



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL CASE NO. 27 OF 2007

REPUBLIC.....PROSECUTOR

V E R S U S

- 1. GEORGE ABUKO.....ACCUSED**
- 2. BONIFACE AMARA.....ACCUSED**
- 3. RAPHAEL OMUNGALA.....ACCUSED**

J U D G M E N T

The accused persons are charged with the offence of murder contrary to **Section 203** of the **Penal Code** as read with **Section 204** of the same code. The particulars of the offence are that the accused on the 4th day of August 2007 at E village, Mundobelwa sub-location, Kisa North location in Butere District within Western Province, jointly with others not before court murdered **J A O S**.

Seven witnesses testified for the prosecution. **PW1, C O A** was aged 13 years old. His evidence is that on the night of 3rd August 2007 at about 1.00 a.m. he was asleep at home with his mother and younger brother, J S. They heard people breaking the door. His mother went to the door screaming and lit a lantern lamp. The attackers drilled a hole near the door and managed to open the door. PW1's mother went and hid herself under the bed and his younger brother hid himself in the sitting room.

One of the attackers had a small torch. He went and removed the deceased from under the bed. PW1 identified that person as Nyunje Rafael. PW1 stated that five people had entered their home. He saw Abuko, Omuka, Komo, Rafael Nyunje and Donald Ichenye. Abuko had a panga, Rafael had a panga and Omuka had a slasher. Donald had an axe. Rafael hit the deceased on the head, back and knees and she collapsed. Komo cut PW1's younger brother on the head near the ear. The deceased had identified Rafael and said "*Mtoto wangu Rafael kwanini unaniuwa bure*".

According to PW1 his young brother went to call a neighbour, Aggrey who came and assisted in taking the deceased to hospital. Rafael was present when the deceased was being taken to hospital. P O, PW1's elder brother also went to the scene. The deceased was taken to Mwihila hospital and was later transferred to Kakamega hospital where she died. The deceased had lit a lamp but one of the attackers hit the lamp with a panga and it went off.

PW2, J S was 10 years old. That night he was asleep with his mother and PW1 when at about 1.00 a.m. some people went to knock. The deceased woke up and lit a lantern lamp. The attackers entered the house and were five in number. PW2 identified Nyonje, Omuka, Komo, Kuka and Abuko. Omuka had a panga, Komo had a panga and Kuka had an axe. Nyonje removed the deceased under the bed and started hitting her. Komo cut PW2 on the ear. PW2 went to his bed and when the attackers left went to wake up Aggrey, a neighbour.

According to PW2, the deceased was carried in a wheelbarrow and taken to hospital. **PW3, P O O** is the elder brother of PW1 and PW2. He was 17 years old. His testimony is that on the 3rd of August 2007 at 8.00 p.m. he was at home. He used to sleep at his uncle's place with Rafael Nyonje and Charles Osore. When PW3 went to sleep he found Rafael and Omuka smoking bhang. PW1 went to a Mr. Obieto's homestead where there was a burial ceremony. Rafael Omuka and one Patrick went to the ceremony and started fighting one Anyangu. They had pangas. PW3 left and went to sleep.

PW3's further testimony is that PW2 went to wake him up that night. PW3 went to his mother's house and together with Aggrey put the deceased on a wheelbarrow. Rafael followed the people who had taken the deceased to hospital.

PW4, G O A was the deceased's husband. His testimony is that on the 3rd August 2007 he was attending a burial of his auntie somewhere near Yala. On the morning of 4th August, 2008 he was informed about the incident. He went to Kakamega Hospital mortuary and saw his wife. She had severe head injuries and injuries on the back, legs and hands.

PW5, AGGREY MUKUMA ABUDI was asleep that night when PW2 went to wake him up. He went to the deceased's home with his wife and found her lying on the floor bleeding. PW5 took the deceased to Mwihila hospital and she was rushed to Kakamega hospital.

PW7, INSPECTOR SIMON MISIKO was in August 2007 based at Khwisero police post as the officer in command. On 5th August 2007 at about 8.00 a.m. PW4 G O went to report the incident. PW7 visited the scene. He got information about the assailants and managed to arrest Komo Opieta and Bonface Omuka. Rafael was arrested on 6th August 2007. He charged the accused with the offence. PW7 was given the accused's names by PW1 and PW2.

The accused were put on their defence. The first accused, GEORGE ABUKO in his sworn testimony testified that on the 3rd of August 2007 he was at home and didn't see the deceased. He denied

committing the offence.

The 2nd accused **BONIFACE AMARA MUSA** in his sworn evidence testified that he was a form two student at Eshinutsa Secondary School. The schools had been closed. On the night of 3rd-4th August 2007 he was at home. He was arrested on 5th August 2007 on a Sunday while coming from a church and taken to Khwisero Police Station for two weeks and was later taken to Butere Police Station where he stayed for 2½ months before he was charged with the offence on 2nd November 2007. He denied that he was called Omuka.

The 3rd accused, **RAFAEL OMUNGALA** in his sworn testimony denied the offence. In his evidence the accused confirmed that he knew the deceased. She was the wife of his young uncle. He testified that on the night of 3rd-4th August 2007 he was at home asleep when he heard Aggrey, PW5 knocking the door. He went with Aggrey to the deceased's home and found the deceased. She was not talking. The accused and others put the deceased on a wheelbarrow and took her to Mwihila hospital. The doctor at Mwihila hospital gave them a vehicle to Kakamega hospital.

The accused denied committing the offence. His further evidence is that if he was involved he could have been arrested at the scene. According to the 3rd accused, there was no family dispute between the accused's family and that of the deceased. There was a burial ceremony that night but the accused did not attend.

Counsel for the accused submitted that the prosecution did not prove its case as required and that the Doctor who performed the post mortem was not called to testify so as to prove the cause of death.

From the prosecution evidence, it is PW1 and PW2 who witnessed the incident. The two witnesses confirm that the incident occurred at night, at about 1.00 a.m. They managed to identify five people namely Rafael, Abuko, Omuka, Komo who was not charged and Donald Ichenye who was also not charged.

The main issue is whether the accused persons were properly identified and whether the prosecution proved its case beyond reasonable doubt. From the evidence of PW1 and PW2, the incident occurred at night. The deceased lit a lantern lamp but from the evidence of PW1, one of the attackers hit the lamp with a panga and the lamp went off. PW2 was cut on the ear with a panga and from his evidence went to his room. He came out after the attackers had left. It is evident from the evidence adduced that nothing was stolen. Both PW1 and PW2 were minors but they testified under oath.

From the prosecution evidence, it is established that the circumstances under which the offence took place could not lead to a clear and undoubtful identification of the accused persons. PW1 confirms that the deceased lit a lantern lamp but it was hit by a panga and went off. The incident occurred at 1.00 a.m. PW2 was cut on the ear with a panga. It is not clear at what point in time did the attackers hit the lamp. The prosecution evidence does not establish how long the incident occurred. PW2 was cut on the ear and went

to his room. It is doubtful that having been cut, PW2, a boy aged 10 years old could still identify the attackers.

PW2 testified that Omuka had a panga while according to PW1 Omuka had a slasher. According to PW1 Donald had a short axe while PW2's evidence is that Kuka is the one who had a short axe.

The prosecution evidence established that the 3rd accused was present when PW3 and PW5 went to the scene. It is the evidence of PW1 and PW2 that it is the third accused who cut the deceased with a panga. It is not established as to whether the 3rd accused's clothes had blood stains. Although PW1 and PW2 testified that the 3rd accused initially refused to assist in taking the deceased to hospital, he later assisted and even went to Kakamega Hospital where the deceased died.

The first charge sheet shows that Donald Achinji was also charged but was later released. PW6 did not testify as to what led to the release of the accused.

The accused in their sworn testimonies denied committing the offence. According to the 2nd accused, he comes from a different village and was a student. The 3rd accused was present when the deceased was being taken to hospital and he went with the deceased to hospital. The 3rd accused testified that there was no dispute between the two families. PW6 did not establish the motive for the killing.

The only evidence connecting the accused persons to the offence is that of PW1 and PW2. The main issue is whether in the absence of other independent corroborating evidence, the evidence of the two minors could corroborate each other. In the case of **KINYUA V REPUBLIC [2003] KLR 294**, the Court of Appeal found that the evidence of two minors was corroborated by that of their mother and the doctor who conducted a post mortem examination on the body of the deceased. It therefore follows that the evidence of the two minors needs corroboration by independent evidence and cannot corroborate each other. PW1 was 13 years old while PW2 was 10 years old. In the case of **KIBANGENY ARAP KOLIL V REPUBLIC, 1959. E. A.** the court held that a child under the age of fourteen years is of tender age. The two minors herein were thus of tender age.

Other than the aspect of corroboration, the circumstances under which the incident occurred creates doubt as to the veracity of the identification by both PW1 and PW2. The incident occurred at night and the only lantern lamp that was at the scene was put off. PW1 was injured during the incident and went to his bed room. The circumstances were quite difficult to identify five attackers in darkness.

In the end, I do find that the prosecution has not established its case beyond reasonable doubt. The circumstances under which the incident occurred raises doubt as to the identification of the accused. The accused are entitled to the benefit of doubt. The accused persons are hereby acquitted of the offence of murder as charged and shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 3rd day of May 2012

SAID J. CHITEMBWE

J U D G E