



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**Criminal Case 28 & 40 of 2004**

**REPUBLIC.....  
.....PROSECUTOR**

**VS**

**FAUSTINE ETYANG *Alias* EKISA GEOFFREY EKISA KABURO.....  
ACCUSED**

**JUDGMENT**

The accused persons herein, Faustine Etyang alias Ekisa and Geoffrey Ekisa kaburo are before this Court duly 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 are that on the 5th day of May 2003 at Mongodewa Village, Moding Location in Teso District within Western Province, jointly murdered Benjamin Emojong.

The prosecution's case against the accused persons is that on the 6<sup>th</sup> day of May 2003, the accused persons visited the home of a couple, Cyprian Oroni (P.W1) and Jane Emojong (P.W5) where they were served with lunch at noon. The accused persons told the couple that they were headed for the house of their uncle called Silas to check on their tobacco which was being roasted. Geoffrey Ekisa (2<sup>nd</sup> accused) is said to have arrived and left while in possession of a stick.

P.W.1 and P.W5 said they heard screams rent the air within a short time after the accused persons left their homestead. P.W1 said he rushed towards the direction of the screams upon which he saw Geoffrey Ekisa (2<sup>nd</sup> accused) hitting the deceased with the stick he had while Faustin Etyang (1<sup>st</sup> accused) held him tightly on the ground. P.W1 said the duo fled the scene when they saw him. P.W1 claimed that he overheard Geoffrey Ekisa tell Faustin Etyang to run away. P.W.1 visited the scene upon which he spoke with the deceased who had a swollen face. P.W1 said the deceased told him that the two accused persons assaulted him because they believed that he played a role in causing the death of their deceased father, Gregory Kaburo who passed away three weeks prior to the incident after the deceased shared a drink with him. P.W.1 reported the incident to Moding Police Post and then took the deceased to hospital but unfortunately the deceased succumbed to the injuries he was inflicted by the accused persons. The police therefore visited the accuseds' homestead. Sgt John Musyoka (P.W10) said that when he visited the accused's homestead, he found it deserted, the accuseds having fled. P.W.10 told this court that the deceased who was seriously ill told him that the accused persons had assaulted him. A similar account

was narrated to this court by Jane Emojong (P.W5). P.W5 confirmed that she saw the 2<sup>nd</sup> accused being in possession of a stick which she later saw him use it to hit the deceased when she rushed to where the deceased was assaulted. Judith Emojong (P.W4) said that on 6<sup>th</sup> May 2003 she rushed to the scene when she heard screams while she was fetching water where upon she met the deceased who told her that the accused persons had assaulted him. P.W4 claimed she saw the stick which was used to assault the deceased at the scene of crime. The stick was identified and produced in court as an exhibit in evidence. The investigating officer also produced in court the post mortem report in which the doctor formed the opinion that the cause of death was hemo/pneumothorax due to fractured ribs on the left side.

In short, the prosecution's case is that the two accused persons were seen by P.W1 and P.W5 attacking the deceased on the 6<sup>th</sup> day of May 2003 and as a result of that assault the deceased suffered fatal injuries. It is also the prosecution's case that the two accused persons had a common intention to murder the deceased. It is the prosecution's case that malice aforethought was established due to the fact that the deceased was suspected to have played a role in the death of the accuseds' father, Gregory Kaburo. In other words, it is the prosecution's position that the accused persons had a grudge against Benjamin Emojong, deceased, because the duo believed that he poisoned their father while they shared a drink. It is also the prosecution's case that the deceased gave a death declaration in which he named the accused persons as his assailants. Before he died the deceased is said to have spoken to P.W1, P.W3, P.W.4, P.W.5 and P.W10 in which he alleged the two accused persons assaulted him. Finally, it is the prosecution's case that the accused persons had guilt conscience when they fled their homes.

Each of the accused persons gave sworn testimony in their defence. The 1<sup>st</sup> accused, Faustin Etyang (D.W1) raised the defence of alibi. He claimed that on the 6<sup>th</sup> day of May 2003 he was in Mombasa at his place of work hence he had no opportunity of committing the offence. He claimed he left for Mombasa on 21<sup>st</sup> April 2003 after attending the funeral of his father. D.W1 confirmed that there was tension between the family of the deceased and that of the late Gregory Kaburo. D.W1 said they were told by the chief to be patient and await for the outcome of the post mortem report over the body of Gregory Kaburo, deceased.

On his part, Geoffrey Ekisa Kaburo (2<sup>nd</sup> accused) D.W2, also denied having committed the offence he is now facing. He asserted that there was no enmity between their family and the deceased's family. D.W.2, said he left for Mombasa on 1.5.2003 after schools closed hence he was not within the scene of crime on 6.5.2003. In essence he raised the defence of alibi. D.W.2, said that his case could be that of mistaken identity. It is the evidence of D.W.2 that their family had a good relationship with that of P.W.1 and P.W5.

In brief, it is defence case that the accused persons were in Mombasa when the deceased was murdered. It is also the defence case that there was no malice on the accuseds' part against the deceased.

There is detailed submissions by the learned counsel for the defence and counsel for the prosecution. Counsel for the defence submitted that the evidence did not pin point who amongst the two accused persons inflicted the fatal injuries. Mr Aoga advocate for the accused persons further contended that there was no enmity between the deceased and the accused persons. It is the defence contention that the evidence of P.W5 and P.W6 were hearsay. It is also alleged that the deceased's dying declaration cannot be relied upon because the language the deceased used while stating his death declaration was not stated.

The learned Principal State Counsel submitted to the effect that the prosecution had established its case beyond reasonable doubt. Mr. Onderi, the learned Principal State Counsel stated that there was direct evidence in the testimonies of P.W1 and P.W5 and that the offence was committed during a broad daylight. He was of the view that the accuseds' alibi defence was displaced by the evidence of P.W1, P.W5 and of course the evidence of the deceased's dying declaration. Finally the learned Principal State Counsel was of the view that there was malice aforethought as manifested by the bad blood between the deceased and the two accused persons.

At the conclusion of submission, I summed up the evidence to the assessors and directed them on the

applicable legal principles. I then asked for the assessors' opinion. They were unanimous that all the accused persons were guilty as charged. They expressed the opinion that the accused persons were placed at the scene of crime by the evidence of P.W1 and P.W5 and that they were seen attacking the deceased. The assessors also rejected the accuseds' alibi defence. The assessors further formed the opinion that the accused persons had malice due to their suspicion that the deceased may have poisoned their father, the late Gregory Kaburo.

Having considered the evidence, the submissions and the assessors' opinion, I have formed the following view of the case. I agree with the assessors that whoever assaulted the deceased was actuated by malice to either do grievous harm or cause his death. In this case the evidence of P.W1 and P.W5, squarely place the accused persons at the scene of crime. P.W1 and P.W5 is a couple who are related to both the deceased and to the accused persons. The couple had a cordial relationship with the accused persons. This fact manifests itself when the quartet shared a lunch meal in the couple's house.

The accused persons in their defence admitted that they had a cordial relationship with P.W1 and P.W5. I believe the evidence of P.W1 and P.W5 that the duo saw the accused persons attacking the deceased. It is not in dispute that the accused persons suspected the deceased as having played a role in causing the death of their deceased father, Gregory Kaburo. The dispute was before the area chief pending the outcome of the post mortem examination on the body of Gregory Kaburo. I agree with the assessors that the accused persons had malice aforethought and that they intended to revenge against the deceased. The defence of alibi raised by the accused persons was displaced by the evidence of the deceased dying declaration, the evidence of P.W.1, P.W5 and P.W9. There is also conclusive evidence of the cause of death in post mortem report which is consistent with the evidence of assault.

The upshot of this trial is that, I find Faustine Etyang alias Ekisa (1<sup>st</sup> accused) and Geoffrey Ekisa Kaburo (2<sup>nd</sup> accused guilty of murder as charged. I sentence them to suffer death in the manner authorized by law.

In accordance with the provisions of section 271 of the Criminal procedure Code, I direct the assessors who have served in this case to be discharged but should not be summoned to served as such in another case until 12 months have lapsed.

Dated and delivered this 14<sup>th</sup> day of September 2006.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Onchiri holding brief for Mr. Aoga for the accused person.

Mr Onderi for the state.