



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM : R.E. OUGO J**

**CRIMINAL CASE NO.109 OF 2012 (MURDER)**

**REPUBLIC.....PROSECUTOR**

**AND**

**DENNIS ARUBA ONYERI.....1<sup>ST</sup> ACCUSED**

**CHARLES ONDIBA.....2<sup>ND</sup> ACCUSED**

**BENARD OYUGI.....3<sup>RD</sup> ACCUSED**

**BONFACE NYABERI.....4<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. By an information dated 13/8/2012 the accused persons, **Denis Aruba Onyeri (1st Accused)**, **Charles Ondiba (2nd Accused)**, **Benard Oyugi (3rd Accused)** and **Bonface Nyaberi (4<sup>th</sup> Accused)** are charged with the offence of murder contrary **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that; on the night of 8<sup>th</sup> /9<sup>th</sup> August 2012 at Sosera village, Sosera sub-location of the South Masaba District within Kisii County they jointly murdered **Benard Nyarimbasi**.
2. The prosecution called six (6) witnesses to prove its case while the accused gave sworn testimonies in their defense. W.A. Okwany J. heard the evidence of 4 prosecution witnesses (PW1 to PW4). I took over the matter and proceeded with the matter from where it had reached having complied with **Section 200** of the **Criminal Procedure Code**.
3. **E.M.O (PW1)** testified that he used to live with his brother in Nairobi but on 8<sup>th</sup> August 2012, he was at home as schools were closed. He was home at 6pm. He went to visit his cousin the deceased at his house which doubled up as a kiosk. The deceased sent him to pick his jacket and after about 15 minutes on his return, the 1<sup>st</sup> accused knocked on the door and asked for 85 pieces of jaggery but declined to pay for them. He asked for 64 more pieces and refused to pay for those too.
4. The 1<sup>st</sup> accused then took out a panga and hit the deceased on the head and also cut PW 1 on the head. He opened the door for the other accused persons who came in and attacked them and left them for the dead. PW 1 recalled that the 2<sup>nd</sup> accused and 4<sup>th</sup> accused were armed with pangas and the 3<sup>rd</sup> accused had a knife. The 1<sup>st</sup> accused hit PW 1 on the head with a nut causing him to fall down and the 4<sup>th</sup> attacked hit him with a panga. He testified that he knew all the accused persons very well as they were his cousins at home and noticed that they did not have a good relationship with the deceased.
5. PW 1 told the court that he regained consciousness the following morning at about 7:00 a.m. and was taken to Hema Hospital. He testified that the deceased had been injured severely. His tongue, eyes and fingers had been removed. During cross- examination PW1 stated that it was a little dark but since the kiosk was small and the accused persons had a torch, he was able to see the accused persons. He recalled that the 1<sup>st</sup> accused had worn a jacket and a shirt and a black trouser, the 2<sup>nd</sup> accused wore a sweater and the 4<sup>th</sup> accused wore a shirt. He recorded his statement while in hospital where he was admitted until September 2012. He mentioned all the accused persons in his statement to the police.
6. On the morning of 9<sup>th</sup> August 2012, Samwel Abeba (PW 2) received information that his son PW 1 was badly injured and had been taken to hospital. He testified that his son sustained severe injuries and was admitted at Hema Hospital for a long time. PW 2 was stood down as he was giving evidence in chief. He was recalled but was later declared a hostile witness on the prosecution's motion for recanting his recorded statement that his son PW 1 had told him who the assailants were. Upon cross-examination by both the prosecution, defence counsel and on

re-examination by the court, PW 2 then stated that PW 1 had given him the names of those who had attacked him.

7. **Monica Nyaboke Nyiarimbasio (PW 3)** testified that her son the deceased went to his place of work where he used to sell sugar on the material day. At about 5:00 p.m. she asked PW 1 to tell the deceased to go back home quickly when he came to pick the deceased's jacket. The deceased did not return home that night. The following morning at about 7:00 a.m. she heard a lady screaming and rushed to where the sound was emanating from. PW 3 sobbed as she described the state in which she found the deceased. She stated that he had been slaughtered and his head decapitated.

8. **Francis Gekonge Omondi (PW 4)** the chief of Ekerongo location Nyaribari testified that all accused persons hailed from his location. On 9<sup>th</sup> August 2012, he was at home when he received a call from one of the community policing members at about 7.00a.m informing him of the deceased death in Sosera sub-location. He rushed to the scene where there was a large crowd and went inside the kiosk. He found the deceased lying on a sack of jaggery. His neck had been cut off completely and there was a pool of blood near the body. He informed OCS Ramasha Police Station who took up the case and took the body to Gucha mortuary.

9. **P.C. Samuel Marwa (PW5)** testified that he took over the matter from his retired colleague Boniface Muli who had investigated the matter. He recorded that on 9<sup>th</sup> August 2012, at 07.00 hours he received a report from the area chief that 2 bodies were lying in a kiosk that was used to sell jiggery. The OCS mobilized officers and proceeded to the scene. At the kiosk they found the body of the deceased on top of the jaggery with 2 deep cut wounds around his neck. PW 1 who was aged 12 years at the time was taken to Hema hospital. They visited him at the hospital and he mentioned the 4 accused persons as the assailants. He testified that the area chief and community policing assisted police in arresting them.

10. **Doctor Peter Morebu (PW6)** testified on behalf of Dr. Boreme who had gone to do his further studies at the time. He testified that he had worked with Dr. Boreme at Kisii Teaching Referral Hospital and was familiar with his handwriting. He presented the post mortem report which had been prepared on 16<sup>th</sup> August, 2012 at Gucha hospital mortuary. The doctor had observed that the deceased was about 25 years old. His external appearance showed multiple cut wounds on the right hand, a cut on the anterior neck measuring around 15 centimeters extending to the posterior part of the neck. He also observed multiple cut wounds on the frontal region on the face with complete cut of the neck veins both right and left. Internal examination revealed that the trachea was completely cut. The rigor vessels in the neck had also been severed completely. He also noted a fracture of the frontal bone on the spinal column. The cervical bones were fractured and lastly he noted a complete cut of the spinal at the level of C3. The doctor concluded that the deceased died as a result of hemorrhage shock secondary to penetrating injury to the neck.

11. In his defense, **Denis Arumba Onyari (DW1)** testified that on 8<sup>th</sup> August 2012 he was arrested by a customer he was ferrying. The customer asked him to take him to the Ramasha police station and told him that he was a police officer and had arrested him for not having a helmet and a reflector. He was later charged with the murder of the deceased. He denied seeing the deceased that night and testified that his place was about 142 kilometers from the deceased's place.

12. The 2<sup>nd</sup> accused person testified that he was at home on 8<sup>th</sup> August, 2012 planting potatoes with his father. The following day he was at the shamba when his father was called to the scene. His father came back and informed him that the deceased had been murdered. As they were making arrangements for the burial, a village elder told him that the chief had summoned him to write a statement. He was taken to Ramasha police Station and placed in the cells. He told the O.C.S that he knew nothing about the deceased's death. He stayed there for two weeks and was arraigned before court to face the charges. He testified that he had no grudge against the deceased who was his step brother.

13. The 3<sup>rd</sup> accused person, Bernard Oyugi denied involvement in the deceased death. He testified that on the material day he went to the shamba. At 9.00a.m. The following day, he heard people crying from Sosera location. He found out about the deceased's death and assisted in building for him. Two village elders asked him to see the chief. When he went there the chief arrested him and handed him over to the police. Investigations were done and he was charged with the murder of the deceased. He denied knowing how the deceased had died.

14. The 4<sup>th</sup> accused person, Boniface Nyakeri Magoi testified that he was at home on the night of 8<sup>th</sup> August, 2012 whilst harvesting his crops he was summoned by the chief who asked him if he had killed the deceased. He denied but was arrested and taken to Ramasha police station. He testified that he did not know the deceased and urged the court to dismiss the case as the charges against him were false.

15. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> accused filed written submission contending that it was at night when the incident was said to have occurred and that PW 1 had not testified that there was light at the time or that he knew the accused prior to the date of the alleged incident. He argued that an identification parade ought to have been conducted to identify the attackers but that was never done. Counsel also contended that the jaggery sold in the deceased kiosk had not been produced as an exhibit. He argued that PW 2 was never called back to the witness box to testify as a witness after he was stood down. He urged the court to dismiss the case as the prosecution had not proved its case. The prosecution relied on the evidence on record.

16. The accused are charged with the offence of murder contrary to **Section 203** of the **Penal Code** which defines the offence of murder as follows, "*any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*" From that definition the prosecution is required to prove the death of the deceased, the cause of the death, the unlawful act or omission on the part of the accused resulting in the death of the deceased and malice aforethought on the part of the accused person to prove their case against the accused person.

17. On the first ingredient, Doctor Peter Morebu (PW 6) adduced medical evidence that ascertained the fact and cause of the deceased's death. He produced the post-mortem form filled by his colleague, Dr. Boreme in line with **section 77** of the **Evidence Act**. Based on his examination of the deceased's body Dr. Boreme concluded that the cause of death was hemorrhage shock secondary to penetrating injury to the neck. The fact of the deceased's death was also corroborated by the evidence of PW1, PW 3 and PW4 who saw the body of the deceased at the scene of crime.

18. To prove that the accused caused the death of the deceased, the prosecution relied on the direct evidence of PW 1 who was the only witness at the scene. It is a well-established principle of law that although a conviction may be founded on the evidence of a single witness, that testimony must be thoroughly tested to ensure it is free from error. In **Abdallah bin Wendo & Sheh bin Mwambere v Regina 20 EACA166**, the court stated;

*“Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification, especially when it is known that the conditions favoring a correct identification are difficult. In such circumstances other evidence, circumstantial or direct, pointing to guilt is needed.”*

19. Similarly, in the more recent case of **Kiilu & Another v Republic [2005]eKLR**, the Court of Appeal held that;

*“Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error.”*

20. In the present case, PW1 testified that on the material day at about 6:00 p.m., he had visited the deceased at his kiosk, when the 1<sup>st</sup> accused came and asked for pieces of jaggery from the deceased and refused to pay for them. When he insisted that he be paid, the 1<sup>st</sup> accused attacked the deceased on the head with a panga and let in the rest of the accused. The 2<sup>nd</sup> and 4<sup>th</sup> accused were also armed with a pangas while the 3<sup>rd</sup> accused was armed with a knife. The accused attacked the deceased and turned on him too.

21. PW 1 testified that it was a little dark when the incident occurred at 7pm and there was no lamp or electricity in the kiosk. Where the conditions of identification are difficult as in this case, the court is required to interrogate whether the circumstances prevailing at the time were adequate for a positive identification. The court may ask how long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witnesses ever seen the accused before? How often? How long elapsed between original observation and the subsequent identification to the police? (See **R-vs- Turnbull & Others (1976)3 All ER 549**)

22. PW1 testified in cross-examination that the accused had a torch when they carried out attack. They were in close proximity and he could recall what they were wearing at the time of the incident. The identification of the accused by PW 1 is buttressed by the fact that he knew the accused persons as recognition is considered more reliable than the identification of strangers. PW 3 confirmed that she also knew the accused persons and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused admitted that they knew PW 1. In the case of **Anjononi & other v Republic (1980) KLR 59** the court stated as follows;

*“This was however, a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification by a stranger because it depends upon the personal knowledge of the assailant in some form or others”*

23. The accused persons counsel argued that an identification parade should have been carried out to confirm the identity of the accused. It is my considered view that the conducting an identification parade would not have served any useful purpose as PW 1 was able to recognize the accused and mentioned their names to the police when they visited him in hospital where he was admitted after the assault.

24. The prosecution applied to declare PW 2 a hostile witness as he had recorded a statement indicating that PW 1 had given him the names of the accused persons which led to their arrest. He recanted this during trial but upon cross-examination, PW 2 went back to his recorded statement that PW1 had disclosed the identity of the assailants to him. The value of his evidence, having been declared a hostile witness is negligible as he is deemed an unreliable witness. (See **Daniel Odhiambo Koyo v Republic KSM CA Criminal Appeal No. 182 of 2010 [2011]eKLR**). That being said, it is my considered view that the evidence of PW 1 was sufficient in itself to prove the identity of the accused since PW 2 did not witness the attack. Further, PW 5 testified that they recorded PW 1's testimony in the hospital and he was able to name the assailants to the police.

25. The accused persons raised alibi in their defences. The 1<sup>st</sup> accused testified that his place was 142 kilometers from his place and that he did not see the deceased that day. The 2<sup>nd</sup> accused testified that he was at home on the material night. The 3<sup>rd</sup> accused testified that he only found out about the death of the deceased the following morning and was not involved in his murder. As for the 4<sup>th</sup> accused, he testified that he was at home at the material time and was not involved in the murder of the deceased.

26. In criminal cases, the burden of proof will always lie on the prosecution. The accused does not assume the onus of proving his alibi. It remains on the duty of the prosecution to prove the falsity of the alibi (See **Victor Mwendwa Mulibe vs Republic [2014] eKLR**). Where the accused raises the defence of alibi for the first time in his defence, the best approach is to weigh the alibi against the evidence of the prosecution. (See **Juma Mohamed Ganzi & 2 Others v Republic [2005]1 KLR 52**)

27. I have weighed the prosecution's case against the defences advanced by the accused and I find that the evidence by the prosecution was overwhelming and trounced their alibi defences. The evidence of the prosecution's main witness PW 1 was consistent, vivid and clear. I warn myself of basing the conviction on the evidence of a single witness. No reason was given on why he would make up evidence against the accused persons. I therefore find that the prosecution proved that the accused persons caused the death of the deceased. Each played a part which PW1 described vividly in his evidence.

28. The last issue is whether the prosecution proved the element of malice aforethought. **Section 206** of the **Penal Code** provides that malice

aforethought includes-

- 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.*

29. The accused persons jointly attacked the deceased with pangas and a knife with full knowledge that their acts would cause death or grievous harm to the victim within the meaning of **section 206 of the Penal Code**. The medical evidence illustrated the severity of the injuries by the deceased. The multiple fractures, his spine was severed and his head decapitated. PW1 was also beaten to unconsciousness. There is no doubt that the accused persons did not intend to leave any witnesses alive to tell tales.

30. There is no evidence that any one of them inflicted the fatal blow. However, under **Section 21 of the Penal Code**, “*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.*”

31. The Court of Appeal discussed the doctrine of common intention in the case of **Dickson Mwangi Munene & Another v Republic CA NRB Cr. App. No. 314 of 2011 [2014]eKLR** and held that;

*“As we have stated, common intention does not only arise where there is a pre- arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In Dracaku/o Afia v R [1963] E.A 363 where “there was no evidence of any agreement formed by the appellants prior to the attack made by each “it was held that “that is not necessary if an intention to act in concert can be inferred from their actions”.*

32. A common intent to cause grievous harm or kill the deceased can be inferred from the fact that the accused persons were all armed with dangerous weapons when they jointly attacked the deceased.

33. I find that the prosecution has proved its case against each accused person beyond any reasonable doubt. I therefore find **Denis Aruba Onyeri, Charles Ondiba, Benard Oyugi and Bonface Nyaberi** guilty of the murder of **Benard Nyarimbasi** and I convict them accordingly.

**Dated, signed and delivered at Kisii this 17<sup>th</sup> day of July 2019**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

**1<sup>st</sup> Accused Present**

**2<sup>nd</sup> Accused Present**

**3<sup>rd</sup> Accused Present**

**4<sup>th</sup> Accused Present**

**Mr. Omwega For the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused**

**Mr. Kaburi For the 4<sup>th</sup> Accused**

**Mr. Otieno Senior Prosecution Counsel Office of the DPP**

**Ms. Rael Court clerk**