



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 42 OF 2014

(Formerly Kisii High Court Criminal Case No. 54 of 2013)

REPUBLIC.....PROSECUTOR

-versus-

1. PAUL OUMA WANGA

2. TOBIAS AKIKO WANGA.....ACCUSED

JUDGMENT

1. **PAUL OUMA WANGA** and **TOBIAS AKIKO WANGA** are jointly charged with the murder of **DANIEL OCHIENG AMONDE**. The two accused persons are brothers. It is alleged that on the 1st day of May 2013 at K'otieno II sub-location in Migori County jointly murdered Daniel Ochieng Amonde. I will refer to **PAUL OUMA WANGA** as '*the first accused person*', **TOBIAS AKIKO WANGA** as '*the second accused person*' and **DANIEL OCHIENG AMONDE** as '*the deceased*'.

2. The accused persons pleaded to the information on 04/06/2013 before *Sitati, J.* in the High Court at Kisii. They 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 six witnesses. **PW1** was **DALMAS ATER AMONDE**, a brother to the deceased. **KENNEDY OTIENO BUNDE** testified as **PW2** and he was a cousin to the deceased. **PW3** was one **MICHAEL OTIENO OWIRA**, the Assistant Chief of K'otieno Sub-Location whereas **DR. MMMANUEL O. OYIER** testified as **PW5** and the Investigating Officer **No. 58771 PC NOAH LIMO** testified as **PW4**. The arresting officer one **No. 1996063339 APC MARWA GATIMU** testified as **PW6**.

4. The prosecution's case is straight forward. In the morning of 1st day of May 2013 at around 07:00am the deceased in the company of **PW2** went to cultivate a parcel of land near a river within Dulu village using a plough pushed by calves. As they so continued, they were hit with some stones but that did not distract them. Suddenly they heard a voice of someone asking them why they were cultivating the farm. **PW2** turned towards the direction where the voice came from and saw the first accused person armed with panga. He raised the panga and aimed it on **PW2**'s head. **PW2** raised his right hand and the panga instead cut him on the hand. He fell. **PW2** also saw the second accused person at the farm who was in the company of the first accused person but the second accused person did not attack him.

5. As **PW2** fell, the accused persons jointly attacked the deceased. They were both armed with pangas. It was the first accused person who first attacked the deceased and cut him on the shoulder. The shoulder

was so severely cut that it almost fell off. The second accused person then cut the deceased on the head. The deceased fell but managed to raise up and ran towards a nearby sugarcane plantation. The accused persons pursued him and caught up with him. They continued cutting him with the pangas. They then left the deceased for the dead and returned to where PW2 was. Having seen what had happened to the deceased, PW2 managed to run away and luckily the accused persons did not pursue him. PW2 met one **Philip Agola Akala** (not a witness) whom he knew. He explained to him what had just happened and asked him to remove a cell phone from one of his trouser pockets and call the name of PW1. Philip obliged and PW2 informed PW1 of what had happened and asked him to rush to the scene and see how the deceased was. Philip took PW2 to Rapogi Hospital where he was referred to St. Joseph's Memorial Hospital in Migori. PW2 was admitted at that facility.

6. PW1 was the first person to arrive at the scene after the attack. He only found the deceased lying down bleeding profusely and with very severe injuries. One of his hands was almost coming off at the shoulder and the head had several injuries. He was already dead. PW1 raised alarm and villagers quickly responded and gathered. He called PW3 and informed him of the incident and then went to report to the local Ayiego AP Post. PW3 also rushed to scene and found that people had already gathered. He called and informed the OCS of Awendo Police Station as well as his Chief.

7. The first accused person was however the first one to report an assault at the Ayiego AP Post and he was in the company of his wife. He took with him a panga which was retained by the officers. PW6 advised him to go the local Otoro Dispensary and seek medical assistance first. When the first accused person left the camp, PW1 went in and reported the murder of the deceased by the accused persons. PW6 dispatched two of his officers who went and arrested the first accused person. He then locked him in the cells. PW6 knew the second accused person and surprisingly he saw him walk towards the direction of the camp. PW6 called and interrogated him but the second accused person denied taking part in the attack. PW6 also arrested him and placed him in cells.

8. PW6 then accompanied PW1 among others and visited the scene. On reaching thereat, he saw the body of the deceased and observed it carefully. He noted the severe cuts on the shoulder and armpit as well as several cuts on the head. He secured the scene and urged the villagers to wait for the police from Awendo Police Station. However, the crowd became so rowdy and were baying for the blood of the accused persons. They then removed the body of the deceased and took it to the camp as they pressed for the release of the accused persons.

9. Some officers from Awendo Police Station later went to the camp and found the body of the deceased. PW4 was among the officers. He observed the body of the deceased and had photographs taken. They collected the body and re-arrested the accused persons. They also visited the scene. PW4 drew sketch plans of the scene and the camp where the body was.

10. The body was preserved at the Rapcom Hospital mortuary where a post mortem examination was conducted by PW5 after the body had been identified by PW1. The examination confirmed the injuries on the head, right shoulder, left arm, and on the cardio-vascular system. It was opined that the cause of death was severe haemorrhage from deep cut wounds sustained from physical assault with a sharp object. PW5 filled in and produced the Post Mortem Report as an exhibit.

11. PW4 investigated the case. He recorded statements from witnesses and after the post mortem examination he took the accused persons for mental examination and later charged them. PW4 produced the P3 Forms for PW2 and the accused persons together with the photographs of the deceased, the panga and the sketch plans as exhibits.

12. The prosecution then 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. The first accused person stated that on one morning he was confronted by two people who were armed and asked him to say his last prayers as they were going to kill him since he had despised them. One of them then cut him with a panga and a struggle ensued. The panga fell and he raised alarm. The attackers then ran away leaving the panga behind. He was then assisted by his wife to the Chief's

office and then to the AP camp where he reported the incident and was asked to go for treatment. He surrendered the panga to the police. On return to the camp, he was arrested and locked in and later charged with an offence he knows nothing about.

13. The second accused person had been ailing in remand during the hearing of this case. Despite review of the bond terms, he still could not secure a willing surety. His health deteriorated with time. By the time he was to tender his defence, he could barely stand on his own. With the concurrence of the prosecution, the second accused person tendered his unsworn testimony through a duly translated written statement. It was his defence that he recalled one day at around 06:00am as he was at his workshop at Ayiego where he was called by a police officer and asked what had happened at his home and responded that all was well. All over a sudden, a group of armed villagers appeared and wanted to kill him. The police shot in the air and the crowd dispersed. He was however arrested and taken to Awendo Police Station and was later charged. The accused persons closed their cases without calling witnesses and the matter was left to this Court for a judgment.

14. 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:

15. It is not in dispute that the deceased person in this matter died. That position is confirmed by 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, PW5 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 severe haemorrhage from deep cut wounds sustained from physical assault with a sharp object. Since there is no any other evidence contradicting that of PW5 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 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 a single witness; PW2. The time was 07:00am on 01/05/2013. It was daytime. PW2 knew the accused persons well as his neighbours. He also knew their names. The attack on PW2 and the deceased was preceded by some stone throwing although PW2 did not see those who were stoning them. Then a voice asked them why they were cultivating the land. PW2 turned and saw the accused persons. He readily recognized them as his neighbours whose farm was separated by a river from his farm. They were both armed with pangas. The first accused person attacked him before the two attacked the deceased. PW2 gave a very vivid account of how the ordeal took place. He narrated how the deceased was jointly attacked by the accused persons. He even gave the names of the parts of the body of the deceased which the accused persons cut and they were confirmed by the other witnesses including PW5. PW2 therefore saw exactly how the ordeal happened. PW2 even saw the attackers return to where he was and decided to escape. PW2 sustained

injuries which were confirmed by the P3 Form. PW2 also readily gave the names of the attackers to Philip, PW1 and the police.

19. On that background, this Court is under a legal duty to weigh the evidence of PW2 who is the sole 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.”

20. 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.

21. 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.”

22. I have carefully addressed my mind to the facts and the law in this case alongside the defences tendered. The attack happened at daytime and the record has no evidence that the vision of PW2 was hindered in any way. I observed PW2 testify in Court and I believed him. He was sincere and truthful and narrated the ordeal with precision. His testimony was neither shaken on examination. I have cautioned myself on the dangers of relying on single-witness-evidence and I am satisfied that the evidence was water-tight and the defences do not outweigh or create any reasonable doubts to the prosecution’s evidence. 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 PW2 (See the Court of Appeal case of **Simiyu & Another vs. Republic (2005) 1 KLR 192**). The identification was 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 aforethought:

23. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.

24. 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...”

25. 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."

26. In this case there is evidence that there was a boundary dispute between the family of the accused person and that of the deceased. According to PW2 the matter was however discussed and the mother to the accused person allowed the deceased and PW2 to plow the lower part of the land and not to interfere with the disputed portion. The fact that there was that consensus was not disputed.

27. The accused persons went to the farm while armed with pangas. Their mission was very clear; to kill those working on the farm. The accused persons chose not to at least first ask the deceased and PW2 why they were working on the land. When they emerged from the sugar cane plantation, they pounced on the two. The accused persons cut the deceased severally. They were two cut wounds on the head which cut off part of the skull causing skull fracture, the right shoulder was severely cut resulting to multiple fractures and the left arm was almost falling off. These were no mean injuries.

28. 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 PW2. Maybe PW2 survived on his escape. I say so in considering the number of times the accused persons cut the deceased on the head and the rest of the body without any evidence of provocation or acting in self defence. Further, the first accused person had aimed his panga on the head of PW2 before PW2 instead offered his hand. There was also no evidence that PW2 and/or the deceased were armed. There is therefore a clear manifestation of malice on the part of the deceased. This Court hence finds that the prosecution likewise proved malice aforethought in this matter.

29. As the prosecution has proved all the ingredients of the offence of murder against the accused persons, this Court now finds **PAUL OUMA WANGA** and **TOBIAS AKIKO WANGA** guilty of the murder of **DANIEL OCHIENG AMONDE** 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 6th day of June 2017.

A. C. MRIMA

JUDGE