



REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CRIMINAL CASE NO. 13 OF 2014

BETWEEN

REPUBLIC.....PROSECUTOR

AND

SAMUEL ONYANGO AROKO.....1ST ACCUSED

PAUL OGALLO AROKO.....2ND ACCUSED

JUDGMENT

1. On 9th April 2014, this court was informed that **SAMUEL ONYANGO AROKO (A1)** and **PAUL OGALLO AROKO (A2)** had committed murder contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. Particulars of the offence were that on the 5th April 2014 at Sigama village, Upper Kayambo Sub-location in Ndhiwa District within Homa Bay County, they jointly murdered **BENARD OKENO OTANGO** (“the deceased”). In order to prove its case, the prosecution marshalled 8 witnesses while both accused gave sworn testimony and called two witnesses. The prosecution case was as follows.

2. The deceased’s son, Charles Oluoch Okeno (PW 1) testified that on Saturday, 5th April 2014 at about 11.00am, he was with his father, the deceased, on a motorbike headed home. At the entrance they saw Aluoch, a brother to the accused persons, headed into their compound. They entered into the compound and stopped outside PW 1’s house. The deceased disembarked from the motorbike and after a few steps towards his house, A1 suddenly appeared with a panga and cut the deceased on the head causing to fall down. PW 1 rushed to defend his father but A2 cut him with panga on his left shoulder, the lid of his right eye and ear, as he tried to hold off A1. Meanwhile A1 continued to assault the deceased who was already on the ground. He tried to ask why A2 was assaulting him and A2 told him to get away from the place. A2 then joined A1 in continuing to assault the deceased. As that point PW 1 lost consciousness momentarily. When he came back to his senses, he rushed to where the deceased was lying and found him already dead. By this time the assailants had already run away. While PW 1 was tending to the deceased, Kennedy Odhiambo (PW 5) joined him at the scene and they walked together towards the home of his uncle to seek help.

3. The deceased’s 10-year-old son, Wycliffe Wanjara (PW 2), gave unsworn testimony after a *voire dire*. He recalled that on the material day, he had just come home from herding cattle and was standing at the doorway of his father’s house when he saw the deceased and PW 1 enter the compound. He suddenly saw A1 came from the nearby banana plantation and cut the deceased on the head whereupon he fell down. He

also saw A2 cut PW 2 several times on the back, ear and next to the eye. He stated that he heard PW 1 ask A2 why he was cutting his father but A2 did not reply. When the accused saw him watching, they started chasing him away.

4. The deceased's son, Kevin Onyango Okeno (PW 3), testified that on the way to church he met the deceased and PW 1 on a motorbike going back home. While on the way and as he was near the home of an uncle to the accused he heard someone talking on phone, saying, "*Okeno is coming.*" He immediately felt a sense of foreboding as there was a land dispute between the family of the accused and the deceased. He ran back home and met with PW 1, PW 4 and PW 5. PW 1 was badly injured and emotionally affected. From where he was standing he could see the two accused and another person holding pangas at a distance. He immediately went to report the matter to the police station.

5. Beatrice Achieng (PW 4) told the court that as she was headed to the river she saw PW 1 and deceased ride into their compound on a motorbike and stop at PW 1's house. She suddenly saw the accused appear and start to assaulting the deceased and PW 1 with pangas. She recalled that A1 cut the deceased while A2 cut PW 1 as he was trying to assist the deceased. She began screaming as she ran back home while the accused also took off.

6. On that day, Kennedy Odhiambo (PW 5), a neighbour of the deceased's family recalled that on that day he was walking from church and from where he was, he was able to see the accused attack PW 1 and the deceased after PW 1 and deceased had arrived at the homestead on a motorbike. He told the court that he saw A1 cut the deceased head and as A2 cut PW 1's shoulder. He stood aside watching as he was afraid.

7. The investigating officer, PC Peter Mbugua (PW 7) recalled that on 5th April 2014, he proceeded to the scene of the incident at about 11.00am after being instructed to go there by his Commanding Officer. He found the deceased body lying within his homestead. He observed the body had deep cuts on the head. He found PW 2 and PW 3 at the scene and was told that the deceased had been attacked by the accused as he was arriving home in the company of PW 1. By that time PW 1 had been taken to Ndhiwa District Hospital for treatment. PW 7 confirmed that the accused lived about 150 metres away from the deceased's home and that they had fled from the scene. He recorded the witness statements and organised for the post-mortem to be done. He recalled that the accused were arrested on 8th April 2014 when they presented themselves to Ndhiwa Police Station. He also produced a P3 form confirming that PW 1 had been injured and had sought treatment.

8. After the deceased body was taken to Homa Bay District Hospital Mortuary, the post-mortem was done on 15th April 2014 by Dr Ayoma Ojwang after it was identified by John Okech (PW 6). As Dr Ojwang has died before the trial, the post-mortem form was produced by Dr Francis Ochieng (PW 8) who confirmed that he had worked with Dr Ojwang and was familiar with his handwriting and signature. Dr Ojwang noted that the deceased had a very large fracture of the skull which exposed the brain substance. He certified the cause of death to be as a result of severe skull fracture due to violent trauma.

9. After the close of the prosecution case, the accused were placed on their defence. They both opted to give a sworn testimony. They denied killing the deceased and stated that at the time of the incident they had left the village on 3rd April 2014 to assist their grandmother, Angeline Ouko Amollo (DW 4) at Kakaeta, Kanyamwa where they stayed until 7th April 2014.

10. The accused's cousin, Jared Omondi (DW 3) that the accused were at his home at Kakaeta, Kanyamwa on 5th April 2015 where they were assisting their grandmother till the land. He told the court that during their stay, they would till the land until 6.00pm in the evening. DW 4 recalled that the accused had gone to assist her till her land as she was unwell. She however told the court that the two accused visited her in May and not in April. She stated that in April, 2014 she had not started weeding the shamba.

11. In order to secure a conviction for the offence of murder under **section 203** of the *Penal Code*, the prosecution must prove beyond reasonable doubt (a) the death of the deceased and the cause of that death;

(b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.

12. The first ingredient requires the fact and cause of death to be established. The autopsy report prepared by Dr Ojwang shows that the cause of death was severe skull fracture due to violent trauma. This is consistent with the testimony of PW 1, PW 2, PW 3 and PW 4 who stated that they saw the deceased was cut with a panga on the head before he collapsed and died.

13. The next issue is whether the accused who caused the death of the deceased by an unlawful act or omission. The prosecution relied on direct testimony of PW 1, who was with the deceased, when A1 approached the deceased and cut him on the head. PW 2, PW 4 and PW 5 witnessed the entire ordeal as it unfolded.

14. In cross-examination of the witnesses, counsel for the accused suggested that there were inconsistencies and contradictions in their testimony regarding the events. I will only point out that each direct witness, that is, PW 1, PW 2, PW 4 and PW 5 were watching the events as they unfolded from different vantage points. PW 1 was very close to the attackers, PW 2 was at the doorstep of the deceased house, PW 4 was going to the river while PW 5 was some distance away while going to church. Although each of them gave a different variation of what they saw, the common thread running through the testimony was the fact that the deceased and PW 1 arrived home on a motorbike. The deceased disembarked and as he walked towards his home, A1 attacked him while A 2 attacked PW 1. Furthermore, given their different vantage points, it is possible that at the time the attack was taking place the witnesses could not have seen each other.

15. I therefore find that the inconsistencies and contradictions in the testimony were immaterial and of no consequence to the bigger picture. In this respect I am guided by the Court of Appeal decision in **Thomas Kitsao alias Katiba v Republic MLD CA Criminal Appeal No. 123 of 2014[2015]eKLR** where the Court observed that;

*We shall promptly dispose of the question of contradictions and inconsistencies in the prosecution evidence. It is true that as regards the confessions there are slight variations from the account of one witness to the other. But we must ask ourselves whether these are normal variations that would be expected when different human beings recollect an event or incident or whether they are of such a nature as to betray a cooked up or contrived case? This Court has stated severally that the mere fact that there are some variations in evidence does not ipso facto prove that the evidence is false or unreliable (See **Willis Ochieng Odero v Republic, KSM CR. APP. NO. 80 OF 2004**). Indeed variations must be expected in evidence that is true. It is said that sometimes evidence without the slightest variation may be a good indicator of coached witnesses.*

16. Counsel for the defence also suggested that the witness testimony was inconsistent with the statements they made to the police as they did not contain certain facts which were disclosed in their respective testimony. In this respect, I am satisfied that the substance of their testimony and their initial statements to the police is that the deceased and PW 1 were attacked by A1 and A2. It must be recalled that statements are taken by police officers who ask questions and record answers given to them. Accordingly, the witness may not record every conceivable fact he or she will testify in court. In light of the entire evidence, I am satisfied that the accused culpability is not in doubt.

17. The accused persons raised the defence of alibi. The burden of proving a case against an accused person beyond reasonable doubt always rests with the prosecution and never shifts to the accused even in cases of an alibi defence. In **Uganda v Sebyala & Others [1969] EA 204**, the court stated thus:

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

18. Furthermore, in **Karanja v Republic [1983] KLR 501**, the Court of Appeal held that in a proper

case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

19. I have tested the alibi defence raised by the accused and against the direct testimony led by the prosecution. The prosecution gave clear and convincing evidence as to what happened on 5th April 2015. The incident took place in broad day light and was witnessed by several people. This was not a case of strangers attacking the deceased but rather well known neighbours who had a land dispute with the deceased. The principal witness, PW 1 was barely a metre away from the deceased when A1 attacked him. A2 attacked him from the back and when he turned, he recognised him. The accused were so close to him that there was no chance of mistaken identity. His testimony was corroborated by the other eyewitnesses leaving no doubt as to their identity and actions.

20. PW 7 testified that the accused, who lived close to the accused, were nowhere to be seen after the attack and were only arrested when they presented themselves to the police on 8th April 2014. In my assessment, the accused left for Kakaeta, Kanyamwa immediately after the attack and came back to present themselves to the police on 8th April 2014 in order to give credence to their innocence and alibi. I also note that since the accused were neighbours of the deceased's family, nothing was suggested to the witnesses in cross-examination that the accused had been away from the village from 3rd April 2010. I find and hold that the accused alibi was exploded by the clear testimony of the eye witnesses.

21. The final issue is whether the accused persons had malice aforethought. From the testimony of PW 1 and PW 3 it is manifest that the accused intended to cause grievous harm if not kill the deceased. The very act of cutting the deceased head with a panga multiple times clearly manifests an intention to cause death or grievous harm within the meaning of **section 206(a)** of the *Penal Code*. Moreover the resulting injury which caused the deceased's skull to fracture can only lead to the same conclusion.

22. The prosecution proved beyond reasonable doubt that **SAMUEL ONYANGO AROKO (A1)** and **PAUL OGALLO AROKO (A2)** and that they jointly murdered **BENARD OKENO OTANGO** and I convict them accordingly.

SIGNED and DATED at KISUMU this 7th day of July 2016.

D.S. MAJANJA

JUDGE

DATED and DELIVERED at HOMA BAY this __ 19th__ day of July 2016

H.A. OMONDI

JUDGE

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

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