



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 82 OF 2014
(FORMERLY OF KISII HCCR NO. 71 OF 2012)

BETWEEN

REPUBLIC **PROSECUTOR**

AND

BEN CHACHA MARWA **ACCUSED**

JUDGMENT

1. According to the information laid before this court on 3rd May 2012, the accused **BEN CHACHA MARWA** (“the accused”) was charged with the murder of **STANLEY OMOYA** (“the deceased”) which occurred on 26th April 2012 at Isebania Township in Kuria West District of Migori County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. Sitati J., started the trial and I completed it after complying with the provisions of **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The prosecution marshalled five witnesses while the accused made an unsworn statement.
2. The prosecution case was that on the night of 26th April 2012, the accused in the company of another person not before the court, attacked the deceased who was in the company of Christopher Turucha Ongubo (PW 1). PW 1 recalled that on the material day at about 8.30 pm, the deceased came to seek financial assistant. PW 1 gave him Kshs. 500 and escorted him to a nearby shop where he bought wheat flour and sugar. As they were walking back, he saw two people approaching from the opposite direction. He was able to see one person with a marvin hat whom he was unable to identify while he could identify the other person who had no hat as there was a full moon and it was very bright. He testified that he had known the person for about 3 years.
3. As they met, the two people attacked them with the pangas they were holding. PW 1 and the deceased both ran away in different directions. After about 30 minutes he heard the screams from the deceased’s home. He rushed there and was informed that the deceased had been cut and had been rushed to hospital. He rushed to the hospital at Isebania but was informed that the deceased had been taken to St. Joseph’s Ombo Mission Hospital in Migori. He went back home and slept until the next day.
4. In the morning, PW 1 went to the deceased home and was informed that he had died in hospital. He went to St Joseph’s Ombo Mission Hospital where he confirmed that deceased had died. He then went back to Police Station where he found the deceased’s father, Mogesi Lichambui (PW 2),

- had recorded a statement. He too recorded a statement and informed the police that he knew the person who had cut the deceased as Ben but did not know his other name. He accompanied the police who arrested the accused.
5. The deceased's father, PW 2, testified that on the material night, the deceased had gone to the shop and before he entered the compound he was attacked and raised alarm. PW 2 called his sons to help and when they went out they found the deceased lying down near the gate. He had a cut on the left arm. He was taken to hospital for treatment but he later succumbed to the injuries. Stephen Samuel Mugesi (PW 3), the deceased's brother, responded to the deceased's screams and rushed to the gate where he found the deceased lying down injured on his hand. He went with the deceased to the hospital and confirmed that he died while undergoing treatment.
 6. Dr Daniel Otieno Agulo (PW 5) performed the post mortem on the body of the deceased on 2nd May 2012 after it had been identified by Bashir Chacha (PW 4). He noted that the only significant finding was that there was a deep cut around the left elbow anteriorly severing the branchial artery which is main artery of the left arm. He concluded that the cause of death was cardio pulmonary failure secondary to profuse external bleeding. He opined that the injury could have been caused by a sharp object.
 7. Corporal Albashir Oloo (PW 6), the investigating officer, was based at Isebania Police Station at the material time and was assigned to investigate a case of murder that occurred on 26th April, 2012. He recorded statement from Christopher Chacha, Samwel Mugesi, Stephen Samwel Mugesi and Bashir Chacha Nyambogai and Masiko Mwita. He noted that PW 1 was only one witness who was with the deceased on the material night. He visited the scene of crime which was at Isebania Township near the residence of PW 1. It was a narrow path between two buildings. He testified that it had rained heavily on the previous night hence he could not recover any weapon or material evidence. By the time he was informed of the incident, the deceased's had been taken to St Joseph's Ombu Mission Hospital where he died after being transferred there from Isebania Sub District Hospital. He then organized for the post-mortem to be conducted. He stated that the accused was arrested by members of the public on 27th April 2012 and was rescued by police from irate members of the public. As a result of his investigations he decided to charge the accused with murder.
 8. When the accused was put on his defence he elected to make an unsworn statement. The tenor of his statement was that PW 1 had impregnated his sister while she was in class 6 forcing her to drop out of school. After his mother reported the incident to the police, PW 1 run away to Tanzania. He came back 2 years after the accused's sister had given birth. The accused stated that on 27th April 2012, while he was working at his mother's shop, five men came to the shop including PW 1. They found his sister seated on a bench outside the shop. PW 1 held his sister and slapped her. The accused came out of the shop and confronted PW 1 about why he was beating his sister. PW 1 turned towards him and wanted to assault him but the accused started beating him. The other four men joined in the fray. As the shop was near the stage, members of the public also got involved. He was subsequently taken to the police station, arrested and later charged with murder.
 9. As this is a case of murder the prosecution is required to establish the following ingredients under the provisions of **section 203** and **204** of the *Penal Code*;
 - a. Proof of the fact and the cause of death of the deceased.
 - b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.
 - c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the *Penal Code*.
 10. The totality of the prosecution evidence establishes that the deceased was attacked on the night of

26th April 2012 by two people. As a result of being cut with a panga on his left arm he bled profusely and died as a result. I therefore find and hold that the prosecution proved that the deceased died and he died as a result of a severe cut inflicted on his left arm which caused him to bleed profusely. The main question to be answered then is whether it is the accused who inflicted the injury.

11. The thrust of the submissions by defence counsel is that the prosecution evidence was contradictory and that the circumstances of the incident were not favourable to positive identification. The prosecution case is based on evidence of identification and recognition by a single witness. On this issue the Appellate Court has given guidance on how evidence of a single witness is to be approached in several cases (see ***Abdalla Bin Wendo & Another v R* [1953] 20 EACA 166**, and ***Anjononi & Others v Republic* [1980] KLR 59**). In ***Francis Kariuki Njiru & 7 others v Republic Cr. Appeal No. 6 of 2001 (UR)*** the Court of Appeal summarized the approach as follows:

The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that: “.....If it is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.

12. Finally, as this case was one of recognition of the accused, the Court of Appeal in ***Paul Etole & Another v Republic, NAI CA Criminal Appeal No.24 of 2000 [2001]eKLR*** stated as follows;

The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

13. It is with the principles I have cited in mind that I proceed to consider the facts and circumstances of this case. The principal witness, PW 1 recalled that he knew the accused for a period of three years prior to the case. The fact that PW 1 and the accused knew each other was confirmed by the accused in his unsworn statement. I am therefore satisfied that this was a case of recognition rather than identification.

14. As to the circumstances of the incident, PW 1 testified that it took place at about 8.30pm though he was not sure about the precise time. In cross-examination he put the time between 9.30pm and

10.00pm. PW 2 put the time of the incident at about 10.00pm while PW 3 placed the time at around 10.30 am. In my view, the incident could have taken place between 9.00 pm and 10.30pm but nothing turns on the precise time the incident took place. PW 1, PW 2 and PW 6 all confirmed that there was full moonlight on that night. Although PW 6 alluded to the fact that it had rained heavily that night, what is clear is that it must have rained after the incident took place.

15.The assailants were not very far from PW 1 and the deceased. When cross-examined about the distance, PW 1 testified that the assailants approached from a distance of about 30 metres away and he identified the accused from 10 metres before he ran for his life. PW 6, who went to the scene of the incident, testified that the attack took place in a narrow path, about two metres wide, between semi-permanent houses. Taking this testimony, into account, I find that the circumstances of the case were favourable to positive identification in that there was full moonlight, the assailant was not very far from PW 1, his face was not covered and that area in which they were attacked was a footpath. Although PW 1 did not see who cut the deceased with the panga, it is clear that the accused acted with the other assailant in a joint enterprise to attack the deceased and PW 1. I find that they had the common intention to assault the deceased and in the circumstances I find the accused liable. I am therefore satisfied that coupled, with the fact of recognition, it is the accused was present and acted with the other assailant to attack the deceased with a panga and cause him grave injury.

16.The accused position was that there was a grudge between him and PW 1. However, the issue the grudge was not put to PW 1 in cross-examination despite the fact that PW 1 affirmatively denied this fact. Likewise, PW 6, the investigating officer, when cross-examined, denied that there were any differences between the accused and PW 1. I therefore find that the accused's defence was really an afterthought.

17.It is clear that the cut on the deceased left arm was inflicted in a brutal manner in circumstances could only have been intended to cause the death of or do grievous harm to the deceased. I therefore find that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

18.For the reasons I have outlined, I find the accused **BEN CHACHA MARWA** guilty of the murder of **STANLEY OMOYA** and I convict him accordingly.

DATED and DELIVERED at MIGORI this 22nd day of October 2015

D.S. MAJANJA

JUDGE

Mr M. Odero instructed by Odhiambo and Company Advocates for the accused.

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