



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 30 OF 2015

THE REPUBLIC.....PROSECUTOR

VERSUS

1. BENSON KIBOMA OYUGI.....1ST ACCUSED

2. BENARD ORINA ONYANCHA.....2ND ACCUSED

3. JOSEPHINE BOCHABERI ORINA.....3RD ACCUSED

4. BENARD EDWIN MOSES ALIAS MOSE.....4TH ACCUSED

5. DENNIS SIRIBA NYANGERI.....5TH ACCUSED (DECEASED)

JUDGEMENT

The accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 4th April 2013 at Bombere village in Magwagwa Sub-location in Nyamira North District within Nyamira County they murdered Zachary Oyange Orina.

They all pleaded not guilty to the charge. In the ensuing trial the prosecution called seven witnesses.

Briefly the facts of the case are that on the material day the deceased left his house at around 6.30 pm to lock his pump but never returned. According to his wife Josephine Gechemba Oyange (Pw1) at that time she was buying vegetables on the roadside, near her home. As her husband was leaving the 2nd accused went and inquired where he was. She pointed the 2nd accused to the direction of the deceased and continued with what she was doing and then went home. She waited for her husband but by 11pm he had not returned home.

The court heard that on the same day between 6pm and 7.15pm the deceased went to Eric Morara Nyaribo's (Pw2) house with the 2nd accused. The deceased was to attest a sale agreement for a piece of land that the 2nd accused was selling to Eric Morara Nyaribo (Pw2). The deceased who was a teacher drafted the sale agreement but the parties could not agree on the size of the portion of land and so they did not execute the agreement. The deceased is said to have left the home of Eric Morara (Pw2) at 7.30pm with the 2nd accused. That was the last time he was seen alive. He was found dead at the junction of Riomego and Ikonge the next day. His son Geoffrey Ombasa (Pw5) testified that he had injuries on the head, left hand and belly and was bleeding from the injuries. A post mortem on his body later revealed that he had died as a result of cardiopulmonary arrest due to intercerebral haemorrhage as a direct cause of blunt head trauma. The post mortem report states that the deceased had bruises on the head, a wound measuring about two (2) centimetres on the left parieto-occipital area, a dislocation of the left shoulder and fracture of the skull on the left tempoparietal area.

Joseph Oyugi (Pw4) a cousin of the deceased and the father of the 1st accused testified that following the death of the deceased he heard people saying that his son (1st accused) had something to do with it. He decided to turn him in to the police for his own safety and so together with two of his other sons they bound him (1st accused) and took him to Nyamira Police Station then to Kisii Police Station. It is alleged that once at Kisii Police Station the 1st accused recorded a confession in which he incriminated not just himself but the 2nd, 3rd, 4th and 5th accused. The 5th accused has since died. In the statement it is alleged that he together with the 4th and 5th accused and three other accomplices who he referred to as Luos but who were never arrested, were contracted by the 3rd accused (the deceased's sister in-law) to kill him because he was getting in the way of her getting her deceased husband's benefits. They were to be paid Kshs. 150,000/= with a down payment of Kshs. 100,000/= and the difference after the burial. The six of them namely himself, the 4th accused, the 5th accused (now also deceased) together with the three "Luos" then waylaid the deceased at the junction and when he appeared they wrestled him to the ground and killed him using a panga, axe and swords. After that they parted ways. He was paid Kshs. 5,000/= and was waiting for the balance of

Kshs. 20,000/= but when he returned home on 12th April 2013 after a few days of hiding he was arrested by his father and brothers and taken to the nearby Administration Police Post then to Nyamira Police Station and later to Kisii Police Station where he recorded his statement.

It was following this confession that the accused persons were rounded up and charged with this offence. The 2nd accused having been the last to be seen with the deceased was also arrested as it was believed that he had been used by the others to lure the deceased.

When this court put the accused persons on their defence, the 1st, 2nd and 3rd accused elected to make unsworn statements and the 4th accused to remain silent.

The 1st accused stated that he used to be a farmer. He narrated how he was tied with a rope by his father and brothers and taken to his bedroom. They asked him to wait for the authorities because he was bothering his father for demanding to be given land yet he was not mature enough. Later they took him to the police station where he was told he had killed someone who to-date he does not know.

The 2nd accused stated that prior to his arrest he was a tea picker at Ngoinya Estate. He stated that on the material day police officers went to his house at 2pm and told him to help them with investigations. He stated that the previous day he and the deceased were together drawing an agreement for sale. He stated that he could not have killed the deceased as he was his uncle and benefactor.

The 3rd accused stated that she is a farmer. She narrated how she was arrested by police officers from Magwagwa who claimed that she was Josephine Bosibori. Her protests that she was not Bosibori fell on deaf ears and she was handed to the police station where she was told it was she who contracted the killers of the deceased. She denied it and handed her phone to them to confirm from Safaricom. She stated that she did not know her co-accused and that the deceased was her brother and they had never disputed.

In summing up, Mr. Bwonwong'a submitted that the prosecution had not proved its case beyond reasonable doubt. He poked holes into the confession by the 1st accused and stated that it was not voluntary as his own father admitted that they bound him with ropes before they took him to Nyamira and then Kisii where he made the statement. Mr. Bwonwong'a stated that it was clear that the 1st accused and his father were not on good terms. Counsel wondered why the 1st accused did not name the two Luos yet he had met with them severally and even shared money with them. Counsel contended that the 1st accused could not have said there were two Luos and the recorder of the statement three Luos if indeed the statement was voluntary. Counsel argued that the confession did not lead to the recovery of the weapon and that another of the accused persons should also have been asked to record a confession to corroborate that of the 1st accused.

Concerning the 2nd accused, Mr. Bwonwong'a submitted that after drawing the sale agreement the 2nd accused and the deceased parted ways and nobody knows who killed the deceased. He contended that the conduct of the deceased's wife and son left a lot to be desired.

Mr. Nyagwencha for the 2nd and 3rd accused submitted that they were connected to this crime by the sale agreement and relationship to the deceased but they were not connected to his death. He submitted that the recorder of the 1st accused's statement did not inform him of his rights and the confession does not comply with Section 25 of the Evidence Act. Like Mr. Bwonwong'a, Mr. Nyagwencha submitted that the evidence of the deceased's wife left a lot to be desired as she left home as if everything was normal yet her husband was missing. He contended that this creates suspicion that she knew what was happening. He further submitted that it was the duty of the prosecution to prove its case beyond reasonable doubt but not to leave it to this court to fill in the gaps.

Counsel for the prosecution, Miss Okok did not submit preferring instead to rely on the evidence on record.

By dint of the definition of murder in **Section 203 of the Penal Code**, the points for determination by this court are: -

- (a) Whether the accused persons killed the deceased;**
- (b) Whether they killed the deceased by an unlawful act and;**
- (c) Whether they killed the deceased of malice aforethought.**

As correctly submitted by Counsel for the defence, the case against the accused persons revolves around the statement of the 1st accused person to Chief Inspector David Kibet (Pw6) at Kisii Police Station. In the said statement the 1st accused admits to killing the deceased and further incriminates the 2nd, 3rd, 4th and indeed the 5th accused who is now deceased. In **Chogo Vs. Republic [1985] KLR 2** the Court of Appeal stated: -

“3.In order to amount to a confession, a statement must admit in terms either the offence or substantially all the facts which constitute the offence. An admission of a gravely incriminating fact is not of itself a confession.”

Applying this test to the 1st accused's statement, I am satisfied that the same is a confession. It is instructive that the same was neither retracted nor repudiated. The 1st accused did not deny that he made the statement even in his unsworn statement. Neither did he allege that he was tortured, coerced, intimidated or induced by his father to make that statement. His father told this court that he took him to the police station for his own sake as there were rumours that he was involved in the murder. This court believed him and was not convinced it was because he asked his father for land as the land has already been given to him. It is my finding that that was just an allegation made as an afterthought. The statement admits the offence in all particulars and I am satisfied it amounts to a confession.

In his submissions, Counsel for the 1st accused attempted to poke holes in the confession but the 1st accused himself neither retracted it nor repudiated it. Counsel should have instead objected to its production when the witness sought to produce it. A trial within trial would then have been held to determine whether it was inadmissible. It is not unheard of for people to associate with others whose names they do not know. This court will therefore not make much of the 1st accused's accused not knowing his Luo accomplices by name. I am satisfied that the reason Counsel did not oppose its production is because it was taken substantially in accordance with the **EVIDENCE (OUT OF COURT CONFESSIONS) RULES, 2009**. It is therefore proof that the 1st accused committed the offence. He narrates his role in the crime and the benefit he attained from it. There is no defence that the deceased had done anything to provoke this brutal killing and the killers therefore acted unlawfully. From his own statement they were contracted killers which establishes that they killed him of malice aforethought. I am satisfied that the charge against the 1st accused was proved beyond reasonable doubt.

As for the 2nd accused, save for evidence that he was the last person to be seen with the deceased there is no other evidence tending to his guilt. He was not even mentioned by the 1st accused as one of his accomplices. The 2nd accused explained where he went with the deceased, what they did and how they parted ways. His evidence was corroborated by Eric Morara Nyaribo (Pw2). There is no evidence that the 2nd accused was used by the killers to lure the deceased to his death. Pw2 confirmed that the offer by the 2nd accused to sell a piece of land to him existed even prior to that fateful day. It was not therefore a hatched plan to lure the deceased. Clearly the charge against the 2nd accused is based on mere suspicion which cannot sustain a conviction.

As for the 3rd and 4th accused they were charged because they were incriminated by the 1st accused in the confession. In **Choge Vs. Republic [1985] KLR 1** the court had this to say of such confessions: -

“4.A confession by one accused person which involves the guilt of another accused person is of itself, if unsupported by other testimony, evidence of the weakest possible kind against that other accused person. It is accomplice evidence which needs independent corroboration and this need is the greater when its maker has sought to retract it....”

In **Gitau & Another Vs. Republic [1989] KLR 187 (Porter & Tank JJ)** stated and I agree with them: -

“3. The confession of a co-accused can only be used to corroborate or supplement evidence in exceptional cases where there is substantial evidence to which the confession may be added.”

In respect of the 3rd and 4th accused persons there is no other evidence that can independently corroborate the confession. The 3rd accused is alleged to have contracted the killers because of a land dispute between her and the deceased. However, neither the land dispute nor the fact that she paid the killers was proved. The investigating officer seems to have rested once the 1st accused made the confession. That was not enough and he should have gone further to gather evidence that the 3rd accused paid the killers. This he could have done with confirmation from the mobile money transfer providers or the bank accounts of the 3rd accused person. She told this court that the police officers asked for her phone to investigate that angle but this court was not told what became of those investigations. As was held in the case of **Choge Vs. Republic (supra)** the evidence against the 3rd and 4th accused is of the weakest possible kind. There is no evidence to which it can be added and I am not satisfied that it can sustain a conviction.

Counsel for the 1st accused stated that it would have been better if another accused made a confession as well. The court of Appeal considered this in **Choge Vs. Republic (supra)** and stated: -

“An extra judicial confession by one accused person cannot be corroborated by a similar confession of that person's co-accused.”

In conclusion, my finding is that the charge has not been proved beyond reasonable doubt as against the 2nd, 3rd and 4th accused persons and they are acquitted. This court is however satisfied beyond reasonable doubt that the 1st accused murdered the deceased. I find him guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly. The 2nd, 3rd and 4th accused persons shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered in Nyamira this 6th day of March 2019.

E. N. MAINA

JUDGE