



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE NO. 33 OF 2014

REPUBLICPROSECUTOR

VERSUS

JARED OMONDO MOMANYI1ST ACCUSED

SLIM BEN NYAKAWA2ND ACCUSED

JUDGMENT

1. The two accused, **Jared Omondo Momanyi** (accused one), and **Slim Ben Nyakawa** (accused two), are charged with murder, contrary to S. 203 read with S. 204 of the Penal Code, in that on the 5th March 2014, at Gekonge Sub-location Masaba South District within Kisii County, jointly with others not before court murdered Vincent Atandi Getanda (deceased).

2. The case for the prosecution was that on the material date at about 3.00 am, screams and shouts emanating from the home of the first accused awakened a sleepy village. Some of the villagers heard the first accused screaming and shouting that a person had been murdered or was dead.

3. The villagers, including **Samuel Getanda Onchera (PW 2)**, father to the deceased proceeded to the first accused's home where they found or were joined by **Hezekiah Ombati Onjera (PW 3)**, **Rose Peter Gesare (PW 4)**, **Samson Ratemo (PW 5)** and **Jared Ondara Ratemo (PW 6)**.

4. On arrival at the home, the villagers found the dead body of the deceased with injuries on the head, back and hands suggesting that he had been assaulted and killed.

The matter was reported to the police. **PC Gideon Mutua (PW 7)**, visited the scene with his team and commenced investigations.

5. The first accused who was at the scene at the time was suspected of having been involved in the death of the deceased. The second accused was arrested later as a second suspect but a third suspect reportedly disappeared.

6. The body of the deceased was removed to the mortuary where a post mortem examination was conducted by a doctor and the necessary post mortem report compiled (i.e P.Ex 1). The body was identified by **Isaac Onchera (PW 1)**.

Both accused were subjected to mental examination and found to be fit. The necessary reports were

compiled accordingly (i.e P.Ex 2a-b_ and on completion of police investigations, the two accused were charged with the present offence.

7. In their defence, both accused denied the offence.

The first accused indicated that he was a matatu conductor by occupation and was asleep on the material night when he was awakened by dog-barks. He made enquiries and saw the dog running towards the back of his house. Thereafter, persons identifying themselves as police officers knocked at his door. Minutes thereafter, villagers arrived at the scene and took him at the back of his house and near the kitchen the body of the deceased was found.

8. The villagers made screams on noticing that the body had injury on the head. This prompted him (first accused) to dash to the police station to make a report. He was later arrested after being suspected of having killed the deceased. He denied ever meeting the deceased on the material night and contended that he did not know how the deceased died.

9. The second accused indicated that he was a carpenter by occupation and had known the first accused for three years. He contended that he never knew the deceased and did not kill him on the material date. He was at his home undertaking his carpentry work when he was summoned by the area chief to a place called Masimba. He went there and found the chief in the company of his assistant and members of a local vigilante group. They all set upon him with kicks and blows before bundling him into a motor vehicle for transportation to Ramasha Police Station. He was eventually charged with the present offence.

10. From all the foregoing evidence, it was not disputed that the deceased met his death at the hands of a criminal or a criminal group. The post mortem report (P.Ex 1) showed that the deceased died from cardiopulmonary failure due to bleeding from multiple cuts including head injury due to an act of assault.

11. The issue which clearly presented itself for determination was whether the two accused or any one of them was identified as the person or persons who assaulted the deceased and occasioned him fatal injuries.

The nature of the injuries suffered by the deceased as shown in the post mortem report left no doubt that the assailant or assailants had the necessary intention to kill the deceased.

12. Both accused denied the offence and explained the circumstances under which they were arrested. They indicated that they were suspected without good cause and arrested.

The first accused indicated that he may have been a passive victim of the offence in as much as the body of the deceased was found at his home.

13. The law does not place any obligation on an accused person to prove his innocence (see, **Kioko Vs. Republic (1983)KLR 289**). Instead, the obligation to prove the guilt of a suspect beyond reasonable doubt lies with the prosecution.

It is herein clear that none of the prosecution witnesses saw any of the accused in the act of assaulting the deceased. They did not therefore offer any direct evidence against the accused and their evidence against the first accused was mere suspicion on the basis that the body of the deceased was found in his home.

14. It is however, instructive to note that some of the witnesses (PW 4, PW 5 and PW 6) indicated that the first accused was among the first people to raise alarm that the body of the deceased was at his home or that he(deceased) was murdered near or at his home.

It is also instructive to note that Jared Ratemo (PW 6) indicated that he observed the body of the deceased and opined that he may have been killed earlier thereby implying that death did not occur at the time when the body was discovered outside the house of the first accused.

15. It may also be noted that Samson Ratemo (PW 5), indicated that the first accused's homestead was normally frequented by many people as it was a "changaa" (illicit liquor) drinking den where boiled goat and cow heads were sold for consumption by customers.

16. Given all the foregoing factors, it was apparent that any individual who frequented the first accused's homestead at the material time was capable of having committed the fatal attack on the person of the deceased. Therefore, the suspicion which was cast upon the first accused was not credible and sufficient for consideration as proper circumstantial evidence against the first accused.

17. In any event, suspicion can never be evidence of commission of a criminal offence no matter how strong if it is not supported by any other credible evidence (see, **Sawe Vs. Republic (2003) KLR 369**).

It is intriguing that the second accused was also suspected and charged yet none of the prosecution witnesses mentioned having seen him at the scene at the material time. The bulk of their evidence was directed towards the first accused.

18. It is also intriguing that the investigations officer (PW 7) implied that the deceased was attacked with a big club inside a kitchen while he was at the homestead of the first accused drinking "changaa", yet no evidence was availed to establish and prove the said facts.

Either, the investigations officer (PW 7), deliberately omitted vital evidence or he was dwelling on conjecture to justify the arraignment of the two accused.

19. For all the foregoing reasons, there is no possibility for this court to enter a guilty verdict against the two accused. The case against them was not proved beyond reasonable doubt by the prosecution. They are accordingly found not guilty as charged and acquitted.

[Delivered and signed this 7th day of March 2017]

J.R. KARANJAH

JUDGE

In the presence of

CC Mohe/Dorothy

State Counsel – Ms. Mbelete

Mr. Anyona holding brief for Mr. Okemwa for accused

Accused 1 – 2

J.R. KARANJAH, J