



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL CASE NO. 30 OF 2015**

**(Formerly Kisii High Court Criminal Case No. 21 of 2011)**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**ENOCK APELE AKOKO.....ACCUSED**

**RULING**

1. **ENOCK APELE AKOKO**, the accused person herein, was arraigned before the High Court at Kisii on 26/09/2011 and charged with the murder of one **FAITH AKINYI AYIETA** (hereinafter referred to as '**the deceased**'). The particulars were that on the 10/09/2011 at Total Area in Migori Township in Migori County within the Republic of Kenya he murdered the deceased. The accused person denied committing the offence and a trial was ordered.

2. The case was thereafter fixed for hearing where the first two witnesses testified before **Sitati, J.** before the case was transferred to this station. Upon compliance with **Section 200(3)** of the **Criminal Procedure Code**, the hearing proceeded before me from where it had reached. I took the evidence of the last three witnesses.

3. The prosecution's case was made up of the evidence of five witnesses. **PW1** was **Dr. Charles Vitalis Ogutu** who conducted the post mortem examination on the body of the deceased. **PW2** was the original investigating officer **No. 69197 Cpl. Rodali Chepkemboi. Tobias Achar Ayieta** testified as **PW3**. He was a brother to the father of the deceased. **PW4** hailed from the same clan as the deceased. He was one **Justus Ben Orote. PC No. 79996 Gabriel Onyango** testified as **PW5** and he was the Investigating officer who had taken over the conduct of the case from **PW2**. For the purposes of this ruling I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. In the morning of 11/09/2011 at around 09:00am, **PW2** was called by the OCS Migori Police Station and asked to visit a scene of murder around Total area within Migori town. **PW2** was accompanied by the Area OCPD and an officer from the Scenes of Crime Support Unit. It was the Area Chief who had told the OCS about the incident. **PW2** proceeded to the scene and met the Area Chief. They entered inside a residential house which had some shops at the front and right into one of the rooms. They saw the body of the deceased lying in a pool of blood on a mattress in an area enclosed by some curtains to make a bedroom. They observed the body carefully and **PW2** saw stab marks on the neck and that blood was still oozing out. He prepared a rough sketch plan of the scene and later prepared a fair copy. He produced both plans in evidence. The police took photographs of the deceased and the scene and the body was taken to Pastor Machage Memorial Hospital Mortuary for preservation and autopsy.

5. **PW1** conducted the autopsy after **PW3** and **PW4** identified the body of the deceased. **PW2** witnessed the examination. **PW1** noted a very deep stab wound running laterally on the left side of the neck, another stab wound on the head and a cut wound on the middle finger on the left hand. On opening the body, **PW1** confirmed that the trachea was severely damaged as well as the jugular erulory. He opined that the deceased had died out of severe external haemorrhage from the cut trachea. He filled in the Post Mortem Form and signed it. It is the one dated 16/09/2011 which he produced as an exhibit.

6. **PW3** was called by one **Moses** (not a witness) who described himself as one of the elders in SDA Church in Migori town where the deceased and her husband used to worship. That was on 11/09/2011 as **PW3** and **PW4** were attending a clan meeting at Gwasi in Homa Bay County. **PW3** was informed by **Moses** that the deceased had been killed by her husband who was a son to Pastor Akoko. **PW3** involved **PW4** and were given the direction to the scene. **PW3** then travelled to Migori town where he reached late in the night and managed to find out the scene. He met Pastor Akoko the father to the said husband of the deceased. However, Pastor Akoko was not ready to discuss the matter at that time of the night and **PW3** went and spent elsewhere until the next morning when he returned to the home of Pastor Akoko. They had some discussions and proceeded to the police before viewing the body at the mortuary. **PW3** then returned home.

7. **PW3** was later accompanied by **PW4** and other family members and returned to Migori where **PW3** and **PW4** witnessed the autopsy. They collected the body for burial and recorded statements with the police.

8. According to PW5, as one Administration Police Officer **Mohamed Ali** (not a witness) was on patrol around Posta area in Migori town on 11/09/2011 at around 12:30pm he saw a group of people beating up a man. He intervened and pleaded with them not to kill him. He managed to rescue the man and took him to the Migori Police Station where the man was re-arrested. That man was the accused person who was said to be the husband of the deceased. The accused person was later taken for mental examination and upon being found mentally fit he was charged.

9. That was the prosecution's evidence which is to be evaluated to ascertain if a *prima-facie* case against the accused person herein has been made to warrant him be placed on his defence. The **Black's Law Dictionary**, 9<sup>th</sup> Edition defines some prima – facie case as '**the establishment of a legally required rebuttable presumption**'. That is to say it is the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. Whereas it is not easy to define a prima-facie case with precision, it may mean evidence that raises a presumption that can sustain a conviction in the event no further explanation is offered by the defence. (See the case of **Ramanlal Trambaklal Bhatt v. R (1957) EA 332** as well as in the case of **Wibiro alias Musa v. (1960) E.A. 186** among many other cases).

10. I will look at the attempts made by the prosecution in attaining that bar. In a charge of murder, the prosecution is to prove the following three ingredients namely: -

(a) *Proof of the fact and the cause of death of the deceased;*

(b) *Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence; and*

(c) *Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.*

11. At the close of the prosecution's case, it was proved that the deceased died out of the injuries she sustained on her neck. As to who the assailant was, there was no direct evidence touching on the accused person. The prosecution therefore relied on circumstantial evidence. From the evidence on record, it was not proved that the accused person was married to the deceased as alleged neither was it proved that the deceased lived with the accused person in the room where the body of the deceased was found which house was said to have been a rental one or that the accused person had been in that room the night the deceased was killed. The owner of the house or the one who had rented out the house did not testify in Court and no plausible explanation given for such a failure. There was nothing that connected the accused person with the room where the deceased was found lying dead. I believe it was not hard to at least avail the other tenants in the house or neighbours or even friends to the deceased to fill in that gap. Even the said Moses who informed PW3 that the deceased and the accused person were members in a church wherein he was an elder and that the church was aware that the two were a couple, did not testify. There was also an attempt by PW2 to introduce a confession but that did not go far. There was equally no evidence as to where and how the accused person was arrested as the police officer APC Mohammed Ali only rescued him from the mob.

12. Reliance on circumstantial evidence must be within the permitted legal limits Evidence must be adduced that satisfies the following requirements that: -

(i) *The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;*

(ii) *The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

(iii) *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*

13. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (supra)** and have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo Vs. Republic (2014) eKLR** among many others. The Court of Appeal in the case of **Musii Tulo (supra)** in expounding the above principles expressed itself as follows:

**" 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus:-**

*'It is also necessary before drawing he inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'*

14. In evaluating the prosecution's evidence alongside the above case law, I have no doubt in finding that there was no chain at all that attempted to link the accused person with not only the death of the deceased but even with the life of the deceased. It is therefore not clear why the accused person was linked with the death of the deceased or charged in the first instance.

15. With such a state of affairs, it serves no purpose to place the accused person on his defence as the prosecution has failed to prove a *prima- facie* case against him. Pursuant to **Section 306(1)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya, I find that the accused person herein **ENOCK APELE AKOKO** is **NOT GUILTY** of the murder of **FAITH AKINYI AYIETA** and he is hereby acquitted.

16. The accused person shall forthwith be set at liberty unless otherwise lawfully held.

**DELIVERED, DATED and SIGNED at MIGORI this 31<sup>st</sup> day of July 2017.**

**A. C. MRIMA**

**JUDGE**