



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 16 OF 2015

(Formerly Kisii High Court Criminal Case No. 137 of 2012)

REPUBLIC.....PROSECUTOR

-versus-

1. PIUS ABIERO MOLA

2. BOAZ OTIENO ABIERO

3. GEORGE OLIGI JERIM.....ACCUSED

JUDGMENT

1. The three accused persons herein, **PIUS ABIERO MOLA**, **BOAZ OTIENO ABIERO** and **GEORGE OLIGI JERIM** were jointly charged with the murder of **ODADA ACHIENG** (hereinafter referred to as '***the deceased***') before the High Court at Kisii (**R. Lagat Korir, J.**) on 07/11/2012. The accused persons are family members.

2. It is alleged that the accused persons jointly murdered the deceased on the 23rd day of October 2012 at Amoyo sub-location within Migori County. I will henceforth refer to **PIUS ABIERO MOLA** as '***the first accused person***', **BOAZ OTIENO ABIERO** as '***the second accused person***' and **GEORGE OLIGI JERIM** as '***the third accused person***'.

3. The accused persons 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.

4. The prosecution called six witnesses in a bid to prove its case. They are **PW1** one **JOHN OMOLLO OCHIENG**, a brother to the deceased. **JARED OWUNDA OCHIENG** testified as **PW2** and he was also a brother to the deceased. **PW3** was one **Dr. K'OGUTU VITALIS OWUOR** and the Land Adjudication and Settlement Officer in-Charge of Migori and Nyatike Districts one **CHARLES MORIASI OSEBE** testified as **PW4**. Another brother to the deceased one **JOHANA ARARE OCHIENG** testified as **PW5** whereas the Investigating Officer No. 49997 Cpl. **JOSEPH KITAKA** testified as **PW6**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

5. The prosecution's case is that in the morning of 23rd day of October 2012 at around 08:00am the deceased in the company of **PW1**, **PW2**, **Samuel Ogwanda Ochieng** (not a witness) and **Odhiambo Adem** (also not a witness) went to cultivate a parcel of land belonging to the deceased using a plough pushed by calves. As they so continued, they saw the three accused persons together with one **Reagan**

Obiero pass by near the farm with some calves and a plough. The four proceeded to a neighbouring parcel of land belonging to PW1 and began ploughing it. They then told the deceased and his three companions to stop ploughing the farm. That did not happen. The first accused person then went to where PW1 was and asked him why he was ploughing his farm. PW1 reminded him that the matter was subject of a court case but they had been allowed to plough. The first accused person then left and went into a nearby bush and collected some spears and pangas. He was by then accompanied by the other three people whom they were cultivating together. The first accused person then took the spears and the pangas and gave them to his companions. As that was happening, PW1 was standing just about 20 metres away.

6. The accused persons together with Reagan Obiero charged at the four. It was the first accused person who speared the deceased who was standing around 3 metres from PW1 and the deceased fell. PW1 rushed and held the first accused person but he was overpowered and thrown down. As PW1 lay down, the first accused person told his son, Reagan Obiero, to spear him and the son obliged. He speared PW1 on his chest. The second accused person then cut PW1 on the head with a panga and PW1 lost consciousness. On coming back to his senses about two days later, PW1 was admitted at Omboo Hospital (also known as St. Joseph's Mission Hospital) in Migori town.

7. PW2 was also hit on his back but was lucky not to fall. He ran home and informed PW5 of what had happened. PW5 rushed to the scene and took PW1 to hospital. It was PW2 who reported the matter to the police. The police rushed to the scene, interviewed people and collected the body of the deceased to Migori District Hospital where it was preserved and a post mortem examination conducted. The police also recovered a spear with fresh blood at a bush just adjacent to the scene.

8. The people who were interviewed at the scene were taken to Nyatike CID offices on that same day and recorded statements. The police visited PW1 at Omboo Hospital on the fourth day post admission and recorded his statement. PW1 gave the names of the four attackers as he knew them well. They were his distant neighbours. Further PW1 and his family were deeply involved in a dispute over the land in issue which had generated several cases, both criminal and civil cases, which some were still pending before courts. PW4 confirmed the array of disputes over the land.

9. A post mortem examination was conducted by PW3 after the body had been identified by PW5. The examination confirmed the sole injury on the chest which pierced the left lung. The cause of death was opined to be cardiac arrest due to stab injury to the heart. PW3 filled in and produced the Post Mortem Report as an exhibit.

10. The accused persons surrendered to the Nyatike Police Station on the day of the incident. The first accused person was the first to surrender and the two others surrendered later in the day. As the witnesses went to record their statements later in the day, they found the three accused persons already in the custody of the police. They identified them as they knew them well.

11. PW6 took over the conduct of the investigations and took blood samples of the accused persons together with that of the deceased and forwarded them to the Government Chemist alongside the spear for analysis. The analysis did not yield the expected results as the blood on the spear could not generate a DNA profile due to poor storage which PW6 attributed it to the unreliable power situation at Nyatike Sub-County Hospital. He also recorded further statements. On completion of the investigations, PW6 took the accused persons for mental examination and later charged them. PW6 produced the Government Chemist Report and the spear as exhibits.

12. However, as the trial went on, the third accused person passed on while in lawful custody. The case proceeded in respect to the first and second accused persons.

13. The prosecution rested its case with the foregone evidence and on consideration of the evidence this Court placed the accused persons on their defences. The accused persons opted for and gave unsworn testimonies without calling any witnesses. The first accused person admitted that on the day in issue he was truly at the farm cultivating and saw PW1, PW2 and PW5. He contended that the witnesses were untruthful to the Court and their testimonies were contradicting. He also pointed out that PW2 clarified

that it was Reagan Obiero who speared the deceased and that it was the second accused person who injured PW1.

14. The second accused person admitted having been at the farm and saw PW1, PW2, PW5 and the deceased. He denied that he attacked anyone as he did not have any issue with them and further he only knew PW2 at the scene. He also denied that he surrendered to the police as he was arrested as he went to see his father who had been earlier on arrested.

15. The accused persons closed their cases and the matter was left to this Court for a judgment.

16. I have carefully considered the evidence on record as well as the exhibits. As the accused persons are 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:

17. It is not in dispute that the deceased person in this matter died. That position is confirmed by all the witnesses who testified save PW4. The first limb is hence answered in the affirmative.

18. As to the cause of the death of the deceased, PW3 produced a Post Mortem Report which he prepared upon conducting a post mortem examination on the deceased. The said report gave the possible cause of death of the deceased as cardiac arrest due to stab injury to the heart sustained from physical assault with a sharp object. Since there is no any other evidence contradicting that of PW3 on the cause of death of the deceased, this Court so concurs with that 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 persons:

19. 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.

20. The evidence touching on the accused persons in this case is principally by two eye-witnesses, PW1 and PW2. There is also the evidence of PW6 which also touches on the accused persons.

21. The time of the incident was 08:00am on 23/10/2012. It was daytime. PW1 and PW2 knew the accused persons well as their neighbours and as having been involved in several disputes on the land in issue including some which were still current in courts. They also knew their names. The fact that the accused persons were on the land as alleged by the prosecution is not denied by the first and second accused persons. They even admit having seen PW1, PW2 and PW5 at the scene. The accused persons however deny that there was any fracas at the scene.

22. It is as well not in dispute that the deceased passed on and his body was recovered and removed from the scene by the police including PW6. ***But how did the deceased meet his death on the farm?*** PW1 and PW2 alluded to an attack by the accused persons. PW3 confirmed that the body of the deceased had a single pierce wound on the left side of the chest. PW1 also so stated. PW3 opined that the injury was the fatal one and it had been caused by a sharp object like a spear. PW1 and PW2 stated that they saw the first accused person spear the deceased on the chest.

23. I have also seen a ruling that was delivered by my sister **Hon. Sitati, J.** on an application by the accused persons for bond pending trial. It states at one point that:

“...is also supported by the affidavit sworn by Pius Abiero Mola on behalf of himself and on behalf of his two co-accused. Both the grounds and the affidavit give a detailed background to the incident leading to the death of the deceased. The deponent avers that the three of them were also seriously injured during what he describes as a duel between himself and his two co-accused on one hand and a group of armed intruders who attacked them as the three of them worked in their shamba on the other hand. The deceased is said to have been part of the intruders.....”

24. The position taken by the accused persons in their defences is at variance with what they told the Court when they were seeking to be released on bond pending trial. It is not possible that at one point there was a duel at the scene and at the other point there was no duel at all. One of the versions must be erroneous. Having considered the evidence in totality and the record including all the proceedings in this matter, I am not persuaded by the position taken by the accused persons in their defences. I find that the accused persons are among those who jointly attacked the deceased and the others at the scene and which attack led to the death of the deceased.

25. In arriving at that finding, I am guided by the law on identification as laid in various decisions including, but not limited to, **Wamunga vs Republic (1989) KLR 426** **Nzaro vs Republic (1991) KAR 212**, **Kiarie vs Republic (1984) KLR 739, R -vs- Turnbull & Others (1973) 3 ALL ER 549**. The accused persons were hence positively identified by recognition as the attackers who caused the death of the deceased. Their names were also readily given by PW1 and PW2 (See the Court of Appeal case of **Simiyu & Another vs. Republic (2005) 1 KLR 192**).

26. I also observed the witnesses as they testified in Court and I believed them. They were sincere and truthful and narrated the ordeal with precision. Their testimonies were neither shaken on examination. The identification was hence free from error. Needless to say, the joint acts of the accused persons were contrary to law and had no justification. The second ingredient is therefore answered in the affirmative.

(c) Proof that the said unlawful act or omission was committed with malice afterthought:

27. I will now consider the third limb as to whether there was malice aforethought on the part of the accused persons in committing the offence at hand. The starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

“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 of 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, or by a wish that it may not be caused.

(c) An intent to commit a felony.

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

28. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed”.

My Lordships in the above case went on to say that: -

“In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...”

29. And in the case of Mary Wanjiku Gitonga -vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR) the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

“We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed....Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances, we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record.”

30. In this case there is evidence that there were series of disputes over the land between the family of the accused persons and that of the deceased. According to witnesses the matter was still pending in court and there was no bar to working on the land. PW1 also faced a criminal charge on trespass over the land. There was therefore sustained acrimony between the two families.

31. On that background, the accused persons went to the farm while armed with spears and pangas. Their mission was very clear; to have the family of the deceased leave the farm or to kill those working on the farm. The accused persons chose not to follow the law. It was expected of them to report the matter to the police or the court for appropriate legal intervention. Having disregarded the law and taken unlawful actions that led to the death of the deceased, the accused persons must face the consequences. It is not a defence to even allege that they were the *bona-fide* owners of the land. Ownership of land is not a justification to commit acts of aggression over any one on such land.

32. It is therefore obvious that the accused persons were fully aware that death or grievous bodily harm will ensue from their joint venture. They had hence planned to kill or severely injure the deceased and any other person on the land. Maybe PW2 survived on his escape. There was also no evidence that PW1, PW2 and/or the deceased were armed. There is therefore a clear manifestation of malice on the part of the accused person moreso on the nature of weapon used to attack an unarmed person; a sharp spear. This Court hence finds that the prosecution likewise proved malice aforethought in this matter.

33. As the prosecution has proved all the ingredients of the offence of murder against the accused persons, this Court now finds **PIUS ABIERO MOLA** and **BOAZ OTIENO ABIERO** guilty of the murder of **ODADA ACHIENG** and each of them is hereby convicted accordingly under **Section 322(2)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

Orders accordingly.

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

A. C. MRIMA

JUDGE