



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 48 OF 2015

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....PROSECUTION

VS

BENARD OTIENO OCHIENG.....ACCUSED

JUDGMENT

1. The accused **BENARD OTIENO OCHIENG** is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya**. The particulars of the charge are that on the 15/9/2015 at Tingare sub-location in Siaya Sub-County within Siaya County murdered one **JOSEPH ONYANGO MBOYA**.

2. The Prosecution called eight (8) witnesses. The facts of the Prosecution's case is as follows: that on 15/9/2015, PW1, Mary Achieng Samo was on her way to Ewaya Market when she saw Nganyi, the accused, grandson to Joseph Onyango Mboya beating his grandfather. PW1 met PW4 Stephen Ochieng Oguna and PW5 David Opiyo Obonyo and informed them what she had witnessed and told them to go and check what was happening to the deceased. PW4 and PW5 proceeded to the deceased's home and found Nganyi, the accused inside the deceased's bedroom standing next to the deceased's bed quarrelling with the deceased. PW4 enquired from Nganyi, the accused what was wrong and the accused replied to PW4 so what was wrong and he hit PW4 with a *rungu*, which PW4 dispossessed the accused. PW4 and PW5 arrested Nganyi, but on their way, met PW3 Edward Ooko Ligale who told them to go back to check on the deceased. PW3 enquired from the deceased what had happened, then the deceased made a dying declaration to PW3 that Nganyi had injured him. PW3, PW4 and PW5 then discovered the deceased's leg had been fractured by Nganyi. PW4 received a call and left. PW3 and PW5 then told the accused to take the deceased to the hospital. PW3, PW5 and others took the deceased to hospital but found it closed, proceeded to police and returned back home. The deceased died the following day at his home. The accused who had been arrested by members of public was handed over to PW9 No. 63312 Cpl Elias Ndirangu on 15/9/2015 at around 6.30 pm at Tingare Police Patrol Base, PW9 called Sigomere Police Station, who came for the accused. PW9 recorded a report of death of the deceased at his home on 16/9/2015 and informed OCS Sigomere Police Station who sent them to the scene with a vehicle with Cpl Munene. PW9 in company of Cpl Munene proceeded to the scene and collected the deceased body and, two *rungus* which had been found in possession of the accused. The deceased body was then taken to Segal Mission Hospital Mortuary. PW9 later recorded witnesses statements and after postmortem report, charged the accused with the offence of murder.

3. The accused denied the offence and gave a defence of alibi. The accused told court he had been staying with his grandmother Jennifer Awino (PW2) wife to the deceased herein, one Mboya, who was his grandfather, that he had stayed with them for a long time and that he did not have any grudge with any

of them. He testified that on 15/9/2015, he had left for Bungasi for work at around 7.00am by which time his grandfather had gone to sell milk, and the only person who he left at home was his grandmother, but who had gone to the shamba. That he left his place of work at 4.30pm and that on the way he met one, Adwera with three other people who stopped him, greeted him and asked him where his grandmother was and told him they suspected him without disclosing to him of what and asked him to accompany them to Ewaya Police Station. He testified that he did not see his grandfather at the place, he met the three persons; however, on the way to Ewaya Police Station he was beaten by the group of people who had a wheelbarrow from which group he recognized Ochieng (PW4) and Songa (PW5). That in the wheelbarrow, the group was carrying Joseph Mboya, his grandfather who had injury on his right leg which was fractured. That he tried to talk to him but he was unable to talk. That the group forced the accused to push the wheelbarrow but after a distance the group took it over and started assaulting him. The accused was then taken to Ewaya Police Station whereby he was arrested. The accused stated he did not see his grandfather at the Police Station and he did not know whether he was taken to any hospital. He later heard his grandfather died at home. The accused denied having assaulted his grandfather on 15/9/2015. He denied having killed his grandfather. He prayed that court do find him not guilty and acquit him of the offence of murder. He stated that he did not plan to kill his grandfather stating he was in good terms with his grandfather.

4. The accused is facing a charge of murder. **Section 203 of the Penal Code** states: -

“203. Any person who of a malice aforethought causes death of another person by unlawful act or omission is guilty of murder.”

5. In a case of murder, the Prosecution must prove that the accused formed the necessary intentions to cause death or grievous harm to the deceased. **Section 206 of the Penal Code** describes circumstances which constitute malice aforethought, which is a very important ingredient for the offence of murder. **Section 206 of the Penal Code** provides: -

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

a) an intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or not;

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be cause;

c) an intent to commit a felony;

d) an intention by the act or omission facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony”.

6. To prove a charge of murder, the Prosecution has a duty to establish the following ingredients: -

(a) the death of the deceased and its cause.

(b) that the accused caused the death through an unlawful act or omission.

(c) the accused possessed an intention to cause harm/kill or had malice aforethought.

7. **Whether the Prosecution proved the death of the deceased and its cause?** PW8, Dr. Willis Ochieng, who gave evidence on behalf of Dr. Fanuel Ojwang testified that a postmortem was carried on the body of the deceased by Dr. Fanuel Ojwang on 24/9/2015 in the presence of PW6 Charles Ouma Mboya and his brother George Otieno Mboya in company of PW9 who identified the deceased body to

the doctor for postmortem report. PW2 and PW3 testified that they saw the deceased's body before it was collected by police. The doctor's evidence corroborated the evidence of PW2 and PW3 who told the court that they saw the deceased's body and who also saw the deceased body when it was collected from his home by police and taken to Sega Mission Hospital Mortuary. The death of the deceased is not in dispute. PW8 testified that the doctor on examination of the body of the deceased opined the cause of death was due to massive left subdural intracranial (subdural and intracerebral) haemorrhage. The death of the deceased and cause of it was therefore proved by the Prosecution.

8. Who caused the death of the deceased? The accused in his defence totally denied causing the death of the deceased. He gave a defence of alibi denying that he was at the scene of the crime and claimed he was arrested on his way from duty and framed by the mob for having assaulted his grandfather. He later while in police cells heard his grandfather passed on. In this case, there are three witnesses who placed the accused at the scene of the crime. PW1 told court she heard noises as she was walking near the gate of the deceased's home. She looked and saw "**Nganyi**" beating his grandfather, thus the deceased. PW1 did not go there as she was scared, however, on her way, she met PW4 and PW5 who she informed what she had witnessed. PW1 stated the person she referred to as "**Nganyi**" is the accused in the dock and was well known to her for a long time. PW2 testified she was not at home at the time of the alleged attack but on her way from the market, she met people who told her things were not good at her home, as "**Nganyi**" her grandson had killed his grandfather. On arrival at the home, she found "**Nganyi**" the accused carrying his grandfather on his back as his leg had been fractured. That "**Nganyi**" had beaten his grandfather and he was taking him to hospital.

9. PW4 and PW5 went to the deceased home after being informed by PW1 that the accused was assaulting his grandfather, the deceased's herein. That on entry in the deceased's house, they found the accused "**Nganyi**" and the deceased Mboya lying on the bed while the accused was standing next to the deceased's bed quarrelling with the deceased. The accused was armed with a *rungu* and a stick. They asked the accused what was wrong and he raised a *rungu* to hit PW4. PW4 and PW5 disarmed him and arrested him. On his way, they met PW3 who told them to return to the deceased's home so that they could take Mboya to the hospital. PW3 told court that PW4 and PW5 told him the accused had assaulted his grandfather. That the deceased told PW3 that, "**this boy has killed me, my grandson Nganyi has killed me.**" PW3, PW4 and PW5 checked the deceased's leg and found it fractured. PW3 asked Nganyi how he could raise his hand and assault his grandfather and he asked PW3 to forgive him. PW3 asked the accused to carry the deceased on his back to the hospital. That they went to Ewaya Police Post. The police officers arrested "**Nganyi**" for assault. PW3 made the report of the assault and took the deceased to Ewaya Hospital in his wheelbarrow from where they were referred to Sega Hospital and as it was too late they took the deceased back home. The deceased died during the night. PW9, No. 63312 Cpl Elias Ndirangu told court that on 15/9/2015 at 6.30pm, a group of people brought a person who was arrested and another person in a wheelbarrow, and they told him they had arrested one Benard Otieno for assaulting the person in the wheelbarrow. PW9 asked the person in the wheelbarrow who had assaulted him, and as he could not talk due to the injuries he had sustained, he pointed at Benard Otieno, his grandson who was held by members of public.

10. From the evidence of PW1, PW2, PW3, PW4, PW5 and PW9, I find that the accused also referred to as **Nganyi** was placed at the scene of the crime. He was seen by PW1 assaulting the deceased. PW3 was told by the deceased he was assaulted by the accused. PW4 and PW5 found the accused at the scene of crime quarrelling his grandfather, armed with a *rungu* and stick exhibits P1 and P2 respectively. I have evaluated the evidence of PW1, PW2, PW3, PW4, PW5 and PW9 and I find the witnesses to be credible witnesses. The accused did not give any reason why the witnesses could have framed him. PW1, PW2, PW3, PW4 and PW5 who are neighbours and relatives of the accused and who know him very well stated in the village they refer to him and call him "**Nganyi**". PW4 and PW5 saw the accused beside his grandfather's bed and I therefore find that their evidence placed the accused at the scene of the crime.

11. I have considered the appellant's defence of alibi and I find the same has been dislodged by the Prosecution witnesses, thus PW1, PW2, PW3, PW4 and PW5. I therefore find the defence of alibi was not raised early enough to give the Prosecution opportunity to check out on it. It was not even raised through the cross-examination. It is in view of the above that I find it to be an afterthought and I reject

the same.

12. There is an alleged dying declaration by Joseph Onyango Mboya to PW3 Edward Ooko Ligale. PW3, PW4 and PW5 testified that the deceased told them that, ***“this boy has killed me, my grandson Nganyi has killed me.”*** PW3, PW4 and PW5 I note included the dying statement given to them by the deceased in their statement to police. They stated how the deceased confided to them how the injuries were inflicted on him in the presence of the accused. PW3, PW4 and PW5 thereafter forced the accused to carry the deceased on his back to the hospital. From the evidence of PW3, PW4 and PW5, I find the deceased was in a position to speak and that he told PW3, PW4 and PW5 in the presence of the accused, that it was the accused who had injured him. The accused who was accused of causing injuries by the deceased in his presence did not claim the deceased was not in a position to speak nor did he challenge the deceased that it was not him who had injured him. However, it appears when the deceased was taken to the police post he was unable to speak due to the passage of time from the time he had been injured. I have considered the postmortem report on examination on the body of Joseph Onyango Mboya exhibit P3. It shows the deceased suffered shortening of the left leg with deformity and valgus position of the foot; edema/swelling of the mid shaft left leg; edema on the left parieto-temporal scalp and left periauricular region; left scalp hematoma-parieto-temporal region measuring 10x10cm, massive left subdural and intracerebral hematoma. The injuries are consistent with beating using a *rungu* and a stick. PW4 and PW5 found the accused armed with a *rungu* exhibit P1 and a stick exhibit P2.

13. Regarding the dying declaration, it is trite that such evidence must be received with great caution. The test applicable was set out in **Republic V Peter Mburu Muthoni, HCCR Case No. 27 of 2004(2015)eKLR** where Osiemo, J. referred to **Choge V Republic** observed as follows: -

“the general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declarations as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person. See CHOGE V REPUBLIC (1985) KLR 1”

14. From the evidence of PW3, PW4 and PW5, the statement of Joseph Onyango Mboya implicating the accused of having caused fatal injuries was made a few hours before he died but immediately the three went to find out what was happening to the deceased and in presence of the accused. The statement is admissible as a dying declaration because it was made first before the deceased stopped talking and few hours before his death and in extremity when the deceased was at the point of death and the mind is induced by the most powerful consideration to tell the truth. The deceased was 80 years old and the deceased knew the accused as his grandson and his name of Nganyi and a possibility of mistaken identity do not arise. His evidence did not in my view require corroboration before it can be relied upon. However, I find corroboration from evidence of PW3 and PW5 who found the accused armed next to the deceased's bed. In view of the evidence of PW1, PW2, PW3, PW4, PW5 and PW9, I am satisfied that the Prosecution proved that the deceased's death was caused by the accused herein.

15. **I now turn to examine whether the accused had malice aforethought?** PW1 said that she saw Nganyi, the accused beat the deceased with his fist. PW4 and PW5 on entering the deceased's home, they found him lying on a bed while the accused was standing next to him quarrelling him armed with a *rungu* and a stick. PW3 told court that the deceased told them the accused had killed him. They observed the deceased's leg was fractured and was seriously injured. The accused was having a *rungu* and a stick used to assault the deceased 80 year old grandfather and he had an intention to cause the death and/or to do grievous harm to the deceased. He had knowledge that the act of assaulting the deceased could cause death or grievous harm to the deceased. PW1 saw the accused assaulting the deceased while on her way, informed PW4 and PW5 who after a while went to the scene and still found the accused armed and quarrelling his grandfather. The nature of injuries as exhibited as per exhibit P1, thus the postmortem report, reveal that the deceased did not receive only one strike but the accused inflicted on the deceased several strikes. I find therefore there is evidence that the accused planned to commit the offence. I have evaluated and analysed his defence of alibi and reject the same for reasons I have already stated in this

judgment. For these reasons, I find the accused killed his grandfather and that malice aforethought is therefore proved. I accordingly find the accused guilty of murder of **JOSEPH ONYANGO MBOYA** and convict him of murder contrary to **Section 203 as read with Section 204 of the Penal Code.**

DATED AT SIAYA THIS 9TH DAY OF FEBRUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 9TH DAY OF FEBRUARY 2017.

In the presence of:

Mr. Ochieng: for the Accused

M/S Odumba: for State

Accused - Present

Court Assistants:

1. George Ngayo
2. Patience B. Ochieng
3. Sarah Ooro

J.A. MAKAU

JUDGE