



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Case 146 of 2003

REPUBLIC PROSECUTOR

VERSUS

MAXWEL OCHIENG OCHAR ACCUSED

JUDGEMNT

The accused Maxwell Ochieng Ochar is facing a charge of offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on 30th March, 2003 he at Ngomongo Estate, Nairobi murdered John Abuonji Odiemo. All parties including witnesses (except police witnesses) were residents of Ngomongo Village. They claim to know each other due to long associations as residents of the said village.

In cases of murder it is inevitable that the Prosecution has to prove primarily the death of the named deceased. PW.4 Mary Obala is mother to the deceased and has testified that on 17th April, 2003 she saw the body before the Post Mortem was performed. Thereafter the body was released to her for burial. PW.5 Dr. Jane Wasike who performed the Post Mortem stated that the body had multiple deep cut wounds on almost all parts of the body with compound fracture of head and skull mandible. She formed an opinion that the cause of death was head and musculoskeletal injuries due to sharp object. The Post Mortem Report indicates PW.4 as one of the identifying person

Considering the above evidence, I do find that the Prosecution has satisfactorily proved death of the deceased as per required standards. I do find after considering the defence that the death is not proved in absence of death certificate and I may note in passing that no questions at all were asked during cross-examination of these witnesses.

Then it is apportune to look at the remaining evidence led by the Prosecution and to determine whether it has proved as per required standard that it was the Accused who by his voluntary act or omission unlawfully killed the deceased with malice.

At the outset I must note here that even though from the evidence of PW.1, PW.2 and PW.3 it emerges that the Accused was with some other people at the time of committal of the offence, the particulars of the offence in the information allege that he murdered the deceased person on his own. This fact only can be sufficient to find that the Prosecution has not been able to prove the charge as leveled against him.

But I may for the purpose of complete evaluation of the case consider the evidence as whole led before me.

Pw.1 is Joseph Otieno Obonyo. He was on the material date, outside a closed Bar with the deceased between 7.30 to 8.00 p.m. He had come to see his brother at Ngomongo. He had also lived there for 17 years till 2002 when his parents shifted to Baba dogo during the conflict of rent increase. According to him from the Security Vigilante Group of the village only five members remained who were kind of ruling the village. Coming back to where he was standing with the Accused, he saw four persons approaching them, carrying pangas and other weapons. No one responded when he asked what was wrong. They were just asking each other **'is this the one?'** Thereafter they got hold of the deceased and started to beat and cut him with pangas. The deceased was crying and screaming by saying what had he done? He knew those people for almost 13 years as residents of Ngomongo. After he saw what was happening he ran away. He was questioned at length on his statement recorded before the police which he said was not read back to him. He reiterated that he could see those four people in the security lights of neighbouring shops. He also agreed that there were hawkers selling food stuffs at that time and must have seen the incident. He also said that the four approached the deceased before he (the deceased) met him. Lastly he explained that he had told the police that he would take them to the houses of attackers but the police were not inclined to walk a distance of 2 to 2½ Km between the house of the Accuseds and Kariobangi Police Post.

He and PW.2 were asked whether they were mugging people in the area in company of the deceased. They both denied.

PW.2 Stephen Omondi is a neighbour in the area where the incident occurred. He was outside the gate of his home around 8.00 p.m. on the material date, and saw the Accused and two others at a distance of about 20 to 30 feet cutting the deceased with panga. The Accused had a panga and whip and others had pangas and a knife. When he shouted on seeing them kill the deceased, the Accused chased him. He ran away through the other gate of the plot. He went to report the incident to Ruaraka Police Post but was told to do so at Kariobangi Police Post. He said he knew all the three persons who attacked the deceased as residents of Ngomongo village. He also said there were electricity lights from the neighbouring shops – about three as per this witness. In his cross-examination he said he saw the three persons from a distance of about 15 feet.

The third witness PW.3 Jacinta Atieno Alumba used to stay in the same plot as that of the deceased and was his friend. However, she clarified that she was not his girl friend. On the material date at around 7.30 p.m. she was standing outside the gate of her plot and saw some persons (she numbered them five persons during her Re-examination) pass her gate and enter a hotel. Thereafter the deceased came and asked her whether she had seen his friend called Josiah (not before the court). She had not and requested him to buy groundnuts from a lady vendor opposite their plot. The deceased obliged and went to buy ground nuts for her. At that time those people who had gone inside the hotel came out and started cutting the deceased. They started shouting as they (witnesses and others) did not know who those people were. First she said she saw two people whom she knew and one of whom chased her when she shouted. Then she said she knew those three people and two were called Ochieng and one was Maxwell (Accused). She also stated that the Accused had a whip in his hands.

She further stated that she could identify them in electricity lights from the shops around from a distance of 20 to 30 feet. She agreed that the groundnut seller was nearer to the deceased as he was bending to buy groundnuts when he was attacked.

I pause to note here that none of the witnesses has given clearer picture as their ability to positively identify the people alleged to have beaten the deceased. Their numbers vary in their respective evidence. Furthermore, they also do not place each other on the scene. PW.2 and PW.3 did not corroborate evidence of PW.1 when he stated that the four persons were questioning **'is this the one?'** as well as his own questions to those people as to what was wrong.

They also agreed that they had gone with the deceased's mother to the police to record their statement which was on 3rd April 2003 after about four days from the incident.

The prosecution has failed to bring forth any other witnesses specially the groundnut vendor who

was nearest to the deceased when attack was alleged to have commenced.

All these witnesses have also denied the suggestions that the Accused was member of the vigilant group for the village.

With the above observations I now turn to evidence of last witness from the Prosecution who is Cpl. Julius Amani (PW.6). He said he received report of assault on the deceased by unknown persons and next day he was informed that the deceased died at Kenyatta National Hospital. But then he said that he started investigation after the deceased's mother came to the station with some witnesses in August, 2003 and after the Accused was arrested which he was informed by former OCPD Ringera. This does not tally with the date of the statements of all three witnesses which is 3rd April, 2003. He also stated that he knew the Accused as the Chief of all elders in the area since mid 2002. He further testified that on investigation he could not get any further witnesses and nobody was ready to talk, even the Chief of the area was unaware of the incident.

I must regretfully state that I did not find this witness as credible at all apart from his inefficiency in carrying out the investigation, when lot was desired to be done. I felt as if he was totally careless in his investigation whether it was deliberate or otherwise.

In face of this evidence the Accused gave his defence by sworn testimony. Although his assertions that **(a)** there was no electricity in the area and still there is none, **(b)** he was with his family in the evening and night of the material date and **(c)** his reason for fabrication of this case against him by the police officers who had arrested him due to his part in agitation against rent increase by Landlords of the area fall short of credibility, I do take note that the onus to prove otherwise has not shifted to him.

I have noted the lacuna in the prosecution case hereinbefore and need not reiterate.

Suffice it shall be to observe that once against the investigation has been deficient and the witnesses were not able to properly put forth their evidence so as to point a definite finger of guilt against the Accused before me. I shall add to this the discrepancy in the particulars and evidence led mentioned earlier by me.

The result which has come out, simply put, is that the prosecution has failed to prove beyond reasonable doubt the guilt of the Accused. I thus enter finding of not guilty against the Accused and acquit him of the charge of murder of John Abuonji' Odeimo as leveled against him.

I may though, observe that I had serious suspicion on the involvement of the Accused in this crime, but I am unable to act on that because I am supposed to determine the case as per evidence put forth.

I therefore agree with the Assessor's opinion.

The Accused be released forthwith unless held otherwise as per law.

Dated and Signed at Nairobi this 9th November, 2005.

K. H. RAWAL

JUDGE

9.11.05