



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION**

Criminal Case 75-108 of 2004

REPUBLIC PROSECUTOR

VERSUS

1. CHARLES ABONYO OGUTU)

2. JOSEPH ODUOR OCHIENG).....) ACCUSED

3. FREDRICK OUMA ODONGO)

JUDGMENT

I have before me three Accused persons who are charged with two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63 Laws of Kenya).

It is alleged that on 17th April 2004 at Ngomongo Village Kasarini within Nairobi Area they jointly murdered Samuel Mwaura Muturi and Wycliffe Omondi. The deceased in first count was the landlord of the plot where the murder took place in count No.I and the deceased in the second count was a resident in a nearby plot at Ngomongo.

It is sufficiently proved by the prosecution that the two deceased persons were found dead with injuries after the tension at the plot owned by the deceased in the first count. Cause of death of the deceased in the first count were head injury, fractured skull, brain haemorrhage due to sharp object and that of the deceased in second count was head injury, haemorrhage due to blunt object.

The prosecution led PW.1 Daniel Moja Mwangi, PW.2 Simon Mwangi, PW.3 Daniel Matimu Mwaura, PW.5 Kennedy Muchiri Mwangi to prove the first count. They were at the material time, with the deceased and were also related to each other. On 17th April, 2004 at around 12 p.m. PW.1 who was brother to the deceased saw some people destroying houses at the plot at Ngomongo owned by the deceased. He went to inform the deceased who used to stay at Korogocho. He accompanied the deceased and other aforesaid witnesses to the plot and saw 3rd Accused with a metal bar breaking windows and doors at the plot. They overpowered him and locked him in a room. After that 3rd Accused started shouting in Dholuo language which he did not understand. On hearing his shouts people of Luo tribe, about 50 in number, started gathering and tried to force open the gate locked by them. When they entered the plot they all ran to hide in different directions. PW.1 hid himself in the bathroom and was rescued by police at around 8.00 p.m. When he came out he saw the dead body of the deceased. This witness identified 3rd Accused at an Identification Parade conducted by Inspector Bernard Wambua (PW.15).

PW.2 son of the deceased was sent to AP's camp to inform the incident of tension at the plot. He went there in company of his mother (PW.4). He reached the scene thereafter, in company of three officers at about 10.00 p.m. and found the body of his father lying in a pool of blood. He saw police arresting two Accuseds. PW.3 a minor son of the deceased in his unsworn statement saw 3rd Accused breaking a door

with a metal bar and then was locked in a room with steel door. He repeated the evidence of others that on hearing screams of the 3rd Accused people started gathering and entered the plot. They all ran to hide. He (PW.3) hid with his cousin (PW.5) in the same room as they were scared of being beaten by the crowd who gathered. When he came out he and his uncle (PW.1) went to chief's camp leaving the deceased being beaten and when they came back he found his father dead.

PW.5 son of PW.1 and a nephew of the deceased was a minor and reiterated in his statement that he hid himself in a room with PW.3. They were let off as they were children. While PW.3 left the scene, he waited outside, and saw the deceased coming out and people started beating him. He saw one of them cut him on his neck. The beating continued even after the deceased fell down. Then he saw two persons with blood stains approaching him. They wanted to rub the blood stains on him but he ran away. He identified these two persons as 1st and 2nd Accused persons. He further stated that it was dark and could not see or recognize any one from the persons who were beating the deceased except the two who came near him.

PW.4 Lydia Wanjiku widow of the deceased came to the scene from AP's camp, where she was waiting, after she was informed of the death of her husband. She had testified that some blood stained clothes were recovered from two rooms by the police. However, PW.16 a Government Analyst who examined those clothes did not find any blood stains on the clothes.

Susan Wangui (PW.9) assisted in arresting 3rd Accused on 22nd June, 2004 almost two months after the incident.

This in short is the evidence led by the prosecution in respect of count No.1. In their defence, all the Accuseds gave unsworn statements. 1st and 2nd Accuseds were working at the material time and reached Ngomongo after 7.30 p.m. They met each other and were on their way to get money from a person owed by 1st Accused and on the way they were arrested by the police.

3rd Accused in his statement told the court that he worked until 6 p.m. and was staying at the plot owned by the deceased. After coming home he came down to buy vegetables and was confronted by the deceased who asked him why he had not yet vacated the home. He was then beaten and locked in Room No.1. He got scared and shouted for help. People responded to his distress call. When he was unlocked he ran away to his brother's place at Brue Cola. Next day when he went back to Ngomongo at 5.00 p.m., the place was locked and he went back to his brother's place. He was then arrested on 21st June, 2004 at a Bus Stage by the agent of the Landlord. Even though I have outlined defence of the Accused persons, the onus to prove the charge beyond reasonable doubt is squarely on the prosecution.

3rd Accused has been identified by witnesses and has been shown to be destroying the property of the deceased. After people responded to his call, no witness has placed him at the scene. His identification by PW.1 at ID parade does not add value to the case of the prosecution. 3rd Accused was seen to be destroying properties by all material witnesses but that fact has not linked him to the commission of this offence.

Evidence against 1st and 2nd Accuseds is solely based on evidence of PW.5 who is a minor. His evidence that those two (1st and 2nd Accused) came to him to rub blood on him is not materially corroborated by any other evidence. The clothes found on them have been shown to be without any blood by the evidence of the Government chemist. Thus I do not have any corroboration of the evidence of a minor. Moreover I do have to take note of the fact that the scene had no lighting around and a cursory mention by Francis Njuguna Nganga PW.9 that he would have been able to see the body of the deceased without a torch definitely does not change the fact that the scene was in dark. With the above mentioned observations and reasoning I cannot safely arrive at conclusion as per law, that either of the Accuseds was guilty of the charge of murder as leveled against them in count No.I. I shall thus enter finding of not guilty against all of them.

Evidence led in respect of count No.II is even less weighty. Only two witnesses were called to tell the court what transpired that night. They are father of the deceased William Ouma Asin (PW.7) and Kevin Oduor a minor and step-brother of the deceased (PW.8).

PW.7 was a tenant in a plot adjacent to the plot where deceased in count No.I was killed. He also rented a room in the same plot for the deceased which was 2nd door from its main gate.

According to his evidence he heard commotion from the adjacent plot when supper was being prepared. He came out of his house and saw people gathering from all directions and trying to enter the said plot. He saw then the owner coming out of the plot and being beaten. He then asked his family members to get into the house. While inside he heard shouts from people that **“a Jaluo today would be killed”** and also heard gun shots and police officers communicating that the situation was very bad and seeking reinforcement.

He then heard the gate of his plot broken into and a cry from his son Wycliffe the deceased. He hid himself and when he felt safe to come out he was told by a neighbour that his son was killed.

PW.8 was sharing the room with the deceased and at about 8.00 p.m. their door was forced open. He hid behind the door and the deceased ran out of the room. He then saw someone raising a stone and hitting the deceased’s head. He did not identify the person who did this cruel act.

I also take notice that all the Accused persons and the deceased herein are Luo by tribe.

PW.12 AP Cpl. Micah Bosire also testified that there were two groups of Kikuyus and Luos and he restrained some persons who wanted to beat two persons (presumably 1st and 2nd Accuseds) to avenge the death of a kikuyu (deceased in count No. I). With this evidence before me, I do not have to dig deeper to find, which I hereby do, that the prosecution has failed to prove the charge against the three Accuseds as leveled in count No. II, as per the laid down law.

I therefore enter finding of not guilty against all the Accused persons. The Assessors were of the same opinion.

In the premises, I further direct that all the Accused persons be released forthwith unless held otherwise as per law.

Dated and signed at Nairobi, this 12th day of July, 2005.

K.H. RAWAL

JUDGE

12.7.05