



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CRIMINAL CASE NO 10 OF 2014

REPUBLIC----- PROSECUTOR

VERSUS

ALFRED ORAMISI OMUSE----- ACCUSED

JUDGMENT

1. Alfred Oramisi Omuse (The Accused) is charged with the murder of his grandfather Clarus Etyang (Deceased). That murder is alleged have been committed on the 18th day of April 2014 at Kaujakito village, Amukura Division within Busia County.
2. The Deceased was husband to Sarah Apama (PW2). Their home is Apokor. On 18th April 2014, at around 10.00 p.m. the home was visited by a Peter Okochili and the Accused. The Deceased who was asleep woke up and opened the door to the visitors. PW2 served them with food. It is her testimony that after initially refusing to eat, the Accused demanded for some ugali but PW2 informed him that it was finished. The two visitors then quarreled amongst themselves. At this juncture, the Deceased asked his now unruly visitors to leave. But they did not and turned on him and began to beat him. It was the testimony of the witness that both the Accused and Okochili assaulted the Deceased. And that they beat him up to death. It was her testimony in cross-examination that Okochili and the Accused used a knife to kill the Deceased.
3. Leonard Esembe (PW3) was on the fateful night in the house of his uncle John Omuse Ilado (PW4). At about 10.00 p.m. the two of them heard PW1 scream. PW1 is the mother to PW4 and grandmother to PW3. PW3 says that his grandmother was calling out and saying “come and help Mzee is being killed. The witness then hurried to the house of PW1. There he found three (3) people. His uncle by the name Peter Okochili, the Deceased and the Accused person. PW3 in his evidence stated that he saw the two of them assault the Deceased. The Accused was armed with a stick, (a fimbo) while Okochili was armed with iron rod and knife. In Cross-examination the witness gave some further details. He told court that there was a quarrel between the Deceased and Okochili. The Deceased threatened Okochili with a panga and at that point Okochili ran to his house and returned with a panga iron rod and a knife and assaulted the Deceased using those weapons.
4. On reaching the scene, PW4 went to where her mother was screaming. Someone who he did not know cut him on his left hand. He attempted to wrestle his assailant but he was overpowered and the assailant ran away. His chase after the assailant was in vain. At this point he saw two people behind him. He could identify the two but as he was apprehensive that they would attack him he ran to his home, took his bicycle and reported the matter at Kotur Police Post. He never saw the people who attacked the Deceased. Joseph Omojong Ilado (PW5) came to the scene after the death of the Deceased and there, found PW2, PW3 and PW4.
5. PW5 was to later to identify the body of the Deceased to Dr. Patson Kubuta (PW1) for the purpose of Post Mortem Examination. That examination was conducted on 24th of April 2014. The

findings of the Doctor was that externally, the body had three deep penetrating cuts on the left part of the face. These were at the submental area, the mandibular area and at the lateral periorbital area. The body also had multiple blunt force trauma and injuries on the abdomen. There were also force blunt injuries on the upper and lower limbs and multiple blunt injuries on the occipital and temporal parts of the head. An internal examination revealed that there was an extensive penetrating injury to the brain on the left mandibular, submental and left lateral periorbital. The brain tissue was injured in the areas corresponding to the penetrating injuries. Additionally there was extensive blood clot on the left temporal area of the brain. Having carried out that examination, Dr. Kubuta formed the opinion that the cause of death was “possibly” severe head injury secondary to an assault.

6. In the early hours of 19th April 2014, at about 2.00 a.m. PC Joseph Musaya received information about an alleged murder that had taken place at Simbachai. With his colleagues Cpl Zakaria Mutwol, PC Kimoho and PC Mureithi he visited the homestead of PW2. The body of the Deceased lay five metres from his house. The body had injuries to the head. The officers then removed the body to Alupe District Hospital. On 21st of April 2014, the police officer recorded witness statements from potential witnesses. Later on 28th April 2014, two suspects being John Oramisi and the Accused were escorted by Senior Chief Daudi Oporong to the AP camp at Busia. Sgt. William Otunge (PW6) and his colleague re-arrested the suspects and escorted them to Kotur Police Post where he handed them to the officers there.
7. In cross-examination Counsel for the Accused confronted PW7 with a document said to be a signal given to the witness by a Cpl. Mutwol. The signal, as explained by the witness was an initial report of the murder incident. In it the only person named as suspect was Peter Okochili. The witness informed Court that Okochili is at large but he was emphatic that further investigations had disclosed that the Accused also assaulted the Deceased.
8. Upon being invited to make a defence, the Accused made a sworn statement. He told court how on the fateful day he had requested Okochili to assist him dig a well. A day or so later, he learnt that Okochili’s father (the Deceased) had been killed. His testimony was that he was told that it is Okochili who had killed his father. The Accused denied the offence and maintained that he attended meetings of the burial arrangements of the Deceased which included a fund-raising.
9. The Post-Mortem carried out on 24th April 2014 at Alupe Sub County Hospital on the body of the Deceased revealed that he had suffered severe head injury. As a result of the examination Dr. Kubuta (PW1), who carried out the examination returned the following opinion as to the cause of death,

“Possibly severe head injury 2^o Assault”

In his oral testimony to court he was more emphatic that the cause of death was severe head injury secondary to assault. The questions that then present themselves for my determination are whether:-

- i. The Deceased was assaulted
- ii. And if so, who assaulted him

10. In answering these questions the focus must be on the evidence of PW2, PW3 and PW4 who were said to be at or near the scene at or soon after the said assault is alleged to have taken place. According to PW2, the Accused and one Peter Okochili visited their home on 18th April 2014 at about 10.00p.m. PW2 is the wife of the Deceased and mother to Peter Okochili and grandmother to the Accused. That Okochili ate but the Accused refused but later demanded for food. The two started to quarrel loudly and that the Deceased then asked them to leave. That at this point when Okochili and the Accused turned on the Deceased and assaulted him to death.
11. The witness (PW1) told Court that the theater of violence was outside the house of the Deceased and that although Okochili

“is the one who had a knife”

both of them used the knife to kill the Deceased. Her evidence was however not without difficulty as at one time in Re-examination she stated;

I never saw a knife. I found when my husband had died. I was confused”

12. PW3 was certain that he saw his uncle Peter Okochili and the Accused assault the Deceased. That although it was 10.00p.m. in the night, he was able to see this as there was moonlight and light from the house that came through a door that was ajar. In his testimony to court, PW3 stated that the Accused assaulted the Deceased with a stick while Okochili used an iron rod and knife. If the witness is to be believed, there may not have been difficulty in him recognizing the assailant as both were his close relatives. But why did the witness tell the police a different story when he recorded his statement soon after the incident? The statement to the police was to the effect that on that evening there was a quarrel between the Deceased and Peter Okochili. The Deceased threatened Okochili with a panga. Okochili then ran to his house, returned armed with a panga, iron rod and a knife and using these weapons he assaulted the Deceased.
13. When John Omuse (PW4) responded to the distress screams of his mother (PW2) he went to the scene but was confronted by someone who cut him on his left hand. He held his attacker but after a struggle, the attacker ran off and PW4 was unable to catch up with him even after a chase. At this point the witness saw two people from behind him. Apprehensive that they would attack him, he took to his heels and to safety. The witness says he was unable to see who had attacked him and that although there was some moonlight he was not able to identify his attackers.
14. Clearly therefore the crucial evidence is that of PW2 and PW3. PW3 as noted earlier has two versions, one he made to the police and another before court. The version he gave to the police appeared to have been the basis of the signal by PC Mutwol where the only suspect named was Peter Okochili. The signal reported :-

That one Clarus Etyang aged 84 years had a quarrel with his son namely Peter Okochili Ojumaa after dinner at around 22.00 hrs on the 18th April 2014. The son dashed to his house and came back armed with a panga and slashed his father on the head and face occasioning him serious injuries.

15. The State Counsel and PW7 who investigated the matter asked the Court not to make too much of the signal because it merely captured the initial report and further information became available as witnesses were interviewed. Some of whom, according to the witness, implicated the Accused person.
16. Is this initial report and the statement of PW3 to the police to be downplayed? Given that PW3 gave two versions, his version implicating the Accused person needed to be corroborated. The only person who could have given that corroboration was PW2 as PW4 did not identify any of the assailants. But PW2 herself was not steady in her evidence. At one point she said she never saw a knife. At another, she says that both Okochili and Accused used a knife to kill the Deceased one knife! She said nothing about the Accused using a rod or stick to attack the Deceased. The latter would not support the evidence of PW3 that the accused assaulted the Deceased using a rod/stick. Even more startling is the evidence of the witness in Re-examination. She said;

“I never saw Accused first before the death of the Deceased. I never saw a knife. I found when my husband had died. I was confused”.

That evidence appears to have taken Mr. Owiti, The State Counsel, by surprise because at that juncture he sought that the witness be stood down for further Re-examination on another day! The Court obliged but the witness was never recalled! The Damage done by the witness to the Prosecution case was never repaired.

17. The view, I take is that the evidence of PW2 did not sufficiently support the version of PW3's testimony that implicated the Accused. And given that PW3 had two versions of one incident, his evidence cannot be relied upon to return a safe conviction. Accordingly, the doubt created by the combined evidence of these two witnesses must benefit the Accused. The result is that I do not

find the Accused guilty of murdering Clarus Etyang. Consequently the Accused shall be set at liberty unless held for some other lawful cause.

Dated, Signed and Delivered at Busia this 3rd day of November. 2015

F. TUIYOTT

J U D G E

In the presence of :-

Oile.....Court Clerk

Owiti.....For the State

Manwari..... For the Accused