



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CORAM: D. S. MAJANJA, J.

CRIMINAL CASE NO. 19 OF 2017

BETWEEN

REPUBLIC.....PROSECUTOR

AND

NAHASHON NYANGA OKONGO alias

MREFU alias JALEGO.....ACCUSED

JUDGMENT

1. The accused, **NAHASHON NYANGA OKONGO ALIAS MREFU ALIAS JALEGO** (“the accused”) was 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)*. It was alleged that on 25th June 2017 at Kaloleni in Kisumu East Sub-County within Kisumu County, the accused unlawfully murdered **DICKSON ODONGO ODHIAMBO ALIAS OWINO** (“the deceased”). The prosecution case was that the accused murdered the deceased at the Kachok dumpsite on allegations that the deceased was stealing from him. After denying the charge, the prosecution called 10 witnesses to support its case. 3 of the prosecution witnesses, **PW 1, PW 2 and PW 3** were protected witnesses under the *Witness Protection Act, 2010*. The accused gave a sworn testimony in his defence and called 2 witnesses.

2. **PW 1** testified that on 25th June 2017, the accused who was known to him as *Mrefu*, came to the dumpsite with another boy and the deceased who **PW 1** referred to as *Buda*. The two were holding the deceased by the waist and when the deceased inquired what was going on, the accused ordered him to be quiet. The deceased asked **PW 1** to pick his phone and thereafter, the accused and the other boy left with him. After a while, two boys came back in a *tuk tuk* and told **PW 1** that the deceased had requested for his phone, but **PW1** declined to hand it over since the deceased had not asked him to release it. On the following day, the deceased’s friend who had run away, came for the handcart and when **PW 1** inquired about the deceased, he told him that the accused had taken him to the Kachok dumpsite and killed him. They went and came back with the deceased’s brother and **PW1** gave him the phone. **PW 1** stated that he saw the accused for the first time on the material day.

3. **PW 2** recalled that on 25th June 2017, as he was leaving the dumpsite for Kibuye, he saw four people, one of whom was the accused, arriving in a yellow *tuk tuk* at the dumpsite. He stated that he saw the accused beating the deceased with a twisted piece of metal while accusing him of stealing as they entered the dumpsite. **PW 2** also noticed that the deceased’s hands had been tied. When they entered the dumpsite, **PW 2** left to his own business. He heard that on the following day, the deceased had died at the dumpsite. The deceased’s body had already been removed from the dumpsite by the time **PW2** arrived. **PW 2** identified a pair of blackish trousers that the deceased had worn when he saw him and blue trousers that the accused was wearing. According to **PW2**, the accused, whom he knew as *Mrefu Jalego* dealt in scrap metal while the deceased, whom he referred to as *Owino*, was employed by the accused.

4. **PW 3** testified that he knew both the accused and the deceased who worked for the accused at the dumpsite. He recalled that on 25th June 2017, at about 8.00 am, a *tuk tuk* carrying people, who were quarrelling inside stopped, at the dumpsite. **PW 3** could not identify the occupants who had alighted at the dumpsite but in a short while, some boys came and told him that a boy who had stolen from the accused was being beaten inside the dumpsite. **PW 3** further testified that when he went close, he saw the accused and 3 other people asking the deceased about the stolen things. He also saw the accused beat the deceased with a piece of metal adding that as we went to fetch water, he saw one of the boys dragging the deceased. As he was being beaten, the deceased then gave the accused a phone number which the accused called and inquired about money. It appeared that the accused and the person called did not agree and the accused disconnected the call. The accused continued beating the deceased with a metal object, and ignored their pleas to stop. **PW 3** testified that the accused, told **PW 3** and the two others to go if they could not pay the KShs. 5,000/- that he was demanding from the deceased. Thereafter, the accused and the three others left together, the deceased was still walking. The accused stated that they were going to look for the deceased’s uncle to get the money. **PW 3** and the others also left to inform their team leader about the incident.

5. The dumpsite manager, John Ochieng Orinda (PW 4), testified that on 25th June 2017, while at a meeting in Kondele, he was informed that someone had died at the dumpsite. He reported the matter to the investigating officer, Corporal David Walubengo (PW 9) who later confirmed the death. Two day later, he spoke to PW 3 who informed him that the accused had come to the dumpsite with other people in a *tuk tuk* and upon alighting they went to the back side of the dumpsite. PW 3 told him that when he went to assist the deceased as he was being assaulted, the accused became hostile causing him to leave. PW 4 testified that he knew the accused as Jalego as he used to sell scrap metal and visit the dumpsite often.
6. A police officer based at the Moi Stadium Base, Joseph Korir (PW 9) recalled that on the material day, he received a call from PW 4 informing him that a body had been found at the dumpsite. He proceeded to the dumpsite and found a body near the river. It was apparent to him that the deceased had been badly beaten. He called police officers from Kondele Police Station who came and collected the body. PC Chrispinus Abula (PW 8) took photographs of the crime scene including the body of the deceased and produced them in evidence.
7. Moses Otieno Odhochi (PW 5), an assistant chief at Kaloleni recalled that on 27th June 2017 he was informed that the accused had killed someone and dumped the body at the dumpsite. PW 5 started looking for the accused who presented himself before him on the following day after learning that he was being looked for. PW 5 recalled that the accused informed him that the deceased was his employee and had stolen copper wire worth Ksh. 100,000/- and had ran away. The accused further informed him that he caught the deceased but he had refused to disclose and as he took the deceased towards the dumpsite in a *tuk tuk*, the deceased jumped and fled and the accused had not seen him since then. PW 5 went with the accused to the chief, Kisumu Town, Willis Anyona Ochieng (PW 6) and when questioned, the accused repeated what he had told PW 5 following which the matter was referred to the DO's office where the accused recounted the same story. Thereafter, they took the accused to Kondele Police Station. PW 5 also started looking for people working with the accused and took them to Kondele Police Station.
8. PW 6 testified that on 28th June 2017, PW 5 reported to him about the murder incident involving the accused. After directing PW 5 to write an incident report, PW 5 arrived later with the accused, a brother to the deceased and other people who had witnessed the incident. He confirmed that he was present when the accused stated that he had heard about the deceased's death from the boys at the dumpsite.
9. PW 9 told the court that after the accused and the other witnesses were brought to the police station, he took their statements which implicated the accused. He stated that the witnesses under protection stated that the accused had together with the deceased and two others gone to the dumpsite in a *tuk tuk*. They had also described the accused by the clothes he was wearing on the material day, a blue jeans trouser which was produced as exhibit 2, a grey shirt produced as exhibit no. 1, and *Sahara* type shoes produced as exhibit 3. He stated that the accused led him to his house in Carwash area and PW 4 recovered the items in his house, including the clothes that he wore on the material day. PW 9 also visited the dumpsite where the manager introduced him to other street boys but the boys were afraid of making statements for fear of victimization by the accused. Two of them gave statements on condition that they would be protected which was allowed following an application in court. PW 9 also testified that one of the witnesses confirmed that he saw the accused beating the deceased with a stone which he recovered and produced as exhibit 8.
10. In his sworn defence, the accused testified that on 25th June 2017, he was in Kakamega to collect plastic for recycling that he came back to Kisumu at about 7.30 p.m. He stated that he went to work on 26th and 27th June 2017 when he left for Nairobi arriving on the morning of 28th June 2017. He then travelled back to Kisumu arriving on 29th June 2017. When he went to work, he was informed that he was being summoned by the chief but did not know the reasons for the summons but only speculated it concerned a previous incident of stealing involving his sister. He stated that the chief and assistant chief took him to the DO's office where he was arrested and taken to Kondele police station. The accused maintained that he did not know the deceased and denied seeing him on the material day as he had gone to Kakamega. He added that his business dealt with plastics and not copper wire as alleged.
11. John Otieno (DW 2), testified that he was with the accused on 25th June 2017 in Kakamega where the accused had gone to buy plastics from DW3's yard from about 7.30 am till they parted at about 6.30 pm. Enoch Ananda (DW 3) testified that the accused came to buy plastics from his yard, at about 8.00am, and he left him at 9.00am with DW 2 as they had already agreed on the price.
12. In order to prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, the prosecution must prove 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*.
13. The fact and cause of death the deceased is not in dispute. Dr Mathew Oluoch (PW 7), a medical doctor at the Jaramogi Oginga Odinga Referral and Teaching Hospital, conducted the post mortem on the body of the deceased on 6th July 2017. He observed that the body had a wound on the left parietal skull measuring about 6cm x 4cm, bruises on the face and ears, multiple bruises on the chest, multiple cut wounds on the lower limbs, a fracture on the frontal parietal area and massive bleeding in the brain. He concluded that the cause of death was excessive brain hemorrhage due to injury by a sharp object in the head.
14. The critical question for determination is whether the accused caused the unlawful death of the deceased. The answer to this question hinges on whether the accused person was properly identified as one of the people who assaulted the deceased causing his death. None of these witnesses saw the accused commit the offence.
15. The evidence available is largely circumstantial. Therefore, I shall be guided by the well-settled principles that a court should consider in relying on circumstantial evidence as a basis for a conviction. As held in the case of ***Sawe v Republic Criminal Appeal No 2 of 2002 (2003) eKLR***, the Court of Appeal restated the principles which ought to be applied when dealing with circumstantial evidence in the following terms:

In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this

inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.

16. In deciding this issue, I bear in mind that the accused in denying the charge against him, advanced an alibi defence. His defence that he was not present at the dumpsite on the material day as alleged was supported by the testimony of DW 2 and DW 3 who stated that he was in Kakamega on the material day purchasing plastic. In an ideal situation, an alibi defence ought to be raised at the earliest opportunity to enable the prosecution test the evidence for the reason that the burden of proof always remains with the prosecution, even when an alibi defence is raised. The Court of Appeal in **Kiarie v Republic [1984] KLR 739** held that;

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.

17. **I am therefore required to weigh the prosecution evidence against the evidence advanced by the accused, to determine whether the prosecution has established its case beyond reasonable doubt linking the accused to the murder of the deceased.** Primary to this question is the testimony of PW 1, PW 2 and PW 3.

18. PW 1 recalled that the accused together with another boy came to the dumpsite holding the deceased at about 10.00-1030 a.m. on the material day. The accused thereafter left with the deceased and the other boy. PW1 did not know what happened thereafter and only learnt the following day the deceased had been murdered at Kachok dumpsite. PW1 further recalled that the accused, was wearing a pair of blue jeans, a short-sleeved grey shirt and *Sahara* boots. The investigating officer stated that the clothes that the accused was wearing on the material day were recovered from the accused person's house. It is notable that the accused was not known to PW 1 before this incident. It is also noteworthy that some contradictions emerged during PW 1's cross-examination between his testimony and his statement to the police. In the statement, the deceased was referred to as alias Owino while PW 1 maintained that he only knew him as Buda. The statement also indicated that the accused was in the kitchen while he had testified that he was outside when he saw the accused leave with the deceased. PW 1 denied having stated to the police that the deceased had told him that the accused was accusing him of stealing copper wire. His testimony in court that he did not follow the accused and the others when they left was also contradicted by his statement to the police which indicated that PW1 followed them and saw them leave in a *tuk tuk*.

19. PW 2 indicated that he knew both the accused and the deceased. He recalled that on the material day he was leaving the dumpsite when the accused together with others and the deceased arrived in a *tuk tuk*. The deceased's hands were tied. PW 2 witnessed the accused beating the deceased with a piece of metal accusing him of stealing. PW 2 observed these happenings while he was on the other side of the road as they went to the dumpsite. PW 2 left soon afterwards and only learnt the following day that the deceased had died. PW 2 also described the accused by his attire, a pair of blue jeans and a gray shirt while the deceased wore black trousers. A few contradictions were also raised in PW 2's evidence. While he testified that he was about some metres away from the dumpsite and did not follow the accused into the dumpsite, his statement indicated that he followed the accused into the dumpsite and confirmed so during cross-examination. His statement also indicated that PW 2 had seen someone give the accused some stones which he used to beat the accused, while PW 2 maintained that he only saw the accused beat the deceased using the piece of metal. During his cross-examination, PW 2 denied seeing the accused choke and drown the deceased in the pool of water as indicated in his statement. He also denied that he saw the accused leaving the dumpsite explaining that his statement to the police that the accused left the dumpsite looking worried was based on what he was told by the people working at the dumpsite.

20. PW 3 testified that on the material day that some people arrived at Kachok dumpsite at about 8.00 am in a *tuk tuk*. He stated that from where he was, he did not recognise them and he only went into the dumpsite when some boys told him that someone was being beaten for stealing from the accused. Inside he stated that he saw the accused and three others asking the deceased about things he had stolen while the accused was beating him with a piece of metal.

21. The contradictions in the prosecution case I have set out above do not, in my view, detract from the substance of the case to displace the fact that the accused, in the company of other people, was seen assaulting the deceased on the material day. From the sequence of accounts available from the testimonies of PW 1, PW 2 and PW 3, there is no direct account of what happened between the period when the deceased was allegedly seen in the company of the accused and others and his death. Indeed, PW2 and PW3, who knew both the accused and the deceased, attested to seeing the accused beating the deceased with a piece of metal. PW 1 on his part only encountered the accused accusing the deceased of stealing from him and leading him away. *PW1, PW2 and PW3 described the accused by the clothes he was wearing in on the material day which were produced as exhibits in court.* The contradiction by PW 9 who stated that stones were used to beat the accused was hearsay and therefore immaterial against the evidence of witnesses who encountered the accused with the deceased. The deceased's body was later found the following day dumped at the dumpsite with injuries consistent with assault. This is further fortified by PW4's account on the nature of injuries as well as the cause of death.

22. I also find corroborating evidence in the statements made by the accused to PW 5 when he voluntarily presented himself after hearing that he was being looked for. His statement is corroborative in that he confirmed that he knew the accused, that the accused had stolen from him and that that they were together in a *tut tuk* when the accused jumped off and disappeared. It is also noteworthy that the accused told PW 5 that the deceased stole copper wire from him.

23. The totality of the evidence is that the accused's alibi defence in light of the testimony of PW 1, PW 2, PW 3 and PW 5 is mere moonshine and I therefore reject it. The evidence is clear that the accused together with others confronted the deceased about stealing copper wire, took him in a *tuk tuk* to the dumpsite where they assaulted him thereby causing his death.

24. I therefore find the accused **NAHASHON NYANGA OKONG'O ALIAS MREFU ALIAS JALENGO** guilty of the murder of **DICKSON ODONGO ODHIAMBO ALIAS OWINO** and I convict him accordingly.

SIGNED at KISII

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISUMU this 17TH day of September 2018.

F. A. OCHIENG'

JUDGE

Mr Kowino, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.