



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER CASE NO. 05 OF 2010

REPUBLICPROSECUTOR

VERSUS

FRANCIS OKARO ACCUSED

JUDGMENT

The accused is charged with murder contrary to Section 203 as read with **Section 204** of the Penal Code the particulars being that on **31st December, 2009** at **Manyatta Sublocation, Kisumu East District of Nyanza** Province murdered Ibrahim Owuor.

Briefly the facts of the case are that on the material day at around **3 p.m** the accused went to the house of his colleague Duncan Otiende at a place called Manyatta- Kona Legio. He did not find Duncan Otiende(**PW3**)but his wife Faiza Aisha (**PW1**) her children among them the deceased and her brother in-law Victor Ahenda (**PW2**). After a short conversation, she excused herself to go to the bathroom which was outside the house leaving him the children and Victor (**PW2**) in the house. It was while in the bathroom that she heard someone screaming Ibra! Ibra!. She panicked and ran out naked. She saw Ibrahim lying on the ground bleeding. She picked him and started running towards hospital only to be intercepted by a neighbour who offered to take him to hospital while She went back to dress. The said neighbour, one Suzzie took the child to hospital on a motor cycle but unfortunately by the time **PW1** reached the hospital the child had died. The matter was then reported to Kondele Police Station.

Victor Ahenda (**PW2**) testified that after his sister-in-law(**PW1**) left for the bathroom he too went to see a friend and left the accused and the children in the house. When he returned he met the deceased at the door bleeding on the chest. He went inside to check on the smaller child and found him screaming. He went out and met a Mama Derrick chasing the accused. He too saw the accused running away. Soon **PW1** came from the bathroom screaming. She called neighbours to assist take the child to hospital and was assisted by a motor cyclist.

Agnes Adhiambo [**PW6**] claimed to have seen the accused at the home of the Otiende`s who who were her neighbours on the material day. She knew him as he had visited them severally. She testified that she was in the house folding clothes when she heard an explosion and her children were playing with balloons outside she thought one had burst. Then she heard a child crying in pain at **PW1**`s house. When she came out she found the deceased outside her door with his clothes soaked with blood at the front. She rushed to the gate and saw the accused-running. She chased him upto a place called Kondele but did not catch him. Earlier she had seen him peeping and going back into **PW1**`s house. She confessed that she did not see the accused committing the crime and also stated that Victor Ahenda was out playing football when the incident occurred.

Upon receiving the report **Nelson Mukmagina Mabusi(PW7)** a police constable at Kondele police

station and other officers visited the scene and saw blood. He then went to the mortuary and confirmed the body had been taken there. Thereafter, he went and recorded the statement of the witnesses and later on 4th January, 2010 he witnessed the post mortem of the deceased.

On 2nd January, 2010 Police Officers among them Sergeant Nicholas Kipkoech [PW5] traced the accused to his home in Luanda arrested him and brought him back to Kisumu. Where he was then charged with this offence.

The accused made an unsworn statement in which he confirmed that prior to his arrest he worked at Brookside Dairy Ltd. He also confirmed that on **31st December, 2009** he was interdicted on suspicion of theft and that he went to the Otiende's house on that day. He explained that his intention was to borrow money to relax and reflect. He confirmed that in the house he found his colleague's wife (PW1), her in-law (PW2) and two children. He further confirmed that that was not his first visit there as he used to deliver milk there and to watch Television. He confirmed PW1's testimony that the Television was not working on that day and that she told him she wanted to go take a bath. He however, stated that at that moment he left to borrow money from another friend and did not return because when he got the money he traveled to his home in Luanda. He stated that PW3 was his close friend and that to date he does not understand and does not know about the murder. He claimed to have been beaten till he lost consciousness at the time of his arrest.

In his closing submissions **Mr. G.A. Mong`are, Senior Principal Prosecution** Counsel summarized the evidence of the prosecution witnesses and submitted that notwithstanding that the evidence against the accused is circumstantial; it appears to be very strong and only points an accusing finger to the accused person and not any one else. He relied on the decision of the court of appeal in **Warui V. Republic(2002) eKLR 750** where it confirmed a conviction on the ground that the appellant having been the last person seen with the deceased while he was alive coupled with the finding of incriminating evidence was sufficient to support a conviction. He urged this court to find that the prosecution had proved its case beyond reasonable doubt. He also alleged that the post mortem report which was produced was in line with the nature or description of injuries narrated by the witnesses.

The defence did not submit and elected to rely on the evidence on record.

The point for determination is whether it has been proved beyond reasonable doubt that on **31st December, 2009** the accused person of malice aforethought caused the death of the deceased herein by an unlawful act. In other words that he murdered the deceased.

None of the witnesses in this case claim to have seen the accused kill the deceased and as correctly summed up by Mr. Mongare the evidence against the accused is purely circumstantial. In **Murangi V. Republic [1983] KLR 522** the court of Appeal had this to say:

“ In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the

inference....”

In that case the court found that the facts surrounding the first appellant's possession of the property of one of the deceased persons and his posing as the deceased were incompatible with his innocence and inconsistent with any other rational conclusion. In **Mwendwa V. Republic[2006] KLR 133** the court held as follows:-

“1. To prove a case based on circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the

prosecution. Secondly, as is now settled law, the chain must never be broken at any stage.”

The inculpatory facts against the accused in this case seem to be that he accused had been left in the house with the deceased and another child (**PW1 and PW2**), that he seemed anxious(**PW1**), that he had been terminated on suspicion of theft(**PW3**); that he had been seen peeping from **PW1** and **PW3**'s house and looking from side to side[**PW6**]; and that he thereafter escaped to his home in Luanda. It is however, noteworthy that during cross examination **PW3** and **PW6** admitted that they did not mention the accused in the statements they made to the police. **PW2** for instance recorded three statements and did not mention that he had seen the accused running away. Neither did **PW6** after running after the accused all the way to Kondele mention his suspicious behaviour to the police. Their evidence is in my view not trustworthy. **PW1** was herself in the bathroom when she heard someone screaming her son's name. When she came out she was met by her bleeding child. She, as any mother, was not at that moment concerned with finding out what had happened but rather with taking her baby to hospital. Her evidence is silent as to whether the accused was still in the house when she came out. It is however, interesting to note that according to her all this occurred in less than a minute and that there was a watchman around who she called as she ran towards the house. It is curious that this watchman was not called as a witness to testify as to the circumstances under which the accused left the compound. There was also nothing to connect the accused's dismissal with the death of the child. Both the father of the deceased[**PW3**] and the accused person allege to have had a cordial relationship. He used to visit **PW3**'s house occasionally a fact which he himself admitted and which **PW6** confirmed. His anxiety can also be explained on the loss of his job a fact confirmed by **PW3**.

It is also noteworthy that save for saying that the deceased had blood in the front part of his body no evidence was given as to the nature of the injury. Indeed even the Post Mortem report was never produced in evidence. Contrary to the submission that the Post Mortem report produced was in line with the nature or description of injuries narrated Mr. Mong`are closed his case before calling the Doctor to produce the post mortem report. He also did not lead his witnesses regarding the nature of the injuries sustained.

In **Ndungu V. Republic [1985] KLR 487** the court of appeal while holding that the Post Mortem report must be produced conceded that there are instances where death can be established without medical evidence. They gave the example where the deceased was stabbed through the heart or where the head is crushed as the cause of death would be so obvious that the absence of a post mortem report would not necessarily be fatal. The other example they gave is where the body was never found. In this case we do not know for sure what caused the death of the deceased or even that it was the accused that killed him. That **“moral certainty to the exclusion of every reasonable doubt”** that is described in **Mwangi V.R. [1983] KLR 522** at page 532 is lacking. There may however be very strong suspicion that the accused killed the deceased but that is just that-suspicion. He gave what seems to be a plausible explanation for going to his rural home- he had lost his job- and again that too would not be incompatible with his innocence.

On the whole, I find that the prosecution did not prove the charge of murder against the accused beyond reasonable doubt. I accordingly find him not guilty and acquit him accordingly.

E.N. MAINA

JUDGE

Signed, dated and delivered on this 23rd day of April, 2015.

In the presence of

Mr. Ruto for the accused

Mr. Onsongo for the state

Moses Okumu- Court clerk