



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.47 OF 2010**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**HESBON ONYANGO ONDIJO.....ACCUSED**

**R U L I N G**

The accused herein 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 31st day of July 2014 at East Reru Sub-Location the accused killed one **SYLVESTER OKELLO OKOL**. The prosecution called 4 witnesses to establish their case.

**PW1 DR. JAMES OMONDI OTIENO** produced the P3 form which he had filled in respect to the deceased. According to him the deceased had sustained fractures of the femur around the hip and blunt chest injury. Apparently the deceased died 3 months later after the incident.

**PW2 DR. CHARLES MUTURI** produced the postmortem report on behalf of **DR. JOHANSEN ODUOR**. According to the doctor the cause of death was Sepsis due to a fracture caused by a blunt object.

**PW3 JANE ANINDO OWINO** was the deceased's daughter-in-law. He told the court that on 1.5.2010 at around 7.30 p.m. while coming from the market, she heard people screaming. Prior to that she had met the accused on the way who refused to respond to her greetings. She said that she had given the accused some work that morning and had not done. As she approached near the fence she met 2 young people and the deceased lying down injured. She was then told by the deceased that he had been injured by a person whom he did not recognise but he could describe his face. They however took the deceased to Jalaram and later AgaKhan hospitals. He did not improve and this forced them to take him to Coptic Hospital Nairobi.

The said witness told the court that she met the accused about 100 meters from where the deceased was. On cross-examination she said that she suspected that it was the accused who had injured the deceased as he came from the same direction and that he had a bad character in the village.

**PW4 P.C. TINDI DAVID** helped in arresting the accused person while taking supper at his mother's house. Previously there was a report against him for attempted robbery.

At the close of the prosecution case the parties herein submitted each in favor of their case. I have read both the prosecution and the defence submissions on whether or not the accused ought to be put on his defence. The only 'eye' witness is PW3, Jane who met the accused on the way. But even her testimony did not link the accused directly to the offence. Granted the deceased died as a result of the injuries but who assaulted him? The 2 boys whom PW3 mentioned that they were with the deceased were not called to testify.

Could the suspicion by PW3 be sufficient enough to convict the accused person in the absence of any other evidence? Could the “**bad character**” of the accused as per PW3 sufficient to put him on his defence? It appears clearly that the accused was 100 meters away from the scene. Was he obliged to return PW3's greetings?? I do not think so. In any case the deceased died after about 1 month thereafter. Why did he not describe to the police whatever happened on that particular day. PW4 said that there was an attempted robbery report. Who made the report and what prevented them from arresting the accused person for a whole month while the deceased was undergoing treatment?

Further, there is no evidence to suggest that the deceased was unable to talk for the whole period while he was bed ridden.

I think I have said much to suggest that there is no proved prima-facie case against the accused person. There is no direct or circumstantial evidence to link the accused to the offence. The evidence of PW3 was simply mere suspicion and was based on past issues with the accused. Infact the person who ought to have unlocked the whole issue ought to be the deceased.

For the offence of murder to be established, malice aforethought, is the essential ingredient. This include two alleged principles namely *Actus Rea* and *Mens Rea*. Both have not been established at all. The defence cannot be called in to fill the prosecution gaps. The investigations in my opinion were shallow and wanting. Mere suspicion cannot be a basis for conviction.

Consequently and in light of the above observation the accused is hereby acquitted under the provisions of Section 210 of the Criminal Procedure Code unless lawfully held.

**Dated, signed and delivered this 29th day of September, 2015**

**H. K. CHEMITEI**

**J U D G E**