



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO 10 OF 2014

REPUBLIC.....STATE

VERSUS

KENNEDY RECHIALA ONGANGO.....1ST ACCUSED

SAMUEL NJIHIA MUCHIRI.....2ND ACCUSED

SAMUEL MUGENDI NJERU.....3RD ACCUSED

JOSEPH THUO MWANGI.....4TH ACCUSED

JUDGMENT

1. The four Accused Persons are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 29th day of December, 2013 at about 2130 hrs at C. K. Plaza near Pistis within Nakuru County, the four Accused Person jointly with others not before the Court murdered **Evans Orina Osugo** (Deceased).

2. First on the witness stand was Gilbert Okero Samuel. His testimony was that on 29/12/2013 he was working as a boda boda operator. At about 8:00pm, a customer asked him to ferry him from London to the CBD. A colleague by the name Obonyo stopped him and told him that he had seen the person who had stolen his motor cycle go into Club Dimples. Gilbert says he proceeded on his way but that at around 9:00pm the same Obonyo called him on his phone and told him that he and the other boda boda riders had arrested the man and had taken him to CK.

3. Gilbert testified that he dropped his customer and proceeded to CK. There, he found a crowd. The suspect had run into a nearby plot. Gilbert says that he saw the other boda boda riders pulling him from the plot. He then saw a man by the name Omosh and the 4th Accused Person siphoning some fuel from motor cycles into a bottle. He also testified that he saw the 3rd Accused Person taking a piece of wood from a fence and hitting the Deceased on the head. Gilbert further testified that he saw the 1st Accused Person and the 2nd Accused Person taking match sticks from a match box. Omosh and the 4th Accused then poured the petrol siphoned from the motor cycles. The 1st and the 2nd Accused Persons, then, lit a match each and set the Deceased ablaze.

4. Gilbert insisted that he saw all these in close quarters as he was in the crowd – barely two or three metres away. He also said that he knew all the four Accused Persons very well since they were colleagues and that he identified them at the scene. He was able to identify the piece of wood he said he saw the 3rd Accused Person using to hit the Deceased on the head.

5. On cross-examination, Gilbert insisted that he saw the events very well as he had pushed into the crowd of about twenty people deep to the front. Most of those in the crowd, he said, were boda boda riders and many had their reflective jackets on. Some had their helmets on while others had placed their helmets on their motor cycles.

6. Gilbert conceded that he was arrested on 03/01/2014 together with other Boda boda riders but that he was released when he gave his side of the story and what he saw on the fateful day. He also conceded that it was at night but that he clearly saw what was happening since there was light; and that even though there was commotion, he was able to see clearly as he was near the front of the action.

7. Finally, Gilbert admitted that he had been tortured by the Police before recording his statement – but that his testimony was accurate about what happened on that day. The only part of the statement that he was forced to say which was inaccurate, he testified, was that he had entered the plot where the Deceased was flushed out on the material day. Everything else was accurate, he insisted.

8. Jane Osugo, the wife of the Deceased testified as PW2. She testified that her husband was a Pastor. That on 29/12/2013, a Sunday, they spent most of their day attending a wedding service at Kaptembwa Parish. They returned home and had dinner. At about 8.00pm the

Deceased left to go and look for their son Jonathan who had not returned home. At 9.00pm the Deceased called to inquire if Jonathan had gone home. Eventually, the son went home at about 9:30pm – but the Deceased did not. Jane tried calling his mobile number but she could not reach him. She could not find sleep the whole night as she was worried about him. The next day, she was accompanied by a Pastor Ondieki to look for the Deceased in town. They could not trace him. A check in at Central Police Station turned up nothing as well. It was only when he returned home that the Deceased's colleagues came and informed him that the Deceased had been killed the previous night. The following day she went to War Memorial Hospital mortuary and identified the body of the Deceased. She saw that his eyes had been gouged out and that he had been burnt. She did not know who had killed her husband.

9. The Deceased's brother, George Moseti Osugo also testified as PW3.

He was also an identifying witness at the mortuary. All he knew was what the Police told him: that his brother had been killed by boda boda riders. He confirmed that the body had head injury and burns throughout the body.

10. PW4, Geoffrey Waweru Gichane was also an identifying witness at the mortuary.

11. Dr. Daniel Wainaina is the doctor who performed the autopsy. He testified as PW5. He performed the autopsy on 31/12/2013. Externally, he noted extensive burns all over the entire surface of the body; a deep stab wound on the lower lip; an obvious open skull fracture on the left side. Internally, he noted a massive intracranial hemorrhage and physical damage to the brain. He concluded that the cause of death was multiple injuries consisting of 100% burns and head injuries following brutal physical blunt and sharp fracture and dry flames. He filled and signed his report and produced it as Exhibit 1 for the Prosecution

12. PW6 was Inspector Chrispin Nyagah. He was the original Investigating Officer in the case. He testified that he received a call on recall 29/12/2013 at around 9.30pm. He told that a man was being lynched in the Pistis Area in Nakuru. He went to the scene with PC Noor. He found a man burning having been set on fire. He tried to put out the fire but the neighbours were uncooperative. They locked their doors as none of them wanted anything to do with the incident. He collected a wallet at the scene. It contained documents of Evans Orina Osugo – the Deceased. He called for a police vehicle. The body had been burnt beyond recognition. He took the body to the mortuary. He booked it as an unknown person pending proper identification. He then returned to the Police Station. The next day members of the SDA Church went to report that their pastor had gone missing. They said his name was Evans Orina. They went to the mortuary and identified the burnt body as that of their missing pastor.

13. Inspector Nyaga testified that one month later, on 13/1/2014, he tried to track the Deceased's mobile phone number. Safaricom gave him a print out showing that the deceased's phone was being used by one Joseph Mwangi Thuo – the 4th Accused Person. He studied the print out and identified that one common caller at that number was at Egerton University in Njoro. He went to Egerton and traced this caller. That caller told him that the 4th Accused Person was his cousin. Through that caller, he was able to lure the 4th Accused Person to the Chief's Camp. He questioned the 4th Accused Person who allegedly offered cooperation. Through the information he got from him, he arrested the other Accused Persons.

14. Inspector Nyaga produced as evidence the piece of wood which had been identified by Gilbert as the one used to hit the Deceased as well as the clothes the Deceased had on the day he was killed.

15. Sergeant Peter Nyandiga was PW7. He testified that in 2013 he was based at Kasarani Police Post in Nakuru County. On 29/12/2013 he was on duty at the Police Post. He said that his In-charge, Inspector Nyaga (PW6) had received information of a lynching at CK Plaza. Inspector Nyaga and PC Noor went to the scene. He did not go with them.

16. He remained at the Police Post. When they returned they recorded in the OB that the victim was one Evans Osugo. Sergeant Nyandiga was involved in the arrest of the Accused Persons on 13/1/2014. Together with other officers they arrested several persons but upon investigations, they recommended the charging of only four suspects in court. A1 is Kennedy Radiala, Samuel Muchiri (A2), Samuel Njeru (A3) and Joseph Thuo Mwangi (A4). He described how they posed as customers to get the boda boda operators to take them to the Police Station where they effected the arrests.

17. He testified that the 4th Accused Person was found to have had possession of the phone of deceased from 30/12/2013 to 3/1/2014. This was shown by a Safaricom printout, he testified.

18. Corporal John Wambua, a Scenes of Crime expert, testified as PW8 and produced photos taken at the scene of the homicide.

19. All the Prosecution witnesses testified before the Honourable Justice Maureen Odera. At the close of the Prosecution case, the Learned Judge ruled that a prima facie case had been established. I took over the matter at that point after the Learned Maureen Odera was transferred out of the station. After complying with the dictates of section 200(3), each of the Accused Person elected to proceed with the case from where it had reached. After being duly informed of their options and rights on defence, each elected to give a sworn statement without calling any witnesses.

20. In his sworn testimony, the 1st Accused Person testified that he did know the Deceased. That he recalled that on 29/12/2013, he was working as a boda boda operator at Stage 58; that he closed his business at around 9.00pm and went home. He testified that he was not near where the Deceased was lynched and that he never witnessed what happened.

21. On cross-examination, the 1st Accused Person insisted that Gilbert was lying and that he only testified against him because he was beaten by the Police.

22. When the 2nd Accused Person was first at the witness stand on 26/09/2018, he testified that he worked as a boda boda operator at Mawanga Centre but that on 29/12/2013 he was not at work. At the request of his advocate, he was stood down from testifying for

“consultation”. He resumed his testimony on 19/09/2019. This time, the 2nd Accused Person conceded that he was at work on 29/12/2013 but that he never participated in killing the Deceased. He testified that he at Whitehouse village at around 9.00pm on that day. He said he got a customer to transport to Nakuru town. He brought the customer to the stage and another customer asked him to take him to Rhonda Estate in Kipande Road. He further testified that as he was heading back, he found a large crowd at CK Plaza. He stopped and asked what had happened. He was told that a boda boda thief had been found and had been lynched. He went back to town and closed his business.

23. The 2nd Accused Person further testified that on 10/1/2014 he went to work as usual. He brought a customer to town. Another one told him take him to Kasarani. Then it turned out to be a Police Officer and he was arrested. He claimed that he was at first arrested because he did not have a helmet and a reflector. He claimed that the Police Officer demanded Ksh 15,000/= and when he did not part with the money, he was put in the Police Cell.

24. The 2nd Accused Person told the Court that he had never known Gilbert until he found him at the Police Station when he was arrested. On cross-examination he categorically denied that he participated in lynching the Deceased. He said that he did not see anyone with petrol and did not know who killed the Deceased.

25. The 3rd Accused Person also conceded that he is a boda boda operator but denied participating in the killing of the Deceased. He said that on 29/12/13 at around 9.20pm he got a customer at 2NK (City Clock) and took him to Mogan – near Ingobo. He said that he used the Highway past Nakumatt and used the Kaptembwa route past Shabab. He said that he came back to the 2NK Stage and then took a parcel to Heshima. He then went home. He claimed that he did not know anything about the killing until on 13/01/2014 when he was arrested by a Police Officer who posed as a customer.

26. The 3rd Accused Person insisted that his stage is Heshima not CK Plaza where the homicide occurred. He conceded that he knew Gilbert Okari (PW1) as a person who used to carry *mizigos* for him at the market. He said that if Gilbert is a boda boda rider then he does not know his stage.

27. The 4th Accused Person equally denied knowing anything about the homicide. He testified that he owns a grocery store in Gikomba where he sells food and other groceries. He said that he knows nothing about the murder and that he was arrested on 13/1/14 at Weaver’s Club after a fracas which had nothing to do with the killing. He claimed that he was arrested at the Club and that he was only charged with murder after he was taken to the Police Station.

28. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

29. To succeed in proving a murder charge, the Prosecution, therefore, is required to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

30. According to our law, *malice aforethought* is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died 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.
- c. Intent to commit a felony.
- d. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

31. After due analysis of the evidence presented above, the upshot is that the evidence adduced in the trial establishes quite clearly that the Deceased was murdered in the night of 29/12/2013. His charred body was recovered by Inspector Nyagah near the CK Plaza in Pistis area. It was still burning by the time Inspector Nyagah arrived at the scene. The body was identified by PW2, PW3 and PW4. Dr. Wainaina (PW5) performed autopsy on it and produced the Post-mortem report. Corporal Wambua visited the scene of the crime and the mortuary and took pictures. All in all, there is no question that the Deceased was, indeed, killed on 29/12/2013 by a combination of deadly assault and being burned by a fire.

32. The main question presented at the trial was who took the actions that led to the death of the Deceased. The evidence was unmistakable that the Deceased was assaulted and was then burnt to death. The evidence led showed that this was done by a group of boda boda riders who suspected that the Deceased had stolen a motor cycle belonging to one of them – a Mr. Obonyo. Were the Accused Persons part of the group that fatally attacked the Deceased, brutally beat him up, doused him with petrol, and then set him ablaze?

33. The direct evidence of Gilbert (PW1) was explicit that the four Accused Persons actively participated in the attack and killing of the

Deceased. Gilbert narrated that he clearly saw the 3rd Accused Person pull out a piece of wood from a fence and hitting the Deceased on the head. The injuries found on the head by Dr. Wainaina is consistent with the description of what Gilbert saw.

Then, Gilbert narrated that he saw the 4th Accused Person and one other person siphon petrol from the boda bodas parked at the scene and dousing the Deceased with the petrol. Finally, Gilbert said that he saw each of the 1st Accused and 2nd Accused Persons take match sticks, lighting them and setting the Deceased on fire.

34. The evidence given by Gilbert was eye-witness evidence. It was straightforward and was given without hesitation. Gilbert was a colleague of the four Accused Persons. They all admitted that they had no grudge with Gilbert; and that Gilbert had no motive to lie or put them in trouble. Gilbert knew each of the Accused Persons very well. He described in simple details what each one of them did during the attack. I found Gilbert's testimony to be credible and truthful. I accept it as the true version of what transpired in the night of 29/12/2013. In doing so, I have accepted Gilbert's identification evidence as one of recognition since he knew the Accused Persons and had worked with them as colleagues for a while. I also find that he was in close proximity to the action; and that there was enough light from the nearby houses and the motor cycles for him to clearly identify the Accused Persons.

35. I find that the identification of the 4th Accused Person is corroborated by the fact that he was found with the phone belonging to the Deceased. It was this phone that was eventually traced to the 4th Accused Person through a number he frequently called from that phone. It was that caller, a cousin, who eventually led the Police to the 4th Accused Person, and eventually to the other Accused Person as well as Gilbert as an eye-witness.

36. I reject the Defence theory that Gilbert merely manufactured his story in order to frame the Accused Persons after he was tortured by the Police. I have analyzed the Statement which Gilbert wrote when he was first arrested. That Statement was produced as Defence Exhibit 1. The Statement, however, does not differ in material terms from the testimony Gilbert gave in Court.

37. I am further buoyed in this finding by the fact that each of the narratives the four Accused Persons tended to give were to be so implausible that there is no inherent possibility that they could be true. While the Defence is not required to demonstrate that its defence theory or narrative is reasonably plausible or probable but it is only required to demonstrate that its version of events or its theory of the case is reasonably possibly true in substance, in this case, the Defence narrative does not meet even this low threshold in order to raise reasonable doubt. The correct test is whether it can be said that the Defence narrative is so improbable that it cannot reasonably possibly be true. (See **S v Shackell (4) SA 1 (SCA)**). In my view, it is not possible to say that the Accused Persons' versions of events have *any* reasonable inherent probability that they are true.

38. I say so because, first, Gilbert gave straightforward evidence which I believed and which withstood cross-examination about the events of that night: he clearly saw the Accused Persons participating in the orgy of violence that ended up with the lynching of the Deceased. Secondly, the tracing of the Deceased's phone linked the Accused Persons to the homicide. Third, the 2nd Accused Person changed his narrative mid-stream through the testimony – a clear indication of the mendacity of his story: he first claimed that he was not at work on that day and then, after his advocate asked for an adjournment to “consult” with his client, changed his narrative to state that he was at work but did not participate in the killing. Even then, he was quite short on details of what happened at the scene.

39. The upshot is that I was persuaded that there was sufficient evidence to show that the four Accused Persons participated in the killing of the Deceased.

40. Did they have malice aforethought? There is no doubt that they did. Under section 206(b) and (c) as defined above, malice aforethought is established if the Prosecution demonstrates that the Accused Person had knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person or where there is an intent to commit a felony.

41. In the present case, the Prosecution was able to call evidence that established that the Accused Persons together with other people pulled out the Deceased from a plot where he had run to; dragged him out; assaulted him with a piece of wood; and finally set him ablaze after dousing him with petrol. Gilbert clearly saw this happening. When a group of people attack a hapless individual, drag him like they did, hit him with a piece of wood, pour petrol on him and set him ablaze, they must have be presumed to have knowledge that such an attack would, at a minimum, cause grievous harm to the victim. Alternatively, the very act of assaulting the victim and putting him on fire is an intended felony in itself. The Accused Persons all acted in concert and they must be presumed to have carried a common intention of either killing or causing grievous bodily harm to the Deceased. That sufficiently establishes the *mens rea* for murder demanded by our law.

42. It is, therefore, this Court's considered opinion that all the elements of murder have been established against the four Accused Persons. Consequently, I find and hold that each of the four Accused Persons namely – Kennedy Radiala Ongango; Samuel Njihia Muchiri; Samuel Mugendi Njeru; and Joseph Thuo Mwangi – are guilty of the murder of Evans Orina Osugo contrary to section 203 as read together with section 204 of the Penal Code and convict them accordingly.

43. Orders accordingly.

Dated and delivered at Nakuru this 16th day of April, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Rita, the Defence Counsel, Mr. Wambeyi Magomere, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Other authorized personnel and representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.