



IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 27 OF 2012

CONSOLIDATED WITH 48 OF 2013

(FORMERLY KISII HCCR CASE NO. 74 OF 2012)

BETWEEN

REPUBLIC PROSECUTOR

AND

JAIRUS MOSE NYAKUNDI alias JAIRO..... 1ST ACCUSED

JAMES KAMANDE BOSIRE..... 2ND ACCUSED

DANIEL ODONGO MOSE..... 3RD ACCUSED

RULING

1. **JAIRUS MOSE NYAKUNDI alias JAIRO, JAMES KAMONDA BOSIRE and DANIEL ODONGO MOSE** are charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information are that on 28th July 2014 are that between 28th March 2012 and 5th May 2012 at Kojwach Location within Rachuonyo South District of Homa Bay County, the accused jointly with other not before the court, murdered **WILLIAM MAKORI ONGONDO** (“the deceased”). The prosecution marshalled 6 witnesses to support its case.
2. The deceased was a pastor residing at Mathobo village, Bonyaiguba Sub-location, West Mugirango, Nyamira County. The prosecution case was that he disappeared at the end of March 2012 and his body recovered from a borehole on 5th May 2012 within the 1st accused’s compound.
3. The post-mortem on the deceased’s body was conducted by Dr Lilian Bosire on 10th May 2012 after it was identified by Teresia Aminga (PW 3) and Charles Onkwere (PW 4). According to the Post-mortem report produced by Dr Kevin Makori (PW 5) under **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the deceased died from cardiorespiratory arrest secondary to asphyxiation from strangulation. Dr Makori opined that the deceased could not have drowned as there was no water in the lungs.
4. The deceased’s brother, Patrick Obino Ongondo (PW 1), testified that he received information from his sister that the deceased had been missing since 31st March 2012. The family tried looking for him including advertising the fact on Egesa Radio. When he could not be found, PW 1 advised the deceased’s wife, Rebecca Salome Kerubo to report the matter to the police. Towards the end of April, he began hearing rumours that the deceased’s body had been found in a borehole

- within the 1st accused's homestead. He reported the matter to Nyamira Police Station but was referred to Oyugis Police Station. He went to the said homestead with the Chief of Kojwach Location where they found a borehole. Together with the help of other villagers, they started removing water from the borehole until they reached the bottom where there were stones. He testified that the deceased's body was recovered after a few days.
5. Caroline Linet Juma Onyango (PW 2), the Chief of Kojwach Location, testified that the 1st and 3rd accused were residents of her jurisdiction and that the 1st accused was the father of the 3rd accused. She stated that she saw the 2nd accused in court for the first time. She recalled that she had received information from local elders that someone had been killed and the body dumped in the borehole within the 1st accused's homestead. She reported the matter to Oyugis Police Station. On 5th May 2012, she accompanied the police to the 1st accused's homestead where people were assisting in retrieving the deceased's body from the borehole. The body was retrieved that evening and taken to Nyamira Hospital Mortuary.
 6. On 10th May 2012, PC Thomas Kareithi (PW 6), the investigating officer, was instructed to take over investigation of the matter. He had visited the scene before the deceased's body was retrieved from a 50 foot borehole within the 1st accused's homestead. By that time the 1st accused was already in police custody as he had come to report that he was being threatened by villagers. PW 6 explained that the villagers had raided the 1st accused's compound and burnt the houses within the homestead as he was suspected of murdering the deceased. He interviewed the deceased's wife, Rebecca Kerubo Makori, who informed him that the deceased was at home when he was requested by a short brown person to go and pray for his family. She informed him that the deceased left with that person and was never seen again.
 7. PW 6 further testified that the 2nd accused was arrested by members of the public on suspicion that he is the one who picked the deceased from his home and was the last one seen with him. As regards the 3rd accused, PW 6 recalled that members of the public arrested him on suspicion that he had killed the deceased together with his father, the 1st accused, and dumped the body in the borehole within their compound.
 8. At this stage I am only required to decide whether there is a *prima facie* case to put the accused on their defence. The test for a *prima facie* case was propounded in **Ramanlal Trambaklal Bhatt v R [1957]EA 332** and it is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
 9. The prosecution case against the 2nd accused is that he was the last person seen by the deceased's wife when he left with the deceased. The deceased's wife was not called as a witness despite the prosecution being given ample time and opportunity to locate her. She is the only one who would have verified his identity. PW 6 admitted that she did not name him in her statement hence it is difficult to know on what basis she identified him since no prior relationship between her and the 2nd accused was established. The 2nd accused was neither named nor identified by any other witnesses and he was only arrested by members of the public on suspicion that he was the last person to be seen with the deceased. I therefore find and hold the prosecution did not establish any evidence connecting him to the deceased's death.
 10. According to PW 5, the deceased could have been strangled and assaulted elsewhere before his body dumped in the borehole. Although the 1st and 3rd accused would be required to explain how a body was found within their homestead, the prosecution did not establish any relationship between the two accused and the deceased or even the relationship between the 2nd accused who was last seen with the deceased and the 1st and 2nd accused. Furthermore, given the period of time

that had elapsed between the deceased's disappearance and the time his body was recovered does not exclude the possibility that the deceased could have been killed elsewhere and the body dumped into the borehole. I find that the prosecution left too many loose ends to the extent that even if the accused elected to remain silent, there would be insufficient evidence to convict them.

11. This prosecution case was largely driven by rumors and information from sources that could not be ascertained or verified. It is a case where the rumors and suspicion far outweigh the evidence implicating the accused. Accordingly, I now record a finding of not guilty against all the accused under the provisions of **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

12. I acquit all the three accused. They are set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 12th day of April 2016

D.S. MAJANJA

JUDGE

Mr Ongoso, instructed by Ongoso Ayoma and Company Advocates for the accused.

Ms Ongeti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions.