



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 60 OF 2014.

REPUBLIC.....PROSECUTOR

VERSUS

ALLAN OMONDI.....1ST ACCUSED

HELLEN KHANGURU.....2ND ACCUSED

JUDGMENT

1. **ALLAN OMONDI** (the 1st Accused) and **HELLEN KHANGURU** (the 2nd accused) were charged with the Offence of Murder Contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the charge are that on **27th July, 2014** at Kaminon village in Nandi County jointly with another not before court murdered **PETRO MUJENGA**. **Both accused denied the charge.**

2. In support of its case, the prosecution called a total of 5 witnesses whose evidence is as follows:

3. **PW 1 (JM)** a student at [particulars withheld] college testified on 27/7/2014 at around 6.00pm, while in the company of **PETER MUJERU** at their home in Kaimosi village, **ALLAN OMONDI** arrived at their home and stated beating **PETER**. Allan slapped Peter and she screamed, then rushed out to call her father who came and calmed them.

4. She accompanied Peter when he went to report the matter to the police and on their way back, just close to **Allan Omondi's** home, **Hellen, Junior and Nicholas** emerged, and confronted them, before assaulting **Peter** using a wooden hoe handles.

5. Subsequently, PW1's father one **KENNEDY KHAMASI** came and took **PETER** to the **Kapkangani hospital**. At that time, Peter was not talking and his eyes were closed. He was taken to then referred to Kapsabet hospital who in turn referred him to Eldoret for a scan, but he died at night before being taken to Eldoret.

6. PW1 was able to identify the two accused persons because they were neighbours. She further stated that she has never had any differences with them neither her family nor the accused family.

7. On cross examination, she stated that on 27th July 2014 at around 6.00pm, she was outside their house her siblings, when **Omondi, Hellen and Nicholas** came to their house. That, Allan Omondi entered the house where Peter was and slapped him. Hellen and Nicholas did not assault Peter inside the house, and during that incident, her brothers **Newton and Felix** were present.

8. Further, that Omondi came and called her uncle and she was left behind with her sister **Queen Mwinamo**. That they followed them but kept a distance of about 100 meters. Along the way Junior, Nicholas and Hellen emerged from their home holding sticks and started assaulting Peter on the head and neck. They screamed and members of the public came and took Peter away.

9. The evidence presented is that **Peter** and **Junior** used to sell sand and the reason for assaulting Peter was that he Allan had sold sand belonging to Peter and when he was asked he became hostile and started assaulting Peter.

10. She further stated that the incident happened at around 6.00 pm and darkness was setting in. The three were wrestling with Peter and she could not tell who was the first one to strike Peter, but nonetheless, Nicholas was part of the attackers who later fled. On re-examination, she narrated that she witnessed the incident and that darkness had begun to set in, night had not yet fallen and she saw people assaulting Peter.

11. **PW2 (Kennedy Khamasi Dere)** the deceased's brother stated that on 27/7/2014 at around 6.15 he was at his home when he heard noise coming from his mother's homestead. He rushed there and on arrival found **Allan Omondi, Nicholas Lukaka and Hellen Sasia** assaulting Peter using jembe sticks. On inquiry he was told that Peter had sold sand. The deceased was on the ground and the three assaulted him while standing on him. PW 2 noticed that Peter's neck was wobbling and he was bleeding from the mouth and head. He identified Allan and Hellen in court.

12. He further testified that at the scene, Allan, Nicholas and Hellen were standing over Peter while assaulting him with wooden hoes. However, he could not tell who started the fight. As far as he knew, the accused and the deceased were friends as well as neighbors and he had never seen them disagree.

13. Upon cross examination, he stated that when he arrived at the scene, he saw the deceased lying down. His children informed him that the three had assaulted Peter and by the time he got to the scene he saw Allan Omondi, Hellen Sasia and Nicholas Lukaku assaulting the deceased who at that time had lost consciousness.

14. **PW3 (Dina Dere)** told this court that on 27/7/2014 while on her way to see her neighbor heard screams which were coming from her compound. She decided to go back and on arrival found her son Peter had been thrashed. There was a big crowd but the assailants had fled. He was taken to the Kapkangani hospital then referred to Eldoret but he died before being taken to Eldoret. She later learnt that Hellen, Omondi and Nicholas were the assailants. She further stated that she came to learn that Nicholas and Junior sold Peters sand and a disagreement arose.

15. On cross examination, she stated that she was informed by her grandchild that the three had assaulted Peter. She recalled that a day before, **Nico Lukaka** had passed by and threatened Peter but he did not respond and the next day they assaulted Peter. She does not know where Nico is as he might have fled after realizing he had committed an offence.

16. **PW4 (IP Mohammed Haji)** office he received a call that someone who had been assaulted the previous day and had died while undergoing treatment. He proceeded to the scene and found sticks which he collected (he produced the sticks exhibits 1a-c). The scene was just outside the fence of the compound and that he came to learn that it was their home because after the incident, members of the public went and burnt down their houses. It is his evidence that The scene had been interfered with since the incident happened the previous day. Together with the OCS, they proceeded to the hospital and requested the body to be preserved for post mortem.

17. They conducted investigation and noted that there was a lot of fracas in the village and as a result the suspects had ran away from their homes. One suspect was arrested at **Serem Police station**, while he arrested the 1st accused's aunt, after his investigations revealed that she was among those who assaulted the deceased. Further that there is nothing special to mark the jembe sticks as having been used in the assault but they were found at the scene, witnesses mentioned them in them in their statement and even

the accused persons stated that they used jembe sticks in their fight.

18. **QUEEN MULANDI (PW5)** a minor of 15 years stated that on that Sunday while in their home cooking, the deceased was outside when Allan approached and the deceased asked him why he took his sand. Allan told him **“just come and I will show you”**. When she came out of the house, she saw them leaving together and on the way Hellen and Nicholas way-laid him while armed with rungu. During that time, she was following them but at a distance.

19. She saw them beat the deceased until the deceased started bleeding from the mouth. The three assaulted the deceased until he fell down. She screamed neighbors came but the three fled away. Her father came and carried Peter away and rushed him to the hospital. At that time, he was in a critical state as he was not talking and was bleeding from the mouth. Later he succumbed to injuries.

20. She knew Allan and Hellen for about 2 years as they lived in the neighborhood. Allan and Hellen were identified in court but Nicholas was not there. On cross examination, she stated that at that time she was cooking ugali inside the house while her uncle was outside the kitchen. Nicholas was the first to strike Peter with a rungu, while Hellen and Allan stood watching. After assaulting the deceased, Nicholas, Hellen and Allan fled. On re-examination, she reiterated that when Nicholas was assaulting the deceased, Allan and Hellen stood by, but in the end she saw all the three assault the deceased.

21. An attempt to have **DR. JOSEPH KANGOR** produce a post mortem report, failed as the report was not very legible. In the end the prosecution closed its case without calling any doctor, after failing to get DR. Kipruto who had filled the post-mortem report, despite the matter being adjourned to accommodate the prosecution's challenges.

22. Upon being placed on their defence, the 1st accused told this court that, he used to harvest and sell sand. He explained that on 27/7/2004, at about 6.00pm, while at his home in Chepsonoi (within Nandi County), he heard **NICHOLAS LIKAKHA and PETER aka PETRO** quarrelling near the river which was about 200metres from his home. This soon degenerated into a fight, and the 1st accused who had rushed to the scene, got between them in a bid to separate them. He saw **NICHOLAS** pulling a stick from the fence, and use it to strike the deceased on the head. The 1st accused blocked the second blow which Nicholas had again aimed at **PETER**. **NICHOLAS** then put the stick down, and the 1st accused noticed that **PETER** fell down, even as **NICHOLAS** fled. At that time, the 2nd accused was not present, and she only went to the scene later. That he in-fact accompanied those who took the deceased to hospital. The next day, a group went to his home armed with sticks, and begun assaulting him, so he fled and made a report to the village elder. He was categorical that he never assaulted the deceased.

23. The 2nd accused in her sworn defence stated that while making supper at home, she heard people making noise outside. She came out and saw a huge crowd of people at the lower part of the river. She proceeded to the scene and learnt that the assaulted person had been rushed to hospital. She maintained that she never held any stick, assaulted the deceased nor did she witness the assault, and was shocked to see three jembe handles said to have been obtained from her home!!

24. On cross examination she confirmed that **NICHOLAS** is her son, whilst **ALLAN** (1st accused) is her sister's son who were both involved in sand harvesting, but since she was not present during the assault, she could not tell who assaulted the deceased. She denied suggestions that she had organized for **NICHOLAS** to flee, nor did she know of any existing differences between the three men.

25. The defence counsel submitted that from the scrutiny of the evidence, PW1, 2 and 5 actually did not directly see the assault took place outside their house at some distance of about 100 meters. That, PW1, 2, 3,4 and 5 all mention Nicholas Lukaku as the person who actually hit or assaulted the deceased first with a jembe stick and that when the deceased fell on the ground he ran away and he is still at large. Allan and Hellen are said to have been standing beside the deceased on the ground.

26. They contend that the evidence of Pw1, 2 and 5 mentions Allan Omondi, Hellen Khanguru and

Nicholas Lukaku as having had hand in the assault, but that no evidence mentions Hellen at all. That the fatal blow was from Nicholas Lukaku and not Allan Omondi. It is further submitted that the prosecutor did not call the doctors who performed the post mortem to ascertain the cause of death, and without medical evidence, it can only be speculated as to what might have caused the deceased's death and the only conclusion is that the cause of death is unknown.

27. Also, that no amount of evidence led by the prosecution at the close of its case proves the charge, as it is not only discredited, but it is also contradictory and valueless, and has no weight sufficient to sustain a conviction

Issues for determination

a) Whether the accused persons caused the death of the deceased.

b) Whether failure to produce the post mortem report in a murder trial is of itself fatal to a conviction.

28. There is no dispute that the deceased, the 1st accused, and NICHOLAS had been involved in sand harvesting, and were known to each other. There is also no dispute that the deceased was assaulted, and was rushed to hospital, but succumbed. There may be some minor discrepancies as to where the assault begun, but a common thread among each prosecution witness was that the 1st accused was the first person to slap the deceased, before Nicholas came and beat him up, and that eventually the two accused persons and Nicholas jointly assaulted him using jembe handles.

29. The two accused persons face a charge of murder contrary to **section 203** of the **Penal Code**. That section defines murder as follows:

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

The prosecution has to adduce evidence to establish that the accused caused the deaths of the deceased children by an unlawful act which lead to their death. The prosecution must prove that the accused action was motivated by malice. In the case of **TUBERE S/O OCHEN V R (1945) 12 EACA 63** the court held that:

“The duty of the court in determining whether malice aforethought has been established, is to consider the nature of the weapon used, the manner in which it was used, the part of the body injured, the conduct of the accused before, during and after the attack

30. In the present instance the incident happened at dusk, night had not yet fallen. The individuals involved were neighbours all known to each other, all the prosecution witnesses referred to jembe handles (also referred to in the proceedings as hoe handles or jembe sticks) as the weapons used, and indeed three jembe handles were recovered at the scene, and were produced as evidence. The defence did not suggest that the jembe handles were planted at the scene. Each one said how after the attack, the deceased's neck was wobbly, suggesting that it had been broken as a result of the blows inflicted using the jembe handles

31. The essential ingredient for the offence of murder is malice aforethought. The circumstances which constitutes malice aforethought are described under **Section 206** of the **Penal Code** 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 or to 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;

(c) an intent to commit a felony;

(d) an 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.

32. In my own view, it is not far-fetched to make a proposition that assaulting a human being using jembe sticks is likely to have very grave outcomes, but the issue for consideration is whether the deceased succumbed as a result of the assault. The crux of the matter is whether in order to prove the cause of death beyond reasonable doubt medical evidence must be availed to establish the effect of the action on the life of the deceased.

33. In the case of **NDUNGU Vs REPUBLIC (1985) eKLR** the court held that: -

“..... where a body is available and the body has been examined, a post mortem (report) must be produced, the trial court having informed the prosecution that the normal and straight forward means of seeking to prove the cause of death is by regularly producing the post mortem examination report as a result of which the Medical Officer who performs the post mortem examination is cross –examined”.

Likewise, in **CHENGO KALAMA Vs REPUBLIC (2015) eKLR**, the Court of Appeal sitting in Malindi held as follows:

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt”.

34. Court of Appeal had occasion to discuss the scenario in **Nairobi Criminal Appeal No. 171 of 1984**, reported as **Ndungu versus Republic (1985) eKLR**. In that case, the deceased was assaulted on night of January, 18, 1983 while on his way home in what appeared to have been a robbery incident. His wife who had rushed to his rescue together with a neighbor took him to Matuu Health Centre but not before they reported the incident at a nearby police station where he was issued with a P3 form. No doctor was available at the health facility at the time but all the same the deceased was given some drugs and apparently went back home. Two days later he returned to the health centre; this time round, he was given three injections and some tablets. After two weeks, he developed stomach pain and his body turned yellow. He was then taken to Thika District Hospital where he was given tablets but his condition worsened and was returned to Matuu Health Centre from where again he was referred to Machakos District hospital. He died two days later, more particularly on 3rd March, 1983.

35. The appellant was charged and convicted of the deceased’s murder; he appealed against conviction and sentence. Just like in the **Cheya** case, the argument of the fact and cause of the death of the deceased revolved around the post-mortem report. In this particular case, the report was neither dated nor signed; it did not also bear the name of the medical officer who conducted the post-mortem. Inevitably, it was argued, on behalf of the appellant, that in the absence of supporting medical evidence or post-mortem report or evidence of the exact treatment the deceased received at Matuu Health Centre and at the two other hospitals, there was, in effect, no evidence to support the trial judge’s finding that the deceased died as a result of the injuries he sustained. Having died 44 days after the assault, so it was argued, it could not be held reasonably that the death was related to the assault since the cause of death was not established.

36. The Court of Appeal accepted this argument and held as follows:

“Where the body is available and the body has been examined, a post-mortem report must be

produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the medical Officer who performs the post-mortem examination is cross-examined. Here no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstances inexplicable and was unhelpful to the prosecution and to the judge.

37. In **Chengo Nickson Katama versus Republic (2015) eKLR** the deceased died two days after the attack; however, as happened in the **Ndungu case**, so it was in Chengo; a report of the postmortem examination was not produced despite the fact that the postmortem was conducted. Like in the **Ndungu case**, the deceased had also been in several hospitals leading the court to doubt whether death could have been as a result of the injuries sustained during the attack or by other cause.

While analyzing the evidence the court noted as follows:

Our next consideration is failure by the prosecution to tender medical evidence regarding the death of the deceased. On record, there is evidence that following the death of the deceased, a post-mortem examination was conducted on his body on 7th February, 2011 by Dr. Otieno of Coast General Hospital and a report thereof prepared. However, attempts to introduce the same in evidence faltered on account of Dr. Otieno's failure to turn up in court severally for unexplained reasons. Therefore, the prosecution closed its case without the post-mortem report being placed on record. The effect of such an omission is that the death and the cause thereof was not established beyond reasonable doubt. The deceased did not die immediately. Indeed, he died two days later whilst undergoing treatment at Coast General Hospital where he had been transferred, as Lamu District Hospital was ill-equipped to manage his condition. It is also important to note that before being transferred to Coast General Hospital as aforesaid, he was first treated at Mokowe Health Centre and Lamu District Hospital. The treatment records from all these institutions could but were not availed. In the absence of these documents indicating the exact treatment which he received, it is not possible to tell whether the death could have been as a result of the injuries sustained or by any other cause.

38. The court then reflected on its earlier position and concluded that:

“the position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post-mortem examination report of the deceased.”

39. Does the scenario obtaining here fit into one of those very exceptional cases where the cause of death does not need medical opinion? I take the cue from the evidence of **KENNEDY (PW2)** who stated:

“It was not a fight, the three had overpowered him as he was alone. By the time I arrived, deceased was on the ground, and the three assailants were standing over him. After stopping them, I took away Peter with the help of a neighbour. I took him to our home, administered First Aid before taking him to Kipkangani hospital. He was referred to Kapsabet hospital where he was admitted, then we were told to bring him to Eldoret for a scan, but he died before we could do that... When I observed Peter, his neck was wobbly, suggesting it was broken. He was bleeding from the mouth and head”

This witness clarified on cross examination that his statement to the police was that when he got to the scene, the deceased was lying down unconscious bleeding a lot from the head, while the two accused persons plus Nicholas stood over him armed with the jembe handles and that the three were still assaulting the deceased although that last part was not recorded in his statement. He maintained that he had told the police as much but the same was not recorded

40. I am mindful of the sentiments expressed by the Court of Appeal in the case of **Ndungu versus Republic (1985) eKLR** to the effect that:

“The judgment in Cheya gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem report is performed and a report prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution”.

41. From the afore-going situation was there room to reasonably infer that the deceased had collapsed into a state of unconsciousness, and was bleeding profusely from the head as a result of the assault. Were there any other intervening events that would perhaps cause a reasonable person walking on the streets of Kapsabet to perhaps speculate that the deceased’s state was a s a result of other factors. I do not think that even science (which incorporates medicine defies logic and common sense). Justice may be the blindfolded lady holding on to the Sword of Domiciles, but I think even justice must be seen to be done. I am persuaded that in this instance, the absence of the post-mortem report was not fatal to the prosecution case. There are no inconsistencies as to the persons involved in the assault, the weapons used, and the manner of assault

42. I am satisfied that the evidence in its totality proves the charge against the two accused persons. The evidence presented by the prosecution clearly shows that they acted in concert, and beat up the deceased jointly who had a quarrel with their kin over sand. Their defence is merely intended to find a way of escape by heaping blame on the one who escaped, and does not shake the prosecution’s case. I return a finding of **GUILTY** for both accused persons.

E-Delivered and dated this 15th day of May 2020 at Eldoret

H. A. OMONDI

JUDGE