



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL CASE NO. 30 OF 2018**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**EVANS SHEM OSORO alias NDEGE OSORO**

**alias WILLIAM OSORO alias GESOKERO OSORO.....1<sup>ST</sup> ACCUSED**

**ROBERT MASEA GEDION alias KEPHA.....2<sup>ND</sup> ACCUSED**

**DENNIS OINO ONDABU.....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. **EVANS SHEM OSORO alias NDEGE OSORO alias WILLIAM OSORO alias GESOKERO OSORO, ROBERT MASEA GEDION alias KEPHA and DENNIS OINO ONDABU** (“the accused”) jointly with others not before this court murdered **EVANS OKEROSI MOKORA** (“the deceased”) on 1<sup>st</sup> January 2018 at Nyagenke village in Kenyena Sub-county within Kisii County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.

2. The prosecution case was that the deceased had injured the 3<sup>rd</sup> accused’s father, James Ondabu Oino (“Ondabu”), at a funeral and that the accused, in a revenge mission, set upon the deceased and fatally injured him. The accused denied the charge against them. The prosecution marshalled 6 witnesses to prove its case while the accused made unsworn statements without calling any witnesses.

3. The evidence concerning the circumstances of death was as follows. James Maobe Ondabu (PW 1), an old man, testified that the accused are his neighbours and he had known them since they were born. He recalled that on 1<sup>st</sup> January 2018 at around 11.00pm, he heard people shouting and running outside his house. When he stepped out to find out what was happening, he met a group of 6 people including the accused. He was told that the deceased had attacked Ondabu with a panga. The group entered his house and looked for him, they went to the kitchen dragged the deceased from there and started cutting him with a panga. PW 1 told the court that the 1<sup>st</sup> accused stood by the side, the 2<sup>nd</sup> accused cut the deceased on the back with a panga while the 3<sup>rd</sup> accused cut the deceased on the leg. At the time he was being restrained by a fourth assailant, *Ouru*, and could not stop the attack.

4. On the same night, PW 1’s wife, Janes Nyanchama (PW 4) and his daughter, Mary Sabina Orwaro (PW 3), were asleep in the kitchen when they were awoken by people knocking the door. According to PW 4, the deceased came to her door, kicked the door open and told her he was being chased. He assisted in pushing the door as the assailants tried to get access to the house by kicking it until it broke. When it broke, she quickly got hold of her daughter and they took off.

5. PW 3 woke up because of the noise and found the deceased in the house. She recalled that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were hitting the door demanding that it be opened. When she ran outside, she was able to identify the 2<sup>nd</sup> and 3<sup>rd</sup> accused by the moonlight. As they ran toward the road, she heard the deceased crying. She testified that as she was leaving, she saw the accused because of the moonlight but did not see whether they had weapons.

6. The deceased’s father, Mokora Mogere (PW 2), testified that the accused were his relatives. On the material night at around 10.00pm, he heard people screaming that the deceased had been killed. He proceeded to PW 1’s homestead where the noise was coming from. On the way, he met the 1<sup>st</sup> accused, his mother and sister who rebuffed him when he inquired what had happened. At PW 1’s house, he found the deceased and asked who had injured him. The deceased replied that it was *Ouru* and *Kepha*. He told the court that *Ouru* was an old man.

7. The investigating officer, Inspector Nicholas Kemboi Tanui (PW 6) told the court that from his investigation, he found that the deceased had a dispute with Ondabu. During a meeting at a funeral, the deceased injured him on his shoulder. Ondabu then resurfaced with the mob that killed the deceased. The 1<sup>st</sup> accused, who was at the scene, was arrested while the 2<sup>nd</sup> and 3<sup>rd</sup> accused were later arrested in Nairobi on 20<sup>th</sup> January 2018.
8. When put on their defence, the accused denied that they committed the offence. Evans Shem Osoro (DW 1) denied the offence and stated that on 29<sup>th</sup> December 2017 he had gone to Transmara to harvest tomatoes. When he returned home at 7.00am with a crate of tomatoes, he found people at the homestead and was arrested.
9. Robert Masea Gedion (DW 2) told the court that he worked at a supermarket in Nairobi. He recalled that in the evening of 31<sup>st</sup> December 2017 he went to his uncle's funeral but left at about 6.00pm to prepare to go to church for an overnight service. While at home, he was informed that Ondabu had been injured by the deceased. As Ondabu was taken to hospital, he proceeded to church where he stayed until 3.00am. Upon returning home, his wife informed him that the deceased had died. He stayed home until 22<sup>nd</sup> January 2018 and went back to Nairobi. He was arrested on 28<sup>th</sup> January 2018
10. Denis Oino Ondaru (DW 3) stated that on 31<sup>st</sup> December 2017 he was informed his father, Ondabu, had been cut with a panga on the head and face. They took his father to the hospital and reported the incident. He went back home together with the people who accompanied them and found people gathered along the road saying that the deceased had died. His father was arrested the following morning. He remained home until 25<sup>th</sup> January 2018 and he went back to Nairobi from where he was arrested on 28<sup>th</sup> January 2018.
11. The offence of murder is defined by **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 must prove beyond reasonable doubt the following three 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*.
12. The fact and cause of the deceased death was not in dispute. Dr Peter Morebu Momanyi (PW 5) carried out the autopsy on the deceased's body at Kisii Teaching and Referral Hospital on 10<sup>th</sup> January 2018. He observed that the deceased had a deep cut wound on the right lateral distal part of the right leg with a fracture of the right tibia and fibula bones. He concluded that the deceased died from severe bleeding from deep cut wounds.
13. Determination of who committed the unlawful that caused the deceased's death depends on the circumstances of recognition of the assailants as the incident took place at night. In such circumstances, our courts have urged caution and in **Wamunga v Republic [1989] KLR 426**, the Court of Appeal held that:
- It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.*
14. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See **R v Turnbull [1967] 3 ALL ER 549**). These requirements are, however, relaxed when dealing with the case of recognition because, “recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other” (see **Anjononi & Others v Republic [1980] KLR 59**). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.
15. PW 1, PW 2, PW 3 and PW 4 all testified that the accused were well known to them as they were from the same village. Thus this was a case not of identification of strangers but of recognition of persons well known to the witnesses. From the evidence, the deceased was being chased by a mob including the accused. The deceased ran into PW 1's compound and then ran to hide in the kitchen where PW 3 and PW 4 were sleeping before he was flushed out by the accused and killed.
16. The accused met PW 1 as they were chasing the deceased. The spoke with him before they entered his house. PW 1 admitted that it was dark but he spoke to the accused as he tried to stop them from attacking the deceased. They also ransacked and damaged his house before he left for the kitchen. As regards PW 1, I am satisfied that recognition was positive and free from error due to the close interaction between PW 1 and the accused and the length of interaction as he tried to stop them from attacking the deceased.
17. When the accused moved to the kitchen they found PW 3 and PW 4. PW 3 testified that it was dark but there was moonlight and as she was leaving, she was able to see the 2<sup>nd</sup> and 3<sup>rd</sup> accused. She stated that the accused were about 4 meters away from her when she saw them. Likewise, PW 4 recalled that after the assailants broke the door and she was running away, she was able to see the accused as there was moonlight. I would mention that PW 4 was able to hear them as they shouted to her to open the door. The evidence of PW 3 and PW 4 was satisfactory. They were able to see the accused who were at their door trying to get to the deceased and since there was moonlight, the accused were positively recognised.
18. PW 3 and PW 4 scrambled for safety while the accused dragged the deceased from the kitchen. PW 1 clearly saw the deceased being cut. He explained that the 1<sup>st</sup> accused was standing by the side, the 2<sup>nd</sup> accused had a panga with which he cut the deceased on the back and the 3<sup>rd</sup> accused cut the deceased on the leg. All this evidence leaves no doubt that the accused pursued and assaulted the deceased resulting in severe injuries leading to his death.

19. **From the testimony of PW 1, the 1<sup>st</sup> accused stood by as the deceased was being attacked by the 2<sup>nd</sup> and 3<sup>rd</sup> accused. Although he did not inflict injury, he is among the accused who chased the deceased in order to inflict injury on him and was thus liable as he was part of the group that proceeded to avenge the injury caused by the deceased to Ondabu. In *Solomon Munga v Republic* [1965] EA 363, the court held that, “If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavours to effect the common object of the assembly.”**

20. In addition to the evidence of PW 1, PW 3 and PW 4 implicating the accused, the evidence of PW 2 is important. First, he placed the 1<sup>st</sup> accused at the scene as he saw him when he was going to PW 1’s homestead. Second, when he spoke to the deceased, the deceased mentioned *Kepha*, the 2<sup>nd</sup> accused, and *Ouru Oino* as the person who assaulted him. I am aware that I must be cautious in receiving a dying declaration although corroboration is not necessary for it to support a conviction (see *Pius Jasunga s/o Akumu v R* [1954] 21 EACA 333). In this case the deceased and PW 2 knew the accused as they were their neighbours and had family ties and the statement to PW 2 was consistent and corroborated with the direct testimony of PW 1 who stated that the 2<sup>nd</sup> accused cut the deceased while the said *Ouru Oino* restrained him. Although counsel for the accused submitted that PW 2 only saw the deceased after he had died, it is not clear how PW 1 had reached the conclusion that the deceased had died and could not talk by the time he called the Chief.

21. **The accused defences were simply that they did not kill the deceased and were not present when the deceased was killed. The evidence of positive recognition putting them at the locus in quo and assaulting the deceased exploded their unsworn statements.**

22. Counsel for the accused submitted that failure by the prosecution to produce the murder weapons and photographs of the house to show where the body was found was fatal to the prosecution case. I reject this contention as all the elements of the offence were proved by available evidence. Even in the absence of a weapon, the post mortem report taken together with the direct testimony of PW 1 who saw the deceased being cut with pangas established beyond all reasonable doubt that the injuries leading to the deceased death were caused by a sharp weapon (see. *Ekai v Republic* [1981] KLR, 569).

23. I now turn to the final issue and it is whether the prosecution established the element of malice aforethought. The accused set upon the deceased and cut him with a panga on his back and on his leg, they must have known that the act of cutting the deceased with a sharp instrument would cause death or grievous harm to the victim. The accuseds’ actions were not innocent but calculated to exact revenge, as they chased the deceased, broke the door to PW 1’s kitchen, dragged him out and proceeded to cut him with pangas leaving him to bleed to his death. They intended to cause grievous harm or indeed death within the meaning of **section 206** of the *Penal Code*.

24. I find that the prosecution has proved the offence of murder beyond reasonable doubt. I therefore find the accused, **EVANS SHEM OSORO alias NDEGE OSORO alias WILLIAM OSORO alias GESOKERO OSORO, ROBERT MASEA GEDION alias KEPHA and DENNIS OINO ONDABU** guilty of the murder of **EVANS OKEROSI MOKORA** and I convict them accordingly.

**DATED and DELIVERED at KISII this 6<sup>th</sup> day of DECEMBER 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyagwencha, Advocate for the accused.

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