



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO.34 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

BENTA AKELO OMWAI.....1ST ACCUSED

AMOS ORWA OGUNA.....2nd ACCUSED

GEORGE OTIENO OMWAI.....3rd ACCUSED

DENIS OCHIENG ONYANGO.....4th ACCUSED

SIPROSE AUMA ODWUOR.....5th ACCUSED

JENIFER ADHIAMBO OKECH.....6th ACCUSED

JUDGMENT

[1] The six accused, **Benta Akelo Omwai, Amos Orwa Oguna, George Otiemo Omwai, Denis Ochieng Onyango, Siprose Auma Odwuor** and **Jennifer Adhiambo Okech**, are charged with murder, contrary to **Section 203** read with **Section 204** of the **Penal Code**, in that on the 17th November 2017, at Kotieno Location, Rachuonyo – Homa Bay County, they murdered Charles Omwai Oduk.

[2] The case for the prosecution was that the first accused (**Benta**) was the second or third wife of the deceased, who was a polygamist with one Karen Anyango, being his first wife and mother to **Philemon Ochieng Omwai Ngaa (PW1)**, who was on the material date at 9.30 p.m. at his home when he was attracted by shouts and noises. He went outside his house and realized that it was his father (deceased) who was wailing nearby. He proceeded to the scene and heard the deceased asking “**why are you killing me**”. He was at the time addressing a group of people dressed in the religious garbs of the “**Legio-Maria**” faith. There was moonlight and this assisted Philemon (PW1) to see and identify by recognition six of the people in the group.

These included second accused (**Amos**), fifth accused (**Siprose**) and sixth accused (**Jennifer**). He implied that the group assaulted the deceased.

[3] He (**PW1**) indicated that the group took off but the three aforementioned accused sat down while he interrogated them. He called the police to the scene after enraged villagers appeared there with the intention of attacking the three. But, prior to the arrival of the police, the third accused (**George**) appeared and took off on being questioned as to why he allowed the deceased to be assaulted. He (**PW1**) indicated that the fourth accused (**Denis**) appeared at the scene with administration police officers alleging that his priest (i.e. accused two) had been attacked.

The police arrested some of the suspects even as they took the deceased to Rachuonyo hospital after he complained of severe abdominal pains. He was later transferred to Kisii hospital for a scan and returned to Rachuonyo hospital thereafter. He passed away while undergoing treatment.

[4] The Assistant Chief of Kasimba location in Rachuonyo **Pius Odoyo Ayugi, (PW2)**, was at his home on the following 18th November 2017, when he received a report at 8.00 a.m. that the deceased had been beaten up by unknown people on the previous night. He proceeded to the scene of the incident and found a mob of people in a frenzy and preparing to set some houses on fire allegedly in search of the third accused who was said to have obstructed Philemon (**PW1**) from rescuing his father from those assaulting him. He (**PW2**) traced the third accused in the vicinity and arrested him.

He (**PW2**) was aware that the deceased and the first accused, had disagreed over religion matters as the deceased belonged to the “**catholic**”

faith while the first accused belonged to the “**Legio Maria**” faith.

[5] A neighbour of the deceased, **Daniel Omondi Juma (PW3)**, was on the material date at 9.30 p.m. asleep in his house and feeling “under the weather” when he was awakened by his wife who told him of noises she heard nearby. He ventured outside his house and called another neighbor called **Ben**, who told him that a group of people had invaded the home of the deceased and were approaching their directions. Shortly thereafter, they saw the second, fifth and sixth accused who agreed to return to the homestead of the deceased after being requested to do so.

[6] Daniel (**PW3**) indicated that the deceased was injured on the stomach and that he (deceased) informed the police that members of the “legio-maria” sect were responsible for the injury. He (**PW3**) confirmed that the fourth accused arrived at the scene with administration police officers.

A daughter of the deceased, **Sophy Akinyi Omwai (PW4)**, was on the material date informed by her mother (accused one) that church members of the “legio-maria” sect would be coming to their home for prayers. Indeed, the church members arrived dressed in their religious garb and after moving around the house and sprinkling some water, they entered the house and forcefully removed the deceased from the bedroom into the living room despite his protest. He was in the process assaulted by those people.

[7] Sophy (**PW4**) indicated that she identified the second, fourth, fifth and sixth accused as some of those who assaulted the deceased and caused him bodily injuries from which he succumbed while undergoing treatment in hospital.

PC Kennedy Wainaina (PW5), investigated the case after which he preferred the present charges against all the six accused who were arrested and treated as suspects for the assault and murder of the deceased.

[8] The case for the defence was a denial by each of the accused of their alleged involvement in the offence. They implied that their mission at the home of the deceased on the invitation of their faith member (**DW1**) was innocent but was misconstrued by some members of the deceased family and a section of the local villagers such that they were intimidated and physically attacked as they left the scene on the way to their nearby church. They also implied that they were not collectively or individually responsible for the fatal injury occasioned to the deceased in the commotion which erupted at the scene. They pointed a finger at the person known by the name Ben and indicated that he was the main culprit in what befell the deceased.

[9] The first accused gave a detailed explanation of the circumstances which led to the presence of members of her church in her homestead.

She indicated that matters turned ugly at the instigation of her step son (**PW1**) who became violent towards the members of her church and herself. She contended that she did not commit the offence and was implicated by the person called Ben.

[10] Accused two indicated that he was the priest leading the prayers at the homestead of the deceased but was confronted by some members of the deceased family and ordered to pack his belongings and leave the place.

Together with some members of his prayer group, they walked to their nearby church but were stopped on the way by a person who insisted that they had to return to the scene. They did so and were subjected to threats and intimidation at the behest of Philemon (**PW1**). Upon being advised to call for help, he (accused two) made a phone call to the fourth accused who arrived after regular police officers had already arrived at the scene. He contended that he did not commit the offence and could not tell what really happened to the deceased on the material night.

[11] Accused three, indicated that as a step son of the deceased, he was perceived to be a stranger in his homestead and among his family members. He considered himself a member of the deceased family by virtue of being the son of the first accused, one of the deceased’s wife. He implied that he was implicated in the murder of the deceased on account of his rejection by his family members and being viewed as a threat to the family. He indicated that during the commotion at their homestead, he was cut on the head with a panga (machete) by the person called Ben who also threw a hand kick at him but missed and landed on the abdomen of his father (deceased) who was really.

[12] George (accused three) contended that it was Ben who injured the deceased. He also said that his brother (**PW1**) used the blunt side of a panga to hit him and that he was rescued by his priest who forewarned him of a plan by some people to harm him. He was therefore taken away by the area chief but was still attached and beaten up by a group of people. He was taken to Oyugis police station where he was locked and later changed with the present offence which he denied.

[13] Accused four explained the circumstances which led him to the scene. He implied that he was not in attendance at the prayer meeting and was called to the scene to rescue his priest (**A2**) who had been attacked while leading a prayer group. He proceeded there in the company of two administration police officers who left the scene on realizing that regular police officers were already there. He was taken there by a “boda” (motor cycle taxi) operator, **Eric Omondi (DW7)**, but was arrested and taken to the police station together with other members of his church. He denied the charge and implied that he was only a “good Samaritan” to the rescue of his religious leader.

[14] Accused five and six agreed with the defences put forth by their co-accused and adopted them insofar as they relate to the events of that night at the homestead of the deceased.

Both of them denied the charge and implied that they were arrested and changed without good cause.

[15] This court’s consideration of the evidence in its totality sees that there was no dispute as to the cause of death. The postmortem report

(P. Exhibit 1) indicated that the deceased died from a severe abdominal injury occasioned most probably by a blunt force.

What therefore emerges as the basic issue for determination is whether the six accused or any one of them was responsible for assaulting the deceased and causing him fatal injuries. The key witnesses in that regard were Philemon (PW1) and Sophy (PW4).

Pius (PW2) and Daniel (PW3) did not really witness what happened to the deceased and could not therefore tell how he was injured and by whom.

[16] The investigating officer (PW5), merely stated what he was told by his superior officer, the officer commanding station (OCS), at Oyugis police station. He (PW5) did not even visit the scene and apparently preferred the charge against the six accused merely because they were arrested as the suspects. His investigations were not worthy of anything and his appearance in court to testify was merely a formality.

[17] Coming back to the evidence of Philemon (PW1), his demeanour while testifying gave strong indications that he was economical with the truth and had a lot which he was hiding. He was in fact pointed out by some of the accused as the person who instigated and/or provoked the ensuing fracas and indeed incited his family members and some villagers against the prayer group which had gathered at the homestead of the deceased. In any event, his evidence did not show or prove that he actually saw the deceased being assaulted by the accused or anyone of them.

His allegation that he saw the assailants could not have been the truth. What he saw is a group of people wearing “legio Maria” religious garbs.

[18] Even if he saw the assailants, it was not possible for him to identify and recognize them during the night on account of moonlight whose intensity was not described. The alleged identification and/or recognition was not watertight or reliable.

In cross-examination, he (PW1) insisted that he relied on torch light to identify the assailants rather than the moonlight. Even if torch light was the source of light, there was no description of its intensity.

[19] The contradiction by the witness (PW1) with regard to the source of light, was a strong indication that he was not speaking the truth and was thus an unreliable person. By the same token, his evidence against the accused or anyone of them was also unreliable to prove that they were part of those who may have assaulted the deceased and occasioned him fatal injury to his abdomen.

[20] With regard to Sophy (PW4), her demeanour suggested that she was a person under siege and torn between the first and second families of the deceased. She could not pinpoint the actual people or person who assaulted the deceased and inflicted the fatal blow on his abdomen. She made a general statement that the deceased was beaten up by the people in religious garbs as he protested being forcefully moved to the living or sitting room from the bedroom. She alleged that those people included the second, fourth, fifth and sixth accused simply because they were her non-family members who were in the dock. It is instructive to note that she did not mention her mother (accused one) and brother (accused three) as persons who also assaulted the deceased, yet they were arrested together with the persons she mentioned for the same unlawful act. She also mentioned the fourth accused as one of the assailants, yet there was undisputed evidence even from the prosecution that he arrived at the scene only after the act and after being called there by accused two.

[21] Clearly, the evidence of Sophy (PW4) against the accused or any one of them was wanting in credibility and substance. It cannot therefore be relied upon for a finding that the accused either jointly or severally were the persons responsible for the fatal injury inflicted upon the deceased.

This was an unfortunate incident but it would appear that the prosecution went for the wrong persons as the culprits. The suspicion cast upon them was based on their presence at the scene but that was not sufficient to prove their alleged culpability in the death of the deceased.

[22] Quite intriguing, the person called Ben or Ben Aoro, was a person of interest in the death of the deceased, yet he was excluded as a key suspect and as a witness for the prosecution. There was credible evidence from the defence that he actively participated in the mayhem that erupted at the home of the deceased on the material night and may have been the person who inflicted the fatal blow or kick on the abdomen of the deceased.

[23] All in all, the prosecution failed to discharge its burden of proof in showing beyond reasonable doubt that it was the six accused or any one of them who assaulted and caused fatal injury to the deceased.

Consequently, this court finds all the six accused **NOT GUILTY** as charged and acquits them accordingly.

J.R. KARANJAH

JUDGE

07.11.2019

Dated and delivered this 7th day of November, 2019