



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE (MURDER) NO. 38 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

MUREI JOEL NTIOME CHOI.....ACCUSED

JUDGMENT

1. By an information dated the 31st October 2018 **MUREI JOEL NTIOME CHOI** was charged with the offence of Murder contrary to **section 203 as read with section 204 of the Penal Code**. The particulars of the offence are that on the **29th day of October 2018** at Emesa village in Kenyena Sub-County within Kisii County murdered **JASON CHOI NTIOME**.

2. The accused person pleaded not guilty. The prosecution called 5 witnesses.

3. The summary of the prosecution case is that the deceased was allegedly stabbed to death by the accused who is his son. The accused was arrested and beaten by members of public and thereafter charged after investigations.

4. Pw1 **USATIA MORAA** testified that Jason Choi Ntiome is her husband and the accused is her son. She was home when Jason died. She met Jason entering their house as she left to go buy cooking oil. On returning she heard Jason talking loudly whilst in the house. He was making noise like he was quarrelling. On reaching the door she found Jason bleeding from the stomach, then he fell down. She screamed asking for assistance. Many people came and they took him to hospital. She did not see the accused that evening. The accused stays within the same compound. He was within the said compound. The police later visited their home. She does not know if police took anything from their compound. Jason and the accused lived well. The accused would even collect Jason when he was drunk. During cross-examination she denied seeing the accused near the place where the deceased was. She stated she did not see the accused kill his father nor could she tell whether it is the deceased who killed his father.

5. Pw2 **DOCTOR OCHIENG BRIAN AYARA** testified that he is pathologist at Kisii Referral Hospital. He recalled that on the 1/11/2018 he conducted a post mortem on the remains of Jason Choi Ntiome who was identified to him by police and witnesses. Jason was a male African in his mid-70's. On examination the deceased was very pale. He had lost a lot of blood and there was signs of medical intervention in the abdomen which had wounds that had been stitched. One was a laceration on the front of the abdomen about 24 cms long and stitched with 19 stitches, the other was 8 cms with 2 stitches. He also noted that he has defensive wounds on the left forearm. On internal examination he had significant bleeding in the abdomen and a stab wound in the abdominal wall into the blood vessels of the intestines. As a result of his findings he formed the opinion that the cause of death was an abdominal injury due to a penetrating force trauma due to assault. He produced the report as exhibit, Pext No. 1. During cross-examination he stated that he had taken blood samples and handed them over to the accompanying officer.

6. Pw3 No. **69112 CPL. Daniel Odongo** testified that on the 30/10/2018 at around 11 hours he accompanied the OCS to Nyamache hospital where the suspect was being treated after being beaten by members of public. They arrested him and escorted him to Kenyena Police station. At about 14 hours the same day they went to the scene of crime with his fellow police officers. They were led to the scene of crime by the relatives of the deceased. The scene is about 7 to 8 kilometres from their police post. Whilst there they searched the accused's house they recovered a knife (Pext. No. 2) which had blood stains which had been recovered under his bed by members of the public. On conducting a further search, they recovered a duvet assorted clothes, a shirt (Pext. No. 3) and open shoes which had blood stains. The accused's sister was present. An inventory was made by the Investigating Officer (I/O) and the exhibits were taken to the government analyst for analysis. The accused was thereafter charged. During cross examination he stated that he does not recall the name of the accused's relative who gave him the knife and that there is a report on the knife and clothes.

7. Pw4 No. 58147 CPL. Andrew Masinde testified that on the 30/10/2018 he received a call from a person had stabbed his father who had been rushed to Kisii Referral Hospital. He rang the OCS and informed him of the report. Later the same day he found the accused arrested and in custody. He found the accused with an injury on the upper eye which was bandaged. He learnt that the injuries he had were caused by members of public who were annoyed with his actions. He recorded statements from members of public who were present. He received a knife stained with blood stains, a shirt stained with blood a few muddy clothes which had been recovered at the scene. On the 31/10/2018 he had the accused charged in court. On the 1/11/2018 he accompanied the deceased's relatives for a post mortem. He asked the doctor who

conducted the post mortem to get him samples of blood from the deceased for DNA test for comparison with the blood on the knife and clothes. A sample of blood was taken from the accused on the 9/11/2018. He labelled all the samples and made a request to the government chemist for DNA. He forwarded the same on the 14/11/2018. The muddy clothes were not taken to the government chemist as they were destroyed by a fire at their police station. As per his investigation he found out that the accused was the son of the deceased. That the deceased and the accused had a quarrel over tea bonus and that the father had denied some shares and that they were both drunk. During cross examination he admitted that some one of the witnesses called Geoffrey Ogada who recorded a statement went underground. Ogada as per the information he got helped to take the accused to hospital. That the deceased's son and daughter who took him to hospital did not record their statements. That he did not arrest anyone who beat up the accused. The deceased died the same night he was taken to hospital. He doubted that the accused's injuries were caused by the deceased. When examined by the court Pw4 stated that the shirt in court belonged to the deceased.

8. Pw5 Richard Kimutai Langat a government analyst of 27 years' experience testified as follows; he did a report on the 10/5/2019. He received an exhibit memo dated the 14/11/2018. The conclusions were based on the findings as per the report. The DNA profiles generated by the blood stains from the knife (item C) and the shirt (item D) matched the profile of Jason Choi Ntiome the deceased and had no DNA genetic relationship with the accused's DNA profile. He produced the report as P Ext. Nos. 4(a) and 4 (b). During cross examination he reiterated that there was no genetic relationship between the accused and the deceased. That there was no cloth from the accused person.

9. After evaluating the prosecution evidence I ruled that the accused had a case to answer. On being placed on his defence the accused person elected to give unsworn statement.

10. The accused testified as follows; he is a farmer and that he still denies the charge. He did not kill the deceased. The deceased is his father. That he recalled that, on the 29/10/2019 at 1.00pm. that he came from the farm. He had been picking coffee. He took the coffee to the machine. He began running slot. He stayed there till 7.30pm. he decided to go home as it rained. He found that his mother had taken his father to hospital. They got a call that the Mzee had died. They started to wail. He recalled it was a day form 4 and standard 8 candidates started exams. There were heard them crying and the police came to their home and told them to keep quiet. He had an exchange with them. The police decided to arrest him. The door of their vehicle hit and cut his finger. They took him to Kenya police station and he said there until 11.00pm. At 11.00pm the in charge went to him to ask him why he had blood on him. He told him that the police officers had beaten him, that they had forced him in the vehicle and that he got injured. The said officer told him that it had been alleged that he had killed his father. The officer told that since his blood was on his clothes they must first investigate, then he was brought to court and then the prison.

11. The accused did not call any witness. Mr. Ondari filed written submissions at the close of the defence case

12. The defence submissions can be summarised as follows;

13. Mr. Otieno for the state elected not respond to the defence submissions. He stated that he would leave it to the court and rely on the evidence on record.

ANALYSIS AND DETERMINATION

14. For the offence of murder under **section 203** of the **Penal Code** to be proved, the prosecution must establish the death of the deceased and the cause of that death; that the accused committed the unlawful act that led to the death; and that the accused committed the unlawful act with malice aforethought.

15. The fact and cause of the deceased's death are not in issue. The cause of death was an abdominal injury due to a penetrating force trauma due to assault.

16. The next issue is whether it is the accused who caused the death of the deceased. The prosecution did not adduce any direct evidence to show that the accused stabbed his father to death. Pw1 his mother denied seeing the accused near their house.

17. The prosecution relied on circumstantial evidence. Whether the court will accept circumstantial evidence is dependent on if those circumstances unerringly point towards guilt of the accused person that there is no other plausible inference to be drawn other than the guilt of the accused. In **Joan Chebichii Sawe v Republic Criminal Appeal No. 2 of 2002 [2003] eKLR** the Court of Appeal held;

"... In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

18. The evidence led by the prosecution was that a knife was recovered from the accused's house and some clothes which had blood stains. The government made the following conclusion after he analysis; *The DNA profiles generated by the blood stains from the knife (item C) and the shirt (item D) matched the profile of Jason Choi Ntiome the deceased and had no DNA genetic relationship with the accused's DNA profile.* The officer who visited the scene did not recover the said items. The witnesses who gave him the items should have been called to testify on where they were recovered the knife and cloth. The accused in his defence has raised a plausible defence that he got injured as he entered the police vehicle after he was arrested. The prosecution has to prove their case beyond reasonable doubt. Having failed to adduce direct evidence to prove that the accused stabbed his father or that the knife was his knife and that it was recovered from his house I find that the circumstantial evidence is not sufficient to hold that the accused is the person who stabbed his father. He was even exonerated by Pw1 his mother who testified that he was not near their house on the material night. The prosecution has failed to prove their case beyond reasonable doubt thus I need not make a finding on the 3rd limb of malice aforethought.

19. The totality of the evidence presented by the prosecution was insufficient to sustain a conviction. I therefore find that the prosecution failed to prove its case beyond reasonable doubt.

20. I hereby acquit **MUREI JOEL NTIOME CHOI**, for the murder of **JASON CHOI NTIOME**. He is discharged from the proceedings and is free to go unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF FEBRUARY 2021.

R. E. OUGO

JUDGE

In the presence of:

Accused In person

Mr. Ondari For the Accused person

Mr. Otieno Senior State Counsel Office of the DPP

Ms. Rael Court Assistant.