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In the Privy Council.

No. 39 of 1949.

ON APPEAL FROM THE PORT HARCOURT
JUDICIAL DIVISION OF THE SUPREME
COURT OF NIGERIA

UNIVERSITY OF LONDON
W.C.1.
17 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

SUNDAY KALA ALAGBA, ISAAC ENYI NGERI, SELE
ORUAMABO, SATURDAY KWANI, JONATHAN GUN,
SUNDAY NABUAYE KIRI, DIGBANI BAMSON, URLAH
OBIKE KALIO and AMATAMUNO ORUBOKO ... APPELLANTS

AND

THE KING RESPONDENT.

CASE FOR THE RESPONDENT

RECORD

1.—This is an Appeal by special leave from the conviction of the Appellants by the Supreme Court of Nigeria (Port Harcourt Judicial Division) of the murder on or about the 11th March, 1949, of one Douglas Obene Marian Braide. p. 44, l. 13; p. 1

2.—Judgment convicting the Appellants was delivered on the 30th May, 1949. The Ninth Appellant, being 15 years old, was sentenced to be detained during His Majesty's pleasure, and each of the other Appellants was sentenced to death. Each Appellant applied to the West African Court of Appeal for leave to appeal against his conviction. The applications were dismissed. p. 39, l. 29-p. 44, l. 14 p. 44, ll. 15-37 pp. 45-62 p. 63

3.—The medical evidence established that the deceased died from hæmorrhage caused by a wound from a harpoon-like spear which completely severed the right brachial artery. There was also a harpoon or spear wound in the left forearm, and a three-inch cut wound on the right forearm. Two harpoons or spears remained in the body until removed by the medical officer who made the postmortem examination. p. 3

p. 4, ll. 1-31

4.—Dora, the wife of the deceased, gave evidence that on the day of her husband's death she, her husband, and two children in one canoe, and Hamilton George (also known as Douglas) in another canoe, on their way to Bile, called at Elemiama (or Old Shipping) where her husband and Hamilton George landed, while she and the children stayed in the canoe. Four fishing canoes containing the Appellants and two others of their party who became Crown witnesses, approached, and Dora sent the children to call her husband and Hamilton George. Those in these canoes wanted to land and in reply to the deceased said they wanted to cut coconuts. The deceased told them that they hadn't any coconuts there as the place was an old town of the Kalabari tribe. The Appellants' party then went back into one canoe, gave an Okrika war-cry, pulled ashore and surrounded the deceased. Dora said they hit the deceased with a stick, cut him with a knife, and threw a spear at him. He died instantly. She recognized all the Appellants as being amongst those who encircled the deceased. It was Isaac (Appellant No. 2) who knocked the deceased down with a long stick. All had offensive weapons and Sele (Appellant No. 3) and Saturday (Appellant No. 4) had spears. 10

p. 5, ll. 11-17

p. 4, l. 32-p. 5, l. 17

5.—When the deceased was killed, Dora, the children and Hamilton George ran away. Dora said that Jonathan Gun (Appellant No. 5) struck her down with a club and cut her head with a knife. Hamilton George was cut with a knife but, with the elder child, swam across the river. The younger child was beaten, and was lying in the mud. The Appellants' party then went off with the two Kalabari canoes and their contents, including a gun, an iron pot, fish racks and a straw sail. In cross-examination, Dora denied that she or any of her party threw sticks or stone at the Appellants' party, or fired the gun. She admitted that at first she had not identified all the Appellants. 20

p. 5, ll. 24-32

p. 5, l. 33-p. 6, l. 6

p. 7, ll. 1-17

p. 8, l. 12

p. 7, ll. 18-30

p. 7, ll. 31-35

p. 7, ll. 36-46

p. 8, ll. 18-21

p. 9, ll. 1-21

6.—Hamilton George said that he, the deceased, Dora and the two children were the only Kalabaris at Old Shipping, a deserted town, on that day; that he and the deceased went into the town and came back when the Okrikans were just landing. He and the deceased told them not to land. Hamilton George denied that anything was thrown at the Okrikans, and confirmed Dora's evidence that the Okrikans collected into one canoe, gave their war-cry and then landed. They struck the deceased on the head with a big stick and speared him twice. Hamilton George then ran away, but was chased, hit with a small axe on the back and on the head with a big stick, and received three knife wounds. He was left for dead. He said Saturday (Appellant No. 4) was the first to strike the deceased while he himself was struck by Sunday Kiri (Appellant No. 6) with a stick, and by Isaac (Appellant No. 2) with a machet. He said the spears were used by Okrika men for killing mighty fish. 30 40

7.—Godwin Brown, one of the Okrika party, gave evidence for the Crown. He said that all the Appellants were fishermen. On the day in

question four Okrika canoes, each containing two men, were going fishing. He was in one canoe with his master, Sunday Kiri (Appellant No. 6). Isaac (Appellant No. 2), Sele (Appellant No. 3), Jonathan Gun (Appellant No. 5), Sunday Alagba (Appellant No. 1) and Saturday (Appellant No. 4) were in other canoes. Beside a mangrove swamp they came upon Digbani and Uriah (Appellants Nos. 7 and 8), who said they had been driven there by Kalabari men who had taken their canoe, and that they had left behind their two partners. Digbani and Uriah were taken into the canoe of Jonathan Gun, and the four canoes went to Elemiama to capture two Kalabari canoes. There the Okrikans landed, under the leadership of Sunday Kiri (Appellant No. 6) holding a spear and a machet. Godwin Brown saw Sunday Kiri and Sele (Appellant No. 3) each use his spear; Sunday Alagba (Appellant No. 1), Isaac (Appellant No. 2), Digbani (Appellant No. 7) and Amatumano (Appellant No. 8) each use his machet; and Saturday (Appellant No. 4), Jonathan (Appellant No. 5) and Uriah (Appellant No. 8) each use a stick. Godwin Brown said that he alone of the party did not land, but remained in a canoe. The party went home taking the two Kalabari canoes, and on the way divided what was in them.

RECORD

p. 9, ll. 22-30

p. 9, l. 31-p. 10, l. 8.

p. 9, l. 44; p. 10, l. 22
p. 10, ll. 12-21

8.—An Okrika fisherman, Panga Luke, partner of Amatumano (Appellant No. 9) also gave evidence for the Crown. On the 11th March, 1949, they were in their canoe, going fishing, when the other Appellants in three canoes came up to them and asked them to go with them to question the Kalabaris at Elemiama because Digbani and Uriah (Appellants Nos. 7 and 8) had been chased by Kalabaris. The whole party then went to Elemiama where two men, a woman and two children were on the shore. Luke said that the Kalabaris threw stones at the Okrikas and said they would not let the Okrikas land, and that they produced a gun which was fired by Hamilton George before the landing. No Okrika man was hurt either by sticks, stones, or guns. Luke said that Hamilton George was reloading the gun, but Sunday Alagba ran up and cut him with a knife; while the other Kalabari man chased an Okrika man, but was speared by Sele (Appellant No. 3). Luke said that he did not see any attack on Dora or the children. The Okrika party then took the Kalabari canoes, went away, and divided the spoils.

p. 11, ll. 1-44

9.—The Crown also called evidence of statements made by the Appellants. Some errors in translation were corrected at trial. The statement of each Appellant establishes, in the Respondent's submission, that such Appellant was present at Elemiama, actively assisting his fellows in attacking the Kalabaris.

pp. 67-87

p. 18, l. 23-p. 20, l. 7

40 10.—Each of the Appellants gave evidence on oath at the trial. The more relevant parts of their evidence may be summarised as follows:

(i) Sunday Alagba (Appellant No. 10) told of rescuing Digbani and Uriah (Appellants Nos. 7 and 8) and two other Okrika men

p. 21, l. 19-p. 24, l. 15

RECORD

who were too exhausted to accompany Appellants Nos. 1 to 8 and Godwin Brown to ask the Kalabari why they had attacked the rescued men. On the way to Elemiama the party met Luke and his partner (Appellant No. 9), and they joined the party. On the river they encountered Kalabaris in two canoes. There was a fight. A gun was fired by the Kalabaris. Both sides landed and continued the fight in which the Okrikas were victors and took the spoils. He did not know how many Kalabaris there were, and saw no woman or children.

p. 24, l. 21-p. 25,
l. 43

(ii) Isaac (Appellant No. 2) gave similar evidence, but said that one Kalabari had a matchet. He denied that he or any of the Appellants had thrown a spear. He knew the chiefs had made a peace, but it was the Kalabaris throwing sticks which caused the fight. He said the Okrikas were unarmed and outnumbered, but victorious. 10

pp. 26-27

(iii) Sele (Appellant No. 3) told how Appellants Nos. 1—8 met Luke and Appellant No. 9 and told them how four Okrika men had been chased into the swamp by Kalabaris, and how they “were going to verify from them,” whereupon Luke and Appellant No. 9 joined the party. On the way the party encountered two Kalabari canoes, the occupants of which threw sticks and fired a gun, but were chased by the Okrikas. The Kalabaris landed, followed by the Okrikas. The fight continued, but Sele did not have any weapon and did not throw a spear. The booty was divided. 20

p. 28-p. 29, l. 28

(iv) Saturday Kwani (Appellant No. 4) told substantially the same story. He denied that he had hit anyone with a stick. He threw a stick back, merely to throw at but not to hit the Kalabaris.

p. 29, l. 34-p. 31,
l. 32

(v) Jonathan Gun (Appellant No. 5) gave a similar account, and said no Okrika used a matchet or spear. 30

p. 31, l. 38-p. 33,
l. 15

(vi) Sunday Kiri (Appellant No. 6) also gave a like account. He saw no Okrika use a spear, and did not see any Kalabari with a matchet. He did not count the Kalabari, but there were about eleven of them. Dora was not there.

p. 33, l. 20-p. 34,
l. 47

(vii) Digbani (Appellant No. 7) told how he and Uriah (Appellant No. 8) had been chased by Kalabari and had had to abandon their canoe and how they were rescued by Appellants Nos. 1—6, who said that the story was not true and that “they wanted to see with their eyes.” The party went towards Elemiama and was joined by Luke and Appellant No. 9. They saw the canoes that had taken 40

the Okrika canoes, and a fight began. The Kalabaris fired a gun and the Okrikas chased them to land and seised their canoe with the gun in it. No Okrika used a spear or machet. The whole party agreed to go to verify, and all landed at Elemiama. The Kalabari were about the same number, and there were no women among them.

(viii) Uriah (Appellant No. 8) told of the attack on him and Digbani and how, when they reported it to their rescuers, their rescuers "said they would like to see those people." On the way to Elemiama Appellant No. 9 and Luke joined the party. Uriah pointed out the Kalabari canoes, which were the ones which had chased him and Digbani. His account of the fight was similar to that of the other Appellants.

(ix) Amatamuno (Appellant No. 9) told a substantially similar story but denied that the Appellants had discussed the case together. He said that his statement was inaccurate where it differed from his evidence.

11.—Section 8 of the Criminal Code of Nigeria provides :

Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

12.—Bairamian, J., the trial judge, in his judgment reviewed the evidence, and then stated his findings of fact. He held that the Okrikas set out with the purpose of having their own back on the Kalabaris. They attacked the Kalabaris at Elemiama knowing quite well that they were not the Kalabaris who had attacked the four rescued Okrikas. That they were Kalabaris, however, was enough as the Okrikas were bent on reprisals. It was a punitive expedition against unarmed and helpless Kalabaris, who had neither fired a gun nor thrown anything. There was no self-defence, and no provocation. The learned judge believed Dora and Hamilton George, while the story of the Appellants was, in his opinion, fabricated. He therefore held all the Appellants equally guilty of murder.

13.—Each of the Appellants in his application for leave to appeal set out statements of fact which, however, threw no further light on the matters considered by the learned trial judge.

14.—The Respondent submits that there was ample evidence to support the findings of the learned trial judge, and that each of the Appellants was

properly convicted of murder. The Respondent therefore submits that this appeal should be dismissed for the following amongst other

REASONS

1. BECAUSE the Appellants with a common intention made an attack with dangerous weapons on the deceased and his companions.
2. BECAUSE in that attack the deceased was killed.
3. BECAUSE there was no evidence upon which it could be held that the Appellants or any of them had acted in self-defence. 10
4. BECAUSE there was no evidence of any provocation sufficient to reduce the crime of any of the Appellants from murder to manslaughter.
5. BECAUSE if there was any evidence of self-defence or provocation the learned trial judge rightly rejected it.
6. BECAUSE there has been no miscarriage of justice.

FRANK GAHAN.

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APPELLANTS

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CASE FOR THE RESPONDENT.

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