



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: D.S. MAJANJA J.)

CRIMINAL CASE NO. 21 OF 2015

BETWEEN

REPUBLIC PROSECUTOR

AND

ERICK KIBOI OMBATI1ST ACCUSED

EDWARD MAUTI OBIERO 2ND ACCUSED

HENRY NYABUTO OBIERO3RD ACCUSED

EVANS OYONDI MAUTI.....4TH ACCUSED

JUSTINE NYAOSI OMBATI 5TH ACCUSED

ERICK MOSE SIBWOGA (DECEASED)6TH ACCUSED

JUDGMENT

1. On 18th January 2015 **WILSON ONAMI NYATIENO** (“the deceased”) was found dead at Kabiero location in Gucha sub-county within Kisii County. According to the information dated 8th November 2017, **ERICK KIBOI OMBATI (DW 1), EDWARD MAUTI OBIERO (DW 2), HENRY NYABUTO OBIERO (DW 3), EVANS OYONDI MAUTI (DW 4), JUSTINE NYAOSI OMBATI (DW 5)** and **ERICK MOSE SIBWOGA (DW 6)** (“the accused”) were charged with murder of the deceased contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. The accused pleaded not guilty and the trial commenced before Okwany J., who took the evidence of one witness but I took over the matter started the hearing afresh. The prosecution marshalled 6 witnesses to prove its case while the accused persons gave unsworn testimony in their defence. The 6th accused died in the course of the proceedings.
3. In order to secure a conviction for the offence of murder under the provisions of **section 203** and **204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients; first, the death of the deceased and the cause of that death; second, that the accused committed the unlawful act that led to the death; and third, that the accused committed the unlawful act with malice aforethought.
4. The cause of death is not in dispute and was established by the post-mortem performed on the deceased’s body by Dr Omari on 28th January 2015 at Tabaka Mission Hospital Mortuary. Dr Morebu Peter Momanyi (PW 5) presented the post-mortem form prepared by Dr Omari. He told the court that the deceased had a deep cut wound running the front to back side of the head and a visibly fractured skull and brain tissue oozing from the cavity. Internal examination revealed that the cut on the skull measured 21 cm. Dr Omari came to the conclusion that the deceased died from an open head injury following a cut wound on the head.
5. The substantial issue is whether the death of the deceased was a direct consequence of an unlawful act of the accused persons. Phanice Kerubo Nyatieno (PW 1) and her husband, Justus Nyandago Nyatieno (PW 2), testified that on 18th January 2015 at 5:30 pm they went to get vegetables from their shamba. PW 1 testified that they met a group people whom they greeted but who threatened them and started chasing them with pangas and stones. They both ran back to the house. She recalled that all the accused were part of the group of people that chased

them. After about half an hour, she heard more noises outside the house when she went out, she found the deceased on the ground bleeding. In cross-examination, she admitted that she did not see the deceased being assaulted.

6. PW 2 testified that he knew all the accused as they were his neighbours. On the material day, at about 5.00am, he had met DW 1, DW 5 and DW 6 who threatened him with pangas. On the same evening while he was with PW 1, he met a group comprising among others, DW 1 and DW 5. He greeted them but they did not respond to him. Another group comprising amongst others DW 2 and DW 4 arrived separately. The two groups started chasing them while threatening them with pangas and throwing stones. They entered the house but he left the house through his window and hid behind the trees. He told court that he saw David Makumba Miencha (PW 4) on his motor bike being attacked by the same group of people who attacked him. He also saw Evans Nyatieno Okari (PW 3) pass by and ask the group why they were beating PW 4 whereupon DW 5 cut his hand with a panga. He added that while PW 4 was lying on the ground, he saw the deceased approach the gang who immediately attacked him blow after blow until he collapsed whereupon DW 1 cut him on the right leg they all left.

7. PW 3 testified that on his way home at about 6.00pm, he encountered a group of people armed with stones and pangas. DW 1, DW 4, DW 5 and DW 6 were in the group. At the same time, PW 4 was on his motorbike approaching the group and upon arrival the group started slapping PW 4 with their pangas. PW 3 told court that he asked the group why they were beating PW 4. Suddenly DW 5 came at him and cut his left hand. As he was bleeding profusely, PW 4 took him to hospital but collapsed on the way.

8. PW 4 testified that on the material evening as he was going to see his father, he met a group comprising amongst others DW 3, DW 4, DW 5 and DW 6 carrying pangas and rungas near PW 2's home. Since he was afraid, he rode his motorbike to inform the chief that there was an armed gang. He went back and found the same gang with the DW 1 and DW 2 having joined them. He testified that they slapped him with pangas until he fell on the ground. His cousin, PW 3, arrived and asked them why they were beating him and he saw DW 5 cut PW 4's hand with a panga. It was about 7:00pm when he took PW 3 to the hospital and on their way to the hospital he saw the deceased approaching the gang and asking why they were beating PW 3. He nevertheless rushed PW 4 to Kenyena Hospital. While he was at the hospital the deceased was brought.

9. Sergeant Simon Wangombe (PW 6) testified that he received a call on 19th January 2015 from the Chief of Kabiero Location who informed him that a gang had attacked the deceased who succumbed to the injuries. He proceeded to the scene with other police officers where they found dry blood stains on the road, a short distance to the deceased's entrance. When they arrived at Kenyena Hospital, they found the deceased had already succumbed to his injuries. His body had a deep cut wound on the head and right leg. He organized for the body to be taken to Tabaka Hospital Mortuary where the post mortem was done.

10. When put on their defence, the accused persons denied that they committed the offence. They made unsworn statements. DW 1 testified that on 29th April 2015, he was arrested and accused of harboring a school girl. He told court he was shocked to be charged as he did not know the deceased and PW 2. DW 2 testified that he was arrested on 5th May 2015 but was not involved in the murder. He recalled that on 18th January 2015 he was harvesting sugar cane which was to be collected by a lorry at 5:00pm and taken to Ndihiwa factory. DW 3 testified that on 18th January 2015 he was at his sister's home at Nyamarambe from 7.00am to 6.00pm. DW 4 recalled that on 18th January 2015 he was at church until 6:00pm. He later learnt that he was a suspect when he was arrested. DW 5 testified that on 18th January 2015, he went to supervise his father's workers who were ploughing sugarcane and remained there until evening.

11. Stephen Obiri (DW 6) testified that he is a human rights activist working for Lutheran Outreach Organization. He told court DW 5's family had a land dispute with the family of one Angasa. He testified that they were asked to intervene by the elders. It was found that Angasa was trespassing on Nyaosi's land and was told to stop encroaching. It was his belief that the incident occurred as a result of the tension between the families.

12. The prosecution case is based on the direct evidence of PW 1, PW 2, PW 3 and PW 4. The incident took place in the evening between 6.00 and 7.00pm. It was not dark and the accused, deceased and the witnesses knew each other as they came from the same village. This therefore was not a case of an attack by strangers. However, as in any case dependent on visual identification, the court ought to exercise caution by examining all the circumstances carefully to avoid a case of mistaken identity.

13. The evidence established that on the material evening, a gang threatened PW 1 and PW 2, threatened and chased them to their house. They then went to the road where they first threatened PW 4 who was riding his motorbike. He left them and returned after reporting to the chief. The gang started assaulting him until PW 3 came and they turned on him and one of the accused cut his hand. As PW 4 was taking PW 3 to hospital, the deceased emerged to find out what happening and the same gang set upon him and beat him until he collapsed.

14. Under the circumstances, it was necessary for the prosecution to establish all or any of the accused or any of them attacked and inflicted injuries on the deceased and that they did so with the common intention to commit assault the deceased leading to his death. **Section 21 of the Penal Code** deals with the doctrine of common intention and it states as follows:

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

15. In *Eunice Musenya Ndui v Republic* CA NRB Criminal Appeal No. 534 of 2010 [2011] eKLR, the Court of Appeal identified five elements of common intention, namely: that there must be two or more persons; who must form a common intention; the common intention must be towards prosecuting an unlawful purpose in conjunction with one another; to which an offence must be committed in the process; and the offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose.

16. It was thus paramount for the prosecution to adduce evidence that the accused persons were present at the scene of the incident and participated in assaulting the deceased. PW 2 was the key witness who saw the deceased being assaulted. He identified DW 1, DW 2 and DW 5 as the persons who assaulted the deceased. PW 3 identified DW 1, DW 4 and DW 5 were present when he found the gang assaulting

PW 4. PW 4 met DW 3, DW 4 and DW 5 the first time he passed by and then when he returned met the them again. On cross examination, PW 2 was not clear whether DW 3 was present when the incident took place. The testimony of PW 4 only places him at the scene before the unlawful act was committed and any reasonable doubt regarding his involvement must be resolved in his favour.

17. The accused presented alibi defences. In **Wangombe v Republic [1980] KLR 149**, the Court of Appeal had this to say:

When an accused person raises an alibi as an answer to a charge made against him, he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution ought to test the alibi whenever possible but different consideration may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution...

18. In light of the direct evidence of PW 2, PW 3 and PW 4 placing all the accused within the vicinity of the offence, I reject their unsworn statements that they were not present. They were persons well known to the witnesses and testimony of the witnesses was clear and gave a clear timeline on how the events unfolded on the material evening. The prosecution established beyond reasonable doubt that DW 1, DW 2, DW 4 and DW 5 were held be on attacking the members of the Angasa family who were involved in a land dispute between the Nyaosi family. In my view, the common intention was fortified by the testimony of PW 2 that he had met the gang armed that morning, they chased PW 1 and PW 2 while threatening them, assaulted PW 2 and PW 4 and then viciously attacked the deceased with blows and kicks when he went to inquire what was happening. The accused acted together to committing the unlawful act that led to the deceased's death.

19. The accused persons attacked the deceased with blows and kicks while DW 5 cut him with a panga. PW 3 and DW 6 testified that there was a conflict involving land and the attack on the deceased can only be described as a revenge attack which was calculated to cause the deceased grievous harm or death within the meaning of **section 206 (a)** of the **Penal Code**. Their action of taking the law into their own hands cannot be justified under any circumstances. I therefore find and hold that the prosecution proved malice aforethought.

20. I therefore find the accused, **ERICK KIBOI OMBATI (DW 1)**, **EDWARD MAUTI OBIERO (DW 2)**, **EVANS OYONDI MAUTI (DW 4)** and **JUSTINE NYAOSI OMBATI (DW 5)** guilty of the murder of **WILSON ONAMI NYATIENO** and I convict them accordingly. For reasons I have given above, I acquit **HENRY NYABUTO OBIERO (DW 3)** and he is discharged from these proceedings and set free unless otherwise lawfully held.

DATED and **DELIVERED** at **KISII** this **20th** day of **MAY 2019**.

D.S. MAJANJA

JUDGE

Mr Nyangwencha, Advocate for the 1st accused.

Mr Kaburi, Advocate for the 2nd accused.

Mr Omwega, Advocate for the 3rd and 5th accused.

Mr Ondari, Advocate for the 4th and 6th accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.