



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 1 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

JOSHUA OGINJO ODUOR.....ACCUSED

JUDGMENT

By an information dated 27/1/2020, Joshua Oginjo Oduor faced two charges of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charges are that on 12/8/2019 at Pith Nyadundo village South Sakwa Location in Awendo Sub County Migori County, murdered Charles Opondo Ombunde and Antony Oduor Ombunde.

The accused was certified fit to stand trial and he denied the charges and the case proceeded to full trial with the prosecution calling a total of six (6) witnesses. He was represented by Ms. Okota.

The evidence of the six (6) witnesses was taken by Justice Mrima and upon his transfer, I took over the matter. Section 200 Criminal Procedure Code was explained to the accused and the defence opted to proceed with the case from where J. Mrima stopped. The accused gave an unsworn statement and did not call any other witness.

PW1 Kevin Onyango Otieno of Uwachi village testified that on 12/5/2019, about 6:00 p.m after tethering his cattle, his step mother Eunice began screaming that her child had been taken away by Jaoko, the accused. PW1 had known the accused for three (3) years because he lived with his step mother. He rushed where Eunice was and she informed him that Jaoko had disappeared into the sugar plantation with the child. In company of many other villagers, they started to search the sugar plantation but did not get accused; that the first deceased who hailed from the neighbourhood was amongst the searchers. They proceeded to another cane plantation; that the 1st deceased faced the accused and he heard an exchange between accused and deceased; that the 1st deceased asked accused what accused wanted with his child; that PW1 moved near them and saw accused hitting the second deceased, pushed him to the ground and stabbed him with a knife on the eyes and the back; that PW1 had a stick with which PW1 hit the accused on the leg. The accused turned and waved the bloody knife at him and PW1 fled for fear of attack. On reaching outside the sugar plantation, he found people crying saying the 1st deceased had died; that the 2nd deceased was also removed from the sugar plantation and taken to hospital while the 1st deceased's body was taken to the mortuary. In cross examination he said that it is the 2nd deceased who said he had caught accused and he rushed where they were and he saw accused stab the 2nd deceased and that darkness was setting in.

PW2 Peter Otieno Ombunde, testified that 1st deceased is his younger brother while the 2nd deceased was a step brother as they shared a father. On 12/8/2019, while in Naivasha, received a call from Caleb Ouma an elder brother and was asked to proceed home. He viewed the deceased's bodies at Rapcom Mortuary and on 22/8/2019, he identified the deceased's bodies to the Doctor before post mortem was done.. PW2 had known accused for four (4) years as a person who had inherited a woman in their village.

PW3 Everest Omondi of Uradi village knew the deceased as neighbour and knew accused for about five (5) years. He is the son of Eunice and accused was the step father. On 12/8/2019, about 6:00 p.m, his mother called to inform him that accused had taken the child VB; the child belonged to Eunice and accused. He rushed home, armed himself with a panga and went where people were screaming around a sugar plantation; that the deceased were among those people searching for accused. They finished searching the first plantation and went to the second. He heard a commotion then heard V (B) calling Baba, and rushed where the sound emanated from. PW3 found the 1st deceased lying on the ground and he picked up the child (V) and took her outside the plantation. He heard a fight going on in the plantation but did not go back to find out who it was but he asked for help for the 1st deceased; that it was approaching 7:00 p.m at that time.

In cross examination, PW3 stated that he did not like the idea of accused inheriting his mother Eunice.

PW4 Janet Akoth Opondo, the wife of the 1st deceased had known the accused for about three (3) years whereas the 2nd deceased was her in law. On 12/3/2019, about 6:00p.m, when arriving at her home, was informed that people were crying that someone had died. She rushed to Uradi and found her husband dead. She observed the body using a torch and saw a stab wound. She also saw the 2nd deceased's body when it was carried from the cane plantation.

PW5 IP Wycliffe Marwa of DCI Awendo is the investigating officer in this matter. He visited the scene which was inside a sugar plantation where they recovered a panga and knife. He found out that accused had inherited one Eunice's with whom they had a child but Eunice's family later said they were related and Accused returned to his home area; that accused returned to Eunice's home that day and took the child and disappeared into the sugar plantation. Eunice raised alarm and members of Public responded and started to search for the accused. He produced the blood stained knife that was recovered by members of public and the panga which was identified as belonging to the 2nd deceased; that the accused disappeared till he was arrested in Homabay on 28/12/2019.

PW6 Dr. John Gregory Wesonga of Migori County Referral Hospital performed post mortem on the bodies of both the deceased persons. In respect of the 1st deceased, he found a penetrating chest injury to the right lung which resulted in the lung collapsing. He found three litres of blood in the chest; rupture of vessels taking blood to the lungs and he formed the opinion that the cause of death was cardio respiratory arrest due to severe blood loss due to a penetrating injury.

As regards the 2nd deceased, he had sustained several penetrating injuries; cuts on the left scapular, left midspine and right loins, penetrating injury to the transverse colon, spleen and descending to the colon and a lot of blood in peritorium; a penetrating right facial cut with severed right eye ball; severed right auxiliary mandibular and lower incisors teeth; an ugly cut on the face and penetrating injury to the lumber spine at L1 and L2 and penetrating injury to the spinal cord. He opined that the cause of death was cardio respiratory arrest due to blood loss due to injuries on the face and abdomen. Although the doctor did not state the possible weapon used, in cross examination he stated that there may have been two sharp weapons used.

When called upon to defend himself, the accused opted to make an unsworn statement. He recalled that he knew Eunice Atieno when he lived with her as husband and wife; that he had been away on fish business between Homabay and Olande but was involved in an accident with a motor cycle. After recovery, he looked for another job and was employed in somebody's home in HomaBay; that on 12/8/2019, Eunice called him to go and get the child because she wanted to go on a journey but he told her he had no money or time to go home. He did not go home but was suddenly arrested and charged for something he knew nothing about.

Ms. Okota, counsel for the accused filed written submissions contending that the case against accused had not been proved.

Whereas counsel did not dispute the fact that the deceased died, she urged that PW1 was the only identifying witness and the court has to weigh that evidence with care and relied on the decisions of **Wamunga vs Republic 1989** where the court held that the court had to examine the evidence carefully and be satisfied that the circumstances of identification were favourable and free from error.

Counsel also relied on **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** where the courts held that evidence of identification at night must be absolutely water tight to justify a conviction. Counsel also relied on **Republic vs Turnbull & others (1973) 3 ALL ER 549** in which guidelines were given on the factors to be taken into account by a court where the evidence turns on identification by a single witness under unfavourable conditions.

Counsel also submitted that evidence of a single witness requires corroboration but PW1's evidence lacks corroboration; that PW3 testified that he hated the accused and so did PW1 and they can do all they can in their power to get rid of the accused because of the vendetta. Counsel concluded that there is no evidence linking the accused to the commission of the offence and urged the court to acquit the accused.

I have considered all the evidences adduced before this court and the rival submissions.

This being a murder charge under Section 203 of the Penal Code, the prosecution has to prove beyond reasonable doubt the following elements:-

- 1) **That the deceased died;**
- 2) **That the accused caused the unlawful act or omission that caused the death (actus reus)**
- 3) **That the accused had malice aforethought (mens rea)**

The death of the deceased is not in dispute. It was attested to by PW1, PW2, PW3, PW4. They saw the bodies of the deceased soon after death. PW6 performed post mortem on both the deceased. PW6 also knew both deceased.

Whether accused caused the death:

It is only PW1 and PW3 who were near the scene of the incident on 12/8/2019 when the deceased were murdered. PW1 testified that he was tying up his cattle about 6:00 when he heard screams and that the search for the person who had taken the child started about 6:30p.m; During the search, PW1 heard the 2nd deceased say that he had caught "him" and he rushed where the 2nd deceased was when he saw accused stab the second deceased. He stated that by then, darkness had started to set in.

According to PW3 his mother (Eunice) called him about 7:00 p.m when it was almost dark and informed him how the accused had taken the child B and entered the sugar plantation.

This means that the conditions for positive identification or recognition may have been difficult and the court has to approach the said evidence with great care and caution. In **Wamunga vs Republic (1989) KLR 426**, the court stated as follows: -

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

In **Gikonyo Karume & Another vs Republic (1900) KLR 23**, the Court said that before a court can rely on a conviction based on identification of an accused person at night and in difficult circumstances, such evidence must be watertight. See also **Maitanyi vs Republic (1986) KLR 198**. In the case of **Republic vs Turnbull & Others (1973) 3 ALL ER 549**, the court set laid down some factors that court's take into account in reception of evidence of single identifying witness under difficult conditions. The court said:

“The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused person under observation?. At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? if only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”

PW1 stated that first he heard an exchange between the 1st deceased and accused but on arriving at the scene, only saw accused and the second deceased and that he actually saw accused stab the second deceased on the eyes, made him to fall and stab him on the back. PW1 said that he even hit the accused on the leg with a stick meaning that he was in close proximity to the two; that he ran away when accused turned and waved the blood stained knife at him. Accused is a person who was well known to PW1 as the accused had lived with Eunice, his step mother in the same homestead. Due to the close proximity and the fact that it was just getting dark and PW1 heard the voices, of accused and deceased and the sugarcane were not fully grown, I am satisfied that PW1 was able to see the accused well and recognized him as the assailant.

PW3, narrated that his mother Eunice, informed him that the accused had entered the plantation with the child, VB. Although PW3 did not see the accused with the child, he is the one who found the said child B in the sugar plantation near where the 1st deceased was found injured. PW3 said that though he heard as if people were fighting nearby, he did not go further. During his investigation PW5 found that the scene where the deceased were killed and was about 10 meters apart. It means that PW3 found the child VB just ten (10) meters from where PW1 had seen the accused injure the second deceased. Since the child was found only ten (10) meters from where accused was seen assaulting the second deceased, that goes to corroborate PW1's testimony that indeed he saw accused at that scene.

Despite PW1's testimony that sugar plantations were sometimes used as hiding places by cattle rustlers, there is ample evidence to the effect that on the said day, an alarm was sounded that the accused had taken his child B and entered the plantation. From the investigations carried out by PW5, the relationship between accused and Eunice was not good and hence the fear as to why accused would take the child into a sugar plantation so late in the day and that is what prompted the call for a search.

The accused raised an alibi in his defence. The law is that even when an accused raises an alibi defence, the accused does not assume the burden of proving the alibi. The burden always rests on the prosecution to disprove the alibi and prove the accused's guilt. See **Ssentale vs Uganda (1968) EA 36**, In **Victor Mwendwa Mulinge vs Republic CRA 357 of 2012**, the Court of Appeal delivered itself on the issue of alibi as follows:-

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. See Karanja vs Republic; This court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing with the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought.”

In this case, the accused raised the alibi for the first time in his defence. It is very vague as to when he took up employment in HomaBay. The evidence of PW1 put accused at the scene of the crime after Eunice raised alarm, that he had taken the child B and indeed B was later found in the sugar plantation by PW3 where the accused had allegedly entered. I find the defence to be hollow and an afterthought.

Of malice aforethought:

Section 206 (b) of the Penal Code provides as follows:-

“206 malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

a) an intention to cause the death of one or do 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 some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.”

In **Republic vs Tubere s/o Ochen (1945)12 EACA 63**, the East African Court of Appeal set out the circumstances in law under which malice aforethought can be inferred:-

- a) the nature of the weapon used, (whether lethal or not)**
- b) The part of the body targeted (whether vulnerable or not)**
- c) The manner in which the weapon is used (whether repeatedly or not)**
- d) The conduct of the accused before and after the attack.**

In the instant case, the 1st deceased sustained a single wound to the chest that penetrated the chest. On the other hand, the second deceased sustained very serious wounds, facial cuts with a severed eye ball, severed mandibles and lower incisor teeth, penetrating injury to the spine and spinal cord. Although the Doctor had not indicated the type of weapons used, in cross examination, he confirmed that they were sharp objects. The use of such lethal weapons which were found near the scene i.e. knife, and panga, and the nature of injuries inflicted on the deceased which were aimed at very vital parts of the body and the multiple injuries inflicted on the second deceased, are no doubt, proof of malice aforethought

In the end, I am satisfied that the prosecution proved beyond reasonable doubt that the accused caused the death of both the deceased. I find him guilty as charged and convict him of the charge of murder under Section 215 Criminal Procedure Code.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 16TH DAY OF JUNE, 2021.

R. WENDOH

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Kimanthi for State Counsel

Mr. Singei holding brief Ms Okota for Accused

Ms. Nyauke court assistant

Accused present