



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 3 OF 2020

THE REPUBLIC.....PROSECUTOR

=VRS=

VALTUS AGETA ONDUKO.....ACCUSED

JUDGEMENT

The accused is 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 night of 26th and 27th September 2018 at Iteresi Sub-location in Nyamira North Sub-county within Nyamira County the accused murdered Isaac Kerongo Momanyi.

After the accused pleaded not guilty to the charge the prosecution called five witnesses to prove its case while the accused testified on oath and called four other witnesses one of them a Clinical Officer.

Briefly the circumstances of this case are that in the early morning hours of 27th September 2018 the body of Isaac Kerongo Momanyi (the deceased) was found dumped in a stream in his home village of Nyabitongo. The body had multiple injuries. The incident was reported to Ekerenyo Police Station and a team of police officers was immediately dispatched to the scene. Thereafter Senior Sergeant Wycliffe Baraza (Pw4), a Criminal Investigations Officer attached to Nyamira DCIO was detailed to carry out investigations. Senior Sgt. Baraza (Pw4) testified that he was not one of the officers who went to the scene but that he recorded the statement of the Assistant Chief who brought the report to the police and that he also made arrangements for a post mortem to be conducted on the body of the deceased. The post mortem report was tendered in evidence as exhibit 1. The same reveals that the body of the deceased had the following injuries: -

- **Bruises on both upper limbs at the elbow joint, cubital fossa and wrists bilaterally.**
- **Bruises on the right costal region on the 4th, 5th and 6th ribs.**
- **Dard hard skin on the back from the scapular region bilaterally up to the lumbar region.**
- **Swelling on the right temporal region of the head.**
- **Left upper eyelid slit.**
- **Sharp cut wound on the left neck at the point of the jugular.**

In the doctor's opinion death was as a result of haemorrhagic shock. During the post mortem a blood sample was drawn from the body.

Peter Kenani Momanyi (Pw2), the Assistant Chief of the area where the body was discovered, testified that he received a call concerning the body at about 6am on 27th September 2018 and immediately went to the scene. He stated that he knew the deceased and confirmed that the body had injuries. He testified that the water in the stream had a lot of blood which was coming from the deceased's eyes which had been gouged out. He also stated that while he was at the scene he heard people saying that the deceased had been with one Cleophas Keere, an illicit alcoholic brewer the previous night. He stated that he went to the house of Cleophas and interrogated him and he told him that the deceased had in fact been at one Fenny Kerubo's home, another illicit chang'aa brewer, and had just briefly passed by his house. He stated that the homes of the two persons of interest were only 800 metres from where the body was dumped and so he apprehended both. Pw2 testified that while he was with the two, Fenny Kerubo told him that she had seen the deceased's sweater outside the house of Cleophas. He stated that they went back to Cleophas' house but they did not find the sweater. He stated that he went and handed the two suspects to the Officer In-charge (OCS) of Ekerenyo Police Station. Pw2 testified that it was Cleophas who implicated the accused when he revealed that him and the deceased had beaten the accused a few days prior to the discovery of the deceased's body and that the accused had vowed he would beat the deceased in retaliation. It was this information that led to him (Assistant Chief – Pw2) arresting the accused. The court heard

that in the course of the arrest police officers who accompanied Pw2 carried with them clothes (white trousers, black trousers and red T-shirt - prosecution Exhibits 3, 4 and 5) which the accused had allegedly worn on the material night. The police wanted the clothes to undergo forensic examination to determine if they had blood and if they did, whether the blood belonged to the deceased. The forensic examination was carried out by Richard Kimutai Lang'at (Pw5) of the Government Chemist Kisumu who testified that upon doing an analysis he found that the red T-shirt matched the DNA profile of the accused; that the white trousers had human blood which matched the DNA profile of Isaack Kerongo Momanyi, the deceased, and that the black trousers had blood stains with a mixed DNA profile of the accused and the deceased. It is these findings that led to the prosecution of the accused for this offence.

The Assistant Chief, Peter Momanyi (Pw2) told this court that in all there were six suspects but only the accused was charged. He also revealed that the deceased and the accused were neighbours and friends and that he had never heard of any altercation between them. Pw2 also revealed that at the material time the accused used to walk with crutches having suffered an injury during a separate assault incident. Pw2 testified that the body was found less than 100 metres from the house of the accused and it seemed the deceased had been killed elsewhere and then dragged to the stream. He stated that they followed "drag" marks which led them to a spot 50 metres from the accused's house. He stated that after he handed the accused to the police the accused was arraigned in court then released. Pw2 was candid that the blood on the accused's clothes was not visible to a naked eye something that was confirmed by the government analyst (Pw5).

When put on his defence the accused testified that he could vividly recall the day that the body of the deceased was discovered. He stated that the deceased was like a son to him and that they would meet, say hello and part ways. He denied that prior to this incident the deceased and Cleophas had assaulted him. He admitted that the clothes produced in evidence were his but disputed that they were stained with blood. He stated that the red T-shirt could not have been stained with his blood as he did not have any injury. He stated that the only injury he had was on the knee and contended that the stains on the red T-shirt were from banana pulp. He disputed that the trousers had blood stains and drew the attention of this court to parts which had been cut. He contended that exhibit 4 was completely white when it was recovered and further stated that if it indeed it had blood then he would not have worn it to the place the deceased's body was found. He testified that the clothes were never washed after he last wore them and stated that the Assistant Chief agreed with him that the clothes did not have blood and for that reason did not agree with the evidence of the government analyst. He stated that he would call witnesses to confirm that those were indeed the clothes he was wearing at the place the deceased's body was found and that they did not have blood. He further contended that blood belonging to two different persons cannot be in the same place as was alleged of his black trousers. He reiterated that he did not have injuries and hence the blood found on the black trousers could not have been his. He further testified that he had been assaulted by one Alfred Nyaboga Akori but not the deceased. He revealed that the case in regard to that assault is before the Magistrate's court and averred that he could not assault anyone since he used to walk with crutches. He stated that when he was assaulted he sustained a fracture on the leg and could not walk. He stated that he was treated at Kisii General Hospital. Further, that he knew the deceased and there was no bad blood between them and that moreover the deceased was physically bigger than him and he could not, in the state he was in, overpower the deceased. The accused further stated that he had not met the deceased immediately prior to his death and so was not in a position to know the path he would take so as to waylay him. He contended that he was a teetotaler whereas the deceased used to help people brew chang'aa. He stated that on the night the deceased was killed he was in his house with his wife (now estranged) as he could not wander around at night in his condition. He alleged that the family of the deceased pressurized his wife to leave him. He also alleged to have heard one Fenny telling the Assistant Chief that she had seen a sweater belonging to the deceased at Cleophas' home and that the Assistant Chief went there but did not find it. He disclosed that Fenny and Cleophas were arrested but were soon released and to-date the sweater has not been traced. He reckoned that Fenny and Cleophas did not record statements in regard to this case. He further disclosed that his first arrest was in 2018 but he was released by the court after Prosecution Counsel Emma informed the Magistrate there was no evidence against him. He stated that a month later one Kimwele called him to go pick his clothes from the police station. He contended that the police could not have released the clothes (exhibits) to him if they indeed had blood. He stated that after his initial arrest he stayed in the police cells for sixteen days and that his blood sample was taken. He stated that in 2020 he was arrested again for the same offence but this time his blood sample was not taken. He tendered the proceedings that took place in the Magistrate's court as Exhibit D1. He reiterated that his clothes had no blood and reckoned that blood stains must first be visible to the naked eye before they can be detected by a machine as alleged by the prosecution.

The accused's first witness was his father Washington Jepta Onduko (Dw2) a retired teacher. He testified that prior to the incident giving rise to this case the accused was assaulted by one Alfred Nyaboga and sustained internal injuries. He stated that he was away at work when he heard about this incident and when he went to the scene he found the accused who was walking with the crutches there. He stated that the accused was wearing the white trousers produced herein as exhibit P4 and T-shirt marked Exhibit P5 and was emphatic that the same did not have blood. He confirmed that the accused's assault case CM CR 845 of 2017 is still being heard. He opined that the deceased was killed elsewhere and his body taken to the river.

Alfred Osano Onduko (Dw3) the accused's uncle, testified that he also saw the accused at the river where the deceased's body was found. Like Dw1 he stated that the accused was wearing white trousers and a red T-shirt. He however maintained that he did not go near the accused and so he could not tell if his clothes had blood. He was however emphatic that the clothes produced in evidence did not have blood stains and also told this court that he had never heard the accused and the deceased had squabbled or engaged in a fight. He also stated that he knew Cleophas and that the said Cleophas had never fought with the accused.

Daniel Nyamenywa (Dw4), a clinical officer at Kisii Teaching and Referral Hospital was called to produce the accused's treatment notes but as he was not the maker he was stepped down. He was however later allowed by the court to produce the documents upon laying a basis for so doing. The documents made by Dr. Enock Okoth Ochieng were admitted as Exhibit D2. The witness testified that the accused was first seen at the hospital on 15th December 2017 following an assault and was reviewed at the hospital on 22nd October 2018 when he was discharged from the clinic because he could flex his knee at 90^o.

Mr. Ondigo, Learned Advocate for the accused summed up by way of written submissions. After analyzing evidence from both sides Mr. Ondigo submitted that the prosecution's evidence is doubtful. He stated that this was because the accused had no external injuries which could have caused his blood to stain his clothes. Mr. Ondigo submitted that if this piece of evidence is false so is the prosecution's evidence that the accused's clothes had blood belonging to the deceased. Counsel urged this court to disregard the evidence of the government analyst and acquit the accused of the charge.

Counsel representing the State did not file their closing arguments although they had undertaken to do so.

The offence of murder is committed when a person causes the death of another by unlawful act and with malice aforethought (**Section 203 of the Penal Code**). From the totality of the evidence this court has no doubt that the deceased died. The prosecution witnesses and those of the accused attested to that fact. It is also not in doubt that the deceased's death was by a human hand. Witnesses including those called by the accused conceded that the deceased was killed before being dumped in the shallow stream where his body was discovered by villagers in the early hours of 27th September 2018. It is apparent from the evidence tendered that he had been brutally battered. According to the post mortem report he had injuries all over his body, all very serious in nature and his left jugular vein had been cut. One of the witnesses testified that the eyes had been gouged out a fact which is corroborated by the pathologist's observation that the left upper eyelid was slit. The post mortem results and more so the conclusion that his death was from haemorrhagic shock arising from the above injuries is proof that the deceased was killed. There is nothing in the evidence that could excuse this offence and it is my finding therefore that the death of the deceased was caused by another by an unlawful act.

The nature and extent of the injuries inflicted upon the deceased tell the story of an assailant who clearly intended to kill him. Why else would that person cut the deceased's wrists, slit his upper eyelid and left jugular vein if it was not to kill him? My finding is that the injuries undoubtedly point to malice aforethought and hence a case of murder and the only issue for determination is whether the accused person was the perpetrator of this heinous crime.

There is no direct evidence against the accused person as none of the prosecution witnesses alleged to have seen him assaulting the deceased. The prosecution did however adduce circumstantial evidence which this court must weigh and evaluate against the evidence tendered by the accused person in determining whether to convict him of the offence. The rule regarding circumstantial evidence is settled and it is that **"in a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt."** (See the case of *James Mwangi v Republic [1983] KLR 327*). The above test is what this court is required to subject the evidence adduced in this case to in order to determine the guilt of the accused.

The circumstantial evidence against the accused is twofold. Firstly, it is that the accused had prior to this case been assaulted by the deceased and another person and he had been heard saying that he would do something to the deceased in retaliation. The other piece of evidence is that blood matching that of the deceased was found on clothes belonging to the accused person and which he was wearing on the day it is suspected the deceased was killed.

I shall begin with the evidence regarding the alleged assault. A closer scrutiny of this piece of evidence will reveal that it was based on hearsay as the person who heard and then told the Assistant Chief (Pw2) that the accused made such a threat was not called as a witness. Secondly, the accused called witnesses who rebutted the allegation that the deceased had ever assaulted him. He also tendered medical records that revealed that the assault against him took place way back in December 2017 but not immediately prior to the death of the deceased as was alleged by the prosecution. Thirdly, the accused adduced evidence which was not controverted that he was assaulted not by the deceased and Cleophas as alleged but by one Alfred Nyamboga who is facing charges pertaining to the assault in Nyamira CM CR Case No. 845 of 2017. Further, the accused called his father (Dw2) and uncle (Dw3) who both negated the allegation that the accused had fought with the deceased. The two witnesses confirmed the evidence of the prosecution witnesses that the accused and the deceased were friends. The evidence of the prosecution that the accused must have been the deceased's attacker as the deceased had assaulted him pales when juxtaposed with that of the defence and it must therefore be ruled out. This court is then left with the evidence of the government analyst that blood matching that of the deceased was found on the clothes the accused was wearing on the day of the murder.

The accused person readily admitted that the clothes produced as Exhibit 3, 4 & 5 belonged to him. He also conceded that the same were taken from him when he was first arrested on 28th September 2018. This court was initially prepared to believe the prosecution's case that when the clothes were subjected to a forensic examination they were found with human blood which was not visible to the naked eye and that the blood matched that of the deceased and the accused. This was until it heard the evidence of the accused and defence witnesses Dw2 and Dw3 that these were the clothes worn by the accused on the day the body of the deceased was discovered and that the same had no blood on them. The accused and his Advocate also triggered doubt in my mind as to whether these clothes were indeed stained with blood when they questioned how the blood of both the deceased and the accused was found at the exact same spot on the black trousers. The court's doubt was also raised by the accused's evidence, which again was uncontroverted, that he did not have any injuries that would have resulted in him staining his clothes. Indeed, the prosecution did not allege that the accused had any injury(ies) at the time he was arrested a thing which created a gap in the prosecution's case. There is therefore nothing to link the blood on the trousers and T-shirt to the accused. Moreover, the exact places where it was alleged the deceased's blood was found had been cut and the pieces were not brought to court. Therefore, this court only heard that there was blood on those pieces but did not see the pieces hence rendering the evidence of the accused and his witnesses that the clothes had no blood more probable than not. While the government analyst is an independent witness whose evidence is treated as objective, in this case his evidence was not full proof as it was rebutted by the defence. He could have salvaged this by availing the pieces of the accused's clothes which he alleged he had cut from the accused's clothes and which he claimed had blood.

Contrary to the prosecution's submission, the onus of proof lay upon the prosecution throughout the trial and the accused was not required to call evidence to disprove that of the government analyst as that would have been tantamount to requiring him to prove his innocence, a thing not allowed by the law as it is he who alleges who must prove.

Moreover, it is my finding that taking all the evidence together it cannot be said that the incriminating facts pass the test that they **"must be incompatible with the guilt of any other person other than the accused."** I say so because the Assistant Chief (Pw2) gave testimony that in the course of his inquiry he was alerted that a sweater belonging to the deceased had been spotted at the house of one of the persons (Cleophas) he had taken in as a suspect. He testified that he indeed went there in the hope of taking the sweater only to find that the wife of the said Cleophas and the sweater had disappeared. Investigations into this were never carried out and apparently neither Cleophas nor Fenny, the chang'aa brewer who alleged to have seen the sweater were asked to record statements and in the end they were not called to give evidence in this case. The officer (Pw4) who was presented to this court as the investigating officer seems not to have done any investigations at all. Had he done so then he would have summoned if not arrested the wife of Cleophas to disclose why she hid the deceased's sweater, a crucial piece of evidence. Further, it is doubtful that quite a Senior Prosecution Counsel as Emma would have told the court to release the accused and given the reason as **"lack of evidence"** if there was evidence against him. The prosecution did not offer any reason for that and much as the release of the accused at that point did not amount to an acquittal which would have prevented him from ever

being charged again, it is instructive that there simply was no evidence against him. The question that begs an answer is where did the evidence with which the accused person is now charged come from? If it was that the clothes were yet to be subjected to a forensic examination, then this court should have been told that much but alas no such evidence was offered.

In the upshot I find that the evidence adduced by the defence casts doubt on the circumstantial evidence adduced by the prosecution. There is evidence that makes it probable that a person other than the accused committed the murder. In the premises I must and do hereby grant the benefit of doubt to the accused person and find him not guilty of the offence of murder and proceed to acquit him and order that he shall be released forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED (ELECTRONICALLY VIA MICROSOFT TEAMS) AT NYAMIRA THIS 24TH DAY OF JUNE 2021.

E. N. MAINA

JUDGE