



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMABAY
CRIMINAL CASE NO. 23 OF 2012
(FORMERLY KISII HCCR NO. 34 OF 2010)

BETWEEN

REPUBLIC PROSECUTOR

AND

BENARD OCHIENG..... 1ST ACCUSED

REPHIUS OKINYI 2ND ACCUSED

JUDGMENT

1. **BENARD OCHIENG** and **REPHIUS OKINYI** are brothers. They are the sons of **JOHN ARAN ORONDO** (“the deceased”) and are both charged with his murder which took place on 24th April 2010 at Rachar Village, Ndhiwa District of Homa Bay County contrary to **Section 203** as read with **Section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. They denied the charge and the trial proceeded with the prosecution marshalling 7 witnesses. The accused gave sworn testimony in their defence.
2. For a charge of murder to be sustained, the prosecution must prove the death of the deceased and the cause of such death; that the accused committed the unlawful act which caused the death of the deceased; and, that in causing such an unlawful act the accused had malice aforethought.
3. The fact and cause of death and also the circumstances in which the deceased died were easily proved by the prosecution. The events surrounding the deceased’s death were narrated by his son, Paul Onyango alias Raila (PW 4). He recalled that on 3rd April 2010, prior to his death, the deceased, his mother, Pamela, and the accused had fought causing the deceased to be admitted to hospital from where he was discharged on 5th April 2010. The deceased told him that if the accused came back, he would arrest them. On the night of 24th April 2010, PW 4 heard some commotion in his father's house. He rushed to the deceased house to see what was happening. He saw someone leaving the house holding something like a panga. The person chased him as he ran towards the river. The person tried searching for him but turned back. PW 4 followed him quietly and saw him enter the house. He then saw three people wearing caps leaving the house. After they had left, he entered the house and found the deceased lying down lifeless. He had a cut on his back. He immediately went to inform Vitalis Magambo, a clan elder, who is now deceased.
4. When PW 4 returned home, he noticed that some items were missing from the deceased’s bedroom, including a **radio**, **Seiko watch**, **Nokia 1200 mobile phone** and a **bag**. The following

morning, police officers came and took the deceased's body. On 26th April 2010, he was asked to go to the police station to identify some items.

5. A clan elder at Rachar Village, Michael Asienyo Nyalwal (PW 3), recalled that on the night of 24th April 2010 at about 10.00pm, Magambo informed him that the deceased had been killed. He proceeded to the deceased's home with Magambo where they found the deceased's body in his room. He reported the matter to the Chief, Thomas Odhiambo Omboka (PW 5). PW 5 recalled that at about 7.30am, PW 3 came to see him and informed him that the deceased had died. He went to the deceased's homestead together with PW 3 and some administration police officers where they found PW 4 waiting. Other villagers had gathered but the deceased's wife and his other sons were absent. PW 4 narrated to them what had happened. They entered the house and found the deceased's body in the bedroom. PW 5 then called police officers from Ndhiwa Police Station.
6. One of the officers who came to the deceased's homestead was PC Justin Munene (PW 7), the investigating officer in the matter. When he arrived at the deceased's homestead in the company of other officers, he found the deceased's body lying in a pool of blood. He noticed that the deceased had a head injury which was oozing blood. The house had been ransacked and things had been scattered. There appeared to have been a struggle. PW 7 suspected that some things had been stolen. He interrogated PW 4 who told him that the deceased had been murdered by masked people on the previous night. Neither the deceased's wife nor the accused were present at the scene. PW 7 removed the body and took it to Homa Bay District Hospital Mortuary where he arranged for the post mortem to be done.
7. The post mortem on the deceased's body was conducted by Dr Ayoma Ojwang on 3rd May 2010 at Homa Bay County Referral Hospital after it was identified by Dishon Oketch Kungu (PW 1) and Daniel Ariwa (PW 2). Dr Ojwang had passed away during the trial hence the post-mortem report was produced by Dr Fredrick Ochieng (PW 6) under the provisions of **Section 77 of the Evidence Act (Chapter 80 of the Laws of Kenya)**. He confirmed that he had worked under Dr Ojwang for about 5 years and he was familiar with his handwriting and his signature. According to the post-mortem form, the deceased had a deep rugged cut wound at the back of the head measuring about 5x2x1cm with a blood clot on the scalp. The injury led to bleeding into the brain hence Dr Ojwang concluded that the cause of death was a head injury.
8. PC Benson Nderitu (PW 8) recalled that on 26th April 2010, he was instructed by the Commanding Officer of Ndhiwa Police Station to proceed to Rodi AP Camp to collect the accused and escort them to Ndhiwa Police Station. He arrived there at about 8.00pm and found the accused in custody. He recalled that members of the public had taken them there on suspicion that they had murdered their father.
9. PW 8 searched the two suspects and recovered from the pocket of Bernard Ochieng (DW 1) a **Nokia 1200 phone** without a line and 2 safaricom pouches with a new line No. 0700***796 which had not been activated. The other line which was activated was No. 075***375. He also recovered two notebooks; a tattered one and a new one with the name of John Aran. He also searched Rephius Okinyi (DW 2) from whom he recovered a Safaricom pouch and a voter's card in the name of John Aran, an MPESA registration and acceptance certificate bearing the name of John Aran and hand written documents and a search for land parcels K/K/Kadwet/906 and K/K/Kadwet/895 in Map No.32 belonging to John Aran.
10. PW 8 further testified that in the room in which the two had been detained, there was a black bag which had been brought by members of the public. It contained assorted items which he secured. He took all the exhibits and escorted the accused to Ndhiwa and handed them over to PW 7, the investigating officer who produced them as follows;
 - **Exhibit No.2** – A black bag said to belong to the deceased.
 - **Exhibit No.3** – Radio make Sonitec ST 4040.
 - **Exhibit No.4** – Nokia 1200.

- **Exhibit No.5A** – Seiko 5 wrist watch.
- **Exhibit No.5B** – Black plastic digital watch.
- **Exhibit No.5C** – Omax wrist watch.
- **Exhibit No.6** – Voters registration card for JOHN ARAN ORONDO.
- **Exhibit No.7A** – Black Note Book belonging to the deceased.
- **Exhibit No.7B** – Torn Note Book with writings and telephone numbers.
- **Exhibit No.8A** – A black safaricom pouch with manual and plate.
- **Exhibit No.8B** – Safaricom pouch with manual and safaricom plate with

number 0715***575.

- **Exhibit No.9** – A green bed sheet.
- **Exhibit No.10A** – A pair of rubber shoes.
- **Exhibit No.10B** – A pair of rubber shoes.
- **Exhibit No.11A** – A white track suit trouser.
- **Exhibit No.11B** – A navy blue skirt.
- **Exhibit No.11C** – A long sleeved black and brown T-shirt.
- **Exhibit No.12A** – An Mpesa Registration Form for JOHN ARAN ORONDO of

ID No. *[particulars withheld]* and telephone No.0715***575

- **Exhibit No.12B** – A piece of paper written K/K/KADWET LAND adjacent JOHN ARAN ORONO. 895 LUCAS OCHOLA ORONO – Map No.32.
- **Exhibit No.12C** – A cash sale receipt of cushions 28 pieces.
- **Exhibit No.12D** – A piece of paper bearing No.0727***645 with a name Anindo.
- **Exhibit No.13** – A green box with a razor shaver.
- **Exhibit No.15** – A bunch of keys.

11.PW 7 confirmed that on 26th April 2010, PW 6 went to arrest the accused at Rodi Police Station and that he recovered several exhibits (**Exhibit Nos. 2 – 15**) which he handed over to him. PW 4 was called to identify the items at the police station on 26th April 2016.

12.When called upon to make their defence, the accused elected to give sworn testimony. Benard Ochieng Aran (DW 1) denied that he had murdered his father. He testified that on 24th April 2010, he was fishing in Sori. He recalled that he only learnt of his father's death when he was arrested with DW 2 at Rodi on 26th April 2010 by members of the public on suspicion of killing the deceased. He further testified that before he went to Sori on 3rd April 2010, he had been at home in Ndhiwa. He stated that he did not have any disagreement with his father. He further testified that he did not carry anything when he left home but was arrested with a bag which had some items which were produced in court as exhibits. He stated that the items found in his possession did not belong to the deceased.

13.As regards the mobile line which was in his father's name, he explained that it was his but was registered in his father's name as he did not have an identity card. He stated that the radio and the bag belonged to him and that he had it when he left home on 3rd April 2010. He stated that on the material day, he left alone at 11.00am while his father had gone to take care of the cattle. He also left DW 2 at home.

14.Rephius Okinyi Aran (DW 2) testified that on 24th April 2010, he was at Sori fishing. He also testified that he only learnt of his father's death when he was arrested with DW 1 by members of the public who handed them over to the police at Rodi. He testified that when he was arrested, he had a piece of paper written K/K/Kadwet in his pocket, an MPESA registration form which contained a number he did not know and a voting card which belonged to the deceased.

15.DW 2 recalled that on 2nd April 2010, he was with the deceased ploughing the shamba when an old man, whom he did not know, came and told the deceased that he wanted to purchase land. The

deceased agreed that the man would purchase 1 acre of land and that he would return the next day, 3rd April 2010. As DW 2 did not want his father to sell the land, he took the title deed which was wrapped in a black paper bag with the voters' card from the cupboard. When he reached Sori, he found the Mpesa registration form and the paper written K/K/Kadwet.

16. DW 2 stated that he left for Sori on 3rd April 2010. When the man who wanted to buy the land came home, the deceased went to check for the documents but did not get them. When the deceased asked him whether he had seen the documents, DW 2 denied whereupon the deceased assaulted him and injured him on the hand. He stated that he went to report the assault at Ndhiwa Police Station before he left for Sori at about 3.00pm.

17. Mr Ojala, learned counsel for the accused, submitted that the prosecution had failed to prove its case against the accused beyond reasonable doubt as it had not established who killed the deceased. He contended that none of the prosecution witnesses implicated the accused in their testimony. Even PW 4, who testified that he the assailants, did not identify them and he did not see them carry anything. As regards the accused, counsel submitted that PW4 established that when the accused left home before deceased's murder, they carried their own luggage. Counsel attacked the statements recorded by PW 7 as these were inconsistent with the testimony and that the translator who recorded PW 4's statement was not traced. Counsel submitted that it was difficult to believe that an officer who translated a statement could not be found hence the court should draw an adverse inference. Further, the court should not be denied that opportunity to verify the statement.

18. Mr Ojala further submitted that the prosecution failed to call any of the members of the public who arrested the accused to demonstrate why they arrested the accused and where they received information that they suspected the accused. Finally, counsel maintained that the prosecution failed to convince the court that at the time of the murder, the accused stole the deceased's property. According to counsel, the accused had given explanation as to why they had the items in their possession. The prosecution did not know or establish how the items came to the possession of the accused. Counsel also stated that the deceased's wife, Pamela, was a prime suspect yet she was not charged or even called as a witness.

19. It is clear from the prosecution evidence that no one saw who killed the deceased. PW 4 could not identify the assailants hence the prosecution relied on circumstantial evidence and more particularly, on the doctrine of recent possession. The prosecution case was that possession of property belonging to a murdered person and suspected to have been stolen from the said person would be appropriate circumstantial evidence against a suspect on a charge of murder. The general principle concerning the application of circumstantial evidence was summarised by the Court of Appeal in **Mwita v Republic [2004] 2 KLR 60 as follows;**

It is trite that (sic) in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt.

Thus, the guilt of an accused person may be inferred from circumstantial evidence but the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

20. Regarding the doctrine of recent possession, the Court of Appeal for Eastern Africa in **Rex v Bakari s/o Abdulla [1949] 16 EACA 84** noted that:

That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal.

The passage was quoted with approval by the same Court in the case of **Andrea Obonyo v R [1962] EA 592** where it stressed that, “*If all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal.*”

21. The ingredients to be established in proving a case based on the doctrine of recent possession were distilled by the Court of Appeal in **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Criminal Appeal No. 272 of 2005** as follows;

It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

For the doctrine to stand, the evidence of recovery of the material property must be sufficient and credible. There must also be sufficient and credible evidence for positive identification of the property as belonging to the murder victim.

22. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against the accused throughout the case, in a case where one is found in possession of recently stolen property like this case, the evidential burden shifts to him to explain his possession. That explanation need only be a plausible one but he needs to put it forward for the court's consideration (see **Malingi v Republic [1988] KLR 225**. In **Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008**, the Court of Appeal observed that;

Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.

23. I now turn to consideration of the evidence in light of the principles I have outlined. The first consideration is whether items from the deceased's house were stolen. PW 4 testified that when he went to the deceased's bedroom after the assailants had disappeared, he found that some of the deceased's possessions were missing including a **radio, Seiko watch, Nokia 1200 mobile phone** and a **bag**. When shown and asked to identify the items produced by PW 7 in court, PW 4 testified as follows in respect of each item;

- **Exhibit No. 1** Although he had seen the bag before and that it was his father's, he stated that it was not the one that was missing from the house.
- **Exhibit No. 3** He stated that he had not seen the black radio before and that the one that was missing was bigger than the one that was produced in court.
- As regards the mobile phone marked as **Exhibit No. 4**, he stated that he had seen the Nokia 1200 mobile phone at home but that it belonged to his mother although his father had taken it. He described it as having a plastic cover and a brownish string attached but the cover was not there.
- He confirmed that the Seiko wrist watch marked as **Exhibit No. 5A** belonged to his father but denied that he had seen the Omax and broken plastic watches marked as **Exhibit No. 5A** and **5B** respectively.
- When shown the electors card marked as **Exhibit No. 6**, he confirmed that it was in his father's name but that he had not seen the card before. Likewise, he had not seen the notebooks marked as

Exhibits No. 7A and B bearing the deceased's names. He had also not seen the Safaricom pouches and their contents marked as **Exhibits 8A, B and C**. He was also not familiar with the telephone numbers on the Safaricom instruction plates bearing the numbers 0729***054 and 0715***575.

- PW 4 could not identify **Exhibits Nos. 9, 10A and B, 11B, 12A, B and C and 13**. He stated that the white track suit trouser with blue strip marked as **Exhibit No. 11A** belonged to DW 2 while the black shirt with Brownish stripes marked as **Exhibit No. 11C** belonged to DW 1.

24. The testimony of PW 4 was evasive and non-committal to the extent that I allowed the prosecution to put to him his previous statement as a hostile witness. Mr Ojala attacked the statement and the fact that the officer who translated the same was not called. In my view, this fact does not weaken the evidence regarding the identity of the stolen items as PW 4's attitude and demeanour was understandable as the accused were his brothers and he was giving evidence against them. However, when considered in the light of previous statements he made to the police when the matter was still fresh, I accept that he identified several items belonging to his father which had been stolen from his room. PW 4's statement recorded in Dholuo and its translation were produced by PW 7 as Exhibit 1A and 1B respectively. According to the statement, he was shown the Sonitec radio (**Exhibit 3**), Seiko 5 wrist watch (**Exhibit 5A**), Nokia 1200 mobile phone (**Exhibit 4**), shaving machine (**Exhibit 13**) and the deceased's black bag (**Exhibit 2**), a skirt that belonged to his mother (**Exhibit 11B**), a white track suit (**Exhibit 11A**) belonging to DW 2, a t-shirt (**Exhibit 11C**) belonging to DW 1, two new sports shoes (**Exhibit 10A**) and an Mpesa registration form no. 922 6126 (**Exhibit 12A**). Apart from the items that PW 4 could identify, the other items collected by PW 8 clearly belonged to the deceased. They were items of such a personal nature that specifically referenced the deceased and the irresistible inference is that they belonged to the deceased. DW 1 and DW 2 acknowledged in their defence that when they were arrested, they were found with certain items in their possession when searched by PW 8.

25. DW 1 admitted that he was found with a bag with some items inside but they did not belong to the deceased. While I accept the explanation that the deceased could have registered the phone line on his behalf, DW 1 could not give an account of the other items. The **Nokia 1200 phone (Exhibit 2)** recovered from him clearly belonged to the deceased according to the initial statement made by PW 4 to the police. Likewise, he did not explain how he ended up with the two notebooks bearing the deceased's name (**Exhibit 7A and 7B**). These notebooks are items of such personal nature that a reasonable explanation of their possession would be required.

26. DW 2 admitted that he had documents belonging to the deceased; the piece of paper written K/K/Kadwet (**Exhibit 12B**) and the Mpesa Registration Form (**Exhibit 12A**). He explained that he took them in order to prevent his father from selling his land. I reject this explanation for the simple reason that the items found in his possession were not title documents. A title document is a distinct document and both documents could not pass for title documents.

27. I therefore reject the explanation proffered by the accused and find that the items they admitted were in their possession belonged to the deceased. Although the accused did not say anything about the other items found in their possession, there is no evidence that the assorted items that were in the bag were found elsewhere other than with the accused when they were arrested. It could not have been a coincidence that some of those items were the deceased's personal items and that they just happened to be at Rodi when they were arrested. In light of this evidence, I doubt that calling the people who arrested the accused and took them to Rodi AP Camp would have been necessary. In any event, the accused admitted that they were arrested by members of the public. I therefore find that the prosecution proved the essential ingredients of the doctrine of recent possession.

28. The circumstantial evidence in this case irresistibly points to the accused and there can be no other explanation for the fact that the accused were found in possession of the deceased's personal property two days after they had come to the deceased home on the night of 24th April 2010, killed him and took his personal belongings in the process.

29. In order to buttress its case against the accused, the prosecution offered evidence of motive. In ***Libambula v Republic* [2003] KLR 683** the Court of Appeal observed as follows;

We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain of presumptive proof especially where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.

30. In this case, PW 7 alluded to the fact that the accused, their mother and the deceased were always quarrelling and indeed there was a quarrel on 3rd April 2010 when the deceased was injured in a fight and admitted to hospital. Upon discharge, he reported the matter at Ndhiwa Police Station. This fact was confirmed by PW 4 and also by DW 2 who stated that it is the deceased who attacked him and he reported to the police. It is telling that both DW1 and DW 2 left for Sori on the day there was a fight and it is evident from the testimony of DW 2 that the issue must have revolved around the deceased disposing of part of his land. Even without a motive, the proven incriminating facts are inconsistent with the innocence of the accused or the guilt of any other person.

31. The totality of the evidence is that after the accused had quarrelled with their father over land, they left for Sori where they were fishermen. With the intention of obtaining the deceased's documents they came back to home, attacked the deceased and took various items from his house expecting to find documents of title to land. Two days after his death, they were found with the deceased's personal items. I would add that the fact that the accused mother, Pamela, was not called as a witness does not affect the prosecution case as there is no evidence pointing to her culpability.

32. In determining the question of malice aforethought, the court is entitled to take into account factors such as the part of the body that was targeted, the type of weapon used, if any, and the type of injuries inflicted upon the deceased (see ***Rex v Tubere s/o Ochen* [1945] 12 EACA 63**). In this case, the deceased sustained a single cut wound on the head which resulted in bleeding into the brain. I find that the injury was inflicted by a vicious blow pointing to an assault intended to cause grievous injury if not death. These injuries were consistent with the unlawful killing of the deceased actuated by malice aforethought within the meaning of **Section 206(a)** of the ***Penal Code***.

33. I therefore find the accused, **BENARD OCHIENG** and **REPHIUS OKINYI** guilty of the murder of **JOHN ARAN ORONDO** contrary to **Section 203** as read with **Section 204** of the ***Penal Code*** and I convict him accordingly.

DATED and DELIVERED at HOMA BAY this 6th day of May 2016

D.S. MAJANJA

JUDGE

Mr Ojala instructed by Ojala and Company Advocates for the accused.

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