



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA**

Criminal Case 13 of 2009

REPUBLIC -----PROSECUTOR

-VERUS-

JASON MAKOKHA ODONGO -----ACCUSED

J U D G E M E N T

The accused, Jason Makokha Odongo, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The charge in the first count, states that he Jason Makokha Odongo alias Sigongo, during the nights of 1st and 2nd March, 2009 at Khuugungu 'B' village within Mundika sub-location in Busia District of the Western Province, jointly with others not before court, murdered Raphael Makokha Khasindu.

In the second count the person stated as murdered by the same accused herein is Sarah Nabwire Makokha.

The prosecution called nine witnesses who were mainly the close relatives of both the two deceased persons and the accused. They included the accused's first wife, the accused's son, brothers in-law, sister's in-law of the accused and mother in-law.

The summary of the evidence is that the accused is a person of violent temper who beat his first wife Felista Akelo Kea, on several occasions between the year 2004 and 2008. On two occasions the assault on Felista was so serious that the matter ended in court in a criminal case. He was imprisoned for one assault and fined 10,000/= in respect to a second assault.

It is in evidence that each time Felista was beaten and even when the accused her husband was in jail serving sentence arising from the assaults, the deceased Raphael Makokha and his wife Sarah Nabwire Makokha, always took Felista in and assisted her financially and in other ways, including giving her refuge. This assistance was from the evidence, taken by the accused as encouragement to Felista his wife, to take him to court whenever he assaulted her.

It is in evidence also that after the accused left jail after serving his imprisonment aforesaid, he decided mainly to leave his house with Felista and join his younger wife elsewhere in another location. Thereafter, he crossed to Uganda where he apparently had a third home and he would only show up in Busia from time to time. The mother of Felista lived in Uganda. She testified that on several occasions the accused went to her home in Uganda and told her to warn the deceased Raphael that he the accused, would kill him unless he stopped encouraging Felista from taking him to the police again and again.

Further evidence on record from several witnesses also established that each time the accused was threatened with arrest or jail, he would openly threaten to kill Raphael, the deceased. Other evidence showed that the deceased's shop was once broken into and goods stolen but there was no evidence connecting the accused with the theft. Another time the accused filed a defamation case against the deceased on

the basis that the deceased had said that the accused had hired one Nduku to kill him and his son and that Raphael the deceased, had alleged that he, the accused, had a gun. The witnesses testified that Nduku visited Raphael and told him that he had been hired by the accused to kill him, Raphael. When Raphael reported the threat to the police, the police found Nduku with a gun for which he was charged of possession and imprisoned.

It is clear therefore that the majority of the witnesses who testified, feared that accused would one day kill the deceased Raphael, considering the many threats the accused had made to several of them.

On 2.3.2009, the accused's defamation case was apparently due for a hearing in Busia. In the evening of 1.3.2009, the son of the accused, Julius Wabwire Okello, joined the two deceased in their house at Nuliko market for a dinner. They discussed the civil case on 2.3.2009 against both of them against both of them which was coming the next day. After dinner Julius left for his home to sleep, leaving Raphael and his wife Sarah safe and sound. The same night at 11.00 p.m. the Busia Police passed at Julius's house and requested him to accompany them to Raphael's house. At Raphael's house he saw the naked bodies of Raphael and his wife Sarah, on the floor, dead. He got information that they were shot dead by thugs soon after he left the house after dinner.

No one saw the people who shot and killed the two deceased persons. Only PW7, Teresa Ochalla, testified that in the night when she was asleep she heard a noise of a gun-shot from the direction of the two deceased's person's house which was about 100 metres away. She did not approach that home until the next day.

Felista, the accused's first wife confirmed the evidence of hatred between accused and deceased's family. She also confirmed that accused, severally, swore to kill the deceased Raphael. She also informed the accused's brothers to inform accused to attend the funeral of Raphael and Sarah. However, accused did not attend the funeral, nor did his brothers.

It is not surprising therefore, that when Raphael and his wife Sarah were shot dead, everyone believed it was the accused, who did it. To make it worse, the accused failed to attend their funeral. This strengthened their belief.

The accused was placed on his defence. His unsworn evidence was that when he received the news of Raphael and his wife's death, he tried to inquire the date of the funeral so that he could come from Uganda where he lived, to attend it. The son of deceased failed to pass the information. Later when he finally arrived at the deceased's home, the burial had been done and it only remained for him to give condolences to the deceased's son. It was while he was doing so that the Busia Police arrived and arrested him. He was later charged with the murders which he knew nothing about.

The defence counsel Mr. Okutta submitted that there was no evidence connecting the accused with the murders. He stated that there were many stories including stories of hatred and death threats which raised suspicions against the accused, but suspicion was not enough to convict the accused.

I have carefully considered the evidence on record. There is no doubt that the accused was on the faces of all the witnesses from the family and community, a very violent man. He was to them, a very threatening person who appeared not to learn much to enable him change his character. He clearly hated the deceased Raphael and probably his wife for taking care of his wife Felisa whom beat from time to time. The witnesses, who gave evidence, likewise hated and feared the accused.

However, there is no eye evidence to link the accused with the shooting to death of the two deceased. Accused lived in Uganda. There is no evidence that he was seen in Busia and in particular, near the deceased's home that material night. Nor is there evidence that he hired thugs who shot the deceased.

In the circumstances, it would be stretching the minds imagination too far to come to the conclusion that the accused was responsible for the two deceaseds' deaths. All there is, is strong suspicion and no more. Suspicion however strong, does not in our law, form a basis for a conviction. Tangible evidence, direct or circumstantial is required to convict. Such evidence lacks in this case.

In the above circumstances, and however hateful the accused may seem, I have no alternative but to acquit him. I hereby do so. The result is to order that the accused be released from remand prison forthwith, unless he is otherwise lawfully held therein. Orders accordingly.

Dated and delivered at Busia this—18 th----- day of May, 2010.

D.A. ONYANCHA

JUDGE