



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO 9 & 18 OF 2018 [CONSOLIDATED][MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE OKAKA OYIRO.....1st ACCUSED

LUKAS ONYANGO OYIRO.....2nd ACCUSED

JUDGMENT

1. The accused persons **GEORGE OKAKA OYIRO** and **LUKAS ONYANGO OYIRO** are blood brothers who are jointly charged with the offence of 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 night of 1st and 2nd day of March 2018 at Ulafu Sub Location, East Alego Location within Siaya County, the accused persons, George Okaka Oyiro and Lukas Onyango Oyiro jointly murdered one **Stephen Ochieng Omwanya**.

2. The accused persons denied the offence and the prosecution called 4 witnesses in support of their case. PW1, who is the deceased mother, testified that on the night of 1st -2nd March 2018, she was inside her house with the deceased. The deceased told her that he would not go to the overnight vigil at the funeral of Michael Mbeya as he was tired. Later at about 9.00pm the deceased escorted her to the funeral, a distance of 10 minutes' walk from her house, and left her at the funeral gate after which he returned home. When she called the deceased at 2.00am to come collect her as they had agreed, he was not reachable. She testified that she saw the 2nd accused at the funeral carrying a rungu and a panga and that the last time she saw him was when he went where the grave was being dug.

3. PW1 never saw the deceased alive again. She stayed at the funeral until 6.00am when she went home. She went to the deceased's house to pick her keys. She found the deceased's house door locked and he was not responding to her calls. She looked around and saw the clothes he had worn the previous day hanged on the flowers. When she went closer she saw blood stains and a rope.

4. She went to her Mother-in-Law's home to get one of his grandsons to come and help her open the deceased house's door. When they opened the door, they found house items scattered all over and they finally saw his body lying on the floor. The deceased was naked and his body was smeared with mud.

5. PW2, Elizabeth Anyango Odhiambo testified that on 1st March 2018, she was asleep in her house with her 3 children. It had rained from 6pm so she did not hear anything. At around 8.00pm she heard a sound from the gate, she had solar lighting in her house and she saw two men who she identified as the 1st and the 2nd accused. That the 1st accused had a rungu while the 2nd accused had a torch and a panga. They asked her if her husband Alfred Odhiambo was around and whether she had seen the deceased. When she asked why they were looking for the deceased, the 2nd accused replied that the deceased had stolen his 4000 shillings and a phone. The 2nd accused told her that the deceased would die a horrible painful death when he finds him. At about 6.00am, PW2 heard voices from her mother-in-law's house (PW1). She heard screams and so she went through the fence and on arrival she met Monicah Awino Oduor (Nyakong'o) who told her that PW1 was crying because the 2nd accused had killed the deceased. She went to the deceased's home and found the deceased dead, lying naked on the floor. A trouser had been pulled up to the ankles and he was muddy all over. He had been knifed in the stomach, ribs, bleeding from the head and his right hand folded. She took his blanket and covered him and later proceeded to record her statement at Siaya Police Station.

6. During cross examination, PW2 stated that the deceased was her brother-in-law. That she lives in her home which is different from the deceased's and her mother-in-Law's (PW1) home. She stated that on that material night, the two Accused persons went to her home asking for the deceased because he used to go to stay in her house and it was at about 8.00 p.m. She stated that she ever met the deceased that day. She stated that the two people knew the deceased's house. PW2 denied saying that the 1st accused had a rungu. She stated that the 1st accused had nothing on his hands

7. The attendance of Dr. Belinda Omondi as a witness could not be procured without unreasonable delay and expense, and as the witness was out of the country on training, **PW3** who had worked with her and was familiar with her handwriting, **Dr. Biko Opidi** testified and produced the post mortem report of Stephen Ochieng Omwonya, the deceased.

8. According to Dr. Opidi on behalf of Dr. Belinda, post mortem was carried out on the body of Stephen Ochieng Omwonya on 15.3.2018 at 16.00 hours at Siaya County Referral Hospital General. Externally, the right arm was swollen, there were several bruises around the body, indicative of a struggle. The Respiratory system was normal; cardiovascular system, Normal digestive; Respiratory and Genital urinary systems were all normal. On the head, there was skull fracture on the frontal parietal region; and subdural hematoma. The spinal cord and Colum were normal. As a result of Examination, the Doctor formed the opinion that the cause of death was subdural hematoma due to blunt trauma on the head. The post mortem report was produced as Exhibit No. 1.

9. **PW4, Henry Oluoch Otete** in his sworn testimony testified and recalled that on the 2.3.2018 he was called by the wife of Lucas Onyango (2nd) accused saying her husband's phone, charger and KShs.5, 000/= had been stolen. He told her that she would go to her the following day to confirm. He did not go the following day. Later she told him that the things that were stolen had been found. He went to her house after three days to find out about the theft. That it was on a Thursday morning when she took him to the house of PW1, the mother of the deceased where he saw blood and a sign of struggles outside. That when they pushed the door to the house of the deceased it opened and inside was the muddy body of the deceased. PW4 then called the Assistant Chief and informed him of what he had found after which he went home and to change his clothes as he was a watchman. He later returned to the scene when Police arrived and collected the body of the deceased and took it to the mortuary.

10. **PW5, No. 236337 Ayub Ngodi** testified that on 2/3/2018 he was at Siaya Police Station and was the in-charge, Crime. He investigated the matter. He recalled that on 2.3.2018 at around 10 a.m. he visited a murder scene with other police officers and scenes of crime personnel. He received the report from Irene Joyce Akoth the wife of Lucas Onyango, the 2nd accused, who had reported that her husband Lucas Onyango and his brother George Okaka had fought with the deceased, Cousin Stephen Ochieng who was their cousin and that the deceased had died at his house. They visited the home of the deceased at Ulafu Sub-Location and on arrival they found the deceased lying in his house dead half naked. He observed and saw injuries on the head and several injuries all over the body. Outside the deceased's house was a struggle and fresh blood which had clotted and a piece of shirt which was torn. The scene was photographed by scenes of crime personnel and they removed the body to Siaya Referral Hospital mortuary. The Reportee gave them the 2nd accused's telephone number which PW5 gave the scene of crime officers.

11. PW5 further testified that after taking the deceased's body to the morgue, he went to the Police Station and found the suspect Lucas Onyango arrested and in custody and Irene Joyce Akoth was also detained for Investigations. That he received a report on 4.3.2018 at around 8 a.m. while at his house that the 2nd accused had escaped from custody. He then went to the station and confirmed the escape and they started tracing him. Acting on a report from Irene Joyce Akoth, he went to the house of the 1st accused with other Police Officers and arrested him. They recovered a panga which was said had been used during the fight with the deceased. The panga was produced as an exhibit

12. In cross examination, PW5 said that he received the report from the 2nd accused person's wife that the accused persons fought with the deceased. He stated that although the panga recovered from the 1st accused house was soiled but no DNA was conducted on it. He further stated that Scene of crime personnel took photographs and that on 4.3.2018, PW1 took to him the national identity card belonging to the 2nd accused claiming that she found it at the scene of crime. PW5 however confirmed that he did not see the ID when he visited the scene and when the photographs were being taken.

13. At the close of the prosecution case, the two accused persons were found to have a case to answer. After the court explained the provisions of section 306(2) of the Criminal Procedure Code, the accused persons both gave unsworn evidence.

14. The 1st accused recalled that on 1/3/2018 he was at his house after returning from work at 8.30pm and proceeded to have his dinner then went to sleep until the following day. He only heard of the death of the deceased the next day while at work. He was arrested on 6/3/2018

15. The 2nd accused testified that on 1/3/2018 he was at work during the day and went home at 9.00pm and had dinner after which he went to the funeral nearby. He saw PW1 at the funeral and even spoke to her. He left the funeral at about 4.00am. He denied seeing the deceased on 1st or 2nd March 2018 and claims to have no issues with the deceased. He only heard of the deceased's demise after being arrested.

SUBMISSIONS

16. Counsel for the accused persons filed written submissions which basically urged the court to acquit the accused persons on the grounds that there was no eye witness to the incident, that the prosecution relied on circumstantial evidence which was mere suspicion, that the purported confession recorded by PW5 from Joyce Akoth the wife to one of the accused persons that her husband had fought the deceased was not done in accordance with the law as stipulated in section 25 of the Evidence Act.

DETERMINATION

17. I have considered the prosecution's case and the defence proffered by the two accused persons. In my humble view, the main issues for determination are

- a) Whether the prosecution has proven beyond reasonable doubt the death and the cause of death of the deceased
- b) Whether the accused persons caused the death of the deceased
- c) Whether the accused persons had malice aforethought in committing the offence.

18. On the first issue, there is no dispute that the deceased subject of the murder trial herein is long dead. The prosecution proven beyond

reasonable doubt the death of the deceased. The death of the deceased was proved by all the witnesses PW1, PW2, PW4 and PW5 who all saw the body of the deceased lying dead in his house. PW3 also produced a post mortem report which further proves the death of the deceased. The post mortem report produced by PW3, opined that the cause of death was subdural hematoma due to blunt trauma to the head. The prosecution has therefore proved beyond reasonable doubt that the deceased died and the cause of death was subdural hematoma due to blunt trauma on the head.

19. On whether the accused persons caused the death of the deceased, the prosecution relied on circumstantial evidence to support its case. In **Republic vs Kipkering Arap Koskei and another EACA 135**, it was held:

“In order to justify circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Circumstantial evidence can only be a basis of a conviction only if there is no other existing circumstances weakening the claim of circumstances relied on. For the court to convict on circumstantial evidence, the evidence must unerringly point at the accused.”

20. The case of **Abanga Alias Onyango vs Republic Cr Appeal No 32 of 1990**, set out three tests that circumstantial evidence has to meet:

1. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established

2. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused

3. The circumstances taken circumstantially, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else

21. The prosecution's case was that PW1 saw the 2nd accused at the funeral carrying a rungu and a panga, the prosecution has not established whether those were the murder weapons. Even after a muddy panga was recovered, no effort was made to subject it to DNA testing to establish whether it was connected with any of the accused persons. Whereas failure to produce a murder weapon is not fatal to the prosecution's case, but where such suspected murder weapon is recovered and it is not subjected to DNA testing, the court would have no choice but to make an inference that had the said evidence been availed it would have been adverse to the prosecution's case, especially where there was no eye witness called in the case by the prosecution. The court can therefore not convict on that basis alone. The last time PW1 saw the accused was where the grave was being dug, this does not place him at the scene of crime. PW1 does not even mention the 1st accused in her testimony. In addition, the cause of death of the deceased based on the post mortem report that was produced by PW3 was that the deceased died as a result of subdural hematoma due to blunt trauma on the head. The prosecution failed to establish whether the panga recovered from the 2nd accused's house was the probable weapon used to cause the blunt trauma on the head, since no DNA testing was done on the said panga.

22. The only witness who saw both the accused persons on the day of the murder was PW2 whose statement to the police contradicts the evidence given. She saw both the accused persons at her house at around 8.00pm however at the funeral which was after 9.00pm PW1 saw the 2nd accused and he was alone.

23. In examination in chief, PW2 claims that she saw the 1st accused carrying a rungu but when cross examined she contradicts her statement by saying that the 1st accused had nothing in his hands. It is therefore not in the interest of justice to rely on such evidence as a basis of conviction.

24. The only circumstantial evidence which would have connected the 2nd accused to the murder was that of his national identity card being found at the scene of crime by PW1. The identification card was produced by PW5 who says he did not see the Identity card when he visited the scene and it was brought to him later by PW1. The court can therefore not use this as a basis of conviction because the Identity card in issue was obtained under questionable circumstances and was brought forward by a party who had an interest in the outcome of the case, the mother of the deceased. There is no reason why the investigating officer did not recover the identity card from the scene of from the mother of the deceased until the hearing date is when the same was brought to court. There is no evidence that the Identity card in question was recovered at the scene of alleged murder as PW1 did not adduce any evidence of recovering an Identity and handing it over to PW5 and if so, at what stage that Identity card was recovered.

25. None of the prosecution witnesses saw the accused persons with the deceased on the material night. It is only PW2 who stated that the 2 accused went to her place looking for the deceased but no evidence was adduced on whether they found him or not. In fact for the accused to go looking for the deceased at PW2 house means that they were not able to find him at his house. The prosecution has therefore failed to adduce any evidence that places the 2 accused persons at the scene of crime.

26. In his defense, the 1st accused provided the defense of alibi that he was at his house from 8.30pm. The prosecution failed to produce evidence to rebut this claim. The 2nd accused also gave the defense of alibi that he was at the funeral until 4.00am, the fact that he was at the funeral was backed by the testimony of PW1 who stated that she saw him at the funeral.

27. The prosecution has therefore failed to adduce sufficient evidence to prove beyond reasonable doubt that the 2 accused persons caused the death of the deceased.

28. On whether the accused had malice aforethought? Section 206 of the Penal Code provides that malice aforethought is deemed to be established when any of the following circumstances are proven;

i. An intention to cause death of or do grievous harm to any person, whether that person is the person actually killed or not

ii. 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 wish that it may not be caused

iii. An intention to commit a felony

iv. 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.

29. No evidence has been provided by the prosecution to prove that the 1st accused had any intention to cause the death of the deceased and the only thing connecting him to the offence is PW2 testimony which had contradictions on whether or not the accused person was carrying a rungu, and PW5's testimony that they found a panga in his house. However, there was no proof on whether that was the murder weapon. The 1st accused was in fact only arrested based on the report of Irene Joyce Akoth, the wife to the 2nd accused who was never called as a witness. Albeit she was not a compellable witness as against her husband, she was nonetheless a competent and compellable witness as against the 1st accused.

30. The prosecution also failed to investigate further the report of the wife to the 1st accused whose report was used as a basis to arrest the two accused persons. The said Irene is the one who reported that the 1st accused had used the panga that was recovered to beat the deceased yet no evidence was brought to corroborate this fact.

31. The prosecution adduced evidence that the 2nd accused had the mens rea. PW2 testified that when she asked the accused persons why they were looking for the deceased, the 2nd accused told her that the deceased had stolen from him, which is further corroborated by PW4 who received a report with regard to the theft. That the 2nd accused threatened the life of the deceased by saying that the deceased will die a horrible painful death if he the 2nd accused found him. Based on the way the deceased body was found, it is my opinion that he died a horrible painful death and that whoever killed him had malice aforethought. However, the prosecution failed in its duty to prove beyond reasonable doubt that the 2nd accused caused the death of the deceased. In **R vs Josephat Muruiri Meru High Court CR 168 of 2002**, it was stated that in law suspicion alone, no matter how strong cannot be a basis of conviction.

32. There was doubt whether the accused persons found the deceased, there was only claims that they were looking for him but no corroborative evidence was adduced by the prosecution to seal all the loopholes in the case. Their defense of alibi was also not disapproved by the prosecution.

33. I find that the prosecution has failed to prove beyond reasonable doubt that the two accused persons caused the death of the deceased. For the above reasons, I find and hold that the two accused persons George Okaka Oyiyo, and the 2nd accused, Lucas Onyango Oyiyo are NOT guilty of the offence of murder as charged. They are accordingly acquitted under section 324(3) of the Criminal Procedure Code and discharged from the Information of murder. Therefore, unless otherwise lawfully held, the two accused persons **George Okaka Oyiyo** and **Lucas Onyango Oyiyo** are hereby set at liberty forthwith.

Dated, Signed and Delivered at Siaya this 4th Day of May 2020 via skype due to Covid 19 situation

R.E.ABURILI

JUDGE