

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER 35 OF 2011

REPUBLIC**PROSECUTOR**

VERSUS

HESBON OTIENO.....1ST ACCUSED

DAVID OWIRA OYUGI.....2ND ACCUSED

RULING

The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the night of 26th and 27th April 2011 at Manyatta Corner Mbaya, Kondele Area Kisumu East District within Nyanza Province the accuseds killed one **PATRICIA ADHIAMBO**.

The prosecution in establishing their case called 5 witnesses.

PW1 PENINAH OKACH who was the deceased's mother told the court that her daughter went missing from 26th April 2011. She reported the matter to the police where eventually her body was traced to Star hospital mortuary. She admitted that she knew 1st accused whom she later learned that he was the deceased's husband.

PW2 OKELLO RAMOLO DINDA was the deceased's landlord. The house was however managed by an agent called Kwili Consultant. He was told on 7.1.11 that the deceased's house was opened and that the same was empty. One **JANE AKINYI** wanted to occupy the same. He said that he did not receive the rent from the deceased for the month of May.

PW3 PAMELA AMADI and **PW4 EUNICE GUYA OMULA** were members of Fresh Green Ladies Chama which the deceased was equally a member. They both testified that the deceased failed to attend 3 meetings which caused them a concern and they decided to look for her. They later learned that the deceased had died.

PW4 DR. CHARLES MUTURI performed a postmortem on the deceased's body at Star hospital. He concluded that the cause of death was head injury as a result of blunt trauma.

The question before the court is whether in the light of the above evidence the prosecution has established a prima facie case against the accused persons capable of being put on their defence. It must be remembered that what is essential herein is whether in the absence of any explanation the evidence or record can convict the accused persons in the absence of their defences.

For the offence of murder to be established one has to prove malice aforethought. There is no direct evidence linking the deceased's death with the accused. None of the witnesses saw them assault or were at the scene at all. There is no circumstantial evidence to link both of them to deceased's death. Nothing at all suggest that the 1st accused person assaulted the deceased neither was their any murder weapon produced.

For the above reasons it would be unfair to let the accused persons fill the gaps left by the prosecution. They are not obliged.

Consequently I find the accused person not guilty under the provisions of Section 306 of the Criminal Procedure Code and acquit them forthwith unless lawfully held.

It is so ordered.

Dated, signed and delivered this 30th day of July 2015

H. K. CHEMITEI

J U D G E