



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL CASE 133 OF 2004

REPUBLIC PROSECUTOR

VERSUS

1. GEORGE OCHIENG OMONDI)

2. JOEL AWUOCHE)..... ACCUSED

3. JULIUS WERE)

JUDGMENT

Before the court there are three Accused persons who are jointly charged with an offence of murder alleging that on 16th March, 2003 at Dandora within Nairobi area, they murdered Joseph Okoth.

The deceased was killed within the Precincts of St Peters Church, Dandora under Legio Maria of African Church Mission. It is also on record that the deceased was an Altar Boy in the said church. I shall henceforth refer the same as “the Church”.

The three Accused persons have also stated that they were at the Church in the morning of 16th March, 2003 which shall be referred to as ‘the material date’ in this judgment.

From the case of the Prosecution it is shown that there were two factions in the church and they were on a kind of warring path. Background of this friction has been given in evidence of PW.1 Maurice Oduor who was the Church teacher and PW.8 Bishop Lawrence Ochieng who was in charge of Nairobi Diocese of the Mission.

In short they testified that the roots of the dispute were sown in August 2001, when one of the two fathers of the Church named father Charles Odindi was transferred. Father Odindi, although accepted gifts of a farewell party hosted by the Church, refused to take the transfer. In the congregation of 11th November, 2001 he publicly denied to accept the transfer alleging that the other father also be transferred instead of being promoted.

The matter was reported to PW.8 who investigated the same. After inquiry he suspended father Odindi (who is at large) from his office and suspended members of his group from receiving Holy Communion. The three Accused before the court are said to be members and active participants of that splinter group.

PW.1 further testified that on 13th March, 2003 three days prior to the material date, father Odindi entered the Church with his people and gave a warning that the coming Sunday (which is the material

date) there will be problem to the extent that someone would be killed. The area Chief was informed of the incident who wrote a letter addressed to Father Odindi, one Jackson Ondiek (both not before the court) as well as 1st and 2nd Accuseds. The said letter was given to him late previous night and he could not deliver the same to the police. This piece of evidence is apparently introduced to show basis for malice for the offence on hand, but this letter is neither produced before the court nor its contents are divulged. I shall thus hesitate to give much credence thereon.

Furthermore, this witness was not present when the Church was alleged to have been broken into and warning given by the said father Odindi and his group.

He was also for a short time at the church in the morning of the material date. According to him after the end of first service at around 7.00 a.m. he saw George Ochieng (1st Accused) enter the Church compound and kneel before the cross outside the Church. Later he also saw 2nd and 3rd Accused, Joel Awuoche and Julius Were entering the Church. On seeing them, he saw red and went to the house of the father of the Church but saw Assistant Father Ochieng (PW.2) preparing for the next service, and entered the Church with mother Alice Kanini (PW.6). After some time he heard noise coming within the Church. He went to check and saw three Accused persons beating altar boys. When he saw this happening he went to Kenyango Police Post to report disturbance in the Church. The Chairman Norbert Oduor, not called as witness, also arrived at the Police Post. The police asked them to accompany them in their vehicle. On the way they met vehicle of the Bishop (PW.8). On nearing the Church they found a crowd of people which was disbursed by the police. They were informed that the deceased was beaten and police arrested six persons, the three Accuseds amongst them. He learnt later that the deceased had passed away. He stressed during cross-examination that when he saw the three Accuseds in the Church he feared of some trouble. He also changed to state that when he left the Church there were about 20 persons and saw altar boys only being chased but there was commotion.

PW.2 Amos Ochieng is a priest in the Church. He was present throughout the incident on the material date. He said that he was neutral in the fight between the two groups and that he was also arrested by the Police after the incident.

He corroborated evidence of PW.1 that around 7.00 a.m. on the material date, he saw 1st Accused kneeling in front of the cross praying. As 1st Accused was warned not to enter the Church, on seeing him he went to father's house and informed him of 1st Accused's presence in the Church. He advised father not to go to Church but father insisted to go for service. Then he saw the father praying at the altar and 1st Accused was near him. He went for his bath and after that he came out and saw people gathered in compound outside the church. They were scared to go inside due to commotion therein. Seeing this he went to father's house and saw him being followed by worshippers. He went inside the Church with three altar boys so that the Accused could be kept quiet. But they continued shouting and beating people. He saw 1st Accused holding a wooden cross, 2nd Accused a wooden sword and 3rd Accused also a wooden cross. He also saw altar boys being rushed - chased. 1st Accused then came out of the Church holding ceremonial cup with its hoist. He started chasing and beating people. When he came out in the compound after changing his prayer clothes, he saw that all the three Accuseds had continued chasing and beating the people. 1st Accused's cross was broken and he then broke the big cross which was kept outside the Church and picked up a piece with which he continued chasing and beating people around. He went to him and tried to appease him but he responded and I quote: "Leave me alone father, I want to kill them".

2nd and 3rd Accuseds also continued chasing people. The people disbursed. He at one time was alone with three Accused persons. Then they (the three Accused persons) realized that some women and children had locked themselves in father's house. They damaged the house by removing iron sheets from it. He tried to stop them but they (the Accused persons) wanted to make sure whether father was inside his house as they wanted to kill him. By then an altar boy (the deceased) Joseph Okoth was seen hiding behind the door and 1st Accused went towards him. The deceased ran towards the main gate of the Church but could not get out as many people had gathered outside the compound. 1st Accused reached him and hit the deceased with the wooden piece of the cross at the back of his head. In cross-examination he had clearly testified that while 1st Accused hit the deceased "the other two Accuseds were chasing other people behind the Church". I specify this as this piece of evidence is very relevant to the cases of

the 2nd and 3rd Accused persons. This witness was not beaten when the three Accused were chasing and beating the worshippers. He also saw the father running away from the Church. This witness also identified pieces of wooden cross used by 1st and 3rd Accused during the incident (Ex.1 and Ex.2). He specified that a white coloured piece was used by the 1st Accused when he hit the deceased.

Other three witnesses stressed more on the involvement of the 1st Accused during the incident.

PW.3 Monicus Oduor lived at Dandora Phase IV and on the material date he was on his way to Catholic Church at about 8.30 a.m. On the way he saw people gathered around the fence of the Church and stood there to check. He saw a man whom he knew by appearance chasing women in the compound who were running towards a tin house. The young man then turned back and saw another young man before the Church gate. That man chased the young man towards the main gate of the Church and hit him at the back of his neck with a wooden timber (sic). The young man fell on his face. The man who had hit the young man went towards a bench in the Church and sat thereon. He also described the wooden piece as white in colour. He described the man as tall and black and stated that he would be able to identify him although he had seen him for the first time. He then identified 1st Accused from the witness box. I am aware that the ideal way of identification of the 1st Accused by this witness would have been through Identification Parade. His description although met with that of the 1st Accused, I shall still hesitate to accept his identification as a certainty. But the evidence of this witness can be accepted so as to show how the incident occurred and that fact definitely, corroborates evidence of other witnesses who have positively identified the 1st Accused.

PW.4 Norah Auma had gone to church to pray around 8.30 a.m. She saw 3 Accused persons named by her beating and chasing people in the Church. She also saw 1st Accused then uprooting the wooden cross outside the Church and taking a piece thereof. 1st Accused went to father's house but the latter was not in his house. She heard 1st Accused saying this day father would be killed and crucified. Not seeing the father, 1st Accused turned to a lady standing near father's house. Thereafter he saw the deceased standing near the gate. She specified that father's house was near the Church entrance. On seeing the deceased, 1st Accused chased him, who ducked to avoid him and ran towards the main gate of the compound but could not get through the gate. At that time 1st Accused hit him at the back of his neck while two Accused persons were chasing other people.

PW.5 Beatrice Adhiambo similarly went to the Church around 8.30 a.m. on the material date. She knew all the 3 Accused persons and saw them standing at the door of the Church. They chased her away as others were so chased away. To safeguard herself she hid in a home which is opposite to that of father of the Church. Through an opening of the door of the house wherein she had hidden, she saw 1st Accused entering father's house but could not find him. A lady named by her as Alice Kanini (PW.6) was chased, but then she saw 1st Accused chasing the deceased upto main gate and hitting him (the deceased) with the piece of timber at the back of his neck. She specified that the main gate was on the side of the house where she was and which belonged to mother of the Church. She could not be scathed during her cross-examination.

PW.6 is Alice Kanini referred to by PW.5. She went to the Church at 7.00 a.m. when PW.2 was preparing for second service. The 1st Accused entered the Church got hold of a cross and started chasing people. She then saw 1st Accused enter father's house with blood on his head as he was injured by an iron sheet of the house. Then 1st Accused removed outside cross and started chasing people. She lastly saw 1st Accused hitting the deceased with the piece of cross at the rear of his back.

All these witnesses saw the deceased taken away by some of the people for treatment and later heard that he died. PW.6 also stated that the 1st Accused was not a member of the Church but other two were and she used to pray with them in the Church. She testified that she was aware of two factions in the Church.

PW.7 is Joseph Juma who was informed by his wife about the incident of breaking in to the Church on 13th March, 2003 (see evidence of PW.1). He went to the Church and a meeting of committee was held on 14th March, 2003. The matter was reported to the area Chief who wrote a letter copied to father Odindi. PW.1 stated that the same was addressed to father Odindi. Be that as it may, although he stated

that he had a copy of that letter, he did not show to the court. He however, stated that the letter contained directions on keeping peace on 16th March, 2003. This witness further testified that he was in Church when three Accused persons entered the Church. Before the mass began, the three Accused intervened by praying aloud. After some time he heard boys crying. Father in charge and Deputy father went to check but they continued beating altar boys and people in the church. When he went out of the church he saw the Chairman passing near the church door and 1st Accused followed him and hit the witness. Then he was told to report to Kinyango Police Post which he did. When he came with Police officers he saw the deceased lying dead. The details of his evidence do vary with other witnesses but he gave further details how St. Lucy's group was formed by Father Odindi to create chaos in the church and the Accuseds were members of that group. The group although directed otherwise continued to come and create mayhem in the church.

I have already referred to evidence of PW.8 Bishop Lawrence Ochieng who stated how he made inquiries into complaints against father Odindi and this group and took action. He specified that these three Accused persons were among the members of the splinter group who were suspended from receiving Holy Communion.

On the material date he received information on the three Accused persons creating incidence in the church by beating worshippers. He went first to Dandora Police Post. Police Officers accompanied him. They found crowd gathered which was disbursed by the police. They were informed by the Chairman Oduor that an altar boy was seriously injured and taken to hospital. He saw the three Accuseds being refrained (sic) by members of the public and church members and later they were arrested.

PW.12 Inspector of Police Joseph Chesire after receiving report from two church leaders about serious fight at the church, mobilized his officers and proceeded to the church. He found worshippers fighting and he disbursed them. He was informed by PW.8 that about five people stormed the church and started beating worshippers. It is evident that neither any witness mentioned number five nor PW.8 was present during the incident. He arrested five persons who were identified by PW.8. He also received (Ex. 1 and 2) two wooden pieces from the scene. He was also informed that one person was hit. PW.15 I.P. Francis Simba is the Investigating Officer in this case. After investigations he arraigned 2nd and 3rd Accused persons before the Chief Magistrates court, Makadara on the charges of creating disturbance. Father Odindi was arrested later and charged with incitement to violence. He is since at large. Only 1st Accused was charged with offence of murder but on the advice from the A.G's office, 2nd and 3rd Accused persons were joined in the present charge.

This was in short the evidence led by the Prosecution. The Accused persons against this evidence gave their defence by unsworn statements.

1st Accused stated that he entered the church on the material date to pray and found about eight people. He waited for 10.00 a.m. mass while praying. But Chairman Robert Oduor (not before the court) asked all worshippers to leave except him. Then Oduor started beating him and he fell down and he was left there. He was deciding whether to come out or stay in and after an hour he heard of a burst tyre. Many people started filling the compound and he went out with blood oozing from his mouth and head.

He saw PW.8 Bishop Ochieng and the people started throwing stones at the Bishop who hid himself. Then Police arrived and he was arrested. I may pause here; and observe that all the Accuseds have stated that people were throwing stones at PW.8 when he appeared but none of the witnesses including Police witnesses was asked on this fact which once again, could not be tested by cross-examination.

2nd Accused went to the Church and named two persons who are not before the court. He saw Joseph Okoth and Erick Ochieng. He found about 15 worshippers. The Chairman told John Ochieng (unknown to the court) to leave prayers as he was making noise. Then the Chairman started pushing people out of the church. Although he did not mention seeing 3rd Accused, he stated that on seeing the above he asked Julius (3rd Accused) that they should go and report to the police. They did so but were informed that PW.8 Bishop Lawrence had already reported the matter.

They went back to the Church and police vehicle arrived with PW.8. The crowd was dispersed but they started throwing stones on seeing PW.8. Five people were arrested after PW.8 named four. One wonders why five were arrested although four were named.

3rd Accused went to pray at the church on the material date. He found four males and five females praying in the Church. He identified male worshippers as 2nd Accused, 1st Accused and one Erick Ochieng. The Chairman entered the Church and asked 1st Accused to leave the church as he was making noise but 1st Accused refused and the Chairman slapped him. On seeing this happening, him and 2nd Accused went to inform the Police. Police confirmed that the report was already received from PW.8. They then went back to the Church. The Police vehicle and that of PW.8 arrived. The police fired in air to disperse the crowd. He then saw George Oduor, Stephen Oduor, Erick Ochieng and 2nd Accused. I pause here to note that he had stated that 2nd Accused was with him to inform the police. Then he said all of them including him were pointed out by PW.8 and they were arrested but at that time people started throwing stones at PW.8.

From the evidence as I have observed hereinbefore there are discrepancies in evidence of both sides. Although I must note that the Defence has no onus to prove their innocence.

The discrepancies on numbers of the people in the church and what happened in the Church in my view, is not very material for the issue on hand. The Accused persons also have agreed that there was problem in the Church and 1st Accused was in the Centre of that problem inside the Church.

What happened outside the Church is most material for the court. Evidence of PW.2, PW.4, PW.5, and PW.6 was corroborated in its details by PW.3 who was not a member of the Church. He just happened to be at the scene and witnessed the hitting of the young man. Although I did observe that the identification of 1st Accused by PW.3 from the witness box was weak, he did fortify evidence of all the four witnesses who knew the 1st Accused and placed him positively at the scene and hitting the deceased at the back of his head. This injury is also corroborated in the Post Mortem Report produced before the court by PW.14 Dr. Jane Wasike. She was permitted to produce the Report prepared and signed by Dr. Maundu who had since retired on the application from the learned state counsel which was considered by me and not objected to by the Learned Defence Counsel. I allowed its production under Section 77 as read with Section 33 of the Evidence Act. I also consider that the body of the deceased was identified to Dr. Maundu before he performed autopsy on the body of the deceased by mother of the deceased Caroline Adhiambo and Fransisca Atieno (PW.9 and PW.10 respectively). I am thus satisfied that the death of the deceased has been proved beyond reasonable doubt by the Prosecution.

To answer the second ingredient of the offence i.e. whether the 1st Accused alone or jointly with other two Accused persons caused the death of the deceased with his voluntary act with malice, I observe as under.

From the evidence, which in my view, I have tried to consider sufficiently hereinbefore, I find and I accept as credible and true the evidence leading to the death of the deceased which occurred as a result of 1st Accused hitting him with a wooden piece of cross. Furthermore, I do not have any doubt that there were two factions of the church and the three Accused persons were members of the splinter group, who entered the Church to cause disturbance in the Church. The 1st Accused was in the centre of the mayhem and was heard saying "leave me father, I want to kill them". These words clearly prove malice aforethought in the mind of the 1st Accused. He put his words in action. When not finding the father, killed the first one who came in his sight, which unfortunately was the deceased, a young man.

In the premises aforesaid I do not have any doubt that the Prosecution has proved beyond reasonable doubt that the 1st Accused murdered the deceased. I therefore enter a finding of guilty against the 1st Accused and convict him of the offence of murder as leveled against him under Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya.

As regards 2nd and 3rd Accused persons, there is sufficient evidence that they neither inflicted any injury on the deceased nor were present at the scene when the fatal blow was inflicted by the 1st Accused.

But did they have common intention to commit the offence? To answer that, I have to find positively that the two shared common purpose to commit murder. There is no doubt that the three Accused persons entered with an intention to create disturbance and interrupt the services of the Church. But would that extend to the committal of murder?

The law on common intention is trite and well accepted. Our courts have accepted often quoted passage of an English case of R.V. Betts and Ridley 22 Cr. App. R. 148 (see Njoroge V. Republic (1982 – 88) 1 KAR 142 at page 147.) I shall quote the passage of Ridley case (Supra):

“If several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means and one of them in the Prosecution of it kills a man it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

In the case of R.V. Kimbwai Bin Manza and another (1939) 6 E.A.C.A. 152, the above principle was curtailed to some extent and it was held that the above passages should not be applied where there exists a reasonable doubt as to whether or not the accused was at the critical time (emphasis mine) aiding and abetting.

In this case the Prosecution has not proved beyond reasonable doubt that the three Accused persons entered the Church with a view to kill. There is no evidence before me that while chasing the worshippers either of the two Accused persons actually inflicted any injury. There is evidence of so doing by the 1st Accused. It has emerged that they entered the Church to create disturbance. But the Prosecution has been unable to prove that in the course of implementation of the said unlawful purpose a plan emerged to kill someone.

Moreover, there is clear evidence that none of the two Accuseds was near the scene. They were placed out of and away from the scene by prosecution witnesses. Only because of this lacuna, I have to give benefit of doubt to the 2nd and 3rd Accused persons. The outcome thereof is that I do not find them guilty of offence of murder and acquit them of that charge as leveled against them. The Assessors in their well thought opinion have observed the same. I therefore order that:

- (a) The first Accused be sentenced to death as per law,
- (b) 2nd and 3rd Accused persons are released unless held otherwise as per law.

Right of appeal against conviction of 1st Accused within 14 days.

Dated and signed at Nairobi this 31st day of October, 2005.

K.H. RAWAL

JUDGE

31.10.2005