



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE NO.35 OF 1994

REPUBLIC

PROSECUTOR

VERSUS

SAMWEL MOSIRIGWA MANDERE)
ACCUSED

THOMAS ONSONGO ONSONGO)

JUDGMENT:

The two accused persons are charged with the murder of Batiseba Nyanchoka Nyaora on the night of 20th and 21st July 1993 at Nyaisero sub location Majoge Chache Location. Kisii District of the Nyanza province contrary to section 203 as read with section 204 of the Penal Code.

The case for the prosecution was that on 20th July 1993 at about 10 p.m. Samuel Nyaora (PW1) then a 15 year old son of Christopher Nyaora Onganga was at his pavement's home at Nyaisero. He was with his brother Ronald Obadiah Nyaora together with their father Christopher and stepmother Batiseba Nyanchoka Nyaora.

At the said time he heard screams emanating from a road nearby. When he and his other three relatives went to the road where the screams were coming from he found people wailing and on enquiring as to the cause of the wailing, he was told that one Samuel Mosirigwa Mandere, the 1st accused, a close relative of the deceased had lost his child; they explained that his son who had been sick had died.

And so PW1, his brother and father went to the home of the 1st accused in accordance with custom to join their relative mourn the death of his son. They found many people at the home of the 1st accused wailing and they joined them in performing that ritual. At their arrival they did not find the 1st accused at home but he arrived later. According to the evidence of PW1, upon arrival the 1st accused whom PW1 knew well, because he was his uncle, asked for the key to his house, opened it and entered. PW1 and his father who had carried a lantern to the 1st accused's house remained outside. After a short while about 10 or so minutes, the 1st accused came out of his house armed with a knife. His posture clearly showed that he was not in a happy mood. He smashed the glass of the lantern the father of PW1 was holding. That action on the part of the accused forced PW1, his father and mother to reconsider their safety position. They decided that it was not quite safe to remain where they were and they had to beat a hasty retreat.

On their arrival home they set in the kitchen to discuss the events of the evening and as they did so they were invaded by a group of people, who surrounded them.

PW1's brother Ronald Obadiah Nyaora (PW2) went outside the kitchen to find out who the people who had invaded their home were and whilst outside PW1 heard him shout.

“we are all dead”

After making that shout PW2 escaped into the darkness and did not come back home that night.

Meanwhile those who remained in the kitchen i.e. PW1, his father and step-mother locked the wooden door of the kitchen for protection. That however did not deter the assailants who started to break it. On realizing that they were under serious attack, PW1, his father and step-mother began to scream.

Nobody from the neighbourhood came to their aid. As the assailants continued to break the kitchen door, PW1's mother advised his father to hide in the roof but the latter refused. At this point the kitchen was set on fire and PW1 pleaded with the invaders to allow him to get out and save himself and the 1st accused whose voice PW1 said he recognized, told him that he could do so. PW1 then opened the door and walked outside.

But no sooner had PW1 walked outside than he was attacked by a man called Samuel Gichauri. The latter kicked him but was restrained by others from beating PW1 further.

He was instead ordered to tie PW1 with a rope. Following this, PW1's hands were tied up and he was ordered to sit down.

Whilst he remained seated down, the kitchen continued to burn with his mother and father still inside. The heat caused by the fire must have become unbearable because PW1's father came out (obviously to save his life) and started running away. He disappeared from PW1's view into a corner of the kitchen. Later PW1's mother also came out of the kitchen.

Later PW1 heard the sound of somebody being beaten at the corner of the kitchen his father had disappeared to and after a few minutes he saw him crawling away from the kitchen. He stated that there was a lot of light from the burning kitchen, which enabled him to see his father clearly. He also saw the 1st accused with the aid of the same light hitting his father with a rungu which had a metal plate. Then the 1st accused told Gichauri to untie PW1.

After he had been untied, PW1 was ordered to go where his father was and push him back into the fire. He said he was forced to do so by threats from a man called Richard Masani. He further told the court that he had no alternative but to push his father back to the fire.

He was similarly forced to push his mother back to the fire although he was reluctant to do so. He was told that he would be killed if he did not obey the murderers orders. He had to obey the orders. PW1 said that at that moment his father could not stand as he had been badly beaten.

The same treatment was meted out to PW1's mother after she had come out of the fire.

Two men, one Andrew Mandere and the other David Nyabangi started to beat her. After beating her, they threw her back to the fire. But she managed to crawl out, upon which she attempted to escape by running into nearby shrubs. She was however followed there by the 1st accused and Andrew Mandere. After a few minutes PW1 was again called by the 1st accused and Andrew Mandere to go to the place his mother had run to. He found a lot of blood on the ground. He was ordered to push her back to the burning fire and had to do so because of threats. A man named Rogoncho assisted him to do so. But Pw1 testified that she managed to come out the third time upon which was killed with a rungu blow at the back of her head.

PW1's father also managed to come out of the kitchen again but he was placed under a granary roof and burned to death. The granary roof was placed on PW1's father by the 1st accused and others. The body of PW1's father was similarly burned. PW1 stated that the name of his father was Christopher Nyaora and that of his mother Batiseba Nyanchoka Nyaora (deceased) the person with whose murder the accused are charged.

Ronald Obadiah Nyaora (PW2) is the elder brother of PW1. He comes from Nyaisero sub location,

Sengera location. He is a 23 years old farmer.

His evidence regarding the events of the material day is similar to that of his brother, except in minor details. For example he differed with PW1 as to whether he, PW1, his father and mother arrived at the home of the 1st accused before the 1st accused. But in my view that discrepancies are minor and immaterial. They did not affect the overall quality of his evidence or that of his brother PW1.

He added that upon their return home PW2, PW1, his father and mother were attacked by people who surrounded the house they were in but he managed to escape. He was however chased by a group of people but he said they did not catch him for he disappeared into some tea bushes. He reported the incident at the office of the D.O., Ogembo but he said he found no vehicle available and he was advised to go back the following morning. The following day he was given 5 Aps but on arrival home he found that his father and step-mother had been killed.

PW2 claimed that he recognized, by voice, the people who attacked him, PW1, his father and mother. One of those people he said was the 2nd accused. He was amongst the people who chased him into the tea bushes. He further said that he managed to see the 2nd accused whilst in the tea bushes because there was moonlight.

On the following day, that is 21.7.93, at about 6.30 a.m. Onyango Onganga had just arrived home from Ogembo where he works as a watchman when the 1st accused approached him. He told him that he had killed Nyaora and his wife the deceased. He wanted to be escorted to the assistant chief.

At the office of the Assistant Chief the 1st accused repeated the same story and the assistant chief arrested him and locked him up at the Administration Police Cells. Later policeman for Nyangusu police station came and re-arrested him.

JARED MIRAMBA (PW4) is the assistant chief of Nyaisero sub location. He testified that on 21.7.93 he received a report from one of his clan elders (PW3) that he had brought someone who had burned Christopher Nyaora and his wife. That person was the 1st accused. He took him to Sengera and placed him in the cells at the chief's camp.

Later he was taken away by the police.

The bodies of Nyaora and his wife Batisaba were taken to Kisii District Hospital where a post mortem was conducted by Dr. Peter Kamau Waweru. The doctor's evidence was that the external appearance of the body of Batisaba showed 100% scalding burns. There was also compound fracture on the right elbow, an extensive open wound on the left leg, a cracking noise when the neck was turned suggesting a fracture or dislocation of the neck. There was bleeding inside the brain, the spinal cord was cut and there was a fracture and dislocation at the C3. Cause of death was due to head injury and cut spinal cord.

When put to their defences both accused elected to make unsworn statements. The 1st accused called no witness but the 2nd accused called one witness.

In his statement the 1st accused told the court about the illness of his child, how he took him to hospital on 20.7.1993 at 5 p.m. where he was admitted. He talked about the treatment the child received and said that he left the hospital to go back home to look after his other children. The following morning he woke up at 4.30 a.m. and went back to the hospital where he stayed until the child died. He then went home with his wife and started organising the raising of funds for the burial of the child.

He further said that on his way to the hospital the following day at about 8.30 a.m. he met the clan elder who told him to wait for him. The clan elder said that he had a letter which he wanted to pass to the assistant chief.

Then the clan elder came with the assistant chief and accused him of being a murderer and arrested him.

The second accused in his statement put forward a defence of alibi. He said he had gone to Molo to visit his brother on 17.7.1993 from where he returned home on 21.7.1993, a day after the murder of the deceased. He added that he was not at home when the incident took place. His alibi was supported by his brother Morumbwa Onsongo.

There is sufficient evidence to show that the deceased Batischeba Nyanchoka Nyaora was murdered by burning and beating on the night of 20th and 21st July 1993. The evidence of her step sons Samuel Nyaora (PW1) and Ronald Obadiah Nyaora (PW2) as well as that of the clan elder Onyango Onganga (PW3) and Jared Miraba (PW4) the assistant chief of Nyaisero sub location where the murder took place, establishes that fact beyond any doubt. The evidence of the post mortem by Dr. Peter Kamau Waweru (PW5) shows that death was due to head injury and cut spinal cord. That evidence corroborates the evidence of Samuel Nyaora that the deceased was killed by beating and more specifically by a blow at the back of the head.

The evidence that connects the 1st accused with the murder is that of Samuel Nyaora (PW1) and Onyango Onganga (PW3). The evidence of Samuel Nyaora shows that the 1st accused was fully involved in the murder. He was amongst the people he saw first when he emerged from the burning kitchen. Before leaving the kitchen he heard his voice which he recognised when the 1st accused told him to get out. The 1st accused was his uncle and he knew him well; he also was able to recognise his voice.

After emerging from the kitchen Samuel Nyaora said he was tied up with a rope but he managed to see what was going on and was forced to participate in the cruel killing of the deceased and his own father. He gave all the details of the brutality that accompanied the killings.

Although Samuel Nyaora participated in the incident by pushing the deceased into the fire he explained that he was forced to do so by the threats of death that were made by those who ordered him to do so amongst whom the 1st accused was one. This witness cannot therefore be considered as an accomplice. He was acting under threats. The killing took a long process. The evidence is that there was sufficient light from the burning fire. I am satisfied that the identification of the 1st accused as one of the killers was free from the possibility of a mistake.

The evidence of Samuel Nyaora is corroborated by that of the clan elder Onyango Onganga (PW3). His evidence was that on the morning of 21st July 1993 at about 6.30 a.m. the 1st accused came to his home and confessed having murdered the deceased and her husband. In his unsworn statement the 1st accused denied having done so but I believe that denial was an after thought. The clan elder had no reason to fabricate such a story to implicate the 1st accused in a serious offence as the one herein. I am satisfied that the 1st accused confessed the murder to the clan elder.

In my judgment therefore there was sufficient evidence to prove beyond any reasonable doubt that the 1st accused killed the deceased. The killing as the evidence reveals was intentional and brutal. It was a clear case of murder. Accordingly with respect to the 1st accused I disagree with all the 3 assessors who thought the 1st accused was not guilty, and I find the 1st accused guilty of murdering Batischeba Nyanchoka Nyaora and convict him as charged.

With respect to the 2nd accused the evidence implicating him is weak. It is that of a single witness Ronald Obadiah Nyaora (PW2). He said he saw and identified the 2nd accused as one of the assailants when he escaped from the kitchen when the initial attack started. As he ran to escape he said he was chased by a group of people, one of whom was the 2nd accused. He also said he saw him as he hid in some tea bushes nearby. He claimed that there was moonlight.

As regards the 2nd accused this is a case of identification at night by a single witness whom conditions for positive identification are not quite satisfactory. See Abdallah Wendoh –v.- R.

The possibility of a mistaken identity was not ruled out and clearly there is some doubt as to the participation in the murder by the 2nd accused. Further his alibi was not in my view fully rejected. For that reason I give him the benefit of doubt and acquit him of the charge and order his immediate

discharge.

Dated at Kisii this 12th day of May 1995.

TOM MBALUTO

JUDGE

Court: Section 323 of CPC complied with. Accused asked whether he has anything before sentence is passed.

Accused: I pray for leniency.

Mr. Okenye: No motion in arrest of judgment under section 324 of CPC.

Sentence: I sentence the accused to death to be carried out as prescribed by law.

TOM MBALUTO

JUDGE

Right of Appeal within 14 days explained.

Court: Assessors discharged with thanks.

TOM MBALUTO

JUDGE