



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CRIMINAL CASE NO. 96 OF 2014

BETWEEN

REPUBLIC PROSECUTOR

AND

CHARLES SURVEY MANINI1ST ACCUSED

RICHARD OMBUI MANINI.....2ND ACCUSED

GILBERT MAKORI MINYONGA alias

MUSEVENI ONSANDO3RD ACCUSED

JOSEPH MANDELA MANINI alias TOM4TH ACCUSED

SAMUEL KAMWANA MOREMA5TH ACCUSED

JUDGMENT

1. **CHARLES SURVEY MANINI (A1), RICHARD OMBUI MANINI (A2), GILBERT MAKORI MINYONGA alias MUSEVENI ONSANDO (A3), JOSEPH MANDELA MANINI alias TOM (A4) and SAMWEL KAMWANA MOREMA (A5)** (“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)*. The particulars thereof are that on 17th April 2014 at Bogitaa sub-location in Kisii South District within Kisii County, they jointly with another not before court, murdered **DENNIS OBWOGA KEREMA** (“the deceased”). The accused pleaded not guilty to the charge after which the prosecution marshalled 4 witnesses in support of its case. The facts emerging at the trial were as follows.

2. The deceased’s wife, Lynette Nyaboke (PW 1), recalled that she was at home with the deceased and with two of her children on the night of 17th April 2014. At about 9.00pm, the accused entered their house. She testified that she could see them by the light from a tin lamp. A4 attacked the deceased with a panga on the neck and the other accused joined in with their pangas. They warned her against raising an alarm as they would also cut her. The deceased ran towards the river with the accused in hot pursuit. PW 1 tried to follow them but was ordered back home. On the following day, she was informed her that her husband had died at Riana Dispensary.

3. PW 1 testified that she knew all the accused as A1, A2 and A4 were the deceased’s uncles. A4 was also their neighbor while A3 and A5 were the deceased’s friends who visited each other. She added that A1 had the deceased’s debt of Kshs. 500/= and to satisfy his debt, the deceased repossessed A1’s goat. She recalled that the incident was reported to the police because the deceased assaulted A1 with a slasher when he went to collect his goat. The deceased was arrested but released on bond. PW 1 admitted in cross-examination that she did not have a torch but had lit the tin lamp when she heard people throwing soil on the roof. She told the court that people had come to their house on the night of the attack but she could not count all of them.

4. The deceased’s cousin, Patrick Mayenga Kirera (PW 2), narrated how the accused were among 6 people, armed with pangas and sticks, who came to his house on that fateful night and started assaulting him while telling him that they had caught the deceased. They took him to where the deceased had been tied to a tree with ropes. He had injuries on his head and hands and his clothes were stained with blood. They ordered him to carry the deceased to Riana Police Post which was about an hour away. PW 2 testified that they tortured and beat him along the way. He recalled A1 cut him on the head with a panga. When they got to the police station, they told him to say that the deceased was the one that had cut him. The police told them to take the deceased to hospital where he was pronounced dead on arrival. PW 2 testified that he was admitted at the hospital for treatment of the cut wound and discharged the following morning. He testified that he recognized A1, A2 and A3 as they were his uncles and they had torches at the time.

5. PW 2 stated in cross-examination that about 10 people came to his house but only the accused entered the house. He stated that he saw the accused beat up the deceased until he was unable to move. He reiterated PW 1's testimony that A1 refused to pay back some money lent to him by the deceased whereupon which the deceased took his goat and when A1 went for his goat they had a disagreement which ended up with the deceased cutting A1 on the face with a panga. A1 was hospitalized and the deceased was arrested and later released on bond.
6. Dr. Morebu Peter Momanyi (PW3) a senior medical officer at Kisii Teaching Referral Hospital, produced the post mortem report prepared by Dr. Jared Atoni, in respect of the deceased. PW 1 and her father in law identified the deceased's body prior to the autopsy. The post mortem report revealed that the deceased had sustained a cut wound on the right supra orbital region. He had bruises on the lower limbs and gluteal region and a cut wound on the left wrist. An internal examination revealed a cut wound on the right side of the head and cerebral oedema. Dr Atoni concluded that the deceased died as a result of the head injury.
7. Corporal Hussein Ahmed (PW4) recalled that when he was attached to Gesonso Police Station, PW 1 came in to report the death of her husband in the company of her father in law. He took the report and proceeded with them to Nyangena Mortuary where they identified the deceased's body. On 19th April 2014, PW 4 and his colleagues went to Bogitaa Location where the deceased resided. He was informed that the deceased was removed from his house, beaten up and taken to Bogita Administration Police Post. PW 4 visited the AP Post where he confirmed that the deceased was brought in unconscious by a group of people. They were directed to take him to Riana Dispensary. PW 4 managed to arrest A1 and A2 but the other accused could not be found as they had disappeared from the area and remained at large. By the time they were arrested, he had been transferred to a new station.
8. When cross examined, PW 4 admitted that he did not recover any murder weapon. He also confirmed that the deceased had been charged for assaulting A1 across the face with a panga and had Kisii Criminal Case No. 1825 of 2013 against him which was still pending. He told the court that he had visited A1 several times in hospital where he remained for a duration though he did not know when he was discharged. He denied that the deceased had been accused of committing other offence including theft and defilement.
9. When the accused were put on their defence, they all gave unsworn statements. They all denied the offence and stated that they resided in Bogitaa Sub-location within Riana Location. A1 went on to state that on the day the deceased died he was in hospital following the head injury he had sustained and could not even talk. He stated that he had been arrested for reasons he did not understand and he did not know how the deceased died. He produced a P3 report dated 31st October, 2013; a letter dated 1st November 2013 from Kisii Level 5 Hospital; a report from Kisii Medical Diagnostics and Imaging Clinic dated 4th November 2013 and discharge summary dated 7th November 2013 from Kisii Hospital to support his alibi.
10. A2 stated that he was working in Mombasa when he heard that his brother, A1, had been injured. He came back home to take care of his brother and he is the one who reported the deceased to the police for assaulting his brother. He stated that him and his brother were both in hospital at the time of the deceased's death and he did not know why he had been charged.
11. A3 told the court he left the village and was informed that A1 had been injured. He took him to hospital and was roused one day by police officers, arrested and taken to Gesonso Police Station.
12. A4 testified that he was a clan elder. He told the court that on the material day he had attended that funeral of the area Chief at Riana. He arrived home late and heard that the deceased had been caught defiling a young child following which the villagers arrested him. He claimed that the deceased was a known criminal and had many cases against him but he did not know anything about his death. A5 testified that he had a motorbike and was not at home at the material time due to business. He was arrested at night by police officers and taken to Gesonso Police Station and charged.
13. The Chief of Riana Location, Edward Mamwacha Moenda (DW6), testified that at about 8:00am on 17th April 2014, he was going to work when he was called by a doctor from Riana Dispensary and informed that a person subject to mob assault had been brought to the dispensary had died. He proceeded there and found it was the deceased whom he knew as he was a resident of Bogitaa Sub location where he had been an Assistant Chief. He testified that the deceased was a known criminal who would dress in uniform and terrorize people at night. He recalled that the chief once brought him to court for stealing a goat and assaulting A1 with a panga. He did not know who assaulted the deceased.
14. A clan elder from Bogitaa sub location, William Moranga Ongoro (DW 7) testified that the deceased stole a goat from A1 and when A1 confronted him about, the deceased cut him with a panga causing A1 to be hospitalized. He testified that it is when A1 was in hospital that people attacked the deceased. He also testified that the deceased was a known criminal who had been accused of defiling a child.
15. At the close of the defence case, counsel for the 1st and 2nd accused filed written submissions in which he raised the following issues:
- a. That the prosecution failed to show that a criminal act complained against was done by one of the accused in furtherance of the common intention of all. The prosecution did not prove that the criminal act was done in concert pursuant to the pre-arranged plan;
 - b. There was no direct or circumstantial evidence against the accused;
 - c. The prosecution failed to establish that bodily injury had been caused by any of the accused in furtherance of a crime; and
 - d. The prosecution failed to prove that there was an intention to inflict that bodily injury on the deceased's body.

16. 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*.

17. The fact and cause of the death are undisputed. The evidence of PW 1 and PW 2 was that the deceased was assaulted and that he died upon arrival at Riana Dispensary. The deceased's body was identified by PW1 on the morning of 18th April 2014. The post mortem form was admitted without calling the maker under the provisions of **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. It established that the deceased had multiple injuries consistent with assault and that the cause of death was a head injury following assault.

18. The next issue for determination is whether the accused caused the unlawful act that led to the deceased's death. The facts presented by the prosecution indicate that the battery of the deceased occurred at night. This brings to fore the issue of identification of assailants in difficult circumstances. In *Wamunga v Republic [1989] KLR 424* the Court of Appeal warned that:

[W]here 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 be the basis of a conviction.

19. 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 *Maitanyi v Republic [1986] KLR 198* and *R v Turnbull [1967] 3 ALL ER 549*). The Court of Appeal was categorical in *Kiarie v Republic [1984] KLR 739*, that reliance on such evidence of identification must be "*absolutely watertight*" to justify conviction.

20. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see *Anjononi & Others v Republic [1980] KLR 59*). But in *Wanjohi & 2 Others v Republic [1989] KLR 415*, the Court of Appeal held that, "*recognition is stronger than identification but an honest recognition may yet be mistaken.*"

21. This was not a case of identification of strangers but rather recognition of persons well known to the witness as relatives and neighbours. They all admitted as much in their unsworn statements. In this case, PW 1 was roused from her sleep when she heard noise and proceed to light her tin lamp. Using the light from the tin lamp could see the accused enter her house with pangas and as they assaulted the deceased, threatened her and frog marched him out his house. In my view, the light in the confined state of the room, the fact of assault of the deceased and in addition to the fact that she followed them before she was threatened was sufficient interaction to exclude the possibility of mistaken identity.

22. After the accused person had taken the deceased they proceeded to the house of PW 2. He also recognised A1, A2 and A3 by their voices and the fact that they carried torches. The assailants walked with him for about 20 minutes to where the deceased had been tied up and then proceeded with him to Riana Administration Police Post. Since the assailants were known to him and they spent a considerable period of time with him were circumstances favourable for positive recognition. In addition, the accused told him that they had earlier caught the deceased confirming that they been at PW 1's house. This fact corroborates the testimony of PW 1.

23. The accused raised alibi defences. 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.

24. 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.

25. A1 claimed that he was hospitalized at the time the deceased passed away. The medical documents he produced show that he was injured on 30th October 2013 and admitted to hospital the following day. He was discharged on 7th November, 2013, more than 5 months before the deceased died. The defence of A2 and A3 was hinged on that of A1. They heard that A1 had been injured by the deceased and went to take him to hospital. The alibi defences of A1, A2 and A3 refer to a time much earlier than the period in question. By the time the deceased was assaulted, A1 had long since been discharged from hospital. It follows that the I must therefore reject the defences of A1, A2 and A3 particularly when weighed against their positive recognition by PW 1 and PW 2. Since A4 and A5 were also positively identified, I reject their respective defences which were mere denial that they were simply also not present at the scene.

26. A1 and A2 were known and were arrested so soon after the incident while the other accused remained at large according to the investigating officer.

27. It is apparent from the testimony of PW 1 and PW 2 that the deceased was subject to multiple injuries by several persons. The prosecution did not prove the fact that any one of the accused inflicted the fatal blow hence it was incumbent on it to prove that all accused acted with common intention to inflict the injuries that caused the deceased's death. Under **section 21** of the *Penal Code*, the prosecution must establish that the accused acted with, "*a common intention to prosecute an unlawful purpose in conjunction with one another.*" In *Dickson Mwangi Munene & Another v. Republic CA NRB. Cr. App. No. 314 of 2011 [2014] eKLR* the Court of Appeal held that;

56. 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 s/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" like "where a number of persons took part in beating a thief.

28. The evidence of PW 1 and PW 2 is that the accused came to the deceased home, dragged him from his house while assaulting him. When they went to take PW 2 from his house, they also assaulted him and told that they had caught the deceased. The frog marched PW 2 to where they had tied the deceased with ropes and where they continued to assault him. All these facts confirmed that the accused planned to take the deceased from his house and assault. That they acted together to prosecute an unlawful act hence I find that common intention was fully established.

29. Finally, the prosecution must establish that the unlawful act was committed with malice aforethought. The vulnerability of the part of the body targeted, the type of weapon, the manner in which it was used and the conduct of the accused before, during and after the attack are factors that can establish the existence of malice aforethought (see *Rex v Tubere s/o Ochen* [1945]12 EACA 63).

30. As I have already found, the accused acted together. Both the prosecution and defence witnesses agreed that the deceased had taken A1's goat and when A1 when to get it, he was assaulted. The prosecution established a motive for the attack and its case was that the accused, who were thirsty for revenge, armed themselves and proceeded to the deceased's house with the sole aim of revenging the attack. According to the accused and their witnesses, the deceased was a known criminal and got his just deserts that night. Under **section 9(3)** of the *Penal Code*, the motive of the accused does not matter in establishing malice aforethought but only makes it more likely that the accused committed the felonious act but in this case, there was clear and direct evidence that the deceased was killed by the accused.

31. The totality of the evidence is that the accused intended to cause grievous harm if not death by going to the deceased's home, frog marching him out of his house, assaulting him with weapons and tying him to a tree while beating him. All these acts were intentional acts. I find that the prosecution established malice aforethought.

32. Before I conclude, I would like to point out that the prosecution called only two direct witnesses who were relatives of the deceased. There is no rule of law or evidence that their evidence must be rejected solely for that reason. What emerged from the evidence including the testimony of the area Chief and elder was that the deceased was a bad person and a known criminal. However, he did not deserve to die the way he did. It is therefore not surprising that only his relatives came forward to give evidence for the prosecution. I am however satisfied that the prosecution proved all the elements of the offence of murder.

33. I therefore find **CHARLES SURVEY MANINI (A1), RICHARD OMBUI MANINI (A2), GILBERT MAKORI MINYONGA alias MUSEVENI ONSANDO (A3), JOSEPH MANDELA MANINI alias TOM (A4)** and **SAMWEL KAMWANA MOREMA (A5)** guilty of the murder of **DENNIS OBWOGA KEREMA** and I convict each of them accordingly.

DATED and DELIVERED at KISII this 5th day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Sagwe, Advocate for the 1st and 2nd accused.

Mr Nyangacha, Advocate for the 2nd, 3rd, 4th and 5th accused.

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