



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CRIMINAL CASE NO. 40 OF 2015**

**THE STATE.....PROSECUTOR**

**=VRS=**

**DOUGLAS MOKAYA ISANDA.....ACCUSED**

**JUDGEMENT**

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on the night of 27<sup>th</sup> and 28<sup>th</sup> March 2010 at Keroka Town, Nyamira County the accused jointly with others not before court murdered Fred Nyangau Nyambane. The accused pleaded not guilty to the charge.

To prove its case, the prosecution called nine witnesses and briefly the facts are that on 28<sup>th</sup> March 2010 the deceased who was a trader at Keroka was found dead at a place called Montine and that the last person to be seen with him was Douglas, the accused person. Peter Obure Nyakora (Pw4) who had before I took over this case given evidence as Pw1 testified that he used to see the accused with the deceased but the last time he saw them together was on a day they had gone to see one Monari James Ndimu in Gucha Hospital. A few days later he learnt that the deceased had been found dead. He called a brother of the deceased and gave him the identity of Douglas, the accused. The court heard that the deceased had a cell phone – a Nokia 3100 – which went missing following his death.

Patrick Okelo Nyambane (Pw5) told this court that he had lived with the deceased who was his uncle and had seen him use the cell phone. The Investigating Officer (Pw9) testified that in the course of his investigations he received information that the accused had made calls to the deceased's phone. He obtained call logs of the accused's subscriber No. 0719837133 which he got from an informer. This assisted them not only to track the deceased's phone but to track the accused as well.

According to Pw9 they eventually found the deceased's phone with Dominic Nyabwana (Pw3) who told them that the same had been sold to him by one Laban Jogoo. The said Laban Jogoo had purchased it from Tabuley Nyamweya Nyambati (Pw2). Tabuley Nyamweya Nyambati (Pw2) admitted having sold the phone to Laban Jogoo. He however stated that he had bought it from the accused. He stated that the accused was his village mate and a friend. He stated that on a date he could not remember in the month of May 2010 the accused approached him and asked him (Pw2) if he could buy his (accused's) phone as he needed some money. It was a Nokia 3100. Pw2 stated that he bought the phone at Kshs. 800 and inserted his sim card No. 0713892892. He used the phone for about 2 months then sold it to Laban Jogoo (not a witness) at Kshs. 1500 on 23<sup>rd</sup> October 2010. The said Laban then sold it to Dominic Nyabwana Omoro (Pw3). Pw3 stated that he was later arrested and told that the phone belonged to a person who had been killed. He stayed in remand for six months before the charges against him were dropped and he was turned into a witness. He stated that he did not know the deceased. Both Pw2 and Pw3 identified the Nokia phone in court. It is this same phone that Patrick Okelo Nyambane (Pw5) claimed to have seen the deceased using. The investigating officer further stated that in the course of his investigations he learnt that the accused person was in Kisii Main Prison. He went there and questioned him. He subsequently charged him with this offence and had Pw2 and Pw3 treated as witnesses. Pw9 produced the phone and call logs from Safaricom in evidence (Exhibit 1 & 2). Also produced was a post mortem report also marked Exhibit 1. The post mortem had been conducted at Kisii Level Five Hospital by Dr. Morris Raute (Pw1). The body was identified to him by Peter Nyambane and Richard Siko. According to the post mortem the deceased died as a result of severe head injury due to assault. The doctor recounted several injuries that he had noted on the body of the deceased.

When this court put the accused on his defence, he maintained his plea of not guilty and contended that he could not have committed the offence as he was in prison at the time it is alleged he killed the deceased. He stated that he was arrested on 5<sup>th</sup> February 2010 and taken to Kisii Prison remand and was not granted bond. Later on 8<sup>th</sup> March 2011 he was convicted and taken to Kibos Main Prison to serve sentence. He stayed there for three weeks before he was taken back to Kisii Prison. While there the investigating officer in this case went and asked him if he knew Fred, the deceased and he said no. He stated that two people who were separately charged with this offence were released. He denied any knowledge of the deceased and maintained that on the night this offence is alleged to have been committed, he was in prison.

In summing up Mr. Nyagwencha, Advocate submitted that the only reason the accused was charged with this offence is because one of the witnesses (Pw4) alleged to have seen him with the accused. He submitted that the investigating officer confirmed to have found the accused in prison. He contended that the fact that the investigating office did not inquire what the accused was doing in prison shows he did not do proper investigations. He described the evidence adduced as hearsay and stated that as there is no direct evidence to connect the accused to the crime, it would not be safe to convict him. He raised the issue of a witness one Rogito Advocate who was not called and speculated it was because his evidence would have been averse to the prosecution's case.

**Section 203 of the Penal Code** defines **Murder** in the following terms: -

**“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

Therefore, for the offence of murder to be proved it must be shown that the accused killed the deceased by an unlawful act and that he did so of malice aforethought. Malice aforethought is established when any or all of the circumstances listed in Section 206 (a – d) of the Penal Code are proved. As in all criminal cases, the standard of proof is beyond reasonable doubt and the burden of proof lies with the prosecution.

There is no doubt that the deceased in this case was killed. The post mortem report indicates that the deceased had multiple injuries. He had multiple cuts on the head, a cut wound on the chin, bruises on the anterior neck, multiple stab wounds on the left hand and deep multiple wounds on the scalp. He also had multiple fractures on the skull. In the doctor's opinion the deceased died as a result of cardiorespiratory arrest secondary to severe head injury following an assault. His body had been dumped at Montine area within Keroka Township. No doubt the person(s) who inflicted these injuries perpetrated an unlawful act and from the nature of the injuries this court can also safely conclude that the intention was to kill the deceased. The issue for determination is whether it is the accused who committed this heinous crime.

There is no direct evidence to connect the accused person to this murder. The evidence against him is circumstantial and is two-fold. Firstly, it is alleged that he was the last person to be seen with the deceased and secondly it is alleged that he sold a phone belonging to the deceased and believed to have been taken from the deceased to Pw2.

It is trite that in order for a court to convict on circumstantial evidence the court must be satisfied that **“the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.”** The court must also **“be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”** (See **Kariuki Vs. Republic [1986] KLR 190**).

Tabuley (Pw2) stated that he purchased the phone alleged to have belonged to the deceased from the accused. He was arrested, according to the investigating officer, after investigations revealed that calls had been made to the phone by the accused. What the investigating officer did not however tell the court is how he established that the subscriber number he attributed to the accused was his. His evidence that he got this from an informer cannot stand since it is common knowledge that the depository of such information is the service provider, in this case Safaricom. The call logs he produced other than showing that calls were made from one number to another do not show who the subscribers of those phone numbers are and do not therefore support the piece of evidence that the phone was sold to Pw2 by the accused. The investigating officer should have gone a step further by getting evidence that the subscriber number that made calls to the deceased's phone actually belonged to the accused; the burden of proof being one beyond reasonable doubt as opposed to a balance of probabilities. It is also noteworthy that Pw2 alleges to have purchased the phone in the month of May whereas this crime was committed in March. On his part he stated that that he bought it from one Laban in October. This raises the issue of recent possession and whether this court can base a conviction on such evidence.

As for the evidence that the accused was the last to be seen with the deceased, that too is shaky. Pw4 who alleges to have seen the accused with the deceased was not very clear on when he last saw them. When he first gave evidence, he stated that he had seen them on 27<sup>th</sup> March as they took tea in a hotel at Keroka but when he testified before me he seemed to imply that that day was different and he had seen them last on a day when they had visited a patient in Gucha. His evidence is watered down more by the alibi raised by the accused who was emphatic that he could not have committed the offence because he was in prison having been arrested on 4<sup>th</sup> February 2010. The prosecution did not do anything to dislodge this alibi. The accused had raised this alibi earlier in the trial and by the time the investigating officer (Pw9) came to testify he had ample opportunity to test if it was true. In **Kiarie Vs. Republic [1984] KLR 739** the Court of Appeal stated: -

**“6. An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.”**

In this case it was the duty of the prosecution to dislodge the alibi and it was easy to do so since the places (police station and prison) the accused alleges to have been are easily accessible to the prosecution. Why the investigating officer did not deem it necessary to test the alibi only he knows but as the alibi was not tested this court cannot but find that it raises doubt that the accused could not have killed the deceased. The charge against the accused was not proved beyond reasonable doubt. This court finds him not guilty and he is acquitted and unless he is otherwise lawfully held he shall be set at liberty.

**Dated, signed and delivered at Nyamira this 31<sup>st</sup> day of January 2019.**

**E. N. MAINA**

**JUDGE**