



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. 41 OF 2010**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**AGGREY RABANDO ONAMI.....ACCUSED**  
**J U D G M E N T**

**Introduction**

1. The accused person 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 8<sup>th</sup> day of November, 2009 at Malaha Market Lusumu Sub- Location Bunyala West Location in Kakamega Central District, he murdered Charles Orada Wafula. The accused denied the charges and the matter went on for full trial.

**The Prosecution Case**

2. The prosecution called a total of three (3) witnesses. The incident is alleged to have occurred at 10.00 am on the material day. According to John Wasike who testified as PW1 (wasike) he was attracted to the scene by some noise. He went to the scene where he saw the accused person slitting the throat and tongue of the deceased with a knife. Amongst other things he saw accused carrying a jug which contained blood and the deceased's tongue and genitals. Wasike also stated that he observed the deceased body which had a cut on the neck genitals and tongue.

3. The deceased body was examined by Dr. Nyikuli whose report was produced by Dr. Dixon Mchana who testified as PW2. Dr. Mchana took the court through the information in the post mortem report which was signed by Dr. Nyikuli on the 9<sup>th</sup> November, 2009.

4. Dr. Nyikuli opined that the cause of death was cardio vascular arrest due to severe haemorrhagic anaemia(blood loss) due to cut wounds on the head and neck. He produced the report which is marked as PEX1.

5. PW3 No. 51256 Inspector Augustine Mwakio OCS Navakholo Police Patrol Base received the report of the murder on the 8<sup>th</sup> November, 2009 at about midday. He went to the scene and saw the deceased body. He was in the company of other police officers. He observed that the dead body which lay in a pool of blood had injuries on the neck and fingers. He also saw a blood stained panga at the scene which was produced as PEX2. He told this court that the accused was later arrested though he did not take part in his arrest. He also took statements from witnesses and removed the deceased's body to Kakamega PGH

for post mortem.

6. After hearing the prosecution case the court found that a prima facie case had been established against the accused who was placed on his defence. Section 306(2) of the Criminal Procedure CODE (CPC) was complied with and the accused opted to give a sworn statement without calling any witnesses.

### **Defence Case**

7. The accused told the court of how he was arrested from his house on the 9<sup>th</sup> October, 2010 at around 8.00pm by four (4) police officers who took him to Makunga police station. He claims that the charges herein were planted on him by the police who did not even tell him the name of the deceased.

8. He testified that he did not remember where he was on 9<sup>th</sup> November, 2009 but stated that around that time, he was a boda boda operator within Mumias and Butula areas

9. The accused denied being a witch doctor but stated that it was his father who practiced it and that he does his business at his Makunga home. His father's name is Francis Rapando.

10. On cross examination he claimed to have been drunk on the day of his arrest and reiterated that his father was the one who practiced traditional medicine. He maintained that he did not know the deceased herein.

### **Submissions**

11. In his written submissions defence counsel has antiqued the evidence by the prosecution witnesses especially Wasike and Insp. Mwakio. He claims Wasike's testimony was full of contradictory and exaggerated statements whereas Insp. Mwakio's evidence had a lot of omissions which exposed his laxity during investigations. In all he maintains that the accused person is not convinced that there is a satisfactory case against him.

12. In conclusions, counsel submits that the prosecutions have not proved its case against the accused person to the required standard of proof which is proof beyond reasonable doubt.

### **Determination**

13. This court has gone through the evidence by both the prosecution and the defence and has also carefully read through the written submissions by counsel for the accused person. In determining this case the court will be answering the following three important questions.

- i. Whether the deceased died and what was the cause of his death.
- ii. Whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person and
- iii. Whether the said unlawful act or omission was committed with malice aforethought.

14. On the fact of death and the cause thereof all the prosecution witnesses saw the body of the deceased. Wasike and Insp. Mwakio saw the said body in a house on the 8<sup>th</sup> November, 2009 between 10.00am and 12.00 noon. The said body lay lifeless in a pool of blood. The post mortem report by Dr. Nyikuli produced as PEX1 showed the cause of death as cardio vascular arrest due to sever haemorrhagic anaemia (blood loss) due to cut wounds on the head and neck. The prosecution has therefore proved the fact of death and the cause thereof.

15. On the second issue the only possible eyewitness to the incident was Wasike. He was the only one who testified and who claims to have seen the accused slitting the throat of the deceased and also cutting

off his tongue and his genitals. No other witness was called to corroborate Wasike's testimony though according to Insp. Mwakio, he interrogated quite a number of other witnesses in his capacity as the investigating officer. The incident herein took place during the day according to evidence. Therefore the identification of the accused person could not be in doubt. What brings doubt to the evidence is the exaggeration by Wasike whose evidence is totally contradicted by that of PW2, Dr. Mchana.

16. It is worth noting that the credibility of a witness in criminal cases is key to the success of the prosecution case. Where a witness tells blatant lies or exaggerates the evidence, the court has to be cautious in dealing with such evidence. In the case of **Ndungu Kimani – vs – Republic [1979] KLR 282**, the court observed:-

“.....in our opinion, the evidence of the complainant does not come up to the minimum standard which we require before upholding a conviction in a criminal case. We lay down the minimum standard as follows; the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straight forward person, or raise a suspicion about his (her) trustworthiness or do (or say) something which indicated that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his (her) evidence.”

17. It is my considered view that Wasike is not a credible witness.

18. There is nowhere in the post mortem report (PEX1) which shows that the deceased's tongue and genitals had been removed and/or cut. Wasike's testimony was also not corroborated by any other person. Insp. Mwakio arrived at the scene some two hours after Wasike and therefore he did not see what might have happened to the deceased. This court finds it hard to believe the evidence by Wasike that even the huge mob at the scene was unable to apprehend the accused Wasike's testimony also contradicted that of Insp. Mwakio with regard to the weapon that may have caused the murder. Wasike talks of a knife whereas Insp. Mwakio claims that it was the panga produced as PEX2 that was used in the murder. These are glaring contradictions which this court cannot ignore. Being a serious offence there was need for more evidence to corroborate Wasike's evidence and there being none, I find that the prosecution has failed to prove that the deceased met his death as a result of an unlawful act or omission on the part of the accused person. It is likely that the accused killed the deceased but the chain of events and the medical evidence do not add up to that conclusion.

19. Having come to the above conclusion, the issue of malice aforethought is also determined. None of the prosecution witnesses told the court what might have led the accused person to murder the deceased. The element of malice aforethought has not been proved by the prosecution.

20. For the reasons as stated above I find that the prosecution failed to prove the charge of murder against the accused person beyond reasonable doubt. Accordingly the accused is not guilty of the offence of murder and is therefore acquitted of the same. He is to be released forthwith unless he is otherwise lawfully held.

Orders accordingly

**Judgment delivered, dated and signed in open court at Kakamega this 28<sup>th</sup> day of June, 2017**

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

Mr. Aburili (Present).....for accused

Mr. Juma (present).....for state

Polycap.....for Court Clerk