two men beating the deceased. He recognized one of the two men as 'Baba D'. Strangely however, the witness was categorical that he would not recognize the said Baba D if he saw him again and also stated that he did not know either of the accused persons.
16. While PW2 may have witnessed the beating of the boy, his testimony is not sufficient regarding the identity of the persons who were assaulting the deceased. The much his testimony does it to confirm that the deceased was assaulted by some people, and that a certain Baba D was placed at the scene, holding a stick. However it does not show that he participated in the attack and neither does it show the court whether Baba D is any of the accused persons. Further, it is observed that the witness may have been coached to deny knowing the said Baba D for earlier on in his testimony he had stated that Baba D was standing at the gate holding a stick implying that he was referring to a person he knew.
17. PW3's testimony also clearly shows that she witnessed the beating of the boy. However, this witness was inconsistent in her testimony. During the examination in-chief, PW3 stated that while she saw the deceased being attacked by people with wooden sticks, she could not identify them as she had not seen them before. She described them as two men of medium build. However, she later stated during cross-examination that she had seen the 1st accused before when they lived in the same plot. PW3 added that she could not recall seeing the accused beating the deceased. In re-

examination, PW3 maintained that she had seen the 1st accused before but did not see him beating the deceased on the material day.

18. On the whole, this witness, seemed evasive in giving information to the court on the identification of the accused. It appeared to the court that either the witness was not an eye witness at all or was clearly going out of her way to conceal the identity of the persons who assaulted the deceased. In any event, her testimony cannot be relied on on account of inconsistencies. These inconsistencies diminish the value that the court can accord to her testimony. Where the witness seems untruthful, the court should be wary of relying on the evidence. As was stated in the case of **Ndungu Kimani v Republic (1979) KLR 282,**

“the witness upon whose evidence is proposed to rely upon should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his truthfulness or say or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”

19. The investigators put the accused persons through an identification parade on 7th April 2012. PW5 Chief Inspector John Wainaina carried out an identification parade in relation to this case. The identifying witness was PW1. In his testimony PW5 stated that PW1 identified the 2nd accused by pointing out to him in the parade. He also stated that the parade in respect of the 1st accused was negative meaning that the 1st accused was not identified by the witness. In cross-examination by Mr. Kisaka for the 2nd accused, PW5 stated that PW1 had not identified the 1st accused during the 1st identification parade. He however, did not state whether there was a second parade in which the 1st accused was identified. With respect to the 2nd accused, PW5 stated that the 2nd accused indicated that he was satisfied and signed the parade form. The parade form was produced in evidence.
20. PW1 also testified about the identification parade. She told the court that she picked out the accused persons in the parade conducted at the Kayole Police Station. She said that when she saw them at the police station, she recognized each of them. PW1 recounted passionately how she had confronted the accused persons when they were beating her son she stated *“I saw them beating the boy. They wanted to continue beating him even when I was there. I saw the 1st accused’s face. I cannot forget the face. He was tall. They did not leave immediately. They continued standing there when I went to the police, I explained to them how they looked and the police looked for them”*.
21. PW1’s account sounds cogent and credible. She came face to face with her son’s assailants and observed their faces. The credence of her account however is compromised by PW5’s account. With respect to the 1st accused whom PW1 states “she cannot forget that face”, Chief Inspector John Wainaina who conducted the identification parade and produced the identification parade forms in court, was categorical that the witness did not identify the first accused at all.

For the 2nd accused, C.I. Wainaina testified that the witness (PW1) picked him out in the parade and that the 2nd accused was indeed satisfied with the process. This evidence was however challenged by the 2nd accused who alleged that initially the witness did not pick him out but was assisted by C.I. Wainaina who asked him to turn around. Without considering the merit of this allegation, I note that the identification parade forms produced by C.I. Wainaina are incomplete. They do not clearly show the results of the parade by indicating whether or not the accused were identified.

22. The investigating officer Cpl. David Kibet who testified as PW6 introduced yet a new contradiction to the identification evidence. He told the court that he proceeded to arrest the accused on the basis of the description given by PW1. The question then is, if PW1 had clearly identified the two accused, why did the investigation officer not bring forth corroborative evidence? It emerged from the testimony of PW6 that the one person who would have given critical identification evidence was one E M. This is the person who raised an alarm on the alleged attempted break-in into her house by the deceased. She is said to have told the police that she had seen the persons who beat the deceased including the one named Baba D. This witness

however was not called to testify in court.

23. It is quite obvious to the court that the police were not diligent in the investigation of this case. Indeed it appears that the task of unmasking the identity of the assailants was left to the deceased's mother. She states in her statement to the police thus:-

“...from the information I gathered I have known the resident of the two who were beating my son. They are the residents of corner mbaya. A woman who called the two is known by Mama Ashiri: she called one Baba Kadogo and while the other one I was shown the house he is living in...”

Even with such information provided by the deceased's mother, it appears that the police did not diligently follow through the leads. The Mama Ashley who according to PW1 knew the two suspects was not called as a witness. During the trial, the investigation officer lamented to the court that the witnesses were unwilling to record statements and to testify. He told the court that it was not possible to get witnesses to give statements and to testify.

24. It is clear to me from my analysis of the identification evidence that there are discrepancies. But are these discrepancies in the testimony material? Not every discrepancy in the testimony of witnesses amounts to a material contradiction that would cripple the prosecution case and therefore, benefit an accused person. A contradiction will be material when it goes to the root of the case. It is material when the discrepancy plants doubt as to the truthfulness of a witness. A contradiction has an effect on the evidentiary value of the testimony of a witness. The weight to be attached to effect of any contradiction is to be determined on the basis of whether or not it goes to the core of the prosecution case.
25. This case largely revolves on the issue of identification since the deceased died as a result of being attacked in a mob. Thus, the question of identification of the accused is material. While PW1 may have well picked out the 2nd accused, as stated again by PW5, the concerns raised regarding integrity of the process requires attention. As noted above, the identification parade report presented in court did not give the results of the identification parade. Thus, there is no basis for testing the concerns raised by the 2nd accused regarding the process.
26. Further, the evidence of PW6 introduced a new tangent altogether. PW6 who is the investigating officer told the court that PW1 gave him the description of the assailants and in fact showed him the house of the 1st accused from where he arrested him and recovered the whip said to have been used in the beating. It is therefore, not possible to safely determine which evidence should be relied on regarding the identification of the accused. On this basis, I am persuaded that these contradictions have had the effect of devaluing the credence of the evidence as to form a sound basis for a conviction. The possibility of mistaken identification cannot be ruled out. This is particularly so in view of the fact that PW2 and PW3 remained evasive in positively identifying the accused.
27. The accused gave their own accounts in their respective defences. The 1st accused denied being present on the material day. He also stated that his arrest was a possible case of mistaken identity since the police came looking for the owner of the house where he had moved in the same day he was arrested. However, his earlier statement to the police was contrary to his account in court. He stated in his statement to the police that he was present on the material day and he had a whip which was grabbed by someone who joined the group of people who were beating the boy. He later joined the group to get his whip back and then he left the scene as the boy was still being beaten. I do not for one moment believe the 1st accused's defence. Considered against PW1's evidence and his own account to the police when he wrote his statement, it is in my view a fabrication calculated to distance himself from the offence. However, it is trite law that burden of proof lies with the prosecution and never shifts to an accused to prove his innocence. As I have stated earlier the prosecution's case has been weakened by failure to tighten the identification evidence.
28. The 2nd accused in his testimony before court and statement to the police stated that on the material day he had been in his house hosting some visitors until late afternoon. In his statement to the police, he stated that he noticed a mob of people as he escorted the visitors from his home. He

also called his wife and the two visitors as witnesses. I must observe however that the testimony of the witnesses was identical to a fault raising doubt as to their credibility. For the accused himself, he told the court that he heard nothing and saw nothing of the incident though he admitted that it happened barely 100 metres of his gate. He said that he only got to learn of the incident when he was arrested. Such testimony was hardly convincing to the court. However, as I have stated above, it was the duty of the prosecution to prove the case against the accused to the required standard.

29. It is not in doubt that the deceased was attacked by a mob on suspicion of being a thief. These not so rare acts of mob injustices against persons suspected of committing crimes are deplorable. It is even more disconcerting when the victim of such unbridled violence is a helpless special child barely aged 15. The deceased, whether or not culpable of the crime he was accused of, deserved to be tried through the due process of the law. He did not deserve to die in the hands of adults who ought to protect the young and vulnerable. Persons who took part in administering the mob (in)justice if known, ought to suffer the consequences of their actions. However, without proper identification of the accused, it is not possible for this court to come to a safe conclusion that the accused persons were present at the scene and actually participated in serious assault which led to the demise of the deceased.

30. For the above reasons, I find the evidence adduced before Court to be insufficient to safely convict the 1st and 2nd accused persons for the murder of the deceased. I acquit them of the charge and order that each accused be set free forthwith unless otherwise lawfully held.

Judgment delivered, dated and signed at Nairobi this 24th day of April, 2015

R. LAGAT - KORIR

JUDGE

In the presence of:

.....:	Court clerk
.....:	Accused persons
.....:	For 1 st Accused
.....:	For 2 nd Accused
.....:	For State