



REPUBLIC OF KENYA

Republic v Nyatundo

High Court, at Kisii April 16, 1985

Masime J

Criminal Case No 25 of 1984

April 16, 1985, Masime J delivered the following Ruling.

The five accused David Ogega, John Ouma, John Mongare Orina, Stephen Nyanchama and Charles Mokuwa Oburi are jointly charged with the offence of murder. The particulars of the offence are that they on the night of March 18 and 19, 1984 at Gekomu village in Kisii Municipality jointly murdered Joseph Mwangi Ruiga. Eight Prosecution witnesses have testified and at the close of the prosecution case a submission has been made by learned counsel for the first four accused that they have no case to answer. I have in this ruling to decide whether the accused or any of them have a case to answer.

From the totality of the evidence it appears that the deceased lived with his mother at Gekomu (not Gekoni) village in Kisii Municipality; he had left school in 1983 and was as at the time of his death engaged in the business of selling groundnuts; Prosecution witness 3 was a friend of the deceased doing the same business and was the last person that saw the deceased alive. Prosecution witness 3 Tom Kunga Samuka, is a juvenile aged about 13 years. When he was called to give evidence, I was struck by his youth and I inquired into his understanding of the value of truth – he told me he was 13 years old, goes to school in std v, understands that to tell lies is wrong and particularly so after swearing to tell the truth. I was satisfied that Prosecution witness 3 could be sworn and he was duly sworn. He gave evidence as follows :-

He knew the deceased Mwangi but did not know his other names: the deceased lived with his sisters in a house the witness had visited for about one month. On 18th March 18, 1984 at about 7.30 pm he was in the deceased's house with the deceased. Then the fifth accused came to that house and talked to the deceased; the house was lighted and accused 5 stayed about one minute and went away saying he was going to a bar to finish off a beer and would return so they would go and buy groundnuts. Four minutes later, accused 5 returned to deceased's house and then accused 5, the deceased and prosecution witness 3 left and accused said they were going to buy groundnuts at accused 5s' home. The trio left and on reaching some bush accused 5 told prosecution witness 3 to wait there while accused 5 and the deceased would go and buy the groundnuts. The deceased then produced some money which accused 5 counted and kept in accused 5s' pocket it was Ksh 60.00.

After a while and while prosecution witness 3 waited, he heard screams like those of children playing. Prosecution witness 3 waited where he was left till about 9.00 pm got tired and returned to the house. The deceased did not return that night. The following day he learned that the deceased had died and he made a statement to the police.

Michael Nyayemi Kidogo prosecution witness 2 is a watchman employed by the Nyaribari Catholic mission at Gekomu. On the morning of March 19, 1984 at 6.00 am he was on his way home from work

when somewhere along the road his attention was drawn to a sack out of which some legs were visible. He observed and saw they were human legs inside a manila bag. Prosecution witness 2 reported to the Kisii Police Station and led the police to the scene; it was found to be the body of a boy; the witness later that day made a statement to the police. The body was removed by the police.

Prosecution Witness 1 – Dr Rig Dhana Singh is the Police Pathologist for Kisii. He testified that on March 23, 1984 at the request of Kisii Police Station he did a postmortem examination on the body of Joseph Mwangi Ruiga, a boy of about 15 years of age. He found bloodstained froth coming out of the nostrils, there was a cloth tied on his neck, there were marks of beating on the right scapular region and left side of forehead; there was a fracture of 6th and 7th ribs, the lungs were perforated, and there was some brain damage and bleeding; the cause of death was shock and bleeding. Before the postmortem, the body of the deceased was identified to Prosecution Witness I by the deceased's father Sylvester Ruiga, Prosecution Witness 6 and the deceased's cousin Prosecution Witness 7 and Prosecution Witness 4, the I P who identified the deceased's' body to prosecution Witness I and also released it to relatives for burial.

Prosecution Witness 8 I P Onesmus Situma was the investigating officer in this case. He gave evidence of what he did on getting the report of the offence; he recorded the report in the occurrence book, arranged to visit the scene removed the body to the mortuary, recovered the manila bag which he produced into evidence and recorded statements from the witnesses and arrested the five accused. Finally, I come to prosecution witness 5 I P Fred Muiya; he recorded the charge and caution, statements from the five accused.

Accused 1 to 4 all denied the charge and their statements were admitted into evidence without any objection. Accused 5 however, objected to his charge and caution statement and I held a trial within the trial in respect of it: I ruled that the statement was voluntary.

The fact that this happened reduces the value of this statement and I cannot use it alone to convict unless I am satisfied that it is otherwise corroborated or is true. Accused 5 is a young man said to be about 17 years of age; he gave a lot of detail in his statements it is a straight forward account of what is alleged to have happened: - that there was a plan between accused 5 and one David Yaganga to lure the deceased to some place and rob him money on the pretence they were going to buy groundnuts. Accused 5 then went to the deceased's house and found him with three other children. Deceased was then called and came carrying a sack for carrying the groundnuts; they then went to a bush where David was waiting with his group – Alfred Mongare Ochieng, John Auma Athiera and Nyanchama. The deceased was then attacked and robbed of Ksh 500.00 he was felled down David lying on his neck; the deceased screamed three times; that deceased's neck was tied with his shirt which had been removed; that two of them then put deceased into the gunny/manila bag and he was put by the roadside. The party then went to David's house, slaughtered and ate a chicken, then went to a bar where change was found and then the robbed money shared out and then dispersed.

Is this statement corroborated in material particulars by the other evidence? I warn myself that it is dangerous to act on this statement which has been retracted as a sole basis for conviction unless it is corroborated by some independent evidence or unless I believe it is true. I have analysed the circumstantial evidence – prosecution witness 3 stated that the deceased had carried a bag into which groundnuts was to be put; then deceased was later found tucked inside a manila bag; the statement says the deceased body was left by the roadside and indeed it was found by the roadside; the statement says the deceased was assaulted, the postmortem evidence shows the deceased was indeed assaulted in material parts of his body; the statement says the deceased's' shirt was removed and eventually tied around his neck; Dr Singh so found a cloth tied around the neck of the deceased. For the above reasons, I believe that the statement is substantially true. However, despite this finding I also find that there are gaps regarding the identity of the first four accused with the persons referred to in the statement as having participated in the offence.

For this reason, I find myself unable to say with certainty that accused 1, accused 2, accused 3, and accused 4 have a case to answer. I acquit them of the charge and hereby set them free. I turn to the accused 5. Prosecution Witness 3 has identified him as the person who came to the deceased's house at

7.30 pm on the evening of March 18, 1984. Accused 5 came initially for one minute talked to the deceased and left; he returned four minutes later and he together with deceased and prosecution witness 3 went away for some distance then the deceased took out some Ksh 60.00 then accused 5 counted it and put it into accused's 5 pocket then accused 5 and the deceased left and some distance away the prosecution witness 3 heard screams from a boy older than him – the screams have not been identified with the deceased however in his charge and caution statement the accused 5 definitely talks about the deceased. For this reason, I find that accused 5 has a case to answer and I put him on his defence.

Defence:-

CHARLES MOKUA OBIRI unsworn states:-

I was arrested on the night of March 18, 1984. I was in my house and some people came there about 3.00 pm and knocked. Before I opened the door they knocked the door and came in and recognized them as police officers. In the house, they conducted a search and then removed one radio and one mosquito net and asked me to produce a receipt; They escorted with those items to the police station.

At the police station they started beating me up and told me to name the persons I was with the previous day. I told them I was sick and did not go anywhere. They put me in the cells; the following day they took me outside where there was some soil and tyres; they placed a tyre on my shoulders and told me to put my right finger on the soil so I could swing around – they were beating me and put me in the cells again. About 3.30 pm they took me to where the soil was and put pepper into my eyes, they forced me to name anybody I was with the previous day. Because of the pepper in my eyes and the beatings I named more than 12 names – I cannot recall those names now. The four whom they forced me to say I was with are my co-accused, I do not know where they had come from. They put the four and I in one cell and told me to lead them to the homes of the remaining 8 of the 12 I had mentioned.

That is all.

J R O MASIME, J

Nyakongo:-

Case not proved beyond reasonable doubt against the accused. Only key witness PW3 heard screams which he thought were of children playing – not identified with deceased.

In cross-examination PW3 said he had not known A5 before that night – A5 came for one minute only the first time. Next time he came and he knew A5 only by face identification doubtful – statement to police dated 19/3/84 mentions a name Joseph only as the suspect.

PW8 admitted in cross-examination. That PW3 did not lead him to home of A5 at time of arrest. PW3 in his statement mentions only Joseph as the suspect – differs from PW3's evidence are: Identification of A5 missing link as to how PW8 got to A5 and identified him. Lack of adequate investigation – A5's names are common. Not even circumstantial evidence connects A5 with the offence. A5's statement retracted – contains some relevant facts and some irrelevant facts. A5 has told of what beatings he went through – Even if true it is unsafe to rely on in absence of further corroboration. Discrepancies in PWs' evidence – no such corroboration. Discrepancies in PWs' evidence – corroboration. Submit case not proved.

Ogada:-

Rely on earlier submission and evidence on record. PW3 stated that he was taken to police station and made his statement which led to the arrest on March 19, 1984 of A5 – PW8 submit case proved beyond reasonable doubt.

Order:-

Further hearing on April 24, 1985 at 10.00 am . Accused RIC till then.

April 24, 1985

Court:- Accused reminded of charge.

Order:- stood over to 2.15 pm accused remanded in custody till then.

April 3, 1985

Ogada:-

Accused present

Nyakongo now present

All assessors present

Nyakongo:-

I apologise for keeping the court waiting (it is now 4.00 pm) – had some urgent matters to deal with in Kisumu and could not get transport to return in time.

Ogada:- nothing to say.

Court:- Mr Nyakongo warned that this is professional misconduct and in the Event of future lapses disciplinary action will be taken.

Accused:- reminded of charge and hearing continues.

Address to assessors and assessors retire at 4.30 pm

Assessors return after 10 minutes

Verdict:-

1. Assessor Zebedeo Nyambegera.

- After considering the matter of death of deceased I'm satisfied deceased was with accused. PW3 identified accused properly in the light – satisfied that the accused was arrested; statement of accused is corroborated; we have no doubt that accused is guilty of murder.

2. Assessor Peter Munda.

PW3's evidence corroborated by the charge and caution statement. No doubt – he is guilty of the offence.

3. assessor Onyiego Oguora

I concur with my assessors. – he is guilty.

Order:-

Judgment on May 9,1985. Accused remanded in custody till then.

ADDRESS TO THE ASSESSORS

Gentlemen Assessors, it is now time for me to address you on the evidence which has been called by the prosecution in this case and the evidence which has been called by the defence.

Now, I will first of all remind you of the charge, the charge against this man Charles Mokuwa Obiri, is that of murder and it is alleged that on the night of March 18 and 19 1984 at Gekomu village within the municipality of Kisii he with others not before the court murdered Joseph Mwangi Ruiga. The prosecution have called eight witnesses as you heard here; and the accused gave an unsworn statement. The offence of murder, as it is defined as causing of the death of a human being with malice aforethought and the sentence if he is found guilty is death, so it is a very serious charge. The burden of proving this offence lies on the prosecutor and the prosecution must prove the case beyond reasonable doubt; if for a minute you have a doubt that he did it then he must have the benefit of this doubt and you must acquit him. It must of course be a reasonable doubt. As to malice aforethought; that is evidence showing that he intended to kill this man or that he intended to cause him grievous bodily harm. Now you heard 8 prosecution witnesses and I am going to summarize to you their evidence.

First of all as to the deceased Joseph Mwangi Ruiga: the evidence show that he lived at Gekomu village with his mother, he had left school in 1983 and at the time of his death he was engaged in the business of selling groundnuts. Evidence has been led by a witness Tom kunga Samuka of what transpired on the evening of March 18, 1984 you will remember Tom Kunga was a young boy. The law does not prevent us from getting evidence from young children but however, before swearing young children, the law requires certain conditions to be fulfilled because they are liable to be coached, they are liable to forget things etc. so the law requires me before I allow him to swear, to interview him and to see whether he understands the meaning of telling the truth and the meaning of telling the truth especially after swearing: you heard me call him near me and talk to him: I was satisfied that he understands the meaning of telling the truth and I allowed him to be sworn; He was 13 years of age, he goes to school in standard V he understands that to tell lies is wrong especially after swearing. He testified that he knew the deceased Mwangi but he did not know his other names: the deceased Mwangi lived with his mother at Gekomu and he had visited that house for about one month. On the March 18, 1984 at 7.30 pm was in the house in which the deceased lived, then the accused came to that house and talked to the deceased; the house was lighted with a hurricane lamp, and he stayed for one minute and then he went away saying he was going away to some bar to finish off a beer, and he would come back so they go to buy some groundnuts. After four minutes the accused again came to that house then accused, the deceased and the witness all went out and accused told them that they were going to buy groundnuts at the accused's home; the three then left and went to some bush and there the accused told the witness to wait while he and the deceased went to buy some groundnuts; the deceased was carrying a gunny bag and while the witness was still seeing the deceased produced some money which the accused counted and put in his (accused's) pocket. It was Ksh 60.00.

After a while and while the witness was still waiting he heard some screams like of children playing, the witness then waited there until 9.00 pm he got tired and went home; while in the house he noticed that the deceased had died. He made a statement at the police station.

The next witness was Michael Nyayemi Kidogo, PW2, he is a watchman employed by St Charles Lwanga Catholic church, he had been on duty on the evening of March 3, 1983 at 6.00 am when somewhere along the road his attention was drawn by a certain woman to a sack out of which legs were showing; he looked there and saw that they were human legs in the manila bag. He went to the police station and reported and he led the police to that place where the body of a boy was found. The witness Michael Nyayemi made a statement to the police and the body was removed to the mortuary. The 3rd witness was Dr Singh who gave evidence that on March 23, 1984 at the request of Kisii police station he did a post mortem examination of Joseph Mwangi Ruiga who was about 15 years and found blood stained froth coming out of the nostrils there was a cloth tied on his neck there were marks of beating on the right scapular region and left side of forehead; there was a fracture of 6th and 7th ribs, the lungs were perforated and there was some brain damage and bleeding. The body of the deceased's cousin as well as an Inspector of Police; later the inspector released the body for burial. The next witness was Inspector Onesmus Sitima who was the investigating officer in this case, he gave evidence of what he did on getting the report of the offence, he recorded the report in the OB he then arranged to visit the scene together with

personnel from crime office, he arranged to recover the body to the mortuary; he recovered the manila bag in which the body was and produced it as an exhibit, he also recorded statements from witnesses and arrested the accused.

Finally, PW5 was inspector Fred Muya; he is the one who recorded the charge and caution statement from the accused: you will recall that the accused denied having made that statement voluntarily so I had to hold a trial within a trial in order to determine whether that statement was voluntary, you remember that the accused alleged that he had been beaten, while in cells and had pepper put in his eyes, he was forced to carry a tyre of an isuzu lorry on his shoulders and that he was told to dig the soil with his finger nails. As a result of that he did not make that statement voluntarily; however; after I heard the evidence on both sides and after looking at the statement itself I was satisfied that the statement was voluntary. Now I will remind you that the accused in his defence gave an un-sworn statement; the statement which he wrote was very detailed: this is what he said and I want you to compare it with the rest of the evidence. The accused said that there was a plan between him and one David Yanganga it was to go and persuade the deceased to some place and rob him of the money that he had so they would pretend to the deceased that they were going to buy some groundnuts; then the accused went to the deceased's house and found him with three other children, the deceased was then called and came carrying a sack for carrying groundnuts. They then went to the bush where David was waiting with his group. The group included David Yaganga, John Ouma, Athieri, John Mongare, Stephen Nyanchama and Charles Moku Obiri. The deceased was then attacked and robbed of Ksh 500.00 he felled down with David landing on his neck, the deceased screamed 3 times, then the deceased neck was tied with his shirt that had been removed, he was stuffed into the gunny/manila bag and he was put by the road side. The original plan was that he should be thrown into the latrine but it was not done; the party then went to David's house, slaughtered and ate a chicken, then they went to a bar where change was found, they divided the money and they dispersed. I considered that statement with the rest of the evidence; you will have to look at the evidence of PW3 Tom Kunga, his evidence was that the deceased was carrying a manila bag and you see that in this statement there is a reference to the manila bag; PW3 stated that the deceased had some money, which was Ksh 60.00 this statement is talking of Ksh 500.00 being robbed from the deceased. The statement talks of the body being the road side PW2 says the body of the deceased was found at the road side, in a manila bag. The statement says the deceased was beaten by these people, you heard the evidence of the Dr about the injuries of the deceased, which said the deceased was beaten, the statement talks of the shirt of the deceased being removed and tied on his neck.

The Dr says before he did a post mortem examination he found a piece of cloth tied on deceased's neck. When a statement is made by an accused and he readily admits the offence it is called a confession but when the confession like that is challenged by the accused it loses its intrinsic value, it becomes suspect, because somebody is saying this and changes to that so as I have found that he has withdrawn it that makes it suspicious and the law says that I cannot use it on its own to convict him of the offence; there must be some evidence of other witnesses which corroborate it. You may find corroboration from the rest of the evidence by analyzing the evidence like I have done; the same thing about the evidence of Tom Kunga: although I was satisfied that he could be sworn, he is still a child of tender age; in the same way I cannot act on his evidence alone without corroboration, you must find some evidence of an adult person which corroborates that of Tom Kunga; if you are satisfied there is no such evidence to corroborate Tom Kunga then you are in doubt and if you are in doubt then you must let this man go. Gentlemen Assessors, I must again remind you of the charge, it is a charge of murder and the responsibility is on the prosecution to prove the charge beyond reasonable doubt, the accused does not have to speak a word to you, you must take into account what he said when I gave him an opportunity: he said he will speak from his place and he gave unsworn statement: in it he said that he was arrested on March 18, 1984 he was at his house, you remember March 18, 1984 is the day these things happened but he says after being arrested he was taken to police station and there he was beaten, pepper put in his eyes, he was given an Isuzu lorry tyre to carry on his shoulders, he was then told to dig soil with his finger nails at the end he was interrogated by police and told to name anybody; that is all he knows about this case. Finally gentlemen assessors you will now retire to some room, consider all I have said and come back to me, I am going to wait for you and tell me what are your individual verdicts. Whether the accused has been found guilty of the offence of murder of Joseph Mwangi Ruiga.

1st Assessor

Guilty

2nd Assessor

Guilty

3rd Assessor

Guilty

JUDGE: I thank you for your attendance in this particular one it has lasted long than I thought but you have been able to get through with it. It is our duty as citizens of this country to assist in the administration of justice voluntary and I hope that I will call upon you in future to assist in this cases. Judgment on the May 9, 1985, you can attend if you so wish but otherwise you are released. Accused to be remanded in custody until that day.