



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 83 OF 2012**

**LESIT, J.**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**JOSEPH APONDO JURA.....ACCUSED**

**JUDGMENT.**

1. The accused person **JOSEPH APONDO JURA** is charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

**“On the 1<sup>st</sup> of October 2012 at Ngei I in Huruma Estate within Nairobi County murdered MOSES MWAURA”.**

2. The prosecution called a total of 6 witnesses.

3. The facts of the case were that the accused stopped at the shop of PW3 in Huruma on 26<sup>th</sup> September, 2012 at about 10.45 p.m. According to PW3, the accused pretended to remove something from his pocket then he started shouting “mwizi, mwizi” “thief, thief”. PW3 then heard the accused make a lot of noise and threaten to kill whoever stole from him. PW3 testified that the accused left saying he was going to report at Huruma Police station.

4. PW3 testified that the accused returned 25 minutes later and found the deceased smoking a cigarette he had just bought. PW3 stated that the accused asked him what he was doing there then held him and hit his head on the shop grills. The deceased fell down and PW3 saw the accused hit the deceased with fists, then step on his chest severally. PW2 testified that he shouted for long to dissuade the accused from hitting the deceased and only after some members of public approached did the accused walk away. PW3 testified that the mother of the deceased later came and took away the deceased.

5. PW2, a friend of the deceased testified that he was with the deceased on 29<sup>th</sup> September 2012 at 7 p.m. He stated that he, the deceased and other customers drunk chang’aa between 7 p.m. and 9 p.m. when he went home. PW2 testified that he returned to the deceased house the next morning to drink more chang’aa to remove the hangover he had.

6. PW2 stated that he found the deceased sleeping and that he was very sick and was not talking. At 2 p.m. on 30<sup>th</sup> he went back to see the deceased again and that time round the deceased who was still unwell was able to talk. PW2 stated that the accused told him that he was attacked by two

Luo men and that the two men threw him into a trench stepped on his stomach severally alleging he was a thief.

7. PW1 the father of the deceased testified that at 10.30 p.m. on 30<sup>th</sup> September 2012 he returned home to find his wife who told him that the deceased had been assaulted by two people and was not well. PW1 stated that he saw the deceased in his house. PW1 said that he decided to let the deceased spend the night then take him to hospital the next day. At 4 a.m. however PW2 was called by PW2 and when he went to where deceased was sleeping, he found him dead.
8. PW5 P.C. (W) Kamau was the investigating officer of this case before PW6 took over the case. PW5 told the court that on 1<sup>st</sup> October, 2012 the father of the deceased went to Huruma Police Station and requested for a burial permit to bury his son. That PW2 who was with him then reported to PW5 that the deceased had been attacked by a man outside his kiosk on the 29<sup>th</sup> October 2012. The matter was therefore treated as a police case.
9. PW4, S.P. Catherine Ringera took a statement under inquiry from the accused on 4<sup>th</sup> October 2012. In that statement accused narrates how his money, KShs.1, 000/= was snatched from his hands as he paid PW2 for an order of milk. He states that he gave chase and that 7-8 youth joined the one who stole from him. He could not catch any and instead reported at Huruma police station.
10. After making the report, the accused states that he returned to the same shop where he saw a young man lying on the ground groaning in pain. He stated that he suspected him to be one of those who had stolen from him and that he stepped on his head and also pushed his head with his leg then left him.
11. The cause of the deceased death as per the post mortem produced by IP Wambua, PW9, on behalf of the doctor shows that the deceased had a perforated colon and faecal matter release into the peritoneum. The cause of death was peritonitis due to blunt abdominal trauma.
12. The accused gave a sworn statement but called no witness. His defence is in tandem with his statement under inquiry produced by S. P. Ringera. The accused stated that on the 29<sup>th</sup> October, 2012 he was robbed of 1000/= outside PW3's shop by a youth who ran away accompanied by other youth. The accused said that he chased the one who stole from him, who was also joined by other youth. The accused stated that he gave up catching any of them. He then proceeded straight to Huruma Police Station, where he reported the theft.
13. The accused stated that when he returned to the same shop same evening, he found PW3 still open. He also saw a person lying on the ground groaning in great pain. The accused said that PW3 informed him that the man was one of those who had robbed him. He said he decided to go to his house being afraid the youths may return and harm him. The accused denied going anywhere near the man or touching him at all. He said he was surprised to be arrested for assaulting the deceased.
14. Mr. Oriyo represented the accused in this case. In his submissions counsel urged that the explanation given by the accused rebutted the entire case by the prosecution. Mr. Oriyo urged that what PW1 was told by deceased that 2 people assaulted him is not same story PW3 narrated to court.
15. Mr. Oriyo cited two cases by this court. The first one is **Republic vs. Mugambi Meru HCCR. Case No. 17 of 2011** for proposition that circumstantial evidence must be tested on principles set out in **Abanga alias Onyango vs. Republic CA No.32 of 1990 (UR)** as set out as follows:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

- i. **the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,**
- ii. **those 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.”**

16. The other case cited also from this court is **Solomon M'Rukawa vs. Republic Meru CA No. 460 of 2011** for proposition the prosecution must prove malice aforethought within the threshold provided under **Section 206** of the **Penal Code**.

17. Ms. Maari who represented the State in the defence case relied on earlier submissions by Ms. Onunga, Prosecution Counsel who prosecuted the evidence by the State in the case.

18. The gist of Ms. Onunga's submissions was that PW3 witnessed the accused hit the deceased against the wall and wrestled him to the ground and stepped on him on his stomach. Ms. Onunga submitted that the deceased was disabled and that the accused took advantage of his inability. Counsel urged that the accused made a conscious decision to cause injury or death to the deceased.

19. I have carefully considered the entire evidence adduced by the prosecution and the defence case. I have evaluated and analyzed the entire evidence before drawing my own conclusions. I did consider the submissions by both counsels in this case.

20. The burden of proof in this case lies with the prosecution to prove the charge against the accused beyond any reasonable doubt. The prosecution must prove that the accused caused injury to the deceased which led to deceased death. The prosecution must prove that at the time the accused caused the deceased the said injury he had formed the necessary intention or malice aforethought to either cause death or grievous harm to the deceased.

21. **Section 206** of the **Penal Code** sets out what constitutes malice aforethought as follows:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –**

- a. **an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- b. **knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

c. **an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

22. The prosecution case has an eye witness of the assault on the deceased. It also has circumstantial evidence in the form of dying declaration. Regarding dying declaration it must meet certain criteria in order to found a conviction. In **REP -V- PETER MBURU MUTHONI NRB HCCR CASE NO. 27 OF 2004/ [2005], e KLR**, where OSIEMO, J. referred to **CHOGE -V- REP** and observed as follows:

**“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced**

**by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person. See CHOGE –V- R [1985] KLR 1.”**

23. In the case of ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR), the learned Judges of the Court of Appeal stated:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

- I. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,**
- II. those 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.”**

24. PW3 was the eye witness in this case. His evidence was that on 26<sup>th</sup> September, the accused pretended to have been robbed of his money at about 10.45 p.m.; and that after making a lot of noise and threatening to kill the offender, the accused left saying he was going to report to the police. PW3 testified that 25 minutes later the accused returned and found the deceased smoking. That the accused suddenly held deceased, hit his head against the shop grills, threw him down and stepped the deceased on the chest severally. Taking into account the evidence of PW3 regarding accused movement between the time of the alleged theft and the attack on the deceased, the deceased was attacked at 11.10 p.m.

25. The dying declaration is contained in the evidence of PW1 and 2. PW1 was the father of the deceased. He testified that he found the deceased sick at 10.30 p.m. on 30<sup>th</sup> September, 2012. On checking on him he thought that although he was not well, he could be able to sleep through the night and be treated the next day. PW1 testified that the deceased told him that he had been assaulted by people he knew without naming any names.

26. PW2 on his part was clear that on 29<sup>th</sup> September 2012 he spent the evening drinking with the deceased. The deceased was in good health. The next morning the deceased was very sick and could not talk. The deceased was able to talk to PW2 at 2 p.m. which is the time the deceased told him that two Luo men assaulted him by throwing him into a trench and stepping on his stomach severally on grounds he was a thief.

27. I have weighed the evidence of PW3 against that of PW1 and 2. While PW3 says that he saw the accused assault the deceased on 26<sup>th</sup> at 11.10 p.m. PW1 and 2 claim that they knew of the assault on the deceased on the 30<sup>th</sup> September. PW1 said he came from work at 10.30 p.m. to find the deceased unwell. PW2 on the other hand said he saw the deceased on the morning of 30<sup>th</sup> and that the accused was so sick he could not talk. PW2 said that the deceased was able to talk to him at 2 p.m. same day; and that he gave him details of the attack. Both PW1 and PW2 were not told about the time or place of the attack; or even the names of the attackers.

28. It is however clear from PW2’s evidence that up to 9 p.m. on 29<sup>th</sup> September when he left the deceased in his house drinking changaa, the deceased was in good health. That suggests very strongly that if the deceased was attacked, it could not have been before 9 p.m. of 29<sup>th</sup> September.

29. The other notable fact in the prosecution evidence is the fact there is no agreement regarding the number of people who attacked the deceased. While PW3 testified that the accused attacked the deceased alone, PW1 and 2 were both informed by the deceased at different times, that two people attacked him.

30. The other fact which was not consistent in the prosecution evidence was the actual part of the deceased body which was hit. According to PW3, the accused first hit the deceased head against the window grills, then hit him repeatedly on the chest. According to PW2, the deceased informed him that he was thrown into a trench and the two men stepped on his stomach several times.
31. Having analyzed the evidence of the prosecution, I find that the incident described by PW3 could not possibly be one and the same incident the deceased described to either PW1 or 2, in his dying declaration. The dates were different, the number of assailant(s) was not the same and finally, the parts of the body injured were different. More importantly the deceased was in good health on 26<sup>th</sup> up to 29<sup>th</sup> September at 9 p.m. according to PW1 and 2. The injury the accused could have caused the deceased was in the head and chest. The cause of death of the deceased had to do with blunt trauma to the abdomen, a part of the deceased body that PW3 never saw the accused touch.
32. I find that the dying declaration by the deceased to PW1 and 2 was clear the deceased was assaulted by two people, with PW2 saying deceased was specific the two were Luo men. He was clear the two men stepped on his stomach severely causing him severe pain in the stomach. The symptoms the deceased suffered from the attack, according to the evidence of PW1 and 2 were in tandem with the cause of death. Unfortunately, the deceased did not give the names of those who attacked him.
33. I find that the deceased dying declaration did not unerringly point at the accused guilt. It was not established by any standard that the person(s) the deceased accused of inflicting injuries on him was the accused, whether alone or with others. The only description given by the deceased of the assailant(s) was that they were Luo. No attempt was made to show accused ethnicity. Even if the prosecution established it in evidence, such evidence would be unreliable as it can be capable of an explanation showing innocence, or creating doubt in the accused guilt. This is because the description by tribe means nothing as it cannot be said to be definitive that only one person can be described by that name.
34. I find that the deceased dying declaration was contradicted by PW3. The deceased definitely knew who inflicted the injuries that caused his death. The description given by deceased of the one who injured him and how he was injured is not in tandem with the descriptions given by PW3. I find that those who did it according to the deceased were definitely not the accused person in this case.
35. I find that PW3 exaggerated his evidence to fabricate the case against the accused. PW3 even declared the accused a liar by saying he pretended to have been robbed. Yet PW5 the Investigating Officer confirmed that the accused indeed reported the theft of his money. PW3 said that the deceased was carried away by his (deceased mother) after the attack. The mother of the deceased was not called to corroborate PW3's evidence.
36. In the Court of Appeal case of NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283, MADAN, MILLER and POTTER JJA held:
- “The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**
37. PW3 was not a credible witness. His evidence contradicts the rest of the prosecution case, including the nature of injuries inflicted and even the cause of death. His evidence also contradicted the dying declaration of the deceased. Even if PW3's evidence was accepted, the assault he saw the accused inflict on the deceased could not have been the one which caused the deceased death. I find PW3 was an unreliable witness and his evidence unsafe and accordingly I reject it in total.
38. The accused in his statement under inquiry to PW4 stated that he hit the deceased on the head then

left him. By the time he hit the deceased, the accused stated that the deceased was already in severe pain and was lying on the ground groaning. The accused statement is not an admission or confession of guilt as the part of the body accused said he hit was not the injury which led to the deceased death according to the doctor. Secondly, accused statement shows that the deceased was already in great pain and was already groaning. The prosecution has not controverted that evidence. That being the case, it is not possible to tell whether the injury causing death was inflicted by the accused. The accused in defence denied hitting the deceased or causing his death. The sum effect of the accused defence and statement under inquiry is to create doubt whether the accused really caused the deceased death. This doubt weakens further the in the already weak prosecution case.

39. Having carefully considered the evidence adduced by the prosecution in this case, I find that the prosecution did not prove its case against the accused person beyond reasonable doubt as required. Having come to that conclusion, I give the accused the benefit of doubt and acquit him of murder contrary to **section 203** of the **Penal Code** under **section 322** of the **Criminal Procedure Code**.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY, 2015.**

**LESIT, J**

**JUDGE**