



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL (MURDER) CASE NO. 29 OF 2009**

REPUBLIC .....PROSECUTOR

VERSUS

CASTRO LIYAYI MUSOTSI.....1<sup>ST</sup> ACCUSED

IDDI ISMAEL LONGU.....2<sup>ND</sup> ACCUSED

**J U D G M E N T**

**Introduction**

1. On 27.07.2009, the two accused persons appeared before Hon. Mr. Justice Chitembwe on one count of 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 17<sup>th</sup> and morning of 18<sup>th</sup> April, 2009 at Kaptien village, Serem Sub-Location, Shamakhokho Location in Hamisi District within Western Province, jointly with others not before Court two accused persons murdered Everlyne Ajerwa Kisanya. They denied the charge and the case has been going on since then.

2. The prosecution called seven (7) witnesses in its effort to prove the charge against the accused.

**The Prosecution Case and the Evidence**

3. Briefly, the prosecution case is that on the 17<sup>th</sup> April, 2009 at around 8.00am Leah Khagati Musambo who is mother to the deceased and who testified as PW1, sent the deceased to the home of her other daughter, Judith Vihenda, Pw2 to fetch her (PW1's) phone which had been taken to PW2's home for charging. That was the last time PW1 (Leah) saw the deceased alive. On the following morning, the body of the deceased was found in Tom's land. The deceased who had left home the previous morning, wearing a skirt, a biker and open shoes, she was found naked from the chest down with her biker around her neck.

4. PW2( Judith) confirmed that on the 17<sup>th</sup> April, 2009 at about 8.30am, the deceased went to her home and collected Leah's Samsung Phone. In the evening of the same day Leah went to Judith's home asking for the deceased's whereabouts. On the following day which was 18<sup>th</sup> April, 2009, Judith was informed that the deceased had died. Neither Leah nor Judith who were both neighbours of the two accused persons knew how the accused persons were arrested.

5. PW3, Gerald Musotsi testified that he was arrested on 20.04.2009 alongside his sons, among them the

two accused persons but he was released on the following day, PW4 Mustapha Longu, PW4 was also arrested together with PW3 (Gerald) and the two accused persons; but like Gerald he was released from custody on 21<sup>st</sup> April, 2009.

6. PW6, Samson Madete (Samson) and PW7 Wilson Mmeyi Dembede(Wilson) are the ones who identified the body of the deceased to Dr. Collins Masika for post mortem examination which was done on 23<sup>rd</sup> April, 2009.

7. Dr. Francis Odira, the medical superintendent at Vihiga District Hospital testified as PW5. He produced the post mortem form as PExhibit 1. He testified on behalf of Dr. Collins Masika. According the post mortem report, the deceased had two serious injuries:-

- A penetrating cut wound on the chest
- A deep cut wound on the neck, severing the spinal cord.

8. The deceased had bruises on the neck. In the doctor's opinion the cause of death was transaction of the cervical spinal cord. The prosecution was unable to avail the investigating officer's testimony, so the prosecution case closed without the evidence.

### **The Defence Case**

9. At the close of the prosecution case, the accused persons were placed on their defence. Each accused person gave sworn evidence and denied committing the offence. Neither accused called witnesses.

### **Submissions**

10. At the close of the defence case, Mr. Nyikuli Advocate submitted for the accused persons relied on the submissions he made on no case to answer and urged the court to find that the prosecution has not proved the charge of murder against the two accused persons to the required standard. The highlights of those submissions are that;-

- The accused persons were arrested simply because of the fact that they lived in the same neighbourhood with the deceased.
- The body of the deceased was not found on land belonging to the accused persons.
- No scientific or chemical analysis of the blood allegedly found on the walls of the second accused persons house was done to establish whether such blood was that of the second accused or of the deceased.
- Even if such blood had been subjected to scientific or chemical analysis evidence of such analysis would have been the weakest form of circumstantial evidence.

11. On the other hand, Mr. Jamsumba Onyango, Counsel for the state submitted that the state had proved its case against both accused persons to the required standard. Counsel pointed out that;-

- The prosecution has shown that it is the accused persons who murdered the deceased;
- Some of the deceased's clothes were found in the houses occupied by the two accused persons in addition to blood being found on the walls of the said house;
- The second accused person did confirm during his testimony that blood was found on the walls of his house.
- Neither accused person has mentioned the existence of any grudge between them and the police

who decided that the two accused were the proper persons to be charged with the murder of the deceased.

- The deceased's shoe was found in the house of the two accused person
- The first accused did not explain how he came to know the deceased and the deceased's mother
- The defence has concealed the truth about the accused persons 'participation in the murder of the deceased.

12. Counsel thus urged the court to find, that even in the absence of the exhibits there is a clear indication that the two accused persons were involved in the death of the deceased and to find them guilty as charged.

### **Issues for Determination**

13. The main issues, for determination is whether the prosecution has by evidence being placed before this court, established that the offence of murder as defined under Section 203 of the Penal Code was committed and in doing so, whether the prosecution has proved that;

- a) the deceased died and the cause of death
- b) The deceased died as a result of the acts or omissions on the part of one or both accused persons;
- c) In killing the deceased, the accused persons had the requisite malice aforethought as defined under section 206 of the Penal Code.

14. It is worth noting that unless all the above ingredients are proved, the prosecution case cannot succeed.

### **Analysis and Determination**

15. From the outset, it is noted that no police officer was called to testify. Further, a part from the post mortem form, no other exhibits were produced in support of the prosecution case against the accused persons. Having said the above, I now move onto consider the evidence on record.

16. From the evidence on record, it is clear that the deceased died and was buried after the post mortem examination conducted on her body by Dr. Collins Masika on 23.04.2009. The evidence also gives the cause of death as transection of cervical spinal cord. The post mortem form was produced in evidence as PExhibit 1.

17. Apart from the evidence of death and cause of death of the deceased, there is no .... Of either direct or circumstantial evidence linking the accused persons to the death of the deceased. Though the accused persons were arrested alongside other suspects, among them Mustapha and Gerald, the witnesses said they did not know why the accused persons were arrested. Since the investigating officer was not availed to give his testimony, this court is left in the dark as to why the accused persons were arrested. It is very likely that the accused persons murdered the deceased, and my sixth sense tells me so, but where is the evidence to bolster that likelihood? There is none, and the lack of evidence may be due to a deliberate effort by combined forces of the prosecution and the defence to suppress evidence. This may also explain why the investigating officer could not be found to give his testimony.

18. I have carefully considered the submissions by counsel for the prosecution, and do not know the source of his assertions. That there is evidence to show that the accused persons are the ones who murdered the deceased. The record does not reveal that there is such evidence. The prosecution also asserted, and I think quite erroneously too, that some exhibits were found in the house which was occupied by the deceased. As rightly submitted by defence counsel, no exhibits, apart from the post

mortem report, were produced. The prosecution also submitted that the defence has concealed the truth about the accused person's participation in the murder of the deceased. The position with regard to burden of proof is that the onus proof in all criminal cases is always on the prosecution and never shifts to an accused person. The two accused persons have no obligation whatsoever to prove their innocence. They have no obligation to give self-incriminating evidence by going beyond the evidence given by the prosecution.

**Conclusion**

19. For the reasons given above, I have reached the inevitable conclusion. That the prosecution case against the two accused persons cannot stand, as it does not meet the stand of proof. Accordingly, I make a finding that the two accused persons are not guilty of the murder of Everlyne Ajerwa Kisanya. Each of them is accordingly acquitted under Section 322(1) of the Criminal Procedure Code. Unless there are other reasons for holding them in custody, they are to be released forthwith.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 23<sup>rd</sup> day of May 2017.

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Nyikuli (present).....for both accused who are present in court.

Mr. Juma Ochieng.....for state

polycap.....court Assistant.