



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL CASE NO 26 OF 2001

REPUBLIC PROSECUTOR

VERSUS

DAVID NYABUCHWA OSEBE 1ST ACCUSED

GEORGE MOGIRE ONDUSO 2ND ACCUSED

JUDGMENT

The two accused persons before this court are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya.

The particulars of the offence are that on the 24th day of December, 2000 at Tilwet Tea Estate in Kericho District within the Rift Valley Province he murdered Sandrus Konganyi.

On Christmas Eve of 24th December, 2000, the deceased was killed following a quarrel at a party where people were dancing and drinking busaa, a traditional liquor.

It was the evidence of PW 1 Loyce Machigwa, the wife of a deceased suspect that she was in her mother in law's house with her husband, where the party was held. The two accused persons present in court were in the party and she knew them from before. As people danced and drank a quarrel broke out, which led to a fight. It turned out to be an ethnic affair with the Kisii's fighting the Luhya. She saw the two accused persons beating up the deceased. The 1st accused slapped the deceased while the 2nd accused kicked him. In cross-examination this witness admitted that she did not actually see the 2nd Accused beat the deceased, she was told that he did; and that the 1st Accused came after the fight broke out.

PW 2, Gabriel Obuya, a Supervisor in charge of security at the estate corroborated the evidence of PW 1. He testified that he saw the 2nd accused hitting the deceased on the stomach, while the 1st accused held the deceased with both hands. He saw Evans Monari (deceased suspect) hit the deceased on the head with a wooden stick and saw the deceased fall down. However, in his statement to the Police, he had said that Evans kicked the deceased in the stomach. He admitted that he did not see everything in the house.

PW 6 Stephen Makhakha Wambua, gave similar evidence that the accused persons participated in beating up the deceased that led to his death.

PW 7 CPL Samuel Kibor was the police officer on duty on the 24th December, 2000. He arrested the two

accused and after interrogation charged them with the murder of Sandrus Konyangi (the deceased). The other suspect died before he was arrested. He further told the court that the accused persons were not drunk when arrested. He did not recover any weapon used in the killing until the following day when they visited the scene of crime and found blood stains on the floor of the house. However, no weapon and no exhibits were produced in Court.

PW 4 Simon Nderitu, a medical doctor who performed a post mortem on the deceased's body after identification by PW 3 (Moses Nyogesa), told this court that the cause of deceased's death was due to primary and secondary brain injury resulting from trauma to the head after being hit with a blunt object.

The two accused persons chose to give unsworn statements in which they denied being involved in the murder of the deceased. They all saw the deceased lying down and tried to help him get to the hospital. They called one witness, DW 1 (Sabina Kwamboka) who corroborated their evidence.

The other deceased suspect Evans Monari died while undergoing treatment.

It will be noted that it was the evidence of PW 2 and PW 6, who saw the deceased suspect hit the deceased in this case on the head with a blunt object. Similarly, the doctor who performed a post mortem on the deceased testified to this court that the deceased died of brain injury caused by being hit with a blunt object.

To support the fact that the deceased suspect was actually dead, PW 5 Richard Omari, testified that on the 25th January, 2001 he was called to Kericho District Hospital to inquire about a patient who was a suspect in this case (Evans Monari) who died while undergoing treatment. He produced a burial permit (P Exhibit 4) and a small card (P Exhibit 5) found in the deceased suspect's pocket indicating that he was diabetic.

In his submissions Mr. Munyao, for the accused, told the court that the prosecution had not proved its case beyond reasonable doubt arguing that the evidence given by the witnesses left a lot of questions unanswered.

Mr. Mutuku, for the Republic, submitted that they had proved their case beyond reasonable doubt and that all the witnesses called gave evidence which connect the accused persons to the death of the deceased. Murder is defined in sec 203 as follows:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”

Malice aforethought is further defined as follows:

- a) An intention to cause the death of or to cause grievous harm to any person, whether that person is the person actually killed or not.
- b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to a person, whether that person is the person actually killed or not, although knowledge is accompanied by indifference whether or grievous bodily harm is caused or not, or by a wish that it may not be caused.
- c) Intent to commit a felony.

To prove the above the prosecution relied on the doctrine of common intention. Section 21 Cap 21 Laws of Kenya stipulates as follows:

“when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such

purpose, each of them is deemed to have committed the offence”.

In Russel on crime , (11th Edition) at pages 33 and 34 it is said:

“It may be stated as a general rule that when A intentionally participates in what he knows B to be doing, then the result of their combined activity will be considered in law to be no less the actus reus of A than that of B and this will be so whether or not B wished for or knew of A’s action in the matter. Nor will it make any difference if A’s contribution to the affair be superfluous or even ineffective”.

Can the two Accused here be said to have formed a common intent together with the deceased suspect to kill the deceased? I think not. I believe, from the evidence before the Court, what happened here was a spontaneous act, following a quarrel, during a drinking spree on this Christmas Eve. PW 1, who was the main witness contradicted herself on material facts, first saying that she saw the 2nd accused kicking the deceased, and later saying that she did not actually see him do so but was told about it. With respect to the 1st Accused, she changed her testimony from “seeing” the Accused hit the deceased, to “I saw him come later”. In any event, the fatal blow according to PW 2 and 6 was inflicted by the deceased suspect, and there is no clear evidence that he acted in concert with the two accused. The evidence before this Court is far too shaky and unreliable to ascribe a common intent, or to convict.

Accordingly, I agree with the assessors who have unanimously brought a verdict of not guilty.

I, therefore, find the 1st accused **David Nyabuchwa Osebe** and 2nd accused **George Mogire Onduso** not guilty of the murder of the deceased Sandrus Konganyi and order that they be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kericho this 28th day of July, 2004.

ALNASHIR VISRAM

JUDGE