



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: D.S. MAJANJA J.)

CRIMINAL CASE NO. 22 OF 2018

CONSOLIDATED WITH

CRIMINAL CASE NO. 23 OF 2018

BETWEEN

REPUBLIC.....PROSECUTOR

AND

HENRY NYABUTO NYAGOSIA alias ELIKANA.....1ST ACCUSED

JACKSON ONAMI OMWOYO.....2ND ACCUSED

JUDGMENT

1. **HENRY NYABUTO NYANGOSIA alias ELIKANA** and **JACKSON ONAMI OMWOYO** (“the accused”) are charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. According to the information dated 19th June, 2018, the accused, jointly with others not before court murdered **DAVID NYABUTO (“the deceased”)** on 17th April 2018 at Chitago Sub-location, Boige location in Etago Sub- County within Kisii County. 5 witnesses testified in support of the prosecution’s case while the accused gave sworn testimony and called 2 witnesses.

2. On 20th February 2019, I issued a witness protection order in favour of PW 4. He recalled that on 16th April 2018, at about 7:00pm, he heard a woman crying and when he went outside he found other villagers gathered. They were puzzled and were asking what had happened. His neighbours, Isaya and Ruth, confirmed that their daughter had gone missing after she had been sent to collect milk at Ekona. PW 4 went with the group to Ekona to look for the child but they did not find her. They all decided to go home and resume the search on the next morning.

3. On the next morning, he joined fellow villagers at Isaya’s home to commence the search. PW 4 testified that he joined the group that took a footpath off the main road. On their way back, he saw people running down the hillside towards the main road shouting and chasing down someone whom they caught started to beat up. When he got to the scene, PW 4 saw identified the deceased as the person being beaten. He saw the 1st accused throw a huge stone on the deceased chest while the 2nd accused hit him with a stick. He was able to identify other people who were armed with sticks, and pangas assault the deceased all over his body. The deceased died as a result of the beating. His body was collected by the police and taken to the mortuary. He told the court that the deceased was his cousin and neighbor and the accused were from his village and he had known them since childhood.

4. In his unsworn testimony, the deceased’s son, SKN (PW 1) narrated that on the material day, he heard screams coming from Isaya’s home. When he got there, PW 1 heard Isaya tell the deceased that his child had gone missing and a search party was heading towards a hill to look for the child. He saw the deceased join the search party but in a while, the people turned on him and started chasing him while accusing him of having killed the child. They beat him up with walking sticks and stones. Among those PW 1 saw beating the deceased were the accused persons. PW recalled that the 1st accused hit the deceased with a stone on the chest and the 2nd accused hit him with a walking stick. He testified that he knew the accused persons as they were related to him. PW 1 told the court that he had been taken to the police station and asked to identify the person who had killed the deceased from a line of people. He was able to identify the 1st accused after which the police took his statement.

5. PC James Michuki (PW 5) testified that according to his investigations, the deceased was killed by a mob after a leaflet was found implicating him and four others in the murder of the young girl. When the girl’s body was found on a hill, the crowd turned on the deceased and beat him to death. The accused had been arrested as PW 5 received information that they had been part of the mob. PW 5 invited

Inspector Joel Tirop (PW 3) to conduct an identification parade. PW 3 recalled that on 13th May 2018, he conducted an identification parade in respect of the 1st accused. He testified that PW 1 identified the 1st accused at the parade.

6. When placed on his defence, the 1st accused (DW 1) testified that on the material day, he was in his shop when he heard a group of about 50 to 60 people saying that a child had been found dead at the hill. He rushed to the scene where he saw the half-naked body of a girl, strangled with a piece of cloth. While at the hill, he heard people shouting that one of the people who had killed the girl had also been killed. He learnt that the person who had been killed was the deceased. He testified that the distance from the hill to the road was about 2 kilometers and stated that about 1,000 people were on the road with some coming from other sub-locations. When he got to the scene, he found the assistant chief and four police officers guarding the deceased. DW 1 denied participating in the attack and stated that he found the deceased already dead.

7. The 2nd accused (DW 2) testified that when he learnt about the disappearance of the deceased, he assisted in making inquiries and went back home. The following day, a crowd of about 600 people was split into two groups. One group went towards the river and the other went towards the hill. He was part of the group that went towards the river with three other people including PW 4. He testified that as they were looking for the child, they heard screams from the hillside. They met about 1,000 people and the police and assistant chief were also present. DW 2 stated that he saw the deceased bleeding and lying unconscious on the ground and the police were trying to push the crowd away. He went to the hill and confirmed that the child had been killed and testified that the police carried away both bodies. He told the court that he had been framed for the death of the deceased as he was not present when he was killed.

8. Omwoyo Paul Onduma (DW 3) testified that he knew both accused as they came from the same location. He recalled that on the day in question, he was at the shopping center when he heard that the child who had gone missing had been found dead at the hill. He met DW 1 and they proceeded towards the scene together but got separated when they got near the hill. DW 3 testified that a large crowd of about 50 people was present viewing the body of the girl. As they were standing there, they were informed that the deceased had been killed. DW 3 went back to where the deceased was and found him already dead. He found armed 3 armed police officers and the assistant chief dissuading people from going near the body. He told the court that he did not see DW 1 beat the accused and that he never saw DW 2 that day.

9. Douglas Obara Omwoyo (DW 4) testified that he knew both accused as they came from the same area. He was part of a group of about ten people that went to look for the missing girl at the river and heard people shouting when they got back to the road. He met DW 2 along the road and they went to see what was happening. He testified that they found a crowd gathering at the scene and that the assistant chief and 4 police officers were also present controlling the crowd. He testified that he saw the body of the deceased lying on the road and went with DW 2 to see the child's body on the hill. He later on assisted DW 1 take the bodies to hospital, only to hear that both accused had been arrested.

10. The offence of murder is defined in **section 203** of the **Penal Code** as follows, “*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*” The prosecution is therefore required to prove first, the fact of death of the deceased and the cause of that death; second, that the accused committed the unlawful act or omission that led to that death; and third, that the accused committed the unlawful act or omission with malice aforethought.

11. The fact and cause of the deceased's death is not in dispute. Dr Ambrose Nabwana (PW 2) conducted the post mortem on the body of the deceased on 25th April, 2018 at Tabaka Mission Hospital. He observed that the deceased's clothes were blood stained and his body had multiple cut wounds on the forehead and scalp. The deceased had two cut wounds on the fore head, one measuring about 4 cm and a clean cut wound caused by a sharp object measuring about 8 cm. The body also had a 4 cm long clean cut wound on the left cheek, four lacerations on the left side of the scalp and two bruises on the chest. Internal examination of the head revealed clotted blood on the left side of the scalp and intracerebral bleeding in the brain with increased pressure. He concluded that the cause of death was the intracerebral haemorrhage resulting from trauma.

12. The key issue for determination is whether the accused caused his death. The events leading up to the death of the deceased were rehashed by PW 1, PW 4 as well as the accused and their witnesses. They testified that the deceased was lynched by a mob on suspicion of killing a girl who had gone missing within the area. PW 1 and PW 4 placed the accused at the scene of the crime as active participants in the assault on the deceased that led to his death.

13. In such cases, where the prosecution's case is based wholly on the visual identification of the accused, a careful analysis of the conditions prevailing at the time is necessary to ensure that the accused were positively identified.

14. PW 1 testified he knew the 1st accused as he had seen him before and that 2nd accused was his relative. While I doubt the utility of the identification parade conducted by PW 3, PW 1 was able to pick out DW 1. PW 5 did not test DW 2's identity through an identification parade but this does not diminish the value of witnesses' testimony as both PW 1 and PW 4 knew him. PW 4 also testified that he knew the accused from his childhood. This was therefore a case of recognition rather than identification of a stranger which is considered more reliable (see **Anjononi & 2 Others v Republic NRB CA Criminal Appeals Nos 480, 208 & 209 of 1978 [1980] eKLR**). That being said, the court is still required to exercise caution in examining such evidence to eliminate a chance of mistaken identity which may occur even with close relatives and friends, particularly given that the incident took place where there was a large crowd.

15. The assault on the deceased occurred during the day and although the witnesses gave varying numbers, what is not in doubt is that the because of the events of the day, the crowd was fairly large. According to the accused, the crowd on the road that day had swelled up to the hundreds which would have hindered the view of PW 1 and PW 4 leading to mistaken identity. PW 1 testified that he was initially far from the scene and could not make out the people who first injured the deceased or what weapons they had used to beat him up but stated that when he moved closer, the deceased was still being beaten. PW 4 was close enough to the spot to make out the accused and other people who were part of the mob. He could name them and stated with precision the weapons they were armed with. PW 1 and PW 4 were consistent in the manner in which the accused assaulted the deceased. Both of them confirmed that the 1st accused hit the deceased with a stone on the chest while the 2nd accused had a stick. There was evidence from the post mortem report that the deceased was injured on the chest.

16. Despite the large crowd, I find that both PW 1 and PW 4 were close enough to the scene to identify the accused. Their identification of the accused is further strengthened by the fact that the incident occurred in broad daylight and the accused were both known to PW 1 and PW 4. Nothing was suggested to them in cross-examination that they had a grudge or animus towards the accused or that they would randomly pick out the accused as persons who attacked the deceased.

17. The accused defence was in the nature of an *alibi*. They maintained that they arrived at the scene when the deceased had already been killed and that there were police officers and an assistant chief at the scene fending off crowds from the deceased. To corroborate this version, the accused called DW 3 and DW 4. The Court of Appeal in **Wangombe v Republic [1980] KLR 149** had this to say about alibis:

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. DW 3 testified that he worked in the town center with the 2nd accused and when they heard that the body of the missing child had been found, they proceeded to the scene together. He however stated that they got separated at the hill where the body of the child was found and admitted that he did not see the 1st accused after that as he had gone on ahead of him. DW 3 also testified that he did not see the 2nd accused at all that day. In my view, his testimony did not support the accused *alibi* as he was not with either of them when he first viewed the deceased, who was already dead at the time. Besides, his statement that the 1st accused went to the scene ahead of him raised more suspicion against the 1st accused.

19. DW 4 testified that he went to view the deceased body in the company of the 2nd accused and that they later on went to view the child's body together. An analysis of the 2nd accused testimony shows that he did not mention going to view the body in the company of DW 4. DW 4's evidence appeared contradictory and inconsistent. He was not clear on whether the accused persons were part of any search party and later changed his mind to say that the 2nd accused was part of the group that went to the hill thereby contradicting the 2nd accused testimony that he and PW 4 were part of the group that headed towards the river. Hence, when weighed against the consistent evidence of PW 1 and PW 4 that put them at the scene where they assaulted the deceased, I reject the accused's defence. I find that the prosecution proved beyond reasonable doubt that the accused assaulted the deceased.

20. The prosecution did not prove that it is the accused who inflicted the fatal blow. In order to find the accused guilty of murder, the prosecution had to prove that the accused together with the mob of people shared a common intention to kill or to do grievous bodily harm (see generally **Augustino Orete & Others v Uganda [1966]EA 430** and **Dracaki s/o Afia & Another v R [1963]EA 363** and **Peter Gachoki Njuku & Another v R NYR CA Crim. App. No. 115 of 2002 [2002]eKLR**). Section 21 of the **Penal Code** 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.

21. In **Solomon Mungai v Republic [1965] E.A. 363**, this provision was interpreted by the court thus:

In order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.

22. In this case, although the accused were part of the group that was beating the deceased, the prosecution did not establish that the accused and the other people acted together or were part of a premeditated plan to cause grievous harm or kill the deceased. While I find that the accused engaged in an unlawful act that led to the death of the deceased such death may not have been intended or anticipated by the accused.

23. I therefore find the accused, **HENRY NYABUTO NYANGOSIA alias ELIKANA** and **JACKSON ONAMI OMWOYO**, guilty of the lesser offence of manslaughter contrary to section 202 of the **Penal Code** and I convict them accordingly.

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

D.S. MAJANJA

JUDGE

Mr Bigogo, Advocate for the 1st accused.

Mr Kaburi, Advocate for the 2nd accused.

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