



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 56 OF 2014
(FORMERLY KISII HCCRC NO. 40 OF 2014)

BETWEEN

REPUBLICPROSECUTOR

AND

JAMES OCHIENG OTIENO1ST ACCUSED

HENRY OOKO OTIENO 2ND ACCUSED

JUDGMENT

1. On 31st March 2014, this court was informed that two brothers, **JAMES OCHIENG OTIENO** and **HENRY OOKO OTIENO** (“the accused”) jointly murdered **JOSEPH NYAUDO OCHIER** (“the deceased”) on 25th March 2014 at Akoko Village, Thim Jope Sub-location within Migori County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.

2. The proof of the fact and cause of death is not in dispute. On the night of 25th March 2014 after about 8.30 pm, the deceased was found dead along a footpath near a sugar plantation at Akoko Village. All the witnesses who responded to the alarm or received a report of his death and went to the scene confirmed that the deceased had died and had sustained multiple cut wound injuries on his body particularly on his head and face. The injuries described by the witnesses were consistent with those observed by the Dr Ganda who conducted the post mortem.

3. As Dr Ganda had left the hospital to pursue further studies, the report was produced by Dr Vitalis Owuor Ogutu (PW 7), a doctor practising at Migori Level 4 Hospital under the provisions of **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. The post mortem on the body of the deceased was performed on 28th March 2014 at Migori District Hospital after the body had been identified by his brother, Elias Okello Ochier (PW 2) and his wife Belisi Moraha Nyaundo (PW 3).

4. According to the report, the deceased had several cut wounds on the body. There was a cut wound with smooth edges approximately 8cm long behind the head and a longitudinal cut on the face running from the forehead to the nose approximately 12cm. An oblique cut wound on the left side of the neck, approximately 9cm long, injured the carotid vessels. There was another cut on the right side of the neck approximately 6cm long. He also observed a smooth clean cut, approximately 6cm long, on the medial aspect of the left hand palm. There was also cut, approximately 8cm long,

on the left side of lumbar region and another cut, approximately 8cm long, on the anterior aspect of the left thigh.

5. Dr Ganda concluded that the cause of death was massive haemorrhage due to multiple cut wounds, the most severe being on the left carotid artery which supplies blood to the brain. PW 7 opined that from the injuries recorded in the Post Mortem Form, the injuries would probably have been caused by a sharp object likely a panga.

6. I therefore find and hold that the deceased died and he dead as a result of massive bleeding resulting from multiple cut wounds inflicted by a sharp object or weapon.

7. In addition to establishing the fact and cause of death, the prosecution, in order to secure a conviction for the offence of murder under the provisions of **section 203** and **204** of the **Penal Code**, must prove beyond reasonable doubt that the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission and that the unlawful act or omission was committed with malice aforethought as defined in **section 206** of the **Penal Code**. The accused denied the charge and the prosecution called 8 witnesses to prove that the accused murdered the deceased.

8. The deceased's wife, Belisi Moraha Nyaudo (PW 3), recalled that on 25th March 2014 at about 8.30 pm while having dinner with her children, her brother in law, Elias Okello Ochier (PW 2), knocked the door, called her aside and told her that he had been informed that her husband had been killed. She proceeded with him to inform the deceased's brother, Samuel Okombo Ochier (PW 7), who lived nearby. The three of them then went to the scene where the deceased had been killed.

9. At the scene she saw her husband's body. She also found the accused together with their mother, Hellen Akinyi Otieno (DW 3), whom she knew as Nyagem. She testified that she knew the two accused as they came from the locality and used to plough with her husband. She saw the accused carrying pangas.

10. Elias Okello Ochier (PW 2) recalled that while he was having supper, he heard noise from outside. At that moment he received a call from Paul Onyango (PW 4) informing him that his brother had been killed. He left immediately and went to PW 3's house, informed her of the incident and they proceeded to the scene. He found PW 4, DW 3 and two young men carrying pangas. They were known to him as they came from the village. He knew one of the boys as Ochieng. He further testified that after a while DW 3, PW 4 and the two boys left the scene.

11. Samuel Okombo Ochier (PW 7) was in his house on the material night when his sister-in-law, PW 3, and his brother, PW 2, came to his house and informed him of his brother's death. When he arrived at the scene he saw four people; the two accused, DW 3 and PW 4. He stated that the accused and PW 4 had pangas which had blood. While at the scene he called Joshua Ojenge, the Assistant Chief (PW 1).

12. On that night, Paul Onyango Abom (PW 4) was awoken from his sleep by noise. When he went out to inquire from the villagers what was happening, he received a phone call from DW 3 who had leased his shamba for growing sugarcane. DW 3 informed him that her children, the accused, had found a thief in the shamba stealing sugarcane. After receiving the call, he went to the scene of the incident and while there he met the accused. He saw the deceased and identified him as fellow villager. When he asked the accused what happened, they told him that as they were guarding the cane, they found the deceased cutting the cane and he started fighting with them whereupon they raised alarm for the villagers to come.

13. PW 4 called Jennifer Atieno Deya (PW 6), a resident of the village and a sister in law of the deceased, to inform her that the deceased had been killed. She proceeded to the scene with her husband, Alexiasious Deya. She saw the deceased's body next to the road near the sugar cane

plantation. She testified that by the time she arrived there were many people at the scene and that she saw the 1st accused whom she knew from the village.

14. At about 8.51pm, Joshua Otieno Ojenge (PW 1), the Assistant Chief of Thim Jope Sub-Location, East Kanyamkago Location in Uriri, received a call from PW 7 informing him of the death of the deceased. PW 6 also called him and informed him what happened. He immediately called the Chief and Administration Police officers from Oyani AP Post. Upon arrival, he found many people had gathered around the deceased's body.

15. PW 1 further testified that police officers came from Migori Police Station and took the deceased's body to Migori Level 4 District Hospital Mortuary. He called the Assistant Chief Alego West Sub-Location, Morris Asende, uncle to the accused and advised him to tell DW 3, the sister to his wife, to report to Migori Police Station. On the next day, 26th March 2014, he met Morris Asendi, DW 3, PW 4 and two clan elders. DW 3 told him that she had been informed by a person that her sugar cane was being stolen whereupon she sent her sons to find out who was stealing. One of her sons called to tell her that they had found a thief and killed him. As the public was agitated at that time, he advised DW 3 to take the accused to Uriri DC's Office. From the DC's office, the accused were taken to Migori Police Station by among others APC Gideon Musila (PW 5), an Administration Police Officer. PW 5 confirmed that on 26th March 2014, he reported to work at Uriri DC's Office and was directed to escort the accused to Migori Police Station.

16. PC Vincent Muswagi (PW 9), the Investigating Officer, visited the scene at Akoko Village at about 2.00 am on 26th March 2014 where he found villagers surrounding the deceased's body. PW 1 was present together with Administration Police officers from Uriri AP Camp. He tried to interrogate members of the public but they were reluctant to give him information. He did not see the two accused at the scene. The officers retrieved the body and took it to Migori Level 4 Hospital Mortuary. He later organised for the post-mortem to be carried out by Dr Ganda.

17. PW 9 confirmed on that on 26th March 2014, PW 1 and PW 5 brought several people to Migori Police Station including the accused, DW 3, PW 4, Fredrick Oduor Otieno and James Ochieng Otieno. Together with the OCS, they interrogated each of them separately and concluded that it is the two accused who were involved in the murder. He did not recover any weapons.

18. After the close of the prosecution case, the accused were put on their defence. They elected to give sworn testimony and called their mother Hellen Akinyi Atieno (DW 3) as a witness on their behalf

19. James Ochieng Otieno (DW 1) denied that he killed the deceased. He stated that he had been framed. He testified that on 25th March 2014 at about 8pm, he was at home with his mother and brother when they received a report from PW 1, to the effect that a dead body had been found at the shamba which was leased to them by PW 4. PW 1 informed them that he is the one who found the body. Like the other villagers who had received the information, they went to the scene but returned home about an hour later. DW 1 further testified that on the next day, PW 1 came to their home and asked them to accompany him to Uriri Chief's camp as the owners of the sugar cane plantation when the deceased's body was found. Thereafter, they were taken from the Chief's camp and then to Migori Police Station.

20. Henry Ooko Otieno (DW 2) also denied involvement in the killing of the deceased. He was at home with his mother and brother when they received a report that a body had been found in the shamba they had leased from PW 4. He confirmed that he also went to the scene and returned home after about an hour. On the next day he testified that PW 1, came to their home and asked them to go and make a statement as the body was found in their shamba.

21. Hellen Akinyi Otieno (DW 3) confirmed that the accused were her sons. She testified that as a peasant farmer she cultivated maize and beans but she denied growing any sugarcane. She also

denied that she had leased the shamba from PW 4. She recalled on 25th March 2014 while she was at home she heard the alarm and after receiving a call from PW 4 who told her that a thief was being killed, she told her sons to go and find out what was happening. She later went to the scene where there were many people. She returned home after a while. On the next day she was shocked when she was told to go to the police to report about the incident she knew nothing about. She was also shocked that her sons were arrested and charged.

22. The case against the accused is largely circumstantial as there is no one who saw them inflict the deadly injuries on the deceased. The general principle concerning circumstantial evidence was summarised in ***R v Kipkering Arap Koske & Another [1949] 16 EACA 135*** as follows;

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the accused.

23. The prosecution evidence is that the accused were seen where the deceased body was at the village path near the sugar plantation at Akoko Village by villagers who responded to the alarm or who were called to come to the scene. The principal witnesses recall that the accused and their mother, DW 3, were present when they arrived. PW 2 met DW 3 there with the accused who were holding pangas. When PW 3 arrived there she also met the accused holding pangas. PW 4 who also went to the scene found the accused holding pangas. PW 6 saw the 1st accused while PW 7 also found DW 3 and the accused at the scene.

24. The incident occurred in the village where people knew each other and lived close by and all the witnesses who testified confirmed that they knew the accused as fellow villagers hence the issue of mistaken identity could not arise. The witnesses, when they responded to the alarm raised, proceeded to the scene with their torches. Furthermore, both accused and DW 3, in their sworn testimony, confirmed that they went to the scene in response to the alarm just like the other villagers. The prosecution and defence evidence therefore placed the accused at the place and time the deceased is said to have died.

25. The testimony of PW 4 was pivotal in establishing culpability of the accused. PW 4 testified that he had leased his shamba to DW 3. DW 3 vehemently denied that she leased the shamba from him and although Mr Kaburi, counsel for the accused, argued the prosecution did not prove that there was such a lease, both accused did confirm that they had leased the shamba from PW 4. They both stated that they went to Uriri Chief's camp the next day to make statements as they were the owners of the sugarcane shamba where the deceased died. In her statement to PW 1, DW 3 also confirmed that the sugar cane was hers. I would add that in such a village, the fact of a person leasing a shamba for sugarcane growing would be such a notorious fact hence PW 7 also confirmed that he knew that the shamba belonged to PW 4 but was leased to DW 3.

26. This fact establishes that there was a relationship between the accused, DW 3 and PW 4. It for this reason that DW 3 called PW 4 to inform him that her sons had found a thief in shamba stealing sugarcane. When he went to the scene and asked them what had happened, the accused narrated to him how they found the deceased cutting sugarcane and how he started fighting causing them to raise alarm. DW 3 also informed PW 1 that she was informed that someone was stealing her sugarcane so she sent her sons to find out and her son called her to inform her that they had found the thief and killed him.

27. Mr Kaburi, in his submissions, suggested it is PW 4 who may have known how the deceased met his death and that he is the one who implicated the accused in the murder. The defence case is also that the accused only came to the scene after the alarm had been raised. To support this version of events DW 3 testified that she was called by PW 4 who told her that someone was being killed so

she sent her sons to check what was happening. The accused also stated that they went to the scene after the news of the death reached them.

28. In my view the testimony of DW 3 cannot be relied upon for two reasons. First, despite her vehement denial that she had nothing to do with the shamba, her own sons contradicted her on this point. Second, she told the same story about the thief to PW 4 and PW 1. PW 4 was a person who was in a special relationship with her family as he had leased to them his shamba and PW 1 was the assistant chief and therefore an independent witness. If what she told them was not true, why would she lie about her sons' to two people? DW 3's version of events is corroborated by what the accused told PW 4 about the incident with the deceased. Her testimony in court was perhaps motivated by the defence of her sons rather than telling the truth.

29. On the other hand I have no reason to disbelieve PW 4's testimony to the effect that when he went to the scene after being called by DW 3 where he found the accused and they told him what had happened. Nothing was suggested in cross-examination or the defence evidence that PW 4 would have a motive to implicate the accused in the murder.

30. DW 1 also testified that it is PW 1 who reported to them that the deceased had been killed and that he is the one who found the deceased's body. On this point, he was contradicted by DW 3 who testified that it is PW 4 who called her to inform of incident while DW 2 did not mention that the PW 1 came to their place that night. Nothing was suggested to PW 1 in cross-examination that he came to DW 3's home on the material night. All in all the evidence is clear that PW 1 was called and informed of the incident by PW 6 and PW 7 and he arrived at the scene much later.

31. I have evaluated the evidence and applied the test enunciated in the *Kipkering Arap Koske Case* and I find that the totality of the evidence including that of the accused is that they were at the scene where the deceased died. They had the means to inflict the injuries as they were seen with pangas at the scene so soon after the death of the deceased and the testimony of PW 1 and PW 4 about what DW 3 told them and also what the accused told PW 4 points to the motive, opportunity and circumstances in which they killed the deceased. The prosecution evidence also excludes the possibility that any other person would have committed the offence. The only other person suggested as the perpetrator, PW 4, could not have killed the deceased. It is also clear that the accused's defence that they merely visited the scene of the incident like other villagers responding to alarm lacks merits and is dismissed. Likewise there is no evidence that the accused could have been framed by PW 4 or any of the witnesses who testified or any other person.

32. Mr Kaburi attacked the prosecution case for lack of material exhibits to connect the accused with the offence. He contended that given the nature of the injuries suffered by the deceased it would have been impossible for the accused not to have blood stained clothes and that the pangas used were not found. The lack of this evidence must be viewed in light of the entire evidence. None of the witnesses who testified gave evidence of the state of the accused's clothing. This is understandable because, it was at night and the witnesses were more concerned about the deceased. Furthermore, by the time they were arrested on the next day, they could have changed clothes. They could also have disposed of the pangas they had and in all likelihood even if their pangas were found they would probably have been cleaned or interfered with. I do not put much weight on the lack of this physical evidence given the other available evidence particularly with the tight circumstantial evidence implicating the accused.

33. I therefore find and hold that it is the accused who inflicted the injuries that caused the death of the deceased.

34. The final issue is whether the death was caused with malice aforethought. Malice aforethought flows from the nature of attack and the injuries sustained. According to PW 7 the deceased sustained multiple deep cuts wounds which could only have been inflicted with vicious force with a sharp instrument or weapon. The accused must have known the cutting of the deceased multiple times on the head and neck with a sharp instrument would result in grievous harm or

death.

35. There is evidence from what DW 3 told PW 1 and PW 4 and from what the accused told PW 4 that the accused could have fought with the deceased when he was found stealing from the shamba. I have considered the possibility of self-defence in light of the available evidence but I find that the multiple injuries particularly on the deceased's neck and head negate any possibility of self-defence. Even if the accused were attacked by the deceased, the force used was clearly excessive as there is no evidence that the deceased was also armed. I am therefore satisfied that the prosecution established malice aforethought in terms of **section 206(b)** of the *Penal Code*.

36. I have come to the conclusion that the that the prosecution proved its case against the accused beyond reasonable doubt. I therefore find **JAMES OCHIENG OTIENO** and **HENRY OOKO OTIENO** guilty of the muder of **JOSEPH NYAUDO OCHIER** and I convict them accordingly.

DATED and DELIVERED at MIGORI this 25th June 2015.

D.S. MAJANJA

JUDGE

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

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