



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CRIMINAL CASE NO.18 OF 2013

REPUBLIC..... PROSECUTOR

VERSUS

RICHARD OPUKO WERE

GABRIEL OKIYA.....ACCUSED

PATRICK WABWIRE KARANI

JUDGMENT

1. The three Accused persons face the Offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 2nd November 2013 at Likhuna village, Madibo sub location within Busia County they jointly murdered Patrick Odhiambo Magero(The Deceased).
2. On a post mortem performed by Dr. Patson Kubuta (PW9) on the body of the Deceased on 7th November 2013, the Doctor returned an opinion that the cause of death was hypovolaemic shock secondary to a ruptured bladder. In a bid to prove that the trio were responsible for causing that death, the Prosecution called 10 witnesses.
3. Chrispinus Mukhwana Lutuli (PW1) returned to his home at 8.30 p.m. after having a drink in the home of Cleophas Okiya. He was disturbed in his sleep at 11.00 p.m. when he heard screams coming from the direction of the home of Cleophas. It was his evidence that he went towards that house and on reaching five metres away he hid in a maize plantation where he could hear the voices of people known to him. It was his evidence that the voices were of Gabriel Lumumba, Richard Okumu, Benjamin Khatiti and Patrick Karani. That the four are his neighbours. That he saw Gabriel Lumumba and one George Wesonga go to the home of Martin Kape where they asked Martin for help to get rid of the body of someone they had killed. That Kape accompanied them back to the scene and that he saw them cart away a body using a wheelbarrow. In cross-examination the witness appeared unsure as to who exactly carted away the body of the Deceased on the wheelbarrow.
4. About a week later, PW1 felt an obligation to share what he says had seen with Beatrice Odhiambo (PW7) the wife of the Deceased. So on 9th November 2013, he went to the home of the Deceased at about midnight and told her and others present about what he knew in respect to the death of the Deceased. Curiously PW7 never made mention of this conversation with PW1.
5. George Wafula Elima (PW2) was on his way home on 2nd November 2013 between 10.00 p.m. and 11.00 p.m. when he saw 7 people standing at the gate of George Wanjala Okiya. Because of the moonlight, so the witness said, he was able to see the faces of the 7 people clearly. He was

- able to recognize them because they were his neighbours. He spoke to them. It was then that he noticed that there was a person lying down in a trench at the gate of George Wanjala Okiya. George left towards his house and returned with a wheelbarrow. Patrick Karani and Benjamin Khatiti lifted the body and placed it onto the wheelbarrow. That at this point Richard Opuko telephoned someone and told him “tumemaliza” (Kiswahili for we ‘have finished’). Patrick Karani pushed the wheelbarrow while Benjamin helped by towing it from the front using a rope. After crossing River Madibo, they placed the body in a trench and returned back to the home of George. Disturbed by what he had seen, the witness telephoned the DCIO Busia on the following day and informed him of the incident. It was his evidence that amongst the 7 were two Accused persons being Richard Opuko (A1) and Patrick Karani (A2).
6. Antonina Okiya (PW3) was at the request of the Prosecution declared a hostile witness. Under cross-examination she denied that she brews and sells Busaa and/or Changaa. She further denied that Richard Opuko and Gabriel Okiya were at her home on 2nd November 2013. She denied knowing the Deceased.
 7. When her son Gabriel Okiya (A2) took the witness stand, in his Defence, it became clear that either PW3 or himself were not telling the Court the truth. It was his evidence that on that day at 7.00 p.m. he took changaa drink at the home of his mother. More shall be said about this later.
 8. The evidence of PW3 was also contradicted by the testimony of Simon Makokha Mukhwana (PW4) and Benson Wekesa Maina (PW5). Both witnesses visited the home of Mzee Cleophas Okiya on the evening of 2nd November 2013. Mzee Okiya is the husband of PW3. At the home of Okiya, PW4 found Richard Opuko (A1), Mwalimu Bernard Welimo, Gabriel Okiya (A2), Patrick Karani (A3), Benjamin Masava, Benson Wekesa, PW3 and her husband Cleophas Okiya. That it was PW3 who was selling the alcohol and they would visit that home frequently for the drink. At about 9.00 p.m. the Deceased came into that house and joined for the drink. He already appeared drunk and sat next to Richard Opuko (A1). He asked for a drink from Richard but Richard told him he was unable to buy him a drink because he did not have money. PW4 says that he then left with Richard and proceeded to the house of Charles Orikonyi where he had one more drink. It was his evidence that he thereafter left for home leaving Richard behind with one Protas Esendi.
 9. PW5 also visited the home of Mzee Okiya at about 8.05 p.m. on 2nd November 2013. There he found Richard Opuko (A1), Simon Ojakoo, Khatiti also known as Benjamin Osaba, Patrick Karani (A2), Gabriel, Antonina (PW3) Mzee Okiya and Ojamong. He bought himself a drink and left at 8.15 p.m. leaving the rest behind.
 10. On 3rd November 2013, a body was found at bridge on Madibo River. The Assistant Chief of Madibo sub location is Patrick Juma Mabunde (PW6). The witness received information about this body from Constant Musungu, a Village Elder. The Assistant Chief visited the scene at about 8.00 a.m. and there he found a crowd of people and a body which had been identified as that of Patrick Odhiambo Magero (the Deceased). The body was in a ditch or trench and was covered with mud all over. He later called his Chief Gerishom Wandera and the police at Nambale and informed them about the body. One of the persons who identified the body at the river as that of the Deceased was his wife Beatrice Odhiambo (PW7).
 11. Richard Ouma Magero (PW8) was also at the scene and identified the body to be that of his brother. When he looked at the body he noticed the following injuries.
 - A stab wound on the right shoulder
 - Broken collar bone
 - A stick had been inserted into the anus
 - Multiple bruises on his legs.

PW8 had last seen his brother alive on the previous day (2nd November 2013) at about 5.00 p.m. in the company of a driver to a lorry that transported some sand.

12. Cpl Guracha Gufu (PW10) investigated the circumstances surrounding the death of the Deceased. On instructions from the OCS Nambale, he along with Sgt. Gladys and PC Mukobi, visited the place the body of the Deceased lay on 3rd November 2013 at about 10.00 a.m. Near Madibo bridge along Madibo-Buyofu dirt road, they found the body in a trench beside the road and

- covered with mud. When he saw the body, he observed that it had bruises on the lower right leg and on the left abdomen. He removed the body to Busia District Mortuary and commenced investigations. That on the basis of what PW1 and PW2 told him he made a decision to charge the Accused persons. It was his further evidence that other persons ought to have been charged with the Accused persons but were at large. One of these was a person called Khatiti.
13. Each of the three Accused persons made unsworn statements in their Defence. Richard Opuko Were (DW1) is a farmer and a Village Elder and resident of Madibo sub location. On the evening of 2nd November 2013 at about 7.00 p.m., he went to the house of Mama Antonina (PW3) for a drink. That house was described by the witness an alcohol club. He drank alcohol and left for his house at 7.00 p.m. The following day he received information that the Deceased had been found dead by the road. He joined members of the public at the scene where the body was found. At about 10.00 a.m. police from Nambale Patrol base carried the body of the Deceased to his home. The Accused was aware that on 5th November 2013 the wife of the Deceased Beatrice (PW7) recorded her statement but did not mention him. He was therefore surprised when he was arrested on 7th November 2013 and charged with the current offence. He denied killing the Deceased.
 14. Gabriel Okiya (DW2) is son of Mama Antonina. On 2nd November 2013 at about 7.00 p.m. he visited his mother's home to enjoy an alcoholic drink. There he found Richard (A1), Khatiti, Patrick Karani (A3) and his mother. At about 7.20 p.m. the Deceased joined them and he appeared already drunk. He was jovial and exchanged greeting with Mzee Opuko. It was the evidence of this witness that he shortly left for his home where he ate and slept. The next day at about 7.30 a.m. his wife informed him that she had received news about someone's body having been found. At 9.00 a.m. the Accused proceeded to where the body lay and found a crowd. That he was saddened when he recognized that the body was that of a person with whom they had shared a drink the previous night. Thereafter, three days passed without incident. But on 7th November 2013 his father told him that he had been summoned by the Sub Chief. It was not long thereafter that he with his co-accused were arrested by the police. He was granted cash bail by the police at Nambale and asked to report on 15th November 2013. It was only then that he was detained and arraigned before court with the current charge. It is the position of A2 that they had been framed up because of a grudge between him and the Chief.
 15. The 3rd Accused Patrick Wabwire Karani (DW3) gave almost a similar account. He joined his friends for a drink at the home of Mama Antonina (PW3) at 6.00 p.m. on 2nd November 2013. At 6.30 p.m. a jovial looking Patrick Odhiambo Magero (the Deceased) joined them. He appeared drunk. He greeted Opuko (A1) and asked him for a drink but Opuko said he was unable to oblige because he did not have money. According to DW3, he left at 7.00 p.m. for his home where he slept until the following day. On that day at 8.00 a.m. he found a group of people going towards the bridge as he made his way to work. The people told him that a body of someone had been found at the bridge. He joined the crowd at the place where the body lay. Amongst the people present was the Village Elder and Assistant Chief. On seeing the body he was able to recognize that it belonged to a person with whom they had had a drink on the previous night. The police removed the body of the Deceased to the Deceased's home after telling the crowd that the body of the Deceased did not suggest that he had been murdered. On 19th November 2013 A3 was summoned to Nambale Police Station and on reaching there he was locked up and subsequently charged. He denies the offence.
 16. As correctly submitted for the State, the stronghold of the Prosecution case would be the evidence of PW1 and PW2 who are said to have offered direct evidence implicating the Accused persons. It is to this evidence that this Court now turns its attention.
 17. After having changaa drink at the home of Cleophas and Antonina Okiya, PW1 left for his home at about 8.30 p.m. He took his dinner and retired to sleep. He said that about 11.00 p.m. he heard screams from the direction of the home of Cleophas. Responding, he went towards that home and hid in a maize plantation and kept a 5 metres distance from where he could hear voices of people fighting. That he recognized the voices as that of Gabriel Lumumba (A2), Richard Opuko (A1), Benjamin Khatiti and Patrick Karani (A3). These were his neighbours and he knew their voices. The evidence of the witness is that he was also able to see the four because of light provided by torches carried by Patrick Karani and Wanjala Okiya. So what is it that the witness says he saw?
 18. PW1 said that the Deceased was killed inside a maize plantation belonging to Cleophas. In

Examination in Chief he told Court that Gabriel Lumumba (A2) and one George Wesonga went to the house of Martin Kape and asked him to help them cart away the body of a victim. That Martin then accompanied the two back to the scene. His further evidence was that the body was carted away on a wheelbarrow. From the evidence it appears that the person who pushed the wheelbarrow was Kape. This is what the witness said in cross-examination:-

“I left for my home when Kape was pushing the wheelbarrow”

19. Now where did the wheelbarrow come from? The evidence of PW1 on this aspect was not entirely consistent. Answering a question in cross-examination the witness stated

“I did not know where the wheelbarrow came from”

He also told court that although he did not know where they got it from, Gabriel Lumumba (A2) and George Wanjala gave Kape the wheelbarrow. This of course is different from what the witness recorded in his statement to the police. There he said,

“Later, I saw them carrying the body to the footpath and immediately one Martin Kape emerged with a wheelbarrow and ferried the body to unknown destination”

20. As for PW2, he testified that he and one “Sonko” got to the scene at Madibo area at between 10.00 p.m. and 11.00 p.m. He saw 7 people standing at the gate of George Wanjala Okiya. That because of the moonlight he was able to see the faces of the seven and recognized them as Richard Opuko (A1), Friday Wechuli, Benjamin Khatiti, Evans Waswa and Martin Kape. He also saw a person lying in a trench at the gate of George Wanjala Okiya.
21. That George Wanjala left towards his house and returned pushing a wheelbarrow. The evidence of the witness was that Patrick Karani (A3) and Benjamin Khatiti lifted the body and placed it onto the wheelbarrow. As they were placing the body on the wheelbarrow, PW2 said that he was able to identify it as belonging to Odhiambo (the Deceased.) At this juncture Richard Opuko (A1) is said to have called someone and said “Tumemaliza” (Kiswahili for “we have finished”).
22. PW2’s further testimony in chief was that Friday ordered everyone present to follow them as Benjamin Khatiti towed the wheelbarrow from the front using a rope and Patrick Karani (A3) pushed it from the back. He and Sonko obliged. About 150 metres after crossing Madibo river, the body was placed in a trench. Evans used a stone to block some running water and he then pushed the body into the mud. After this they all returned to the home of George Okiya. Here, Sonko and PW2 parted with the rest and left for their respective homes.
23. Under cross-examination, PW2 was emphatic that with the body loaded on it, Patrick Karani (A3) pushed the wheelbarrow as Khatiti towed it. He also conceded that in his statement made to the police on 16th November 2013, Martin Kape is not mentioned as one of the people he saw at the scene. He further stated that before it was carted away, the body lay at the gate of George Wanjala and not in a maize plantation. As to the source of light, the witness told court that although his friend Sonko had a torch and Richard Opuko’s (A1) mobile phone had some assistive light, the moonlight on that night provided sufficient light for him to see the people involved and the events of that night. Critically, he stated that of the seven only Richard Opuko (A1) had a source of light and that none of the seven were armed.
24. In his final submission, Mr. Owiti for the State argued that the evidence of PW1 was corroborated by PW2. Mr. Otanga on the other hand submitted that the testimonies of the two witnesses contradicted each other. The two witnesses gave evidence that a body of a person was carted away in the presence of the three Accused persons who were in the company of other people.
25. If PW1 is to be believed, then he got near the scene when the assault on the Deceased was ongoing. This is what he said,

“I went towards the home, about 5 metres away, I hid in a maize plantation from where I could hear the voices of those fighting.”

Remember he had responded to the screams coming from the direction of the home of Cleophas.

He left the scene when Kape was pushing the wheelbarrow with body of the Deceased. When PW2 got to the scene he found seven people standing near the gate of George Wanjala Okiya and remained in the company of the seven until they got rid of the body and returned. Given the time-span set out above it is expected that the account of PW1 and PW2 would be similar on certain aspects. These would include:

- i. Where the body of the Deceased lay
- ii. Who was present at the scene when PW2 and Sonko got there.
- iii. How was the body of the Deceased removed from the scene?

26. The evidence of PW2 was that when he got to the scene, the body of the Deceased lay down in a trench at the gate of George Wanjala Okiya. On the other hand the evidence of PW1 suggested that the body was in a maize plantation. PW1 who was at the scene at the time a fight was going on ought to have seen PW2 and his friend Sonko get to the scene and find seven people there. This is because PW2 and his friend Sonko purportedly got to the scene when the fight was over and the Deceased already dead. Curiously in his evidence, PW1 makes no mention of Sonko and PW2. Sonko and PW2, according to PW2 left the scene with the seven to the point where the body was disposed and thereafter returned to the home of George Okiya before parting ways. Apart from not mentioning Sonko and PW2, PW1 did not mention Friday Wechuli and Evans Waswa as being present. These two, according to PW2 were among the seven at the scene. And Friday's role in the disposal of the Deceased's body was not peripheral because it was him, according to PW2, who ordered everyone present to follow Patrick Karani and Benjamin Khatiti as they carted the deceased's body on the wheelbarrow. Why would PW1 miss out on this significant event?

27. According to PW1, one Martin Kape played a major role in the disposal of the corpse. Kape is the one who pushed the wheelbarrow that transported the corpse away from the scene. But PW2's side of the story on how the wheelbarrow disposed of the body is entirely different. According to him the wheelbarrow with the corpse was towed by Khatiti and pushed by Patrick Karani (A3). In fact this witness did not mention the presence of Martin Kape when he wrote his statement to the police on 16th November 2013!

28. There are more contradictions between the testimony of PW1 and PW2. PW1 told court that the source of light at the scene were 2 torches. That Gabriel Lumumba and George Wesonga each had a torch. Compare this with the testimony of PW2. According to PW2, apart from his friend Sonko, Richard Opuko had assistive light from his mobile phone. This witness was unequivocal that apart from the moonlight, these two were the only other sources of light. He said nothing about Gabirel Lumumba and George Wesonga having torches.

29. Certain other gaps to the Prosecution case does not help its theory at all. PW2 told Court that he was with Sonko during the entire period when the body was picked from the ground, loaded onto the wheelbarrow, carted to the River side, removed and dumped there. Sonko, no doubt would have been a crucial witness and his evidence could have provided valuable support to that of PW2. Yet there was no indication from the Investigating Officer (PW7) whether this potential witness was interviewed by the police or why he did not testify. No evidence has been availed as to whether he was interviewed by the police. PW2 attempted on cross-examination to explain Sonko's whereabouts. He said "that Sonko had moved away with his business". Does this mean he had moved beyond the reach of Police or was he simply reluctant to come forward? There are no answers to these questions as the person (PW7) who ought to have given them did not proffer any explanation.

30. Further, the wheelbarrow that was used to dispose of the body would be an important piece of evidence for the State. It was not produced before Court and nothing was said as to whether or not it was recovered. In addition, if PW2 was to be believed, Kape who helped in the disposal of the body would be an accomplice in the crime. What became of Kape? The Prosecution made no explanation.

31. This Court has analyzed the evidence of PW1 and PW2 even without giving detailed attention as to whether the Prosecution had established that there was sufficient light to enable the two witnesses see what played out at the scene on that night and the identity of the players. Even then the evidence of PW1 and PW2 has too many material contradictions that makes their evidence

unbelievable. It would be unsafe to return a conviction on such contradictory evidence.

32. Is there any other evidence that implicates the Accused persons? The evidence of PW4 and PW5 is that on the evening of 2nd November 2013, the Deceased visited the home of Cleophas Okiya and Antonina Okiya (PW3) for a changaa drunk. PW4 says that, at about 9.00 p.m., the Deceased joined him and others for a drink. Then he left the house of Cleophas in the company of A1,

....”those who remained behind were Gabriel Okiya, Mama Antonina Okiya, Cleophas Okiya and the Deceased”

As for PW5 he saw PW4, Richard Opuko, Simon Ojako, Benjamin Khatiti, Patrick Karani Gabriel Makokha, Mzee Okiya, Ojiambo and the Deceased at the said home. He says that those people remained behind when he left.

33. Taken together, the evidence of PW4 and PW5 would be that ;of the three Accused Persons, it was only Gabriel Okiya (A2) who was left behind with the Deceased drinking alcohol in the house of Cleophas and Antonina. Even then, Gabriel and the Deceased were in the company of at least two people, Antonina and Cleophas. There was no evidence by Antonina and Cleophas that the last person seen with the Deceased while he was still alive was A2. In my evaluation of the evidence, the Prosecution did not prove that any of the Accused Persons was last seen with the Deceased while he was alive.

34. The upshot is that I am unable to find any evidence that can found a safe conviction against any of the three Accused Persons. The result is that I find that the three are not guilty of the charge they face. I set them free unless held for some other lawful cause.

Dated, signed and delivered at Busia this 22nd day of October 2015.

F. TUIYOTT

J U D G E

In the Presence of :-

OileC/Assistant

Owiti For State

Okuta Advocate..... For Accused Persons