



IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 3 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

FREDRICK OTIENO ODHIAMBO.....1ST ACCUSED

VICTOR OUMA ODHIAMBO.....2ND ACCUSED

ADONIJA ODHIAMBO OPIYO.....3RD ACCUSED

JUDGMENT

1. The three accused were charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the offence as per the Information dated 2nd March 2010 were that on 16th October 2009, at Ronda Estate in Nakuru District the three accused jointly murdered Duncan Otieno.

2. The prosecution called a total of 8 witnesses. PW1 was Saddam Hussein and a cousin to the deceased. He testified that on 15th December, 2009, at about 10.00pm, he accompanied the deceased to committee meeting for the funeral arrangements for the burial of Otieno at Rhoda.

3. After about 30 minutes, a mob came to the meeting. The first accused person went to the deceased and said to him in Dholuo "*today we are with you.*" The second accused closed the gate to the compound and thereafter PW1 saw the first accused remove a hammer and hit the deceased on the elbow. On seeing this PW1 ran and hid but could still see what was transpiring. The mob then attacked the deceased while the first accused held him on his right elbow so that he could not defend himself. Afraid that the mob might see and attack him PW1 ran away from the compound as did the other mourners present at the meeting.

4. PW1 testified that he knew the accused prior to the fateful day as they used to visit his aunt's place with the deceased. He knew them by their nicknames: first accused- *lover boy*, second accused- *Blackie* and third accused- *Adonija*. He learned of the death of the deceased the following morning and identified his body at Nakuru Municipal Mortuary.

5. During cross-examination, PW1 stated that there were few people at the meeting. He could see the gate using the bulb light as it was in front of the tent where they were seated and there were no bushes in between.

6. PW2 was William Owino Ayungu a resident of Ponda Mali. He knew the deceased as they used to operate *boda boda* bicycles at the same stage. On the fateful day, he was at the meeting during which

the deceased was attacked. He testified that *Lover boy (the first accused)* who was wielding a hammer held the deceased as *Blackie (the second accused)* ran to close the gate to the compound. The second accused returned and together with *Adonija (the third accused)*, stabbed the deceased with the knives they were wielding on his stomach and neck.

7. The deceased, who was injured and loosing blood staggered to the adjacent plot where he collapsed and died. The mob followed him and PW2 heard lover boy and Bruce who was not before the court saying “*leo tumemaliza yeye*”, “*Today we have finished him.*” PW2 was able to see the attack using the light from two electric bulbs which were sufficient to light even the adjacent plot.

8. In cross-examination he stated that he had known the first accused for about two and a half years prior to the incident. He saw PW1 who ran away when the deceased was attacked. He was unable to intervene and stop the attack as the accused persons were armed.

9. PW3, the deceased's mother identified the deceased at the Mortuary for purposes of conducting the postmortem and also identified the accused persons to the Police when they were arrested. PW4 took photographs of the deceased at the scene and compiled, the photographs and Report which were produced as exhibits 1 and 2. The second accused was arrested by PW5 (*PC No. 222794*) upon being pointed out by the deceased's brother Victor Omondi while the third accused was arrested by PW8 (*PC No. 52225*). The matter was investigated by PW6 (*PC No. 83382*) who preferred the charges against the three accused persons. No weapons were recovered from the scene of the incident or from any of the accused.

10. A mental assessment was conducted on the accused persons and they were found fit to stand trial. Dr. Omboga carried out the postmortem on the deceased following identification by the family members and a Police Officer. The deceased had stab wounds on the upper back, right side lateral thigh and on the ulterior chest wall. The respiratory system had massive haemorrhage with collapsed lungs. The cause of death was caused by the chest injury due to sharp trauma and massive haemorrhage. His reports were produced by DW3 with consent of Counsel for the accused.

11. At the close of the prosecution case, this court found that the accused had a case to answer. The three accused gave sworn statements denying any involvement in the attack of the deceased. DW1 the first accused, a panel beater at Obare's garage admitted that he knew the deceased prior to the incident but by appearance only and did not know his name. He saw the deceased being beaten with timber off-cuts by many people but did not participate in the attack. He could however not recognise any of them as there were about a hundred people at the scene although the place was lit. He denied knowing his co-accused prior to their arrest or having any grudge against the deceased.

12. The second accused also gave sworn testimony. Also a boda boda operator he was friend with the deceased. He stated that he was at the scene of the attack together with another hundred people when a fight broke out. He however fled before finding out what was transpiring and only learnt of the death of the deceased the following day. He acknowledged during cross-examination that he saw the deceased being whisked away by the crowd but could not recognise anyone who was involved.

13. DW3, in his sworn testimony also denied being involved in the attack against the deceased and took off immediately the commotion started. Like the second accused, he learnt of the death of the deceased the following day. He denied knowing his co-accused prior to their arrest.

Analysis of submissions and evidence

14. Mr. Orege for the second accused submitted that the prosecution had not proved the charges against his client beyond reasonable doubt. He contended that there was no independent witness as the eye witnesses to the incident were related to the deceased. In addition the circumstances under which the accused were identified were difficult and there was a possibility that the witnesses were mistaken.

15. He further contended that there were gaps in the prosecution evidence that had remained unanswered. Firstly it was not clear whether the phrase “*today we are with you*” was said at the scene of

the attack or elsewhere. It was also not clear how PW1 was able to witness the commission of the offence when he ran away from the scene on seeing the deceased being attacked. Finally the investigating officer did not make any reference to the hammer with which the deceased was hit and failed to call Bruce as a witness in the matter for fear that he may give evidence not favourable to the prosecution. According to Counsel without clarifying these issues, the offence against the accused remained not proved. He therefore urged the court to find that the charges against the accused had not been proved beyond reasonable doubt.

16. There was no appearance by Counsel for the first and third accused persons. On his part, the Prosecution Counsel relied on the evidence on record and did not make any submissions.

17. The offence of murder is defined by section 203 of the Penal Code, (*Cap 63, Laws of Kenya*) as follows -

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder-

- (a) the fact and cause of death of the deceased person,
- (b) that the death of the deceased was as a result of an unlawful act or omission on the part of the accused persons,
- (c) that such unlawful act or omission was committed with malice aforethought.

18. With regard to the first ingredient, PW8 noted stab wounds on the chest and right thigh. Dr. Omboga who carried out the postmortem on the deceased found stab wounds on the upper neck, back right side, lateral thigh and chest anterior wall. There was massive haemorrhage in his respiratory system with collapsed lungs. He opined that the deceased died as a result of the chest injury due to sharp trauma and the massive haemorrhage. I find that it was established that the deceased met his death as a result of the injuries inflicted upon him during the attack.

19. The question that follows is whether these injuries were caused by the accused persons in the course of an unlawful act or omission. There were two eye witnesses to the incident, PW1 and PW2 who were the deceased's cousin and brother-in-law respectively. Counsel for the accused however contended that as the two were related to the deceased, their evidence should not be given much weight.

20. The law regarding the competency of a witness is provided for under Section 125(1) of the Evidence Act, (*Cap 80 Laws of Kenya*) and says -

“125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.”

21. My reading of the above Section is that the competence or otherwise of a witness is a question of fact to be determined by the trial court on the basis of the ability of the witness to comprehend the questions put to him and to give rational answers to them. There is no bar to a witness giving testimony as long as the court is satisfied that he understands the nature of business in which he is involved. The weight to be given to this evidence is based on the demeanor of the witness and the truthfulness with which he answers to the questions put to him. It is my finding therefore that PW1 and PW2 were competent witnesses in this case.

22. It was not disputed that the assault on the deceased occurred at night, around 10.30 pm and the

circumstances under which PW1 and PW2 identified the accused persons were difficult. Counsel for the accused contended that there was a large crowd at the scene which was only lit by an electric bulb. Given the fact that PW1 did not see the second accused stab the deceased as alleged by PW1, it is possible that they did not see what transpired.

23. In addition, said counsel contended, the evidence suggests that there were many people involved in the attack. PW2 testified that another person named Bruce who had not been charged or called to testify was involved in the attack and was heard saying “*today we have finished him.*” According to Counsel, it would therefore be unfair to only pick on the accused persons and convict them of the murder of the deceased.

24. However, the evidence by PW1 in this regard was that he was seated with the deceased on the third row bench in a tent that was facing the gate. The place was lit by one electric bulb and he confirmed during cross-examination by Mr. Orege for the first accused that there was nothing obstructing his view. He saw the first accused walk over to the deceased and say to him “*today we are with you.*” PW2 also testified that the scene was lit by electric bulbs.

25. Their testimony on what transpired on the fateful night was consistent and corroborated each other on material aspects. They saw the first accused hit the deceased with a hammer which he removed from his trousers after which the second accused ran to close the gate. Although PW1 fled from the scene upon seeing the mob descend on the deceased, PW2 who stayed on watched as the second and third accused stabbed the deceased on the right side of his stomach and in the neck. He was unable to offer the deceased any assistance as the attackers were armed. I am satisfied on this evidence that PW1 and PW2 were able to recognize the accused persons as being among the people who inflicted the fatal injuries on the deceased which caused his death.

26. Section 20(1) of the Penal Code deems the following persons to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say -

- (a) every person who actually does the act, or makes the omission which constitutes the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence,
- (c) every person who aids or abets another person in committing the offence,
- (d) any person who counsels or procures any other person to commit the offence.

And Section 21 provides – ***“that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

27. It is clear from the evidence in this case the common intention of the accused was to kill the deceased, for in addition to being armed with dangerous weapons to wit, knives, the first accused and Bruce were heard saying “*leo tumemaliza yeye.*” In pursuit of this common intention, the first accused hit the deceased on the elbow and held him, while the second and third accused stabbed him with knives. The fact that it was not established who inflicted the fatal injury that led to the death of the deceased or the failure to prosecute the other persons with whom the accused were acting in concert does not exonerate these accused from liability. The law (*Section 21 of the Penal Code*) deems that each one of them contributed to the infliction of the fatal injuries and its cumulative effect, the fatal injuries and death of the deceased.

28. For all those reasons, I find that the prosecution has discharged its burden of proving beyond reasonable doubt that it is the accused who killed the deceased, and I accordingly find each of them,

Frederick Otieno Odhiambo (“*lover boy*”), Victor Ouma Odhiambo (“*Blackie*”) and Adonija Odhiambo Opiyo (“*Adonija*”) guilty of the murder of Duncan Otieno, and I convict each of them of the offence of murder contrary to Section 203 of the Penal Code.

29. I call upon counsel for the three accused to address me in terms of Section 329 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*), on why the accused should not be sentenced to death as provided by Section 204 of the Penal Code aforesaid.

30. It is so ordered.

Dated, signed and delivered at Nakuru this 27th day of June, 2014

M. J. ANYARA EMUKULE

JUDGE