



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KWACH & TUNOI, JJ.A. & BOSIRE, AG. J.A.)

CRIMINAL APPEAL NO. 9 OF 1996

BETWEEN

SIMON OBARA OBURE.....APPELLANT

JOSEPH MOBEGI OBURE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisii (Mbaluto J) dated 7th August, 1995

IN

H.C.CR.A. NO. 12 OF 1995)

JUDGMENT OF THE COURT

Simon Obara Obure and Joseph Mobegi Obure (the appellant) are brothers. They were charged with murder contrary to section 203 as read with section 204 of the Penal Code, in that on the night of 15.9.1994 at Misesi sub-location in Kisii District in Nyanza Province, jointly with others not before the court, murdered Orange Otieno (hereinafter called "the deceased"). They were convicted and sentenced to death. They now appeal against their conviction and sentence.

The appellants' petition of appeal contains seven grounds but the participant ones are that the trial judge erred in law and in fact in finding that the prosecution established common intention against the appellants; that the trial judge erred in both law and fact in finding that the appellants actually participated in beating the deceased; that the learned judge misdirected himself as to the cause of death and the weapons which caused the fatal injury to the deceased; that the learned judge erred in law and in fact in disregarding the appellants' defence of alibi; and finally, that the learned judge erred in law and in fact in finding that the circumstances of identification were ideal and free from error.

The judge found as a fact that the deceased was forcibly taken from the house of Zebedeo Okindo Otieno (P.W.1) (Zebedeo) by a gang of about 10 people, which included the appellants, dragged a short distance away, and brutally murdered. Zebedeo's evidence was that the deceased, who was his brother, went to his home on 15.4.94, to visit him. Early in the evening at about 7.30. P.m., he was sitting with the deceased in his house when a hostile group of about 10 people, which included the appellants, came and knocked on

the door. He came out to talk to them and he noticed that they were all his relatives. Zebedeo asked them what they wanted, but they did not respond. He locked the door and returned inside the house leaving the group still standing outside. When they made no attempt to leave, Zebedeo came out again and inquired from them a second time what the matter was, and according to him, they said:-

“Give us the person who is in your house, Orange.”

Zebedeo asked them why they wanted Orange, and they replied:-

“We want to kill him now.”

Zebedeo pleaded with them not to kill the deceased but they started shouting demanding that he should hand over the deceased. When Zebedeo saw that things were getting out of control, he instructed his wife, Agnes Okindo (P.W.2) (hereinafter called “Agnes”) to advise the deceased to escape through the window. She did, and when he tried to do so, he ran into some members of the gang who caught hold of him. Somehow, the deceased managed to slip out of the grip of his captors and sought refuge in a poultry house nearby. The mob apprehended him and dragged him to the road, a short distance from Zebedeo’s house, where he was found, shortly afterwards, dead. Zebedeo did not witness the actual killing but he told the judge that he heard the deceased screaming. He reported the incident to a clan elder immediately but he advised him that it was very late at night, he should report to the assistant chief the following morning, which he did. He explained that he did not follow the mob as they were dragging the deceased to the road because he was afraid. He told the judge that the people were armed with rungun.

When the gang arrived at Zebedeo’s house, Agnes was in the kitchen cooking the evening meal. Zebedeo and the deceased were in the main house. She heard people shouting asking for the deceased to be given to them so that they could kill him. She went to the main house where the deceased was, and advised him to escape through the window to save his life. There was moonlight and she could see clearly the people who were baying for the deceased’s blood and recognized them. She knew them well because they are Zebedeo’s nephews. She referred to them correctly as her sons in keeping with the customs of their clan. She said the deceased heeded her advice to escape through the window, but as we have already said, he never made it to safety. He was captured by the mob and dragged down to the road where he was killed. When Agnes saw what was happening to the deceased she started screaming. Next morning when she ventured to the place where the deceased’s body lay, she saw a cow and her calf grazing nearby and also saw stones and bricks at the scene. Agnes does not appear to have seen the deceased running to the poultry house as related by Zebedeo but that is quite unimportant. Nor did she hear of any talk of a stolen cow although she admitted that the cow she found near the body following morning belonged to the second appellant.

Robert Okindo (P.W.3), a son of Zebedeo and Agnes, was also present when the deceased was captured by the mob and dragged down to the road where he was eventually killed. He recognised both appellants as being members of the gang and they were all armed with rungun. Although he did not follow the mob as they dragged the deceased to the road he was able to confirm later that he had been killed.

David Okindo (P.W.7), another son Zebedeo and Agnes, was in his but when the trouble started. He came out, saw all these people and heard the altercation between his father and the gang, as they demanded to be given the deceased. He too recognised the appellants. Shortly after they had dragged the deceased to the road, he heard them shouting “thief”. Later he went to the scene and found the deceased’s body there. He accompanied Zebedeo to the home of a clan elder whom he reported what had happened. The elder advised them to report to the assistant chief the following morning.

The post-mortem examination of the deceased was conducted by Dr. T. D. Ogaro who formed the opinion that the cause of death was severe head injury inflicted by both sharp and blunt objects.

Both the appellants denied killing the deceased. The first appellant said he was woken by noise outside coming from the direction of the second appellant’s home. He went to his brother’s home but found no one there but somehow he learnt that a cow belonging to his brother had been stolen and he joined in the

chase ending up at the road where he found people shouting “Here is the thief”. There he found that the “thief” had been killed and the victim turned out to be his uncle. He then returned to his home.

The second appellant’s account tallies in all essential respects with that of the first appellant. He said he woke up in the middle of the night only to find that his cow had been stolen; followed the trail down to the road where he found the deceased lying dead after being killed by people who claimed he was a thief. When he looked closely at the dead man, he realised that he was his uncle. He claimed to have reported the matter to the assistant chief. We would pause here to observe that we find it very strange that these two appellants could find their uncle lying dead virtually in their home, so to speak, and yet not take the trouble to inform Zebedeo, who is also their uncle and a brother of the deceased. The appellants’ case was that the deceased was killed by people who were chasing a stock thief. Some of these people must have been known to the appellants yet no one was identified by name or even called to give evidence about the alleged thief. Of course the appellants had no burden of proof, this being a criminal case, but since they put forward an account which involved several people, one would have expected some of them to be called to relate how the “thief” had been chased and captured. The only reason we can see why that did not happen, is not because the event alleged existed only in the imagination of the appellants. It was a devise concocted by the appellants to put the police off their trail. That is why the appellants’ account completely disregards the prosecution’s case which placed them right in the home of Zebedeo where they captured the deceased and led him to his tragic and violent death.

The evidence against the appellants was overwhelming, and if we may say so, damning. They captured the deceased alive from Zebedeo’s house and they were seen and recognised not only by Zebedeo but also by his wife and their sons. He was later found dead down the road. And the appellants had specifically asked Zebedeo to give them the deceased so that they could kill him. That is precisely what they did. This evidence clearly shows that the appellants were at the scene and there is also evidence that they took part in the attack upon the person of the deceased. This is sufficient to dispose of their alibi defence and their claim that they did not participate in the killing of the deceased.

Mr. Onsongo, for the appellants, made great play of the fact that since the deceased was said to have been killed by a combination of sharp and blunt instruments, he could not have been killed by the appellants who, according to the evidence, were armed only with blunt weapons namely, rungun. We think the simple answer to that submission is that the prosecution witnesses who said the gang was armed with rungun could only testify to the weapons they could see from where they stood. Their evidence could not possibly include concealed weapons. Once it was proved that the appellants were members of a gang acting in concert, as in this case, common intention was established and each member of the gang became responsible for their actions.

Mr. Onsongo also strongly criticised the identification evidence arguing that it was not free from the possibility of error. He said that there was no evidence as to the intensity of the moon. But the three witnesses who testified about the moon all said they saw the appellants whom they knew very well and are their relatives. This is not a case of identification. It is a case of recognition. We would also point out that it is not a case of identification by a single witness. It is a case of identification by four witnesses who were no strangers to the appellants. And in the case of Zebedeo, he had two encounters with the gang during each of which he spoke to them and had a good look at them. Otherwise, he would not have found it necessary to apply to them the affectionate term of “my sons”. He was addressing people he knew and recognised.

In our view, the learned judge wrote a very careful judgment and correctly directed himself both on the evidence and the law. Like him, we too are satisfied that the appellants were properly convicted and we reject all the grounds of appeal urged on their behalf. And the appeal is accordingly dismissed.

Dated and delivered at Kisumu this 13th day of March, 1997.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR