



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

HIGH COURT CRIMINAL CASE NO. 90 OF 2014(MURDER)

REPUBLIC.....PROSECUTION

VERSUS

ANDREW ONDIEKI NYABWANGA.....ACCUSED

JUDGMENT

1. On the 29th of March 2016 Andrew Ondieki Nyabwanga jointly with Kelvin Amata Omboto were charged with the offence of murder contrary to section 203 as read with 205 of the Penal Code. The particulars of the offence are that, “on the night of 23rd and 24th February 2013 at Bosinange village in Gucha South Sub County within Kisii County jointly with others not before court murdered Oeko Onyongo. Kelvin pleaded guilty to a lesser charge of manslaughter and was sentenced to two years’ probation on the 23rd of May 2017. The accused person denied the charge and the matter proceeded to hearing.

EVIDENCE

2. The prosecution called 5 witnesses. Pw1 Agnes Rabera Oyongo testified that on the 23rd and 24th February 2013 night whilst in her house preparing supper she asked the deceased her son to get the calf and tie it up. She saw the house of her co-wife burning. The sons of her co-wife brought out the deceased from the house which was burning. She saw the accused also known as Moi Obwocha, Mirega, Ongaga and Kevin beat her son she tried to intervene. They used stones and metal rods to beat the son. The accused had no weapon. She tried to protect her son but they were barring her from doing so. The incident happened at 6pm. During cross examination she stated that there was funeral at their neighbour’s place and her son had caused a commotion in the said home and was sent away. That the crowd said her son had burnt the house. That she does not recall the time the incident happened.

3. Pw2 Hellen Moraa testified that the deceased is her last born brother and the accused is his neighbour and cousin. On the 23/2/2013 she attended a funeral gathering around their home and left at 5pm. The deceased returned at 7.30pm. She was preparing supper. The deceased was asked to untie the cow. The deceased told her that she had heard noise outside and had wanted to find out what was happening. Then she heard her brother crying for help. She went out with her mother and found people wanted to kill him. She knew 10 of them. She asked them what happened. One of them had a rungu. She began to scream and was chased into the sugarcane farm. She heard her brother crying. He ran into a mabati toilet and they went for him at the said place. She asked Kevin and Andrew why they wanted to kill her brother. Kevin told her brother not to cry and that he was an askari. She continued to scream as they continued to beat the brother. The accused took a stone and hit the deceased on the stomach. He died. They pulled him to take him to his house to burn him there. They damaged the house. Police took the body the next day. During cross examination she denied that the deceased had caused a commotion at the funeral.

4. Pw3 James Oroo Oyongo testified that he identified the deceased’s body on the 6th March 2013 at Tabaka Mission hospital. The deceased was his step brother.

5. Pw4 Doctor Willis Omwoyo testified that he did a post mortem on the body of Oeko Oyongo on the 6/3/2013. The deceased was about 20 to 25 years old. He noted multiple lacerations involving the head. The head had a big permanent cut about 2 cms at the frontal aspect of the head superficial laceration at the occipital region. On the nervous system there was a penetration into the brain tissues, there was a crack. The legs had multiple cuts. He concluded that the deceased’s cause of death was cardio respiratory arrest due to brain damage or the central nervous system.

6. Pw5 No.236125 Inspector Moses Wanadati recalled that on the 23/2/2013 he accompanied the OCS Ogembo to a scene of murder at Itibonge village. At the scene they found the body of the deceased lying in a shamba next to his mother’s shamba. The body had injuries on the forehead deep cuts and bruises on the back of the head. His mother was also at the scene and she had serious injuries. She gave the names of the suspects who are their neighbours. The area chief had arrested suspects. They decided to charge the 2 persons who were involved as they looked for other suspects. On the 14/3/2013 Andrew Ondieki recorded his statement at their police station and on the 14/4/2014 he was charged. During cross-examination he testified that there OB entry shows that the fight ensued amongst the mourners and a person was killed. That some suspects are still at large and that the name Andrew Ondieki Nyabwanga was not in his list of suspects but there was a name of one Moi Obwocha. That during his investigations he issued a notice to the accused to present himself at the police

station. That he did not record the statement of the assistant chief but he was involved in giving them intelligence information.

7. The accused elected to give an unsworn statement in his defence. He testified that Moi is not his name. That on the 23rd February 2013 he was grinding sugarcane in Rongo. He went to his place on the 24th and on the 25th when he woke up he found the police arresting people. They were taken to Ogembo where he wrote his statement and went back home. He stayed home up to the 13th November when he was arrested in the morning and taken to chief Obongi who took him to Ogembo. On the 14th he was brought to court and he found 3 people charged with the offence like the one he was facing. He was jointly charged with them. They admitted that they killed the deceased. He has stayed in jail since then. They were put on probation. If they admitted that they murdered the deceased why he was in court. He sought to have the case dismissed so that he can go and look after their children.

SUBMISSIONS

8. At the close of the defence case Mr. Omwega for the accused filed written submissions. In the said submissions he narrated the evidence of the prosecution witnesses and the accused's defence. It was submitted that the accused's defence of alibi was not challenged. That it is the duty of the prosecution to prove their case beyond reasonable doubt. That there was a contradiction in the evidence of Pw1 and Pw2 on the time the incident took place. Pw1 said it was 6pm and Pw2 said it was 8pm. That this contradiction puts the credibility of Pw1 as a witness in question. That she was not reliable, truthful and not a credible witness. He urged the court not to believe her evidence. That the alleged attack took place at night, it was dark there was no electricity or some other reliable source of light to assist Pw1 and Pw2 to identify the accused as the one of the alleged assailants of the deceased. That the investigating officer concluded that the incident was a revenge as the deceased had burnt the house of their neighbour Jackson Onyongo. The accused is not a member of the family of Jackson Onyongo. That there was no evidence that the accused had an ill motive or grudge against the deceased. That there was no evidence that the accused murdered the deceased, the prosecution have thus failed to prove their case beyond reasonable as required and that the accused person should be set free.

9. The prosecution relied on the evidence on record.

DETERMINATION

10. Section 203 defines the offence of murder and requires proof of the following if the offence of murder is to be established, malice aforethought on the part of the accused, death of the deceased, the cause of the death and an unlawful act or omission on the part of the accused resulting in the death of the deceased. Section 206 of the Penal Code defines malice aforethought as follows;

‘Malice aforethought shall be deemed to be established by evidence proving anyone 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.”

11. The first issue that I will consider is the cause of death of the deceased. The post mortem report indicated that the cause of death was cardio respiratory arrest due to brain damage. This is in line with the facts as narrated by Pw1 and Pw2 who saw the deceased beaten to death by a group of people using stones and metal rods.

12. The next issue is whether the accused is responsible for the injury which caused the death of the deceased. Pw1 and Pw2 testified that the accused was amongst the group of persons who beat the deceased who had been suspected of burning a house. According to Pw1 the accused is a neighbour and is known to her as Moi Obwocha. Pw2 stated that though it was 8pm there was full moon and she was able to see the accused and others, that the accused took a stone and hit her brother's stomach. She asked the accused and Kelvin why they were doing that to him. Is this evidence sufficient to identify the accused as one of the assailants? The accused was a person known to the 2 witnesses they saw him amongst the group of persons who beat up the deceased and the injuries he sustained caused his death. Pw2 recalled that there was moonlight at the time and she was able to see. The difference in time in my view does not cast any doubt on the prosecution case as the accused and the persons who beat up the deceased were known to Pw1 and Pw2 both were able to identify them to have them arrested.

13. The accused has raised an alibi defence that on the 23rd February 2013 he was at Rongo working and that he was arrested with others released and later charged. In the case of **Kiarie vs Republic [1984] KLR** the Court of Appeal held that:-

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. ”.

The prosecution did not call for evidence to disprove the alibi raised by the accused and so I have to weigh the alibi against the evidence of the prosecution. I have compared the alibi by the accused and the evidence by the prosecution. In my view the accused is not telling the court the truth. Pw1 and Pw2 who witnessed the incident and I believe their evidence. Pw1 was a credible witness and her evidence pointed to the accused as one of the persons who beat up her son. Pw2 too was credible and was consistent in her evidence.

14. The final issue for determination is whether there was malice aforethought. From the evidence the accused was part of a group of persons who decided to beat up the deceased on allegations that he had burnt down a house. The accused and others were responsible for the injuries which led to the deceased's death however am not convinced that they had the intentions to kill him. He was part of a crowd of people who were set out to teach the deceased a lesson for allegedly burning a house. Malice afterthought has not proved by the prosecution, I find that the prosecution have proved a case of manslaughter contrary to section 202 of the Penal Code for which I find him guilty and convict the accused accordingly.

Dated and delivered at Kisii this 8th day of January 2019.

R.E.OUGO

OUGO

In the presence of;

Accused In person

Mr. Omwega For the Accused

Mr. Otieno Senior Prosecution Counsel

Rioba Court Clerk