



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CRIMINAL CASE NO. 11 OF 2013

REPUBLIC-----PROSECUTOR

VERSUS

HERBERT ANYANJE-----ACCUSED

JUDGMENT

1. HERBERT ANYANJE (the Accused) faces the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence being that on the 24th April 2013 at Wakhungu Sub location within Busia County he unlawfully murdered Paul Omboko.
2. Kilo Sakwa Geresu (PW1) was amongst the 6 witnesses who testified on behalf of the Prosecution. He is a grandchild of the Deceased. The witness resided with the Deceased in one house and he and his brother Dino were under the custody and care of the Deceased. On 21st April 2013, the Accused Person who is the cousin of PW1 came to the home of the Deceased at Samia. Three days later, on the 24th of April 2013, the incident giving rise to the charges herein is alleged to have occurred. On that day at about 7.00 p.m. the Deceased came home and found PW1 and his brother having eaten supper. His grandchildren served him dinner which he ate in the sitting room. At that time the Accused Person was away at Funyula. Later at 9.00 p.m., the Accused came home and found Dino, the Deceased and PW1 in the sitting room.
3. PW1 says that he heard the Accused Person telephone his mother who is in Nairobi and tell her words to the effect that he would kill the Deceased unless he gave him land. He stood up held the Deceased by the shirt and banged his head against the wall severally. PW1 attempted to intervene but he was shoved off the way by the Accused. At this point PW1 opened the front door and this gave an opportunity to the Deceased to run out. The Accused pursued the Deceased using the back door. The Accused had armed himself with a stick. PW1 followed the two to the outside. It was then that the Accused started to assault the Deceased first using the walking stick. The evidence of PW1 is that the Accused hit the Deceased on the back of the head. The Deceased fell under the weight of the assault. At this point the Accused dropped the stick and took up a Hoe (jembe). It is said that the Accused person hit the Deceased on the head three times using the Hoe.
4. PW1 was helpless because the Accused Person chased him away. On seeing what had happened, PW1 ran to neighbours and informed Bonface Sigulu Wanyama (PW2) about the incident. In turn, PW2 relayed this message to Okuku. It was the Evidence of PW2 that he, his brother Michael Bwire Wanyama, (PW3) and PW1 went to the house of the Deceased. The evidence of PW2 was that the three found the door to the house ajar and the sitting room lit by a tin lamp. They checked each of the rooms of the house but were not able to find either the Deceased nor the Accused. On returning to sitting room, PW1 noticed blood on the floor. That blood was near the door. Having found no one in the house. The three searched the overgrown compound of the Deceased, again, they were unable to trace the Deceased. As the three left, they met the Deceased

who was injured. It was the evidence of PW1 that he was able to see the Deceased because he shone a torch at him. The three noticed that the Deceased was injured. Both PW2 and PW3 say that they saw that the Deceased had 4 cuts to his head. As to PW1, he saw that the Deceased was bleeding from the head. PW1 and PW2 also noticed the shirt of the Deceased was soaked in blood.

5. It is the evidence of PW1 that the Deceased spoke to them and said,

“Herbert has killed me”

The words PW2 heard were that,

**‘Herbert has killed me I cannot survive it take
me to hospital’**

While PW3 heard the Deceased say

“Herbert has cut me take me to Caleb.”

6. On seeing the seriousness of the injuries sustained by the Deceased, PW2 and PW3 took him to Nangina Mission Hospital where he was treated and admitted until the 26th of April 2013. Upon his discharge, PW2 escorted the Deceased to Funyula Police Station where the Deceased lodged a criminal complaint. That complaint was captured as OB No. 16 of 26.4.2013 (P exhibit 2A).
7. After lodging the complaint, PW2 took the Deceased to the Private Hospital of Caleb. Caleb is said to be the cousin of the Deceased. Later on 27th April 2013, PW2 received a call from Joyce Omboko who is a daughter of the Deceased who told him that the Deceased’s condition had deteriorated. The witness, a few days later on 3rd May 2013, was to receive the sad news of the passing on of the Deceased.
8. Cpl. Robert Kisilu (PW6) investigated the murder complaint. At the material time he was attached to Funyula Police Station. He is the same officer who received the complaint of the Deceased on 26th of April 2013. When he saw the Deceased, the Deceased had a bandage on his head. The Deceased complained that he had been assaulted by his grandson namely Herbert Anyange (the Accused). That report was entered into the Occurrence Book of the station.
9. On 3rd May 2013, Charles Gaunya (PW4) saw the Accused Person at Omedo Centre in Siaya County. PW4 who is the Assistant Chief of Budalangi Sub location arrested the Accused and took him to Funyula Police station. He effected the arrest because he had, on 25th April 2013 at about 9.00 a.m. received information that the Accused had assaulted the Deceased. At Funyula Police Station, PW4 handed over the suspect to PW6 who re-arrested him.
10. A Post Mortem was conducted on the body of the Deceased by a Doctor Nicholas Mitei. That Doctor was unavailable to testify and so his Report was produced on his behalf by Doctor Rabare Nina (PW5). Dr. Nina had worked with Dr. Mitei for about 2 ½ years and was familiar with his handwriting and signature. PW5 led the Court through the major findings of the post mortem. On the external appearance of the body, there were two deep lacerations on the scalp at the occipital region measuring approximately 5cm and another at the left parietal region measuring 5cm. There were also diffuse bruises and abrasions at the occipital and frontal scalp. On the Internal Appearance the Doctor noted that there was no fracture to the scalp and no intracranial heamotoma. Dr. Mitei formed the opinion that the cause of death was Cardio Respiratory failure secondary to head trauma. PW5 who produce the Report explained that the breathing and circulation of air was compromised due to the head injury. Under cross-examination the Doctor explained that there were injuries on opposite sides of the head and it was therefore unlikely that this could have resulted from a fall. This turns out to be a significant explanation!
11. When the Accused was put to his Defence he gave a sworn statement. He acknowledged that he met the Deceased on the night of 24th April 2013. He returned home at 8.00 p.m. from Funyula market where he had taken alcohol with his friends. When he got home he found the Deceased in the company of his grandsons Kilo (PW1) and Dino. It was his evidence that the Deceased was

extremely drunk and that Kilo and Dino were in the bedroom. Upon conversing with the Deceased, the Deceased got angry and attempted to slap him. That the Accused who was seated, woke from his chair at this point, the Deceased held the Accused Person and attempted to wrestle him to the ground. Seeing this, the Accused Person pushed his grandfather who fell on his back and hit his head against a seat. The Deceased left the house.

12. That on the next day, at about 8.00 a.m., The Accused Person did not see the Deceased in the compound. But he prepared breakfast for his cousin Dino and left for Funyula market. This would be about 12.00 noon. On reaching the market he met the Deceased who was on his way to a posho mill. It was the testimony the Accused that he noticed that his grandfather had a bandage on his head and because of this he advised him to go home and rest. The Deceased never heeded that advice and responded that he had his own business to attend to in the market. Later at 2.30 p.m., he met the Deceased with PW1. He saw the Deceased instruct PW1 to take home some maize meal. It was the further evidence of the Accused that when he returned home at 9.00p.m., the Deceased was at home. He found Kilo and Dino there. The two told him that the Deceased had gone to visit his grandmother at the hospital. He never saw the Deceased again as he had never returned home. The Accused told Court that he was arrested on 3rd May 2013 at Aboke Centre which is on the Busia/Siaya boundary. That the Centre is about 1 km from their home and he had gone there to buy some breakfast. The Accused denied the charges.

13. Did Herbert Anyanje murder his grandfather Paul Omboko? Having heard the Prosecution and Defence evidence and having received submissions from both sides, I see the following as the issues for determination;

- a. What was the nature of confrontation between the Deceased and the Accused on the night of 24th April 2013?
- b. Did that confrontation lead to the Death of the Deceased?
- c. Did the Accused have malice aforethought?

14. At about 7.00 p.m. the Deceased, PW1 and one Dino were at home. There is evidence that the Deceased came home after his Grandchildren had eaten. They then served him supper. There is also evidence that some time after that, PW1 put it at 9.00 p.m., while the Accused Person says it was 8.00p.m, the Accused came home and met the Deceased Person. What then happened?

15. The evidence of the Accused was that when he came home, PW1 and Dino were in the bedroom and the Accused was in the sitting room. The evidence of PW1 was that the Accused found them in the sitting room. What both agreed, however, was that a tin lamp (call it lantern) lit the room. The Accused conceded, on cross-examination, that he saw PW1 on that night. This was his evidence;

“Kilo was not asleep. I saw Kilo (now) leave the house 15 minutes after I arrived there. I was near the tin-lamp”

16. In my assessment of the evidence, there was sufficient light in the house of the Deceased on that night that enabled both the Accused Person and PW1 see and recognize each other. The two, it must be remembered are cousins and as at the day of the said incident, The Accused had been home for at least 3 days.

17. The Accused told Court that the Deceased aggrieved him and slapped him. He then pushed the Deceased and left the house. That the Deceased fell and hit his head against a seat. The version given by PW1 was graphically different. PW1 says he saw the accused hold the Deceased by the shirt and bang his head severally against the wall. When PW1 tried to intervene, the Accused Person shoved him aside. In desperation PW1 opened a door to allow the deceased to escape. And he did, but only shortly! Once outside the Accused caught up with him.

18. The assault outside was more vicious. The Accused, using a stick, hit the Deceased on the back and head. Then, the Accused got a Hoe (jembe) and used it to hit the Deceased on his head.

19. PW1 may have been able to see what happened in the house because of the light from the tin lamp. That light as admitted by the Accused in his Defence was sufficient enough for him to see the Deceased and PW1 at one point as he left the house. In my assessment that light was sufficient to enable PW1 see the Accused and the Deceased in the sitting room and witness any

confrontation between them while they were in the room. What about the alleged incident outside the house? Although the witness told Court that there was moonlight, he also told court that the compound had many trees and this compromised the quality of light from the moon. Now which version is to be believed?

20. The Medical results of the Post Mortem may offer some answer. The Deceased had 2 deep lacerations on the scalp. One at the occipital region measuring approximately 5cm and the other at the left parietal region measuring about 5 cm. Both were sutured in nylon. Then this important finding,

“diffuse bruises and abrasions on the occipital and frontal scalp”

In cross-examination, PW5 a Medical Doctor said,

“it would be possible for the injuries to be sustained by a fall but my problem the diffused nature of the injuries.

There were injuries on the occipital, frontal and parietal areas explaining injuries on the opposite sides of the head from a fall would be unlikely.”

The Defence Counsel, perhaps unwittingly, asked the Million Shilling question. The evidence of the Doctor would rule out the version of the Accused that the injury may have been as a result of the Deceased hitting his head on the seat after the Accused Person pushed him. The Medical evidence is more consistent with evidence of PW1. It is now said that technology and medicine seldom lie! On this occasion, this Court holds and finds that medicine supports the recollection of the events of the 16 year old boy whose testimony was not debunked by a short cross-examination.

21. That the evidence of PW1 is perhaps credible is also corroborated by what happened after the incident. The injured person sought medical attention at Nangina Mission Hospital where he was admitted for 2 days. Upon his discharge, PW2 accompanied him to Funyula Police Station where the Deceased lodged a complaint. PW6 is the officer who received the Deceased. The complaint was captured as entry No. 16 of 26th April 2013. It may be of benefit to reproduce the entire report.

Report made to the Station is one Paul Omboko a Samia male adult c/o Telephone Number 0714-034267 and a resident of Wakhungu Sub Location Odiado Location reports that on 24th day of April at around 21.00 hours while at his home he was attacked and cut by a jembe by his grandson namely Herbert Anyange where he sustained injuries on the head on the neck and both eyes. He was rushed to Holy Family Mission hospital Nangina where he was admitted, treated and discharged on 26.4.2013 in a fair condition. The reason for the assault he does not know. He is now referred to crime office for statement recording and a P3 form for further Police action.

That Report, made perhaps without the contemplation of Death, implicated the Accused Person. In my view it fortifies the evidence of PW1 as to how the Accused Person confronted and assaulted the Deceased.

22. The Deceased died 8 later days after the assault by the Accused. But the result of the Post Mortem is that the cause of his death was cardio Respiratory failure Secondary to Head Trauma. The evidence of PW1 is that the Accused used a jembe (hoe) to inflict blows to the head of the Deceased. As revealed by the Post Mortem, there is a connection between these blows and the death of the Deceased. I find and hold that the Deceased died as a result of the assault by the Accused Person.

23. Did Prosecution prove mens rea? The evidence of PW1 is that before launching the assault, the Accused called his mother and said,

“I will kill your father who you love like white ants if he will not give me land”

PW1 explained that that Accused person meant that he would kill the Deceased. True to his word, the Accused Person carried out the atrocious threat! I find that the Accused contemplated his action and malice aforethought is established. Even if I discarded the testimony of PW1 on the evidence of malice, I would still find that by hitting the Accused Person with a hoe to the head three times, the Accused Person had malice aforethought as set out in Section 206 of the Penal Code which reads:-

Malice aforethought

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 of 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.**

24. The result is that I find Herbert Anyange guilty of murdering Paul Omboko on 24th April 2013. I do hereby convict him of the Offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

F. TUIYOTT

J U D G E

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF JULY 2015

IN THE PRESENCE:-

OILE.....COURT CLERK

OWITI.....FOR STATE

ASHIOYA H/B FOR WANYAMA.....FOR ACCUSED