



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 22 OF 2016

PROSECUTION

REPUBLICPROSECUTION

VERSUS

GEORGE OCHIENG ANGASA.....1ST ACCUSED

STEPHEN OWUOR ANGASA.....2ND ACCUSED

JUDGMENT

1. The accused persons are charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

2. The Information states that on 15th June 2016 at East Katieno Sub-location in Seme District within Kisumu County the accused persons jointly murdered **Cleophas Omollo Angasa**, deceased.

3. Briefly the prosecution’s case is that on the material day at about 10.30PM while Benard Omondi Otieno (PW2) was on his way to his sleeping quarters inside the home of the accused persons he saw the accused and even though he had recognized the 2nd accused he loudly asked him “who are you”. The 2nd accused did not respond and so Benard (PW1) followed him to find out why he had walked away. The 2nd accused disappeared into a nearby bush and Benard (PW1) proceeded to his house. Soon thereafter the 1st accused called him and asked him if he had a grudge with his brother the 2nd accused. Benard (PW1) said no and then got into bed.

4. It was not long before he heard Cleophas (the deceased) tell the 2nd accused that he did not want him there as people were sleeping and he was disturbing them. The 2nd accused retorted (referring to Benard) “who is that dog who is spending (the night) in a house that is not his And it was me who had followed him”. Benard (PW2) did not go outside to see what was happening but according to Margret Akoth (PW1), the wife of the deceased, the deceased went outside to stop the 2nd accused from making noise outside. That was the last time the deceased was seen alive as the next day his body was found in a thicket at the home of the accused persons by a herdsman (PW3). (Benard told this court that while he was inside his house he heard the deceased tell the 2nd accused “**We will see who you will cut with the panga you are carrying**”). The herdsman (PW3) testified that the body had cuts on the back and sides of the head and there was a pool of blood on the ground. He reported the matter to the area Chief (PW4) who immediately went to the scene.

5. The Chief (PW4) testified that while he was at the scene he gathered information that the previous night the deceased had left his house to quell a quarrel between Benard (PW2) and the 2nd accused but did not return. He also learnt that the accused persons had not been seen since that morning. Later he learnt from another Chief that the 2nd accused had been taken to Riat Administration Police Post and then to Kisumu Police Station. At about 1PM he went to the home of the accused persons' sister at Nyakach where he had been informed the 1st accused had fled to and apprehended him. The two accused persons were thereafter taken to Kombewa Police Station. The Chief (PW4) alleged that the 1st accused person told him where he had kept the murder weapon – a corner in their mother's house. He stated that together with PC Kisang (PW9) they went to the house and collected the panga and took it to the police station. He also testified that the accused persons narrated to him what they had done to the deceased in the presence of police officers.

6. Peter Ouma Angasa (PW5) a brother of the deceased testified that he took part in the manhunt for the accused persons who are also his brothers and that he also witnessed the postmortem on the body of the deceased. He testified that on the head the deceased had cotton wool that had saw dust and that he had been killed using a sharp and a blunt object. This was reiterated by Corporal Kiplangat (PW6) one of the police officers who went to view the body at the scene before taking it to the mortuary at Jaramogi Oginga Odinga Teaching & Referral Hospital. He testified that he too witnessed the postmortem and that the cause of death was consistent with injuries inflicted by sharp and blunt weapons. The postmortem was produced by Dr. Rukia Aksam (PW7) as Dr. Owen Mangusu who conducted the postmortem was not available. The report dated 20th June 2016 opined that the cause of death was severe head injury due to deep penetrating object.

7. The other witnesses were Felix Ochieng Ajuoga (PW8) who testified that on the fateful night he invited the deceased to his house for dinner and that as they were eating the 2nd accused went there and although he refused to eat he left the house shortly after the deceased left to go home. PC Stanley Kisang (PW9) confirmed that he was one of the officers who were called to the scene upon discovery of the deceased's body. He also participated in removing the body to the mortuary and in the arrest of the 2nd accused person. He also confirmed that he together with the Chief (PW3) recovered the panga where the 2nd accused said he had kept it. He stated the panga had no blood. He further testified that the 2nd accused told him he had killed the deceased with a hammer a statement that was repeated by Village elder Samuel Otieno Oyoo (PW10).

8. When this court put the accused persons on their defence both gave sworn evidence. The 1st accused denied that he killed the deceased. He testified that the deceased was his elder brother and that there was no grudge between them. He contended that on 15th June 2016 he was at work in Riat and that he spent the night there because he had not completed the work. He stated that at around 7PM five people who had ropes and sticks went and demanded to know if he had an identity card. When he said he did not they assaulted him and told him he would talk at the Chief's camp. However at the Chief's camp he was told he had killed his brother and run to Riat to hide. His area Chief and Kombewa police were then called. He denied that he was never at East Kotieno on 15th June 2016 and contended that he had seen Benard Otieno on the night of 14th June at their home in Seme. He stated that he left home at 6AM and went to a place called Otonglo near the Airport. He told the court that until now he does not know why he was implicated in this crime. He stated that his uncle's wife had declined to be his witness although he was at her home on the night in issue.

9. The 2nd accused testified that at the material time he was a casual labourer at Bar Orua School in East Kotieno; That his parents were dead and he was living with his brother George Ochieng Angasa. He stated that on the material day he worked the whole day and on going home he just ate and then went to sleep at the home of their neighbour one Mathews Ochieng Omogos. He denied meeting the deceased

on that day saying that the deceased lived at the trading center. He also denied meeting Benard (PW2) on that day. He however admitted that he was arrested at his sister's home in Nyakach and stated he had gone there on the morning of 16th June 2016.

10. In summing up, Mr. Arikho, Learned Counsel for the accused persons, submitted that none of the witnesses witnessed the incident, and that none of them placed the accused at the scene. He submitted that the allegation by PW6 that the accused persons confessed to the crime was denied by the accused persons. He contended that even if there was a confession it was obtained through coercion. Mr. Arikho further submitted that the ingredients for the offence of murder were not proved and that the accused had raised the defence of alibi which was not discharged by the prosecution. He stated that in the absence of any evidence that directly or indirectly links the accused persons to the death of the deceased they should be acquitted.

11. On her part Miss Chelengat, Prosecution Counsel, submitted that PW2 heard the deceased chase the 2nd accused saying "***we will see who you will cut with a panga***". She submitted that the postmortem evidence as to the cause of death corroborates the above statement. She submitted that Benard (PW2), the accused persons and the deceased lived in the same house and Benard (PW2) therefore knew the accused person and that therefore this was evidence of recognition. She further submitted that PW10 gave evidence that the 1st accused had told him of a disagreement he had with the deceased and that he had thrown a hammer at the deceased and then fled for his own safety. Miss Chelengat described the defence as inconsistent and concluded that the accused persons were lying. She urged this court to find the defence not strong enough and convict the accused persons.

12. In reply Mr. Arikho submitted that Benard (PW2) did not clearly explain which accused person he recognized and whether he saw any of them. He described PW2's testimony as cast in doubt. He disputed that the evidence of PW10 indicated there was a grudge between the accused persons and the deceased. He reiterated that there was no evidence that directly links the accused persons to the death of the deceased and stated that none of them were at the scene and they should be acquitted.

13. There is no doubt that the deceased died as a result of injuries he sustained on the night of 15th June 2016. The injuries described by witnesses PW3, PW4, PW5, PW10 and also by the doctor who performed the postmortem on the body leave no doubt that the deceased was killed and that whoever killed him used a sharp as well as a blunt object. The post mortem report indicated that the deceased had deep cuts on the head one extending from the frontal region to the temporal region. His skull was depressed on the right side, his left shoulder was dislocated and the skull cavity on the right parietal region was empty due to loss of brain matter. The person(s) who inflicted these injuries did so unlawfully. The nature of the injuries inflicted are proof that the killers must have had only one motive and that was to kill the deceased. I am convinced beyond reasonable doubt that the deceased was murdered.

14. The point for determination is whether it is the accused persons who murdered the deceased.

15. Having evaluated the evidence and submissions by the prosecution and by the defence I am satisfied that there is circumstantial evidence linking the two accused persons to the murder of the deceased. The deceased's wife (PW1) who lived in a room adjacent to Benard Otieno's (PW2) heard the 2nd accused's voice that night when he insulted Benard (PW2) that he was a dog living in another person's house. According to Benard (PW2) the 2nd accused had confronted him before he went to his house. The 2nd accused had followed him closely and when PW2 demanded to know who he was, albeit knowing who he was, the 2nd accused disappeared into a bush. Benard (PW2) later heard the deceased tell the 2nd accused he (deceased) would see who he (2nd accused) was going to cut with the panga he

was carrying meaning that the 2nd accused had a panga. These two witnesses the deceased's wife and PW2 knew the accused persons very well as they were the brothers of the deceased. In fact according to PW1 (deceased's wife) the 2nd accused used to eat dinner at their house. They also lived in the same area as their home was nearby. The witnesses (PW2) therefore recognized the voice of the 2nd accused. Benard (PW2) also told this court that the 1st accused also went to his house wanting to know if he Benard had a problem with his brother the 2nd accused and when Benard answered in the negative the 1st accused left. PW1 testified that it was while this conversation between PW2 and the 2nd accused was going on that her husband (the deceased) said he was going to tell the 2nd accused to keep quiet. He went outside. The deceased never went back to his house and the next day his wounded body was found in a thicket at the homestead of the accused persons. The accused persons were the only people whose voices the two witnesses had heard outside that night and they were nowhere to be found when the body of the deceased was discovered by the herdsman (PW3) giving rise to suspicion that they were the ones who had committed the crime. Whereas they allege not to have been at the place they are said to have been at the time the offence was committed hence raising an alibi, evidence on record proves that they were. Apart from that evidence of voice recognition by PW1 and PW2 there is credible evidence by Felix Ochieng Ajuoga (PW8) that the 1st accused was within the vicinity that night. PW8 told this court that he had invited the deceased for dinner that night and that as they were eating the 1st accused went there but left after five minutes. In his testimony the 1st accused alleged to have been at a place called Riat on that fateful night. He claimed to have gone there early that day and had to spend the night because he had not completed his work. This was however contradicted by his brother the 2nd accused who during cross-examination forgot that he had earlier said he slept at a neighbour's house and said it was his brother the 1st accused who slept at the neighbour's house. Their alibi defence if it can be called that was not convincing at all. The statements the accused persons allegedly made to the Chief, the Village elder and the two police officers do not amount to confessions and must therefore be excluded in determining their guilt, and the panga the 2nd accused is said to have led the Chief and the police officer was never proved to be the murder weapon and that piece of evidence is not of much probative value. I am however satisfied beyond reasonable doubt that the exculpatory facts in this case cannot be explained on any other hypothesis other than that of the accused persons guilt. I am satisfied that they caused the death of the deceased by an unlawful act and that they did so of malice aforethought. I find them both guilty of murder Contrary to Section 203 of the Penal Code as read with Section 204 of the Penal Code and convict them accordingly.

Signed, dated and delivered at Kisumu this 21st day of December 2017

E. N. MAINA

JUDGE



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