



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL (MURDER) CASE NO. 16 OF 2013

REPUBLICPROSECUTOR

VERSUS

GILBERT SWAYI OPISA.....1ST ACCUSED

OSCAR ONDIEK OGUTU.....2ND ACCUSED

J U D G M E N T

Introduction

1. Gilbert Swayi Opisa and Oscar Ondiek Ogotu are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 6.03.2013 at Miyekhe Village, Ebusakami location within the County of Vihiga, jointly with others not before court they murdered Stallone Echenje Nelson. They pleaded not guilty to the said charge and the case was set down for hearing. It is worth noting that this court did not hear the evidence of the witnesses herein. The prosecution case was heard by Hon Mr. Justice Chitembwe who went on transfer before the case was determined, and thereafter Hon. Mr. Justice Mrima took over the same and heard the defence case. Unfortunately due to intervening ill health Justice Mrima was unable to write the judgment. The file was brought before this court on the 26.10.2016 for directions on writing of the judgment. Both the accused persons and their counsel agreed that this court writes the judgment. The 1st accused was represented by Otanga Elunyi Advocate and the 2nd accused by Mr. Kundu Advocate.

The Prosecution's Case

2. The prosecution called eight witnesses. The prosecution case was as follows;-

PW1 was working on the farm of Mr. Kenneth Marende, on the 6.3.2013 at around 9.00 am. When he heard screams from the 1st accused house. He rushed to the said house where he found the 1st accused's mother (DW2).

3. DW2 told him that the deceased had stolen from the 1st accused and he was being beaten. Shortly thereafter the 1st accused opened the door of his house and came out and on seeing PW1 he threatened to beat him. Two other people came out of 1st accused's house dragging the deceased who was at that time naked. One of the two people was the 2nd accused person herein. When the 2nd accused saw PW1 he returned the deceased into the house then locked the door from outside with a padlock. The deceased was

his cousin. PW1 also testified that the 1st accused's mother told him that she had called the police. PW1 then ran to the nearest shopping centre and called other people and together they went to the 1st accused's house. He requested the 1st accused to open the door or else they would use force. The 1st accused asked him to tell the crowd to disperse before he could open the door and let the deceased out.

4. After the crowd left the compound, the 1st accused opened the door and the deceased came out naked. PW1 asked the 1st accused to give the deceased clothes and he (1st accused) gave out a pair of shorts to the deceased. PW1 testified that he saw the deceased who had a swollen head and bruises on the back. The deceased told him he was finished. He walked with the deceased to the shopping centre but the deceased told him he was unable to reach home. PW1 left the accused at the shopping centre and went back to his place of work.

5. The following day he went to the deceased's house and the deceased told him that he was in pain. He asked the deceased's parents to take the deceased to hospital but by evening they had not taken him.

6. The deceased died on the 08.03. 2013. PW1 told, the court that he knew both accused persons and maintained that he had no grudge with them. On cross examination by Mr. Otanda for the 1st accused he explained that he heard the voice of the deceased who was screaming. He claimed that the 1st accused was drunk at the time and that he (PW1) did not hear anyone shouting "Mwizi Mwizi" "Thief thief". He further explained that the only other people he met at the compound of the 1st accused were 1st Accused's mother and a young girl.

7. PW1 reiterated his earlier testimony that the deceased was pulled from the house by Oscar the 2nd accused and Gilbert the 1st Accused and that when they saw him (PW1) they dragged the deceased back to the house. He added that it was the 1st accused who came out of the house first armed with eucalyptus stick. However, it transpired during cross examination that PW1 did not indicate to the police that the 1st accused had a stick. He claimed to have witnessed the dragging of the deceased though he did not witness the assault. He also stated on further cross examination that the deceased told him he was assaulted and that it was not true that the deceased was assaulted by other people. He confirmed did not take any exhibits from the scene.

8. PW1 was also cross examined by the 2nd accused's Counsel Mr. Kundu. He explained to the court that he was the first person on the scene. He reiterated that he saw the 2nd accused dragging though and that he did not report to the police that day. He talked to the deceased as they walked towards the shopping centre and the deceased told him that he (deceased) was with the 1st accused at the shopping centre where they were drinking the previous night. In the morning the 1st accused went to the deceased's house and told him that he had lost something that night and he wanted to check if the deceased had seen it.

9. PW1 maintained that the deceased was attacked by three people that is the two accused persons and 1st accused's brother. PW2 Joash Muganda Were received information from PW1 that the deceased was being assaulted by the 1st accused and the 2nd accused. He accompanied PW1 and other people to the 1st accused's house where they found the 1st accused outside his house together with other people. His(1st accused's) mother was seated on a chair.

10. He saw Nixon (1st Accused's brother) Oscar the 2nd accused and another boy called "J". Accused was seated on a mattress inside 1st accused's house. PW2 told the court that the 1st accused claimed that deceased had stolen from him. He checked on the deceased who told him that he had been severely beaten. He asked the 1st accused why he did not report the case to the police. The mother to the 1st accused asked for kshs.10,000/=, so that the deceased could be released.

11. PW2 also testified that when PW1 came to the scene with other people they pleaded with the 1st accused to let the deceased go and the deceased was released. They did not pay the kshs.10,000/=

allegedly stolen by the deceased from 1st. On 08.03. 2013 he heard that the deceased had died. PW2 told the court that other people at the scene were outside the 1st accused's homestead and they comprised of women and children. He maintained that it is the accused persons and their relatives who attacked and injuries the deceased.

12. On cross examination by Mr. Otanda for the 1st accused PW2 reiterated his earlier statement that he heard screams while he was at the shopping centre but he did not respond to them. He stated that it was PW1 who told him that the deceased was being killed. He maintained that the deceased was not attacked by the people who were outside the 1st accused's compound. He added that the deceased had internal injuries and his back was swollen. The incident happened in the morning between 10.00 and 11.00am and that it was the 1st accused's mother who told the 1st accused to open the door for the deceased to leave.

13. On cross examination by Mr. Kundu for the 2nd accused PW2 maintained that he did not tell the police that the deceased was attacked by members of the public though he did not mention the 2nd accused in his statement.

14. PW3 the father of the deceased told the court that on the 07.03.2013 he received information of the assault of the deceased from PW1 who went to his house. PW1 told him that the deceased had been assaulted. He asked the deceased if they should take him to hospital but the deceased declined. The deceased died the following day as he was being taken to hospital. PW3 identified the body for post – mortem examination.

15. On cross examination by Mr. Otanda for the 1st accused PW3 maintained that he was told that the deceased was assaulted. He also told the court that he talked to the deceased and wanted to take him to hospital but the deceased died before he could be taken to hospital.

16. PW4 Felistus Ayuma got a call on the 07.03.2013 informing her that the deceased had been assaulted. The deceased was her brother. On the 08.03.2013, she went to the deceased home, and on seeing her, the deceased told her in Kiswahili."Wameniuwa" she asked her relatives to call for a motorbike to enable them take the deceased to hospital but he died as he was being dressed up. She then informed the area assistant chief who reported the incident to the police at Luanda. She identified the deceased's body for post mortem.

17. On cross examination she explained that the deceased told her "Wameniuwa" and that he mentioned one "Osieka."

18. PW5 Andrew Awando Ounza got information of the deceased's death from PW4. He claimed that PW4 mentioned the 1st accused In connection with the death of the deceased. He also participated in arresting the 2nd accused.

19. PW6 Kevin Joseck Ochenje testified that on the 6.3.2013 he went home after work and found his brother the deceased crying saying that he had been assaulted. He gave him the names of the two accused as the persons who had assaulted him. PW6 told the court that as they prepared to take the deceased to hospital he succumbed to his injuries. On cross examination by counsel for the 1st accused PW6 explained that he was living with the deceased in the same house and that the injuries deceased sustained were on the neck and back. He reiterated that the deceased mentioned the 1st and the 2nd accused persons as the persons who had assaulted him.

20. PW7 Dr. Philip Athero performed the post mortem Examination on the deceased on 13.3.2013 at 9.30 am at Rabour Hospital Dolphin Nursing and Maternity home). He found bruises on the head and shoulder of the deceased, bruises on the back of the body. He also found fracture dislocation of the neck. He formed the opinion that the cause of death was cardiopulmonary arrest secondary to the injuries due to assault. He produced the post mortem report which is marked as PExh1. On cross examination by Mr.

Otanga for the 1st accused PW7 explained that at the time of death all system of the body stop. He further stated that no sharp objects were used to attack the deceased but it could be blows or runkus which caused the blunt injuries.

21. PW8 No. 39634 Acting inspector of Police Fredrick Koech attached to Luanda Police Station testified that on 8.3.2013 at 2.45 pm they received information of the death of the deceased herein and together with Corporal Laban they went to the scene accompanied by the reportee. At the scene they found the deceased's body which was lying on the bed. He talked to the family members and later took the body to the mortuary at Dolphin Maternity and nursing hospital. He also testified to the injuries on the deceased's body which had bruises on the back and stomach. When he went back to the police station he found members of community policing who had arrested the 1st accused. They also rescued the 2nd accused who was about to be lynched by members of the public. For his investigations, he relied on the statements by PW1 and PW3 who stated that they saw the deceased in the 1st accused's house after they had heard some commotion.

22. On cross examination PW8 explained his investigations did not reveal that the deceased had gone to steal from the 1st accused's house. He also added that his investigations did not reveal that members of the public descended on the deceased. He explained that members of the public stood by until the deceased was released by the 1st accused after he (deceased) had already been assaulted.

23. On cross –examination by Mr. Kundu for the 2nd accused PW8 explained that the statement of Joash (DMF12) does not mention the second accused. He added that the situation at the scene was tense and that Joash was also arrested as a suspect. When re-examined by Mr. Oroni PW8 explained that during his investigation there were no names of members of the public who allegedly attacked the deceased.

24. The prosecution did not call one Benson as a witness since his statement had been referred to by the defence. The prosecution surrendered him to the defence. At the close of the prosecution's case the court found that the prosecution had established a prima facie case against the two accused persons and placed them on their defence.

Defence Case

25. The 1st accused person opted to give a sworn statement and called one witness. He testified that on the 6.03.2013 he locked his house and went to the trading centre to buy some items. He went back to his house after about one (1) hour. He then saw a boy next to the window of his house and when the boy saw him the boy ran away. On reaching his door he found that it had been opened. He entered the house and noted there was someone in his bedroom. On seeing him the person took a club and attempted to hit him. He evaded and ran outside the house and locked the door and he raised an alarm and people went to the scene. They included Faniel Harun, Erick Odhiambo, Thomas Okaya and Walter Olunyama who he instructed to guard the house as he rushed to the Administration Police at Mabango to report. He did not find the AP Officers as they had gone for an assignment so he decided to go back to his house. At his house he found a large crowd had gathered and the thief had been removed from the house and was lying outside on the ground. He asked the crowd not to beat the thief any more as they waited for the police. The thief had been beaten badly by the crowd and his clothes removed.

26. At 12.30pm a brother to the thief (PW1) requested the 1st accused to allow him to take the thief and promised to pay for the damages. PW1 was in the company of two other persons. He (DW1) told the court that he had lost Kshs.10,000/= a trouser and a belt. He told PW1 to tell the crowd to disperse before he could release the thief for fear they would lynch him. He gave the "thief" clothes to put on and eventually allowed the "thief" to walk away with his brother.

27. The next day 07.03.2013 the AP officers went to his house and inquired on what had happened. He gave them a letter by the "thief's" brother. The police went away claiming that they will investigate the matter. On the 8.03.2013 he was arrested by the vigilante group and taken to the police. He was released on a free bond until 18.03.2016 when he was arrested and charged with the offence. He claims that he

met the 2nd accused in the cells together with one Benson Otonda.

28. DW1 maintained that at the time the thief was being beaten he was not at home but had gone to report the incident to the police. He was cross examined by Miss Omondi for the state. He explained that his door was not broken into but the padlock was open. He added that he saw his mother after he raised an alarm and that the person in his bedroom had a rungu which he evaded when he tried to hit him. He further stated that the people who responded to his call were his neighbours. He maintains that he restrained the crowd from further beating the “thief”. He did not see the 2nd accused during the incident.

29. DW2 Mildred Ambasa Opisa the mother to the 1st accused testified that on 6.03,2013 she was at home when she heard a loud voice from the 1st accused’s house calling “thief.....thief.....thief.” It was the 1st accused’s voice which she recognized. She rushed outside and saw the 1st accused who was struggling to close the door to his house. People responded to the calls and gathered in the compound. She testified that the 1st accused left the house and went to Molongo Police Post. When 1st accused left the crowd opened the house and started beating the “thief.” She tried to restrain them but they overcame her and were now threatening to lynch her and the thief. The 1st accused returned to the homestead at about 12.00pm and he pleaded with the crowd not to kill the deceased. PW1 a brother to the deceased also pleaded with the crowd and agreed to pay Kshs.10,000/= as compensation for the release of the deceased. She claimed that she was in her house when the beating was taking place. PW1 took the deceased and went away after he had committed himself by a letter to compensate the 1st accused. She was called after one (1) week and informed by the police that the deceased had died and later her son was arrested by the police. She maintained that the 1st accused was not at home when the thief was being beaten.

30. DW2 was also cross examined by Miss Omondi. She explained that she was seated outside her house and saw DW1 rush into his house and later came out struggling with two people. DW1’s house was just next to her house and she could see the door of his house. She testified that one person ran away with 1st accused’s money. She reiterated that the crowd responded to the 1st accused’s distress call and went to their compound. DW2 testified further and added that the village elder from another village Nabule Amakhono(Deceased) promised to assist in their case. She also claimed that she saw the 2nd accused among the crowd.

31. DW3 Oscar Ondieki Ogutu testified that on 6.03.2013 at 10.00am he was at his work place in Maseno. On 07.03.2013 he was arrested while drinking and those who were arrested with him paid money and were released but since he did not have money he was told to clean the Luanda Police Station. He was arrested and the charges herein planted on him. He denied the said charges and maintained that he did not take part in assaulting the deceased.

32. On cross examination DW3 maintained that on 06.03.2013 he was working at his usual place and that he left work at 06.00pm. He added that he did not know the 1st accused but only saw him at Luanda Police Station. He also testified that he did not know anything about the allegations in this case. The defence closed its case at this juncture.

Analysis of evidence and determination

33. Having considered the evidence tendered and the submissions filed by the defence, certain key issues are not in dispute. The fact that the accused persons were present at the scene of crime on the 6.03.2013, and that the deceased was assaulted at the 1st accused’s home are not in dispute. These facts were confirmed by both the prosecution and defence witnesses. It is also not in dispute that the deceased succumbed to the injuries inflicted by the assault on his person. What is left for the court to determine is whether the two accused persons with malice afore thought inflicted the injuries that resulted in the death of the deceased. Admittedly, the incident in which the deceased sustained the fatal injuries occurred in the home of the 1st accused which was close to where PW1 was working, PW1 was attracted to the 1st accused’s place by the screams he heard which according to him were screams of the deceased who was his brother and with whom he lived in the same house. The incident occurred in broad daylight at about

10.00am and therefore PW1 was able to identify the accused persons. PW1 testified her found DW2 and a girl in DW1's compound. He was able to see DW1's house and saw DW1 and DW3 dragging the deceased out of the house. When the two saw him they returned the deceased into the house. DW1 and DW2's versions of what happened on the fateful morning are different. DW1 claimed that he found the deceased person in his house. His house was not broken into. He had locked the house before he left for the shopping centre. He claimed that the deceased stole his items including money. This version of the 1st accused's story looks extremely doubtful and cannot stand in the face of the strong case by the prosecution because if truly the deceased had stolen from him and he found him red handed, the stolen money and other stolen items could have been recovered there and then. It is also doubtful how the deceased accessed 1st accused's house.

34. PW2's testimony corroborates PW1's evidence in that when PW1 informed PW2 that the 1st accused was assaulting the deceased he PW2 rushed to the scene where he found the 1st accused outside his house together with others. PW2 saw 1st accused's brother Nixon, the 2nd accused and another boy called "J". The deceased who was inside the 1st accused's house told PW2 that he had been thoroughly beaten by the two accused persons and the 1st accused's younger brother. I have no doubt in my mind that deceased was inside 1st accused's house where he was assaulted. He was not assaulted outside the house by a mob as Dw1 and DW2 want this court to believe.

35. PW8 who is the investigating officer testified that from the investigations carried out the deceased did not go to steal from DW1's house. PW1 on cross examination explained that the deceased told him that they were drinking with the 1st accused the previous day and the next day the 1st accused went to the deceased and claimed that he had lost something that night and he wanted to check if the deceased had seen it. That is how deceased found himself in the home of the 1st accused. PW7 stated on cross examination that no sharp objects were used to attack the deceased but it could be blows or rungu which caused blunt injuries.

36. PW8 further stated that no names of members of the public were given to him which means that members of the public did not attack the deceased as DW1 and DW2 would want this court to believe. On the other hand the deceased gave the names of the two accused person and a third person who is still at large as his assailants. This was with deceased's first report to his people.

37. The reason for assaulting the deceased herein is evident. The 1st accused alleged to have lost money and since they were with the deceased the previous night he went to ask the deceased for the same. During the interrogation and in an effort to get his money back the 1st accused, accompanied by the 2nd accused decided to assault the deceased. The injuries they inflicted on the accused are the ones which later led to his death.

38. It is true that the evidence herein is circumstantial as no one saw the two accused person's assaulting the deceased. There is no evidence by anyone who saw the mob beating the deceased. There are allegations brought out by the 1st accused person and his mother but those allegations are not supported by the police who the 1st accused claimed to have reported to. The alleged letter of compensation has also not been shown to the court as evidence. DW2's alibi evidence has also not been corroborated. He was seen at the scene by PW1 and PW2 together with DW2. He cannot therefore claim that he was just arrested for nothing.

39. It follows from the above that upon a careful evaluation of the evidence, the court finds that the prosecution evidence was over whelming and effectively dislodged the defence offered by the 1st accused, his witness and the 2nd accused. This court is satisfied that the two accused person having properly been placed at the scene inflicted the injuries that led to the death of the deceased and that from the severity of the attacks, it was the intention of the two accused persons to cause grievous harm if not death to the deceased.

40. The assault on the deceased whether or not he had stolen money from the 1st accused or not was an unlawful act. The court of appeal held in the case of **Njoroge vs. Republic [1983] KLR 197 that:-**

“if several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man it is murder against all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the cause of his endeavours to effect the common object of the assembly.....”

41. Their common intent may be inferred from their presence, their actions and omission of either of them to disassociate himself from the assault. The deceased may have succumbed to injuries inflicted by different self-appointed executioners but the 1st and 2nd accused herein assaulted him first and their names mentioned. Even if the claims that members of the public assaulted the deceased they were part of them and they are equally guilty of the murder of the deceased. The upshot of all the above is that the prosecution has proved their case against the two accused persons beyond reasonable. They are both found guilty as charged and are convicted of the offence of murder.

Orders accordingly

Judgment delivered read and signed in open court at Kakamega this 21st day of February, 2017

RUTH N. SITATI

JUDGE

In the presence of :-

Mr. Olinga and also holding brief for Mr. kundu.....for Accused

Miss Tarus (present).....for State

Mr. Polycap.....Court Assistants