



**Republic v Deng & 2 others (Criminal Case 9 & 46 of 2020
(Consolidated)) [2023] KEHC 3808 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3808 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE 9 & 46 OF 2020 (CONSOLIDATED)**

JK SERGON, J

APRIL 20, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

SABIT MAMUOR DENG 1ST ACCUSED

AJAK DAU AKECH 2ND ACCUSED

JOSEPH KAMAN DAU ALIAS MANYOK 3RD ACCUSED

JUDGMENT

1. The Accused Persons herein namely: Sabit Maruor Deng, Ajak Dau Akech and Joseph Kaman Dau alias Manyok are before this Court on trial for the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence are that on the 12th day of February, 2020 at Kakuma Refugee Camp in Turkana West within Turkana County jointly with others not before the Court murdered John Aleu Deng Aleu.
3. The Prosecution presented the evidence of eleven (11) witnesses in support of the charge while the defence called two witnesses in support of the defence case.
4. The first Prosecution witness is Garang Deng Arok (PW.1) told this Court that on 12th February, 2020 he was with brothers preparing to sleep when someone knocked on their door and spoke in Arabic to them. PW.1 said he opened the door and saw between 20 to 30 people outside carrying rungas and pangas. He stated that those people flashed a torch and that in the process, he was able to recognize Ajak Dau Akech, the second Accused herein. PW.1 said that he managed to identify him because he met him in a funeral he attended.



5. PW.1 said that when he stepped out of their dwelling, he saw the deceased lying on the ground and also realized that his twin brother was injured. PW.1 said the police came and took away the deceased's body plus his injured twin brother. PW.1 stated that the deceased was his cousin and that he managed to identify the 2nd Accused using a torch.
6. In cross-examination, PW.1 stated that it was dark during the fateful night. He also said that the police recorded his statement on 13/2/2020.
7. PW.1 confirmed that he told the police in his initial statement that he could not identify any of the persons and that in his second statement, he changed his statement claiming he was able to identify 10 people.
8. Akoi Akech Machar (PW.2), the deceased's father testified stating that he started screaming when he saw people cutting the fence before attacking his home. PW.2 said that his house was speared but he was not hurt since he went to hide.
9. PW.2 further said he saw the arm of Mayeng was speared but he was unable to identify the attackers.
10. Atok Ajak (PW.3) said he left the house to check on what was happening and in the direction where some women were screaming and that is when someone threw a spear at him.
11. PW.3 claimed he saw the attackers leaving while singing and that he saw the deceased's body. Monicah Abul Deng (PW.4) said that she was at her home when she heard people singing war songs.
12. PW.4 said she visited the scene and saw the deceased's body and found people armed with clubs and rungus.
13. Atem Deng Bil (PW.5) said he was the deceased's brother and confirmed the ascertainment of PW.1 that he was with his brother at home. PW.5 claimed that the 2nd Accused came and greeted them in Arabic and that PW.1 used his mobile phone to flash at the attackers making it possible for him to see Ajak.
14. PW.5 however confirmed that more than 30 people were outside their house. PW.5 further said that his brother closed the door and the group which was armed with sticks and clubs started screaming.
15. PW.5 said he managed to see the deceased's body when they got out of their house and that the group vanished when police officers arrived.
16. Both PW.2 and PW.5 have clearly stated that they did not know why they were being attacked.
17. In cross-examination, PW.5 said that he did not record in his statement recorded on 14/2/2020 that he identified the second Accused.
18. PW.5 further confirmed that he told the police that he did not identify the person who knocked the door. PW.5 further stated in his second statement that he did not identify Ajak in the Identification Parade.
19. Alen Kurboy (PW.6) told this Court that he was able to recognize Dau Mayeng, Ng'ok Deng, Achuok Bi and Manyok Thol using a torch he flashed.
20. Atem Manyok Deng (PW.7) claimed that on the material day, he was with the deceased and Jacob Deng when they heard women scream and that they rushed out to check what was happening.
21. PW.7 said that the deceased was running in front of him. He said that there was a crowd which was trying to break into the house of Akoi and had flashed torches.



22. PW.7 said he managed to see Ajak whom he knew since they met at a marriage ceremony. PW.7 however said he did not see who attacked the deceased.
23. PW.7 further stated that he was aware that there was a quarrel between the youths of Dachuek and Abek communities hence the fight was a community conflict.
24. PW.7 said he recognized Ajak but he did not record that in his initial statement. He was unable to tell the clothes Ajak wore that material night.
25. PW.7 further stated that he told the police that he couldn't identify the attackers but that he only heard people mention the name of Ajak.
26. Dr. Aisha Suleiman (PW.8 produced a postmortem report on behalf of his colleague who had left employment. In the Postmortem report, the cause of the deceased's death is severe head injury secondary to assault with a blunt object.
27. Zainab Cherop Chebango (PW.10) stated that on 5th March, 2020 an ID parade was conducted and 4 suspects were identified. She also stated that a second identification parade was conducted 25/6/2020 whereof Ajak was identified.
28. PW.10 stated that on the material date it was so dark that one could only identify a person using a torch. PW.10 stated that the four (4) people who had been identified in an identification parade were released on the directive of the Director of Public Prosecutions and soon thereafter, they all fled out of the county and that further statements were recorded after the lapse of two months.
29. PW.10 stated in cross-examination that the first eye witnesses did not identify any of the Accused Persons then in Court.
30. PW.10 also said that they recorded further statements and that is when other witnesses changed their initial statements. PW.10 confirmed that she attended all the identification parades and that none of the Accused Persons were identified.
31. John Kimaiyo (PW.11) said he was directed to investigate the case. PW.11 stated that an identification parade was conducted on 5/3/2020 where 4 suspects were identified namely: Dier Manyenk, John Nyak, Manyok Atem and Manykon Mareik.
32. PW.11 said that Ajak Dau was arrested while attempting to flee the country. He stated that the DPP directed them to release all the persons they had arrested and that those person fled from the Country and could not therefore be re-arrested.
33. PW.11 confirmed that in the second recording of witness statements, Ajak was identified. PW.11 confirmed that in the identification parade of 5/3/2020, none of the Accused Persons were identified.
34. The defence summoned the evidence of four witnesses. Sabit Mamour Deng (DW.1) denied committing the offence he was facing before this Court. DW.1 told this Court that the fight which occurred on the material night were revenge attacks between the Dachuek and Abek clans which he was not involved.
35. DW.1 stated that they lived in Kakuma Refugee Camp in house made of iron sheets and mud wall hence one cannot see outside. He also pointed out that it was during the day of the attack.
36. Ajak Dau Akech (DW.2) also denied committing the offences he was charged with before this court. DW.2 stated that on 12/2/2020, he together with his Cousin were taking dinner when they heard



- screams. He said that he was told by his Cousin that he received a phone call informing him that the Dachuek Clan had attacked the Abek Clan in revenge.
37. DW.2 said he did not move out of his house. DW.2 said he was advised by his Cousin to flee Kakuma for his safety. He said he was arrested at J.K.I.A when he was about to fly out to U.S.A. and taken back to Kakuma.
 38. DW.2 further stated that he did not know Sabit Momuor but only came to know him when they met in custody. It is his evidence that they could not plan to commit the offence when they were strangers.
 39. DW.2 denied speaking in Arabic language. DW.2 said he wanted to quickly leave out of the country for fear of revenge attacks.
 40. Joseph Kaman Dau (DW.3) said that on 12/2/2020 at about 9.00 pm, he was inside his house in Kakuma Refugee Camp when he heard noise of people fighting. He said he feared for his life and that is why he decided to flee the Camp.
 41. DW.3 said he was arrested while on his way back to Southern Sudan. He said he did not know his Co-Accuseds.
 42. Peter Ajang Arwenyo (DW.4) told this court that on 12/2/2020, he was with his Cousin DW.2 taking dinner when he received a phone call informing him that a fight between Dachuek clan and Abek clan had broken out. He said he decided to stay indoors for fear of his life. DW.4 said that DW.2 did not know his co-Accuseds.
 43. In order for the offence of Murder to be proved, two ingredients must exist – namely: actus reus and mens rea. The question is whether the aforementioned ingredients obtains in this case.
 44. The first ingredient is actus reus in latin law meaning the ‘deed of crime’ or the “guilty” act or “forbidden” act. In [Back’s Law Dictionary](#), 11th Edition actus reus is stated to be

“The wrongful deed that comprises the physical components of a crime and that generally must be coupled with mensrea to establish criminality.”
 45. To establish the ingredient of actus reus, the prosecution must prove that the deceased person in the case before the Court is dead and that the death of the person killed was caused by the Accused person under trial. The Prosecution should also establish that the cause of death is an unlawful act or omission by the Accused Person.
 46. The Prosecution in this case summoned 11 witnesses to testify in support of their case. The totality of the evidence is that the attack which led to the death of the deceased was done by a group of between 20 to 30 people. It is apparent that majority of the witnesses recorded two witness statements. In their initial statements of PW.1, PW.5 and PW.7, there is no mention of the names of any of the Accused Persons who are now before this court.
 47. Garang Deng Arok (PW.1) in his evidence told this Court that he identified Ajak Dau Akech, the 2nd Accused Person. PW.1 recorded his first witness statement on 13th February, 2020 immediately after the attack. It is curious to note that in the initial statement while the evidence was still fresh, he did not mention any of the Accused Persons.
 48. He stated in his evidence in Court that on the fateful night, the person who knocked at their door spoke their language but he subsequently changed and said that he spoke Arabic while testifying before this Court.



49. PW.1 recorded a second statement in July, 2020 more than 3 months after the attack. In the second statement, PW.1 said that he was able to identify ten people. It is disturbing to note that PW.1 was unable to identify any of the ten (10) people.
50. Atem Deng Dil (PW.5) gave near similar evidence to that of PW.1. He claimed he was able to identify the 2nd Accused Ajak Dau Akech. He however confirmed that he did not identify the 2nd Accused in the statement he recorded on 14/2/2020. Infact PW.5 was emphatic that he told the police that he could not identify the person who knocked at their door. PW.5 was unable to identify the 2nd Accused in an identification parade he attended.
51. Atem Manyok Den (PW.7) also told this Court that he identified Ajak Dau Akech, the 2nd Accused. PW.7 was unable to explain how he was able to identify the 2nd Accused in total darkness.
52. In cross-examination, PW.7 said that he told the police he could not identify any of the attackers but that he heard people mention the name of Ajak. It is important to note that PW.3 is also known as Ajak just like the 2nd Accused.
53. All the witnesses who testified stated before Court that it was dark during the fateful night. It is the evidence of PW.1 that the attackers flashed a torch and in the process, he saw Ajak Dau Akech.
54. PW.5 on the other had claimed that his brother Garang Deng used his phone to flash at the attackers and that is when he identified Ajak in a group numbering 30 attackers. It is important for this Court to critically examine the circumstances and evidence of identification.
55. I have already pointed out that the incident occurred at night in total darkness. I'm not persuaded that the evidence emanating from a phone is sufficient light to identify and single out a person in a crowd of thirty people.
56. Aleu Kurboy (PW.6) testified stating that a group comprised of 30 people attacked them and in the process he was able to identify four of them namely: Dau Mayeng, Ng'oyak Deng Achuok Boi and Manyok Thol with the assistance of light flashed. The people PW.6 named are not before this Court.
57. Having analyzed the evidence of identification and recognition by the Prosecution witnesses, I am not convinced that the Accused Persons were placed at the scene of crime.
58. It is clear PW.1 and PW.5 attempted to link the Accused Persons with a crime they did not do. Their evidence of identification appear to have been an afterthought and was meant to fix them.
59. It is important to take note of the evidence of P.C. Zainab Cherop Chebango (PW.10) and P.C. John Kimaiyo (PW.11). Both witnesses admitted that there was a lot of pressure to arrest the Accused Persons.
60. PW.10 and PW.11 further confirmed that 2 identification parades were conducted. The 1st and 3rd Accused Persons were not mentioned anywhere nor identified by any witness. The 2nd Accused Person was only identified by witness statements which were recorded much later and which contradicted the statements recorded earlier.
61. The evidence tendered did not link any of the Accused Persons as the perpetrators of the offence of Murder. There is no credible evidence proving that any of the accused persons participated in the killing of the deceased.
62. There is no doubt that John Aleu Deng Aleu died as a result of injuries inflicted on him. The postmortem report indicates that the cause of death was severe head injury secondary to assault with



a blunt object. The Accused Person were not positively identified as the persons who assaulted the deceased.

63. The second ingredient which must manifest itself is mens rea. Mens rea in Latin Law means guilty mind. In *Balck's Law Dictionary*, 11th Edition Mens rea refers to 'Criminal intent' or 'guilty mind'.
64. To prove Mensrea, the Prosecution must be able to show that the Accused Persons before this Court possessed the intent to cause death or grievous harm and knew the act or omission will cause the death or grievous bodily harm of the person killed.
65. There is no doubt that the person or persons who assaulted the deceased intended to cause death or grievous bodily harm, therefore malicious aforethought can be inferred.
66. However, having failed to link the Accused Persons as the perpetrators of the heinous crime, malice aforethought cannot be attributed to any of the Accused Persons. In the end I find that the Prosecution has failed to establish the ingredients of Murder.
67. Having considered the evidence tendered by both sides in support of their cases plus the rival submissions, I find that the prosecution did not establish the case against all the Accused Persons to the required standard in Criminal Cases of beyond reasonable doubt. Consequently, the Accused Persons namely: Sabit Mamuor Deng, Ajak Dau Akech and Joseph Kaman Dau alias Manyok are hereby acquitted of the offence of Murder and should therefore be set free forthwith from custody unless lawfully held

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF APRIL, 2023.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Chepkoech

Accused Persons – Present in Prison

Musyoki for the State

