



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 28 OF 2014

(Formerly Kisii High Court Criminal Case No. 17 of 2012)

REPUBLIC.....PROSECUTOR

versus

JOANNES ONYANGO NYANDEJE..... ACCUSED

JUDGMENT

1. Before Court is a 53-year-old **JOANNES ONYANGO NYANDEJE** facing an information on the murder of **DUNCAN OUMA OMITI** on 29th January 2012 at North Kamwango sub-location, North Kamagambo location in Migori County. I will henceforth refer to the said Duncan Ouma Omiti as **'the deceased'**.

2. The accused person pleaded to the information on 09/02/2012 before *Sitati, J.* in the High Court at Kisii. He denied the offence and a trial was ordered. Before the commencement of the trial, this case was transferred to this Court upon the establishment of a High Court station.

3. In a bid to prove the information, the prosecution called a total of nine witnesses. **PW1** was **ELVIS OMONDI ONG'ONG'A** who was with the deceased on the day he met his death. He was also with **SETH OCHIENG OGOLA** who testified as **PW4**. Two brothers of the deceased also testified. They were **BENARD ODHIAMBO OMITI** and **DANIEL OCHIENG ODONGO** who testified as **PW2** and **PW6** respectively. The mother to the deceased, **ELIZABETH ACHIENG** testified as **PW3**. **PW5** was one **JACOB ADO ODUONG**, the Assistant Chief of K'oluoch Sub-Location whereas the Chief of North East Kamagambo location, **CHARLES OUMA OWUOR**, testified as **PW7**. **DR. SAMMY RUWA MWATELA** testified as **PW8** and the Investigating Officer No. 60296 Corp. **DAMINIUS ONYANGO** testified as **PW9**.

4. The prosecution's case is that in the early morning of 29th January 2012 at around 04:00am the deceased was walking home in the company of PW1 and PW4 from a funeral. As they approached River Nyakuda they saw a group of people at the river armed with spears and rungu. As a motorcycle rode from their direction of travel past the river, PW1 and PW4 managed to identify two of the people who were at the river. They were the accused person and his brother one **Chief Nyandeje**, who was killed by a mob following the death of the deceased. It was the evidence of PW1 and PW4 that they were aided by the bright moonlight and the lights from the motor cycle to identify the two. When the group saw the trio, they pelted them with some stones. One of them hit PW4 and on sensing danger he ran into a nearby sugarcane plantation. The remaining two, that is the deceased and PW1, continued moving towards the river. On reaching there, they were suddenly attacked. PW1 was the first one to be hit by the accused person with the side of a rungu (club) and he fell.

5. As PW1 was on the ground, he saw how the accused and his late brother were armed. The accused person had a spear on one hand and a rungu on the other hand as his brother had a long knife and a panga. It was the accused person who immediately after hitting PW1 speared the deceased through his stomach. His brother also knifed the deceased on the chest. The deceased began running away and the two pursued him. PW1 rose from the ground and ran away and informed PW2 of what had happened to the deceased. PW2 immediately left for the scene with PW1 using a motor cycle and on reaching there, they saw the deceased having fallen and bleeding profusely. According to PW2, the deceased was already dead. The two carried the deceased home and placed him inside PW3's house. They closely observed the body and noted several cut wounds on the head and a stab wound that ran through the stomach. They reported the matter to PW5. PW5 visited the home of the deceased and confirmed that indeed the deceased had died. He informed PW7 as well as the police.

6. The body of the deceased was later collected by the police from Kamagambo Police Station. The police left with PW2, PW5 and PW7 and headed to the home of Chief Nyandeje whom they had been informed was the suspect. They however did not find him. The police left PW2, PW5, PW7 and other Chiefs who had also gathered there with instructions to find and arrest the suspect and avail him to the station. As they continued with the search, they received a call from a member of the public that two suspects had been arrested at the homestead of Nyandeje and they rushed there. They found that the suspects were the accused person and one **Joseph Ouma Okoth** whom they took to the police station.

7. The body of the deceased was preserved at the Rosewood Hospital mortuary where a post mortem examination was conducted by one Dr. Emmanuel Oyier after the body had been identified by PW6. It was opined that the cause of death was massive haemorrhage from hemopentoreum sustained from multiple stab wounds into the abdomen as a result of assault with a sharp object. The Post Mortem Report was however produced by PW8 on behalf of the said Dr. Emmanuel Oyier who was said to be pursuing further studies and was not available to attend Court. PW8 had known the said Dr. Emmanuel Oyier for 10 years since Medical School and had also worked together in Migori County.

8. The case was investigated by one **PC Choge** who at the hearing, he had been transferred and the matter was handed over to PW9. PC Choge had been informed by PW5 of the death of the deceased and visited the scene. He collected the body and took it for preservation and organized for an autopsy. PC Choge then recorded statements from witnesses and received two suspects from PW5. They were the accused person and one **Joseph Ouma Okoth**. He however released the said Joseph Ouma Okoth due to lack of any incriminating evidence. Since PW1 and PW4 had identified the accused person as the one who killed the deceased, the accused person was taken for mental examination and was later charged.

9. The prosecution then rested its case with the foregone evidence and on consideration of the evidence this Court in a ruling delivered on 24/01/2017 placed the accused person on his defence. The accused person opted for and gave sworn testimonies and called two witnesses; **JACINTA OUMA ONDIEKI (DW1)**, the wife of Chief Nyandeje, and **PETERLIS OLIECH NYANDEJE (DW2)**, his brother.

10. It was the accused person's defence that he never took part in the killing of the deceased as he never went to the river as alleged. He only learnt the death of the deceased from DW1 who had gone to his home in the morning of 29/01/2012 and informed him that a brother to the deceased one Paul had informed her that DW1's husband had killed his brother. The accused person then hurriedly proceeded to see his brother Chief Nyandeje and upon enquiry Chief Nyandeje told him that he had gone to a funeral the night before and as he was on his way home with his girlfriend they were confronted by a group of people and in the process of defending himself and the girlfriend one of the attackers was injured. The accused person advised his brother to report the matter to the police or to wait and surrender to the police when they visit the scene to collect the body of the deceased. He then returned to his house.

11. At around 10:00am, the accused person saw the police in the company of the PW2, PW5, PW7 and other Chiefs from the neighbouring location visit their homestead. They searched the house of Chief Nyandeje and since he was not at home the police left but instructed the Chiefs to pursue and arrest the said Chief Nyandeje. The accused person was at the homestead during that time and nothing was said of him. A search was conducted in the nearby sugarcane bushes and one Joseph Okoth was arrested and

taken to the homestead of Nyangejes. On returning with the said Jiseph Okoth, the Chiefs then arrested the accused person as well alleging that he was also part of the attackers. He was led to the police station and later charged.

12. The evidence of the accused person was corroborated by DW1 who informed this Court that it was her husband, Chief Nyandeje, who told her that he had engaged in a fight with some people on his way home from a funeral over a woman and that one of them was injured. Her husband however did not tell her that he was in the company of the accused person during the fight or at all. At around 11:00am a group of armed youths visited her home looking for her husband and threatened to kill the entire family if they do not find her husband. DW1 ran into safety with her children and learnt later that her husband had been killed. DW2 also confirmed seeing the group of the youths looking for Chief Nyandeje and not the accused person although he had all along been at home.

13. The defence filed written submissions urging this Court to acquit the accused person since the prosecution failed to prove its case as required in law and that the evidence could not sustain such a serious information. The State relied on the evidence on record in calling for conviction of the accused person.

14. I have carefully considered the evidence on record as well as the exhibits and the Counsels' submissions. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients:

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will therefore consider each of the issues independently.

(a) Proof of the fact and cause of death of the deceased:

15. It is not in dispute that the deceased person in this matter died. That position is confirmed by nearly all the witnesses who testified. The first limb is hence answered in the affirmative.

16. As to the cause of the death of the deceased, PW8 produced a Post Mortem Report which was prepared by Dr. Emmanuel Oyier upon conducting a post mortem examination on the deceased. The said report gave the possible cause of death of the deceased was massive haemorrhage from hemoperitoneum sustained from multiple stab wounds into the abdomen as a result of assault with a sharp object. Since there is no any other evidence contradicting that of PW8 on the cause of death of the deceased, this Court so concurs with the medical finding.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:

17. This issue is aimed at establishing whether the accused persons caused the death of the deceased and if so, whether it was by an unlawful act or omission.

18. The incident that led to the death of the deceased was witnessed by two witnesses; PW1 and PW4. The time was the wee hours of the 29/01/2012. The scene was illuminated by a bright moonlight and the headlight of a motor cycle. That scene was at the River Nyakuda. There was a road leading to that river. It was a narrow path and could only be used by one person at a time. That is why when the motor cycle appeared from the rear of PW1, PW4 and the deceased, they all had to get off that path to give way to the motor cycle.

19. PW4 saw a group of many people at the river when the lights from the motor cycle illuminated ahead. He could not approximate their number but insisted that they were many. They were armed. Shortly, stones were thrown to them and he was hit by one of them. He immediately ran into the nearby sugar plantation. PW4 however witnessed a fight as he ran away. He however did not give an elaborate account of how that fight broke out and the circumstances surrounding the fight remain unknown. PW4 testified that with the help of the moonlight and the motor cycle headlight he managed to identify the accused person and his brother as among those who were armed at the river.

20. Be that as it may, PW1 and the deceased still proceeded to the river. PW1 also saw the group of armed people at the river and that they were many. Just as PW4, he also managed to identify the accused person and his brother as among those at the river. That was by the aid of the moonlight and the motor cycle headlight. PW1 instead did not witness any fight and did not see any stones thrown to them either. As they approached the river, he was ahead and saw how the accused person and his brother were armed. The accused person had a spear on one hand and a rungu on the other. The accused person attacked PW1 and hit him with the rungu on his hip. PW1 fell. While on the ground, he saw the accused person raise his spear and pierced the deceased on his stomach. It was only once and the deceased fell. The brother to the accused person then stabbed the deceased with a knife on the chest. The deceased stood and ran away as the two pursued him. PW1 managed to get a chance and escaped to his home where he informed PW2 of what had happened. PW1 did not elaborate on what the other people who were also armed did. Could they have just stood and watched as the ordeal was executed by the two brothers? Maybe, maybe not.

21. Both PW1 and PW4 knew the accused person and his brother well as their neighbours. However, they could not remember how the accused person and his brother were dressed at the river. They only saw them armed. But PW1 went so near them and lay on the ground as he witnessed the attack on the deceased. It was reasonably possible for him to at least see how the attackers were dressed. Were they hooded? Did they have caps? Were they dressed in similar clothes? What of the rest of the people? Further PW1 was hit on the hip and fell. He then went to hospital for treatment. It was not also revealed how injured he was as to ascertain whether with such an injury he could still run.

22. The assertion by PW4 that there was a fight is not remote. The same was corroborated by the accused person and DW1, the wife of Chief Nyandeje. DW1 testified that when her husband reached home that early morning he told him that he had been engaged in a fight with people who wanted to snatch his girlfriend and that one of them was injured. Likewise, when the accused person received the information from DW1 that Chief Nyandeje had killed the deceased he went to his brother and sought for clarification. His brother confirmed the fight. From the evidence of the three witnesses, this Court finds as a fact that there was indeed a fight at the scene. Again, the details of that fight remain so scanty and one wonders how PW1 could have easily followed up the events during such a fight and at night.

23. On the foregone set of events, this Court is under a legal duty to weigh the evidence of PW1 and PW4 who are the identifying witnesses with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under:-

“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.”

24. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

25. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

26. I have carefully addressed my mind to the facts and the law in this case. Whereas it is easily possible to connect Chief Nyandeje with the death of the deceased moreso from the evidence of the accused person and DW1 and the fact that the villagers in a revenge mission killed him, there are lingering doubts as to the involvement of the accused person in the death of the accused person. I find that the circumstances that prevailed at the river that early morning taken in totality and weighed against the law cannot be said to have accorded PW1 and PW4 such opportunities to clearly recognize the accused person as one of those who were at the river. The identification of the accused person by recognition cannot be said to be without error. I therefore find that the prosecution failed to prove that the accused person was the author of the death of the deceased. The second ingredient is therefore answered in the negative.

27. Having failed to prove the second ingredient, it goes without say that the accused person cannot be seen to have acted with malice aforethought. Infact a consideration of the last ingredient will not serve any purpose in this matter.

28. I hence conclude that the information of murder facing the accused person has not been proved. The accused person is hereby found **NOT GUILTY** of the murder of **DUNCAN OUMA OMITI** and is hereby set at liberty unless otherwise lawfully held.

29. Lastly, I wish to thank **Mr. Adiso**, Learned Counsel and **Ms. Owenga**, Senior Principal Prosecution Counsel for their deliberate efforts that enabled the finalization of this matter which was among the old ones in the station.

DELIVERED, DATED and SIGNED at MIGORI this 12th day of June 2017.

A. C. MRIMA

JUDGE